American Journal of Criminal Law

Published at The University of Texas School of Law

Volume 39 Spring 2012 Number 2

AMERICAN JOURNAL OF CRIMINAL LAW

VOLUME 39 SPRING 2012 NUMBER 2

Published at The University of Texas School of Law

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VOLUME 39

SUBSCRIPTIONS

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AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

VOLUME 39 SPRING 2012 NUMBER 2

Articles

Note

Article

OBJECTIFYING AND IDENTIFYING IN THE THEORY OF EXCUSE

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Abstract

As fundamentally social creatures, healthy and normal human persons have a deep and well-developed capacity for identification with other persons. We are susceptible to such identification when we see others as similar to ourselves, and especially when we have extensive, particularized knowledge about such other persons. In this Article, I argue that identification plays an important role in our excusing practices.

To date, the leading naturalist and psychological accounts of excuse have made no room for identification. Instead, they follow an influential naturalist account ("the objectification account") in which all our excuses are explained by reference to either our "reactive attitudes" or the "objective attitude." In this Article, I offer an alternative naturalist account of excuse that makes room for identification; I describe identification and parse it into component judgments and attitudes; I show how these component parts are conducive to excusing and how they drive some of our most important excuses; and I explain how identification can help us understand a long-standing mystery in excuse law (*tout comprendre, c'est tout pardonner*). Finally, I suggest that identification helps us understand why certain long-standing controversies in excuse theory persist, including debates about rotten background excuses and about the significance of causation and determinism for excuse.

Having laid out the identification account, this Article also shows that identification has important ramifications for excuse theory. First, where the conventional objectification account makes excusing a disreputable practice, the identification account shows that excusing is connected to our social and imaginative capacities, and thus to some of the best parts of our psychology. Taking identification into account, then,

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should make us more receptive to innovation in and expansion of the criminal law excuses. Second, where the objectification account resists excuses rooted in formative character influences, the identification account is open to such excuses. And, third, where the objectification account denies the possibility of causal excuses, the identification account offers reasons to think such excuses are plausible. These are deep and important differences between the two accounts, differences that do not emerge clearly until we have a systematic account of identification in mind.

In the end, the identification account gives us a naturalist account of the excuses with which we can identify. Where the objectification account yokes excuse to a weird and detached psychological outlier (the objective attitude), the identification account connects excuse to a central and valued feature of our social psychology. In this way, it gives us a picture of the excuses that feels natural, intuitive, and connected to what we value most in ourselves, and it helps us understand why we persist in the practice of excusing.

I. Introduction

If I intentionally kill my rival or take money from your wallet without permission, you are likely to think I should be blamed and punished. However, if it turns out that I was very young, mentally ill, or in a desperate situation, you might decide that I should be excused, even if you think I did something wrong. Why is this? Why do we sometimes think a wrongdoer should be excused?

Some answers to this question start with claims about human psychology. They say that we excuse wrongdoers when we have certain attitudes toward them, and that our criteria for excuse track or conform to the cases in which we naturally experience these excusing attitudes.[1] Speaking loosely, we can call these naturalist accounts of excuse.[2] Such

1. I discuss some such theories later in this Article. *See infra* Part II.

2. *See* PAUL RUSSELL, FREEDOM AND THE MORAL SENTIMENTS: HUME'S WAY OF

naturalism is by no means the only way to understand excuse, but it has played an important role in excuse theory.[3]

In this Article, I contrast two naturalist accounts of excuse. One has been well-developed and influential in excuse theory; the other has some popular or "common sense" appeal, but has received little attention in the theory of excuse. The former traces an important part of our excusing practices to the psychological phenomenon I will call *objectification*.[4] The latter links excuse to a different sort of psychological phenomenon, which I will call *identification*.[5]

The objectification account maintains that a primary reason we excuse wrongdoers is that something moves us to see them objectively rather than interpersonally.[6] This might happen, for example, if we learn that the wrongdoer has a characteristic that makes him unfit to participate in normal human relationships: perhaps he suffers from a profound mental illness or a congenital intellectual impairment. Once we see that the wrongdoer is disqualified from normal relationships, we do not blame him for failing to fulfill the usual interpersonal expectations that arise in such relationships any more than we would a wolf or a tornado.[7] We excuse him, then, because we see him objectively—as a phenomenon to be controlled or avoided—rather than as a person to be praised or blamed.[8]

NATURALIZING RESPONSIBILITY 60 (1995) (providing a detailed discussion of naturalist accounts of responsibility attribution, blame, and excuse).

3. See *infra* Part II.

4. *See infra* Part II (providing a full definition and discussion of objectification as I use the term here); *see also generally* P.F. Strawson, *Freedom and Resentment*, *in* FREE WILL 72 (Gary Watson ed., 2d ed. 2003) [hereinafter *Freedom*] (presenting the seminal and highly influential modern discussion of the concept of objectification).

5. *See infra* Part III (providing a full definition and discussion of identification as I use the term here); see Part III, *supra*. Some criminal theorists have gestured at seemingly-related ideas. For example, some have suggested that there is a connection between feelings of "compassion" and excuse. *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 808 (1978) ("excuses are motivated by compassion"; upon learning about an excusing condition or circumstance, "we cannot but feel compassion and excuse his all-too-human transgression"); Joshua Dressler, *Reflections on Excusing Wrongdoers*, 19 RUTGERS L.J. 671, 672, 674, 682–84 (1988) [hereinafter *Excusing*] (suggesting a connection between compassion and excusing); *id.* at 682 ("an intimate connection exists between showing compassion and excusing. . . . I submit that it is the feeling of compassion that usually moves us from fear and anger toward excusing"); *c.f.*, Joshua Dressler, *Some Very Modest Reflections On Excusing Criminal Wrongdoers*, 42 TEX. TECH L. REV. 247, 252 (2009) [hereinafter *Wrongdoers*] (explaining why author subsequently rejected the compassion-based explanation). These compassion-based explanations, however, have generally confused attitudes like compassion with the very different phenomenon of identification. In fact, while identification can include compassion, identification is quite different from compassion and supports a much more robust account of excuse. FLETCHER, *supra*, at 808. Fletcher comes closer to the idea that excuse and identification are connected when he says that excusing is connected with "recogniz[ing] our essential equality with the accused" and "identify[ing] with his situation." *Excusing*, *supra*, at 682. Dressler comes closest when he writes that compassion involves "affinity, or community of interest." *Id.* However, both authors mistakenly subsume such identificatory impulses under compassion, rather than seeing that compassion is but one facet of the much more complex phenomenon of identification.

6. *See infra* Part II.

7. *See infra* Part II.

8. *See infra* Part II.

The identification account paints a different picture. Identification is the psychological phenomenon in which we identify with others—discovering shared traits and experiences, standing in their shoes, empathizing and sympathizing with them, and so on.[9] As deeply social and imaginative creatures, we are strongly susceptible to identification with others, even wrongdoers, and this tendency is magnified when we come to know detailed facts about others' lives, personalities, and personal histories.[10] According to the identification account, this psychological phenomenon can play an important role in excuse, for when we identify with others, we naturally slip into attitudes and ethical perspectives conducive to excusing.[11] Thus, identification can be an important driver of excuse.

Though neither of these accounts formally excludes the other, there are deep tensions between these two ways of understanding excuse in contemporary theory. One kind of tension has to do with the psychological models they assume.[12] As it has developed in the theoretical literature, the objectification account depends on a bifurcated psychological model, according to which we can have two sorts of attitudes toward wrongdoers: reactive attitudes and the objective attitude.[13] (When we have reactive attitudes toward wrongdoers, we blame them for any acts showing disregard or malevolence toward others.[14] When we take the objective attitude toward wrongdoers, we exempt them from interpersonal expectations, and therefore excuse them.[15] Identification does not fit into this bifurcated taxonomy, for identification involves neither reactive blame nor disengaged objectivity.[16] Instead, it involves an understanding of the other that amplifies, rather than suppresses, interpersonal connection, yet nevertheless inclines us to excuse.[17]

Another kind of tension has to do with the two accounts' implications for hard problems in excuse. It turns out these two psychological models suggest very different approaches to some of the most fundamental issues in excuse theory, including questions about the legitimacy of our excusing attitudes and about the significance of personal history, causation, and determinism for excuse.[18] While the objectification account encourages us to see our excusing attitudes as suspect and dangerous, the identification account casts these attitudes in a more

9. *See infra* Part III.
10. *See infra* Part III.
11. *See infra* Part III.
12. *See infra* Parts II and III.
13. *See infra* Part II.
14. *See infra* Part II.
15. *See infra* Part II.
16. *See infra* Part III.
17. *See infra* Part III.
18. *See infra* Part IV.

appealing light.[19] And while the objectification account marginalizes concerns about the significance of personal history, causation, and determinism for excuse, the identification account is more receptive to these concerns.[20]

In this Article, I will argue that the objectification account fails because it does not take account of identification's role in excuse, and I will show that taking identification into account has profound ramifications for the theory of excuse. I will begin, in Part II, with the objectification account, laying out its psychological claims and showing how those claims give us an account of excuse. Part III shifts focus to identification, explaining what identification is and showing that identification plays an important role in excuse. In Part IV, I look more closely at what taking identification into account means for excuse theory. I show that the identification account dispels the impression that excusing is inherently a demeaning or patronizing activity, opens the door to potentially powerful excusing considerations that the objectification account resists (especially those pertaining to a wrongdoer's hard personal history), and reinvigorates concerns about the significance of causation and determinism for excuse.

In these ways, I conclude, the identification account of excuse gives us a much richer account of excuse. Where the objectification account yokes an important set of excuses to a weird and detached psychological outlier (the objective attitude), the identification account connects excuse to a deep and valued feature of our social psychology (identification), better explaining the importance we place on excuse in our responsibility-attribution practices. And where the objectification account turns a cold eye on powerful intuitions many people have about the causes and sources of human wrongdoing, the identification account helps us understand why those intuitions feel powerful and what they mean for excusing. The identification account, then, identifies us with our excusing practices in ways the objectification account cannot.

II. The Objectification Account of Excuse

In this Part, I lay out the central elements of the objectification account of the excuses.[21] The heart of the objectification account is a set of

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19. *See infra* Part IV.

20. *See infra* Part IV.

21. In doing so, I will follow the most influential discussions of this account, especially Strawson's *Freedom* , *supra* note 5, and Strawson's SKEPTICISM AND NATURALISM 39 (1985), in which the theory is laid out in detail, and Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, *in* AGENCY AND ANSWERABILITY 219 (2004) (a very influential exploration of some of the account's ramifications and problems). I will also draw on other very helpful discussions, including: Michael McKenna and Paul Russell, *Perspectives on P.F. Strawson's "Freedom and Resentment," in* FREE WILL AND THE REACTIVE ATTITUDES 1, 1–18 (Michael McKenna and Paul Russell, eds., 2009); Paul Russell, *Strawson's Way Of Naturalizing Responsibility*, *in* FREE WILL AND THE REACTIVE ATTITUDES 143–56 (Michael McKenna and Paul Russell, eds., 2009); Jonathan Bennett, *Accountability*, *in* FREE WILL AND THE REACTIVE ATTITUDES 47, 47–68 (Michael McKenna and Paul

claims about human psychology and the relationship between that psychology and our excusing practices. I begin by describing the account's psychological claims, and then explain how these claims support an account of the excuses.

A. Psychological Claims: The Reactive-Objective Model

The objectification account is grounded in a set of claims about "natural" human psychology. These claims include that humans are necessarily and deeply social creatures and that, as social creatures, we are susceptible to two kinds of attitudes toward wrongdoing—"reactive" and "objective" attitudes. Taken together, these claims give us a reactive-objective model of natural human reactions to wrongdoing.

1. The Reactive Prong of the Reactive-Objective Model

The most fundamental claim in the objectification account is that human beings are *intrinsically social creatures.*[22] As P. F. Strawson put it in his seminal articulation of the objectification account, we are endowed with a basic "human commitment to participation in ordinary inter-personal relationships."[23] This commitment is "thoroughgoing and deeply rooted"[24] and a feature of our "humanity" rather than our "intelligence."[25]

Our social character determines our natural reactions to wrongdoing. Given our social character, we are naturally *concerned about the attitudes others have toward us*. We care deeply "whether the actions of other people . . . reflect attitudes towards of us of goodwill, affection, or esteem on the one hand or contempt, indifference, or malevolence on the

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Russell, eds., 2009); Michael McKenna, *The Limits Of Evil And The Role Of Moral Address* 203, *in* FREE WILL AND THE REACTIVE ATTITUDES 201, 201–18 (Michael McKenna and Paul Russell, eds., 2009); DERK PEREBOOM, LIVING WITHOUT FREE WILL 199–213 (2001); TED HONDERICH, THE CONSEQUENCES OF DETERMINISM (1988); Tammler Sommers, *The Objective Attitude*, 57 THE PHIL. Q. 321 (2007).

22. *See* P.F. STRAWSON, SKEPTICISM AND NATURALISM: SOME VARIETIES 39 (1985) [hereinafter *Skepticism*] ("We are naturally social beings; and given with our natural commitment to social existence is a natural commitment to that whole web or structure of human personal and moral attitudes, feelings, and judgments"). RUSSELL, *supra* note 2, at 59–60 (noting that Strawson echoes Hume in these claims).

23. *Freedom*, *supra* note 4, at 81. *See also* Jonathan Bennett, *Accountability*, *in* FREE WILL AND THE REACTIVE ATTITUDES 47, 60 (Michael McKenna and Paul Russell, eds., 2009) (noting that human commitment to relationships is central to Strawson's account).

24. *Freedom*, *supra* note 4, at 81.

25. *Id.* at 80. A number of Strawson's arguments—here and elsewhere—depend in crucial ways on claims that a human belief, attitude, or orientation is "natural" in such a way that it constitutes an "original . . . inescapable commitment[] which we neither choose nor could give up." *Skepticism*, *supra* note 22, at 28; *see also* RUSSELL, *supra* note 2, at 60 (associating such arguments with Strawson's "naturalistic strategy"). Such arguments seem to adopt an implausibly rigid account of the psychology at issue (one that refuses to countenance the diverse ways in which the relevant attitudes might be inculcated and the entirely plausible possibility that such attitudes might change over time). For the purposes of this Article, however, I will assume that while an objectification account of excuse will typically adopt Strawson's bifurcated reactive-objective psychology, it need not embrace Strawson's claims about the origins or rigidity of the attitudes involved.

other."[26] This concern is so strong and pervasive that it gives rise to a "demand" for "goodwill" and "regard" in all our interpersonal relationships.[27]

As a result, we are susceptible to what Strawson famously called the "*reactive attitudes.*"[28] The most elemental of these are the "personal"[29] or *participant reactive attitudes.*[30] These are "feelings" or emotional states like resentment, gratitude, and anger.[31] They are "reactive" in that they are responses to things other people do[32] and to "attitudes and actions" that "display" "the good or ill will or indifference of others toward us."[33] They are "personal" or "participant" in that we experience these attitudes as part of our ordinary interpersonal relations with others.[34] These attitudes give rise, in turn, to a more complex set of reactive attitudes—including indignation and admiration—which Strawson called the "*moral reactive attitudes.*"[35] Like the participant reactive attitudes, the moral reactive

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26. *Freedom*, *supra* note 4, at 76; s*ee also* Bennett, *supra* note 23, at 54 (noting Strawson's emphasis on our concern for other's attitudes toward us).

27. *Freedom*, *supra* note 4, at 76 ("We should think of the many different kinds of relationships we can have with other people—as sharers of a common interest; as members of the same family; as colleagues; as friends; as lovers; as chance parties to an enormous range of transactions and encounters . . . . In general, we demand some degree of goodwill or regard on the part of those who stand in these relationships to us."). *Id.*

28. *Id.* at 76; *Skepticism*, *supra* note 22, at 40. Strawson emphasizes the strong connection between our social nature and our reactive attitudes: "Our general proneness to these attitude . . . is inextricably bound up with that involvement in personal and social relationships which begins with our lives, which develops and complicates itself in a great variety of ways . . . and which is . . . a condition of our humanity." They are "as deeply rooted in our natures as our existence as social beings."

29. *Skepticism*, *supra* note 22, at 39.

30. *Freedom*, *supra* note 4, at 80.

31. *See* RUSSELL, *supra* note 2, at 147 (in Strawson's account, "the reactive attitude . . . [is] simply a species of emotion"). Strawson repeatedly uses the term "feelings" to describe the reactive attitudes. As feelings, the reactive attitudes are distinct from mere judgments. Thus, for example, to experience a reactive attitude in response to a wrong committed by another is not just to judge the other has done wrong, but also to have an accompanying feeling. Michael McKenna, *The Limits Of Evil and the Role of Moral Address*, *in* FREE WILL AND THE REACTIVE ATTITUDES 201, 203 (Michael McKenna and Paul Russell, eds., 2008); Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, *in* AGENCY AND ANSWERABILITY 219, 227 (2004). But this does not mean that they are brute "effusions of feeling, unfettered by facts." Rather, they are triggered by and depend upon certain "beliefs" and have "internal criteria." *Id.* at 223.

32. On Bennett's understanding, they must be triggered, and they cannot be summoned. "One cannot adopt a reactive attitude for a purpose," and such attitudes are "essentially spontaneous, adopted without the guidance of a *telos*." Bennett, *supra* note 23, at 68. *See also* McKenna, *supra* note 31, at 203.

33. *Freedom*, *supra* note 4, at 80; s*ee also id.* at 96 (presenting a similar formulation); Michael McKenna & Paul Russell, *Perspectives on P.F. Strawson's "Freedom and Resentment," in* FREE WILL AND REACTIVE ATTITUDES 1 (Michael McKenna and Paul Russell, eds., 2008); Bennett, *supra* note 23, at 54 ("They are essentially expressions of one's caring about the attitudes of other people"); Watson, *supra* note 31, at 233 (fleshing out Strawson's account, proposes that in this sense the reactive attitudes "are incipiently forms of moral address," insofar as they express the demand for goodwill and regard).

34. *Freedom*, *supra* note 4, at 80.

35. *Id.* at 84, 86, 92; *Skepticism*, *supra* note 22, at 32 (calling these attitudes "moral sentiments" or "moral attitudes and judgments"); Bennett, *supra* note 23, at 61. Bennett raises concerns about Strawson's effort to connect the moral reactive attitudes to the participant reactive attitudes, noting that it is not clear why the moral reactive attitudes, divorced from a personal relationship, should involve

attitudes are responses to the acts of others manifesting good or ill will or disregard, but we feel them vicariously,[36] on behalf of others.[37] That is, they are reactions to how others treat each other (rather than how others treat us). All these reactive attitudes are expressions of our inherently social psychology. They are "natural" "human" "fact[s],"[38] "part of the general framework of human life,"[39] "given with the fact of human society."[40]

Among these reactive attitudes, two are especially pertinent to blame and excuse. One is the participant reactive attitude commonly called "*resentment.*" Resentment is our typical reaction to being "offended or injured"[41] where we believe that the injury was inflicted from disregard or malevolence.[42] (If we believe that the injury was not the result of disregard or malevolence—because, for example, it was a non-culpable accident or because acceptable reasons overrode his legitimate goodwill—this tends to "remove" resentment.[43]) Resentment involves "an at least partial and temporary withdrawal of goodwill" and a "preparedness to acquiesce in that infliction of suffering on the offender . . . ."[44] The other is a moral reactive

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feelings, rather than purely objective judgments. *Id.* at 63. A possible solution, says Bennett, is to say that reactive attitudes "prepare" us for *ongoing or future* relationships, such that we can see the moral reactive attitudes as "readying oneself for . . . a special kind of relation" (which may or may not come to exist).

36. *Freedom*, *supra* note 4, at 83.

37. *Id.* at 84.

38. *Id.* at 83 (discussing "the fact of our natural human commitment to ordinary inter-personal attitudes").

39. *Id.* at 83 ("This commitment is part of the general framework of human life, not something that can come up for review as particular cases can come up for review within this general framework.").

40. *Id.* at 91. Like Strawson, Dressler suggests that these attitudes are an immutable feature of human psychology. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Limits*, 62 S. CAL. L. REV. 1331, 1384 (1988) [hereinafter *Exegesis*].

41. *Freedom*, *supra* note 4, at 77.

42. *See id.* at 76. ("If someone treads on my hand accidentally . . . the pain may be no less acute than if he treads on it in contemptuous disregard . . . or with a malevolent wish to injure me. But I shall generally feel in the second case a kind and degree of resentment that I shall not feel in the first."); *id.* at 77–78 (no resentment for non-culpable accidents); *id.* at 85 (resentment "involve[s] or "express[es]" "a demand for interpersonal regard. The fact of injury constitutes a prima facie appearance of this demand's being flouted or unfulfilled," but a "class of considerations may show this appearance to be mere appearance, and hence inhibit resentment"). This sort of consideration removes resentment because it shows that infliction of injury was "consistent with the agent's attitude and intentions being just what we demand they should be"—namely, goodwill rather than contempt. *Id.* at 78. Ceasing to resent for these reasons, Strawson says, is "essential and integral" to "ordinary inter-personal relationships" and is "in no way opposed to or outside . . . ordinary reactive attitudes." *Id.*; *see also* Bennett, *supra* note 23, at 54 (describing accountability "as a matter of degree"). Strawson's account resonates with Hume's, which held that we do not experience moral sentiments like blame or approbation regarding actions unless they reveal an underlying motive or character. RUSSELL, *supra* note 2, at 63 (highlighting a "contempt or hatred"); *see also id.* at 112 (*quoting* DAVID HUME, A TREATISE OF HUMAN NATURE 349).

43. *Freedom*, *supra* note 4, at 77.

44. *Id.* at 90; RUSSELL, *supra* note 2, at 138 (*quoting* DAVID HUME, A TREATISE OF HUMAN NATURE 591). As Russell points out, Hume had a similar view, for similar reasons: Hume "argue[d] that our moral sentiments naturally give rise to 'benevolence or anger; that is, with a desire of making

attitude—*moral indignation*.[45] Moral indignation is a "sympathetic or vicarious . . . analogue[]" to resentment, a "reaction[] to the qualities of others' wills . . . towards others" rather than "towards ourselves"[46] —a kind of "resentment on behalf of another."[47] It "rest[s] on" an analogous "demand" to the one resentment rests on: "[T]he demand for the manifestation of a reasonable degree of goodwill or regard . . . towards all men."[48] Like resentment, it has an essentially social aspect: it is a reaction we can only have to someone who is "a member of our moral community," for we only make this demand of the moral community's members.[49] And like resentment, it involves at least some inhibition or withdrawal of goodwill toward the offender, some acquiescence in the offender's being made to suffer, and some reduction in the demand that the offender be spared suffering.[50]

On this account, then, we are intrinsically social creatures who care deeply about the attitudes others have toward us, and, as a result, we naturally have strong and distinctive reactions—resentment and indignation—when others act in ways that show contempt or disregard toward us or toward other members of our community. This is the reactive prong of the reactive-objective model.

2. The Objective Prong of the Reactive-Objective Model

While our normal response to wrongdoing involves reactive attitudes, the reactive-objective model holds that there is a second sort of response we can have to wrongdoing, one that emerges in a special sort of case. In these special cases, we "suspend" or "abandon" "our ordinary reactive attitudes"[51] and view the wrongdoer in a more detached way.

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happy the person we love, and miserable the person we hate.'"

45. *Freedom*, *supra* note 4, at 83.

46. *Id.*

47. *Id.* at 84.

48. *Id.*; *see also id.* at 90. Indeed, "[t]he making of the demand" is nothing but "the proneness to" moral indignation.

49. *Id.* at 90. It is, that is, a reaction we have to someone who is subject to the community's demands (a member of the community) and has offended against them.

50. *Id.* (moral indignation entails a "modification . . . of the general demand that another should, if possible, be spared suffering," the effect is "proportion[al] to what is felt to be the magnitude of the injury and to the degree to which the agent's will is identified with, or indifferent to, it"); Bennett, *supra* note 23, at 67–68. Bennett elaborates on this point, contending that moral indignation ("vicarious resentment") "involves . . . hostility or ill-will towards its object; and this makes us less unwilling for its object . . . to be hurt in the interests of the greater good." It "has the same human roots as the desire for vengeance."

51. *Freedom*, *supra* note 4, at 78, 79; *see also Exegesis*, *supra* note 40, at 1331, 1359 ("[J]ust as we do not blame the pit bull who kills . . . the insane person or similarly excused actor is immune from moral blame . . . [because we] 'suspend our ordinary reactive attitudes'. . . . We . . . do not feel the type of anger that results in blame.").

Although the objective attitude involves abandoning the reactive attitudes, it does not entail abandoning all feeling. Rather, as Strawson later explained, we may still "rejoic[e] or regret," even if we do not feel "gratitude or resentment." *Skepticism*, *supra* note 22, at 32.

Strawson famously called this alternative response the "*objective attitude*."[52]

The objective attitude is an impersonal and naturalistic[53] attitude, one in which we regard the wrongdoer as a natural phenomenon to be observed, understood, or controlled. In the objective attitude:

> [We] achieve a kind of detachment from the . . . natural attitudes and reactions . . . and . . . view another person . . . in a purely objective light . . . [We] see . . . others simply as natural creatures whose behavior . . . we may seek to understand, predict, and perhaps control in just such a sense as that in which we may seek to understand, predict, and control the behavior of nonpersonal objects in nature.[54]

In this stance, we see the other "as an object of social policy . . . as something . . . to be managed or handled or cured or trained [or] . . . avoided,"[55] as "posing problems simply of intellectual understanding, management, treatment, and control."[56]

According to the reactive-objective model, this objective attitude arises naturally[57] in two sorts of cases. In the first, the wrongdoer's normal psyche was temporarily disrupted at the time of the act—he was "not himself"—as in cases of post-hypnotic suggestion.[58] In these cases, we continue to have reactive attitudes toward the actor in general, but we take the objective attitude regarding the action committed during the period of disruption.[59] In the second sort of case—which Strawson deems of much

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52. *Freedom*, *supra* note 4, at 79 (emphasis added).

53. *See Skepticism*, *supra* note 22, at 35 (suggesting that the objective attitude "might better be called 'the purely naturalistic'" view).

54. *Skepticism*, *supra* note 22, at 34; *see also Freedom*, *supra* note 4, at 81 (explaining that in the objective attitude we deal with others "without any degree of personal involvement, treating them simply as creatures to be handled in our own interests, or our side's, or society's—or even theirs"); *id.* ("For reasons of policy or self-protection, we . . . concentrate . . . on understanding 'how he works.'"); Bennett, *supra* note 23, at 53–55 (emphasizing that the objective attitude involves an inquiry into explanations for human acts).

55. *Freedom*, *supra* note 4, at 79.

56. *Id.* at 86; *see also Skepticism*, *supra* note 22, at 40 (we can see people "simply as objects and events in nature, natural objects and natural events, to be described, analyzed, and causally explained in terms in which moral evaluation has no place; in terms, roughly speaking, of an observational and theoretical vocabulary recognized in the natural and social sciences, including psychology").

57. *Freedom*, *supra* note 4, at 77; *see also Skepticism*, *supra* note 22, at 34 (in some cases, the objective attitude is "more or less forced upon us, or is at least felt to be itself humanly natural."). Russell interprets Strawson to hold that the objective attitude is not just natural, but mandatory in these cases. Paul Russell, *Strawson's Way Of Naturalizing Responsibility*, *in* FREE WILL AND THE REACTIVE ATTITUDES 143, 145 (Michael McKenna and Paul Russell, eds., 2009) (characterizing Strawson as holding that in such cases "we must—we are rationally and morally required to—adopt the objective attitude").

58. *Freedom*, *supra* note 4, at 78.

59. *Id.* ("We shall not feel resentment against the man he is for the action done by the man he is not.").

greater importance—the wrongdoer is psychologically unfit for social relations.[60] We shift to this attitude when the wrongdoer is "psychologically abnormal"[61]—"warped or deranged, neurotic or just a child," "compulsive in behaviour or peculiarly unfortunate in his formative circumstances,"[62] a person "whose picture of the world is an insane delusion," or "whose behaviour[] is unintelligible to us . . . in terms of conscious purpose[]," or "wholly lacking . . . in moral sense."[63] In these cases the wrongdoer's abnormality or deficiency leads us to suspend the usual demand for goodwill,[64] and thus inhibits our participant and moral reactive attitudes.[65] He is not suitable for ordinary social relations, so we do not subject him to the usual social expectations and demands and do not have participant or vicarious reactive attitudes toward him. And without our normal social reactions, we are left seeing him the same way we see the rest of the natural universe: objectively.[66]

Because the objective attitude involves the suspension of the reactive attitudes, and because those attitudes are essential to ordinary human relationships, the objective attitude is incompatible with ordinary

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60. *Freedom*, *supra* note 4, at 79.

61. *Id*; *see also Skepticism*, *supra* note 22, at 34 (the objective attitude is "humanly natural" in cases where the other suffers from "extreme abnormality," e.g., "someone who is quite out of his mind"); McKenna and Russell, *supra* note 33, at 145 (describing the phenomena that trigger the objective attitude).

62. *Freedom*, *supra* note 4, at 79.

63. *Freedom*, *supra* note 4, at 86. As critics have pointed out, there is an important ambiguity or unappreciated shift in how Strawson describes these cases. At some points, he suggests that "abnormality" triggers the objective attitude; at other points, he suggests that it is "incapacity" that triggers the objective attitude. *See* RUSSELL, *supra* note 2, at 153–54; McKenna and Russell, *supra* note 35, at 30.

64. *Freedom*, *supra* note 4, at 86.

65. *Id.* at 79; *see also id.* at 86 ("It tends to inhibit resentment because it tends to inhibit ordinary interpersonal attitudes in general, and the kind of demand and expectation which those attitudes involve"); *id.* at 79 (suggesting that in these cases, objectivity is a "natural" response: it is the attitude we "naturally tend to fall into . . . where participant attitudes are . . . inhibited by abnormalities.").

66. *Freedom*, *supra* note 4, at 82 ("[O]ur adoption of the objective attitude is a consequence of our viewing the agent as incapacitated in some or all respects for ordinary inter-personal [sic] relationships"); *see also id.* at 81–82 ("In the extreme case of the mentally deranged, it is easy to see the connection between the possibility of [taking] a wholly objective attitude and the impossibility of . . . ordinary inter-personal [sic] relationships"); McKenna and Russell, *supra* note 33, at 77; Bennett, *supra* note 23, at 54 (summarizing Strawson's argument as follows: because the reactive attitudes "get their value from their role in normal, adult, interpersonal relations . . . it is inappropriate to have such feelings towards someone whose youth, mental ill-health, etc., incapacitates him . . . for such relations"); McKenna, *supra* note 33, at 204 (Strawson equates "incapacity for adult interpersonal relationships" with "incapacity for responsible moral agency").

As several friendly critics have pointed out, Strawson does not say much about what the capacities necessary for adult interpersonal relationships are. *See, e.g.*, McKenna, *supra* note 33, at 204. Some of these critics have endeavored to fill the gap. *See, e.g.*, Watson, *supra* note 31; McKenna, *supra* note 33. McKenna, for example, suggests that the capacity required is the "capacity for membership within the moral community." *Id.* at 207. This, in turn, might require the "capacity for moral address," "the capacity to be seen as a potential interlocutor in our interpersonal exchanges." *Id.* at 204, 207. And this might require "sharing" in, or at least "understanding," the community's "moral framework." *Id.* at 204–05, 207–09.

human relationships: "[I]t cannot include the range of reactive feelings and attitudes which belong to involvement or participation with others in inter-personal human relationship; it cannot include resentment, gratitude, forgiveness, anger, or the sort of love which two adults can sometimes be said to feel reciprocally, for each other."[67]

As a result, it is impossible or intolerable for social creatures like us to take the objective attitude in any general or sustained way. While we can summon such an attitude for a brief period of time[68]—perhaps as a "refuge" if we wish to escape "the strains of involvement" with another[69]—"we cannot, in the normal case, do this for long, or altogether,"[70] for "[a] sustained objectivity of inter-personal attitude" would entail an isolation that we, as social creatures, would not be able to bear.[71]

The objective attitude, then, is an alternative to our normal reactive attitudes, arising in those special cases where we suspend the expectations we have for participants in human social life. It is the natural response of social creatures to beings (temporarily or persistently) unfit for social life. This is the second prong of the reactive-objective model.

3. A Bifurcated Psychology

The reactive-objective psychological model, then, paints us as susceptible to two very different sorts of reactions to wrongdoers: reactive attitudes and the objective attitude. The reactive attitudes spring naturally from our fundamentally social nature, by virtue of which we feel resentment and indignation regarding social actors who violate normal interpersonal and communal expectations. The objective attitude is the natural response of fundamentally social creatures to persons who are not fit for social life. Together, they map the full range of responses that creatures like us have to wrongdoers.

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67. *Freedom*, *supra* note 4, at 79. As a number of commentators have noted, Strawson's argument here does not seem complete. Strawson fails to provide a clear explanation for why the objective and reactive stances are at odds. Bennett, *supra* note 23, at 63. The "fundamental opposition between the 'objective' and the 'participant' stances" does not adequately account for the fact that we may experience "personal, emotional response or engagement" toward another even if we do not have reactive attitudes toward him. McKenna and Russell, *supra* note 33, at 25. Indeed, Strawson himself recognizes that the "simple opposition of objective attitudes on the one hand and the various contrasted attitudes which I have opposed to them must seem as grossly crude as it is central." *Freedom*, *supra* note 4, at 88.

68. *Freedom*, *supra* note 4, at 79–80; *Skepticism*, *supra* note 22, at 34. *See also Freedom*, *supra* note 4, at 90 ("[I]t is possible to cultivate an exclusive objectivity"); RUSSELL, *supra* note 2, at 146 (characterizing Strawson as holding that the objective attitude is sometimes "an available option, which we may choose to adopt if we wish, though we are not required to do so").

69. *Freedom*, *supra* note 4, at 79–80, 86.

70. *Id.* at 80. *See also Skepticism*, *supra* note 22, at 34 (we can only do this "temporarily").

71. *Freedom*, *supra* note 4, at 80–81. *See also Skepticism*, *supra* note 22, at 34 ("the price" of maintaining this attitude "for very long" "would be higher than we are willing, or able, to pay"; "the loss of all human involvement in personal relationships, of all fully participant social engagement."). As Bennett puts it, Strawson suggests that sustained objectivity "is barely conceivable and wholly repellent." Bennett, *supra* note 23, at 53.

B. From the Reactive-Objective Model to an Account of Excuse

This reactive-objective psychological model is the foundation[72] for the objectification account of the excuses.[73] On this account, our responsibility attribution practices "are expressions of our moral attitudes,"[74] and "the practice of holding responsible" is "*constitut[ed]*" by the reactive attitudes.[75] Thus, on this view, we blame those who act with disregard or malevolence when we experience the reactive attitudes toward them, and we excuse when we take the objective view.

If this is right, then we can identify the conditions for blame and excuse by observing the factors and circumstances present where we have or suspend the reactive attitudes. We blame when we feel moral indignation or resentment regarding another person's wrongful act.[76] We experience these reactive attitudes regarding a wrongful act when the act manifests disregard or malevolence on the part of the actor and the actor is a fit target for the normal social demand for goodwill.[77] These, then, are the conditions for blame.

We can derive the conditions for excuse in a similar way.[78] According to the objectification account, there are some cases in which we relate to the actor reactively, but do not experience resentment or indignation toward the actor because we see that despite inflicting injury, she did not do so out of disregard or malevolence.[79] (This can happen in

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72. In traveling from its psychological model to claims about the criteria for excuse, the objectification account makes what appears to be a naturalist move, traveling from observations about actual human psychology to claims about the moral criteria for excuse. On such moves, *see generally* RUSSELL, *supra* note 2. Such moves are open to a number of important objections. For the purposes of this paper, however, I will put those objections to one side and, accepting *arguendo* that the naturalist move could in theory identify the criteria of excuse, I will argue that this move has not been correctly performed.

73. Although this account is most strongly associated with moral philosophy, it has also had a strong influence on leading criminal theorists. *See, e.g.*, *Exegesis*, *supra* note 40, at 1384 ("[t]he immutable reality is . . . that we possess these feelings [the reactive attitudes]. . . . It would be wrong, and ultimately self-defeating, to develop and enforce rules of criminal responsibility alien to these reactions"; to override these reactions would be to "run afoul of our natural reactions to wrongdoing").

74. *Freedom*, *supra* note 4, at 93; *see also id.* at 92 (blaming and punishing are "in part, the expression" of these "human attitudes").

75. Watson, *supra* note 31, at 227 (in Strawson's account, reactive attitudes are "constitutive of the practice of holding responsible"). On this view, what we call holding responsible is, in fact, a "'natural human reaction[]'" to the attitudes others have toward us, an "expression[] of certain rudimentary needs and aversions [arising from] . . . 'the demand for the manifestation of a reasonable degree of good will [sic] or regard.'" Watson, *supra* note 31, at 222 (quoting *Freedom*, *supra* note 4, at 84); *see also Skepticism*, *supra* note 22, at 79 (blaming and punishing are "in part, the expression" of these "human attitudes").

76. *Skepticism*, *supra* note 22, at 79 (blaming and punishing are "in part, the expression" of these "human attitudes").

77. *See supra* Part II.A.

78. *See* McKenna, *supra* note 31, at 202 (extracting "local" and "global" excuses from Strawson's account).

79. *See supra* Part II.A.2.

cases of non-culpable accident, for example.)[80] Our reactive machinery remains engaged, but the offensive attitude that normally triggers resentment and indignation is not present in the actor.[81] As a result, we do not blame the actor.[82]

In other cases, we excuse because we take an objective view of the actor, suspending our reactive attitudes and viewing her like a natural phenomenon.[83] We do this in a selective or limited way in cases where the actor suffered a temporary psychological disruption at the time of the act, such that she was "not herself." [84] (This can happen in cases of post-hypnotic suggestion, for example.)[85] In such cases, we take the objective attitude toward acts committed during the psychic disruption, and thus excuse those acts.[86]

In another sort of case, we take the objective attitude in a general or comprehensive way.[87] We do this in cases where the actor is so psychologically abnormal that she cannot participate in normal human relationships at all.[88] In these cases, we cannot hold her to normal social expectations, and thus we do not have reactive attitudes regarding any of her acts.[89] This is why infants are generally exempt from blame: they lack the basic capacities necessary for participation in normal adult relationships, so we see them objectively rather than reactively, and therefore excuse them.[90] It is the reason why people of subnormal intelligence are excused: they too lack the basic capacities necessary for participation in normal adult relationships, such that their wrongs do not trigger resentment or moral indignation in us.[91] And it is why those who are seriously mentally ill are excused: pervasive misperception, delusion, confusion, or irrationality leaves them unable to participate in normal adult relationships, such that we do not hold them to the usual requirements for goodwill and regard.[92]

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80. Strawson also suggests that this is why we do not blame in cases of justified action. In such cases, the actor's good reasons for acting dispel the impression that the actor acted from disregard or malevolence. Watson, *supra* note 31, at 222–23.

81. *Freedom*, *supra* note 4, at 79.

82. *Id.*

83. *Id.*

84. *Id.* at 78.

85. *Id.*

86. *Id.*

87. *Id.* at 79.

88. *Id.*

89. *See Exegesis*, *supra* note 40, at 1357—58.

90. *Id.* at 1357 (stating that "in cases of insanity [or] infancy . . . the wrongdoer is blameless because he substantially lacked the capacity for free choice").

91. *Id.*

92. For examples of this sort of reasoning in criminal theory, see, e.g., Michael Moore, *Causation and the Excuses: Justifying the Excuse and Search for Its Proper Limits*, 73 CAL. L. REV. 1091, 1137 (1985) (because the insane lack rationality, they are "no more proper subjects of moral evaluation than are young infants, animals, or even stones"); Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 280 (1987) (the insanity defense is "fundamental" because "blaming" "insane people" "commits an anomaly . . . similar to that entailed in blaming a rock for falling or a dog for barking"); *id.* at 284

In this sense, then, the objectification account's psychological model gives us the basis for an account of the excuses. One especially important implication of this account is that an agent will be excused if she is the sort of person toward whom we naturally take the objective attitude—meaning that, due to psychological abnormality or deficiency, she lacks (temporarily or persistently) the capacities necessary for participation in normal human relationships. In the absence of this capacity, we cannot expect her to understand or comply with the demand for goodwill and regard, and we therefore will not have participant or moral reactive attitudes toward her when she fails.[93] Instead, we will view her objectively, as a phenomenon rather than a person, and excuse her.[94]

III. The Identification Account of Excuse

The objectification account supplies a robust naturalist explanation of our excusing practices, anchoring those practices in our deeply social nature and in two sorts of attitudes that arise from that nature. Nevertheless, I will argue that this account has a serious flaw: its bifurcated psychological model fails to account for an important psychological phenomenon, one that is pertinent to our excusing practices.

What the model overlooks is our susceptibility to "identification,"[95]

(rejecting the rotten social background excuse because evidence of such background does not show the defendant to be a person "whose powers of judgment and rational action have been so destroyed that he must be dealt with like an infant, a machine, or an animal"); *Exegesis*, *supra* note 40, at 1331, 1357–58 (we excuse in cases of insanity and infancy because such "disability" prevents a person from being "a responsible moral agent" or a "member of the moral community").

Dressler once also echoed this sort of reasoning (albeit, blending this reasoning with ideas about compassion and excuse that he subsequently rejected). As Dressler wrote, we excuse an insane person because he "is not a 'whole' human being. We sense this inadequacy in the mentally ill person. We feel sorry for him. We try to reduce his suffering his suffering by freeing him from blame." *Excusing*, *supra* note 5, at 682. (In passages like this, Dressler appears to blend elements of an objectification account of the excuses with elements of a nascent identification account. This was an awkward fit, and the awkwardness may help explain why he so quickly abandoned his compassion-based account of the excuses.).

93. *Freedom*, *supra* note 4, at 79–80.

94. *Id.*

95. The term "identification" has acquired a multitude of meanings in popular and academic use, with its usage depending on context and audience. One thesaurus, for example, associates the term with the set of concepts including "understanding, relationship, involvement, unity, sympathy, empathy, rapport, fellow feeling." COLLINS THESAURUS OF THE ENGLISH LANGUAGE (2002). A widely used dictionary defines identification as "[a] person's association with or assumption of the qualities, characteristics, or views of another person or group." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Another defines it as "psychological orientation of the self in regard to something (as a person or group) with a resulting feeling of close emotional association" or "a largely unconscious process whereby an individual models thoughts, feelings, and actions after those attributed to an object that has been incorporated as a mental image." MERRIAM-WEBSTER ONLINE DICTIONARY (2012) http://www.merriam-webster.com/dictionary/identification (last visited Feb. 5, 2012).

As discussed more fully below, I use identification in this Article in a way that tracks one common use. On this use, identification describes a particular psychological phenomenon, having both cognitive and emotional aspects, in which one person judges and experiences another person to be similar to

a natural corollary to our social nature and a vital feature of human psychology. In this Part, I flesh out the concept of identification and explain the connection between identification and excuse.

A. What is Identification?

It is sometimes said that the *Catcher in the Rye* was so influential because adolescents "identified" with the protagonist Holden Caulfied.[96] Sarah Palin made such a splash during the 2008 national elections because many Americans found her easy to "identify" with.[97] Most teachers can identify with a colleague who dreams her lecture notes turn to gibberish while she is teaching.[98]

As these examples suggest, we often use the term identification to describe a particular attitude we can have toward another person. Here, I

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himself in a way or ways important to his sense of self or identity. For various illustrations of this use, see, e.g., Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); Lisa A. Crooms, *Stepping Into the Projects: Lawmaking, Storytelling, and Practicing the Politics of Identification*, 1 MICH. J. RACE & L. 1 (1996); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135 (2002); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983 (2000).

Finally, it may be useful to distinguish two alternative uses of the term "identification." First, the term is sometimes used to describe a facet of the parent-child relationship—namely, the child's identification with the parent. In this context, identification appears to take on an aspirational aspect. An essential feature of the identification is that the child aspires to be like the parent (and thus, for example, models her behavior after the parent's). (The term is sometimes used analogously in relation to other sorts of stratified relationships.) *See, e.g.*, 22 SIGMUND FREUD, *The Dissection of the Psychical* Personality, *in* THE STANDARD AND COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 63–65 (James Strachey ed. and trans.) (discussing identification with the parent and its relation to development of the super-ego). I do not use identification in this sense in this Article. The sort of identification I describe does not necessarily entail the aspiration to be like another person. Second, the term is sometimes used to describe an attitude a person can have toward a social group or institution—namely, an allegiance or loyalty to that group or institution. *See, e.g.*, Christina Bicchieri, *Social Norms*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, March 30, 2012, http://plato.stanford.edu/entries/social-norms (discussing identification with social groups). We might use the term this way if we say that a person identifies with the Republican Party, or identifies with a clique in his school. I do not use identification in this sense here, at least insofar as this sort of identification does not depend upon a judgment of interpersonal similarity.

96. Jennifer Schuessler, *Get A Life, Holden Caulfield,* N.Y. TIMES, June 20, 2009, at WK5 (observing that while adolescents once identified with Salinger's protagonist, they are less likely to do so today).

97. *See, e.g.*, Yuval Levin, *The Meaning Of Sarah Palin*, COMMENTARY MAGAZINE (February 2009), https://www.commentarymagazine.com/viewarticle.cfm/the-meaning-of-sarah-palin-14674?page=all (last visited Feb. 5, 2012) ("Republicans tend to identify with the traditional values, unabashedly patriotic, anti-cosmopolitan, non-nuanced Joe Sixpack. . . . It was this sense, this feeling, that Sarah Palin channeled so effectively"). Christina Hager, *Hockey Moms Identify With Sarah Palin*, WBZ 38 (August 30, 2008), http://wbztv.com/local/vice.president.running.2.806738.html (last visited April 5, 2010) (quoting approving prospective voters: "She's really a regular person, you know, just like most of us. She feels the same way that we feel"; "I'm a mother of four, I can kind of relate to what her day is like").

98. *See, e.g.*, ELAINE SHOWALTER, TEACHING LITERATURE 1–2 (2003) (recounting several teachers' teaching anxiety dreams, including several dreams where notes are unfamiliar or otherwise useless).

give an account of this attitude. On this account, identification is a complex psychological phenomenon having both cognitive and emotional components: it is triggered by certain judgments, and these judgments activate certain feelings. It is also a natural fit for our social nature.

1. The Triggering Judgment: Similarity

Identification is triggered by a judgment that another person is similar to oneself. I identify with Holden Caulfield because I believe that he has an attitude toward authority figures—that they are phonies—that I believe I have too. I identify with Sarah Palin because photographs of Palin holding a beer and smiling suggest she enjoys letting her hair down, just as I think I do. In each case, I identify with another because I judge that the other is similar to me in that the other has features that I have too.

Some similarities seem stronger to us than others, and this influences the strength of identification. I see myself as more like the teacher with gibberish notes than I am like Holden Caulfield, and more like Caulfield than Sarah Palin. As a result, I identify more strongly with the teacher than with Caulfield, and more strongly with Caulfield than with Palin. Thus, similarity judgments vary in strength, and the intensity of identification varies with the strength of the similarity.

What determines the strength of the similarity? Sometimes similarity strength seems to have a quantitative dimension—as though it depends on the *number* of shared features we have. This might be what happens when a tween boy notices that he shares a laundry list of traits with the hero of *Diary of a Wimpy Kid*[99] and thinks "he is *just like me*." More often, strength of similarity lies in something qualitative. I might say that I am "very similar" to another person if we share characteristics that I consider important in my account of myself. Even if you and I are very different in most ways, I may consider you a kindred spirit if you survived the same harrowing battle in the war or if we share a strong conviction regarding an important moral issue. Along comparable lines, similarity seems stronger when we share a *vivid* trait (a flamboyant temper) rather than a pallid one; when we share an especially unusual or *distinctive* feature (a severe physical disability) rather than a common or universal one; and when we share an *easy to conceptualize* characteristic (an intense fear of heights) rather than one for which there is no easily accessed schema. In short, the strength of similarity normally depends on whether the similar features are important, vivid, distinctive, or easy to conceptualize.

Finally, given the foregoing, the sense of similarity and (thus) the experience of identification are especially likely to be strong when we encounter richly detailed narratives regarding other persons. Such narratives offer multiple points of comparison, making it more likely that

99. JEFF KINNEY, DIARY OF A WIMPY KID (2007).

significant similarities will be identified. Such narratives also (typically) foreground the other person's most vivid and distinctive traits and organize those traits into accessible schemas, further facilitating and intensifying the identification-generating similarity judgment.

2. Triggered Feelings—Other-Affirming and Self-Affirming

Identification is not just a similarity judgment, for the similarity judgment triggers an array of important feelings that are part and parcel of the experience of identification. Some of these feelings are other-affirming, and some are self-affirming.

One of the primary *other-affirming* feelings associated with identification is *empathy*.[100] Upon determining that the other is similar to the self, we come to empathize with the other.[101] The perception of similarity draws us, imaginatively, into his shoes,[102] and we come to

100. Empathy is defined in several competing ways. *See, e.g.*, Robert M. Gordon, *Empathy*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 261 (Robert Audi ed., 2d ed. 1999); Ellen Berscheid and Harry T. Reis, *Attraction and Close Relationships*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 193, 229–30 (Daniel Gilbert, Susan Fiske, & Gardner Lindzey eds., 4th ed. 1998) (discussing multiple definitions of empathy and how empathy affects relationships); C. Daniel Batson, *Altruism and Prosocial Behavior* 304, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 304–05 (4th ed., Daniel Gilbert, Susan Fiske, & Gardner Lindzey, 1998) (exploring various ideas of what empathy is and disagreements over the nature of empathic feelings). Some definitions focus on a primarily emotional phenomenon—"empathic concern." Bersheid & Reiss, *Attraction and Close Relationships*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra*, at 193, 229–30. This entails "feeling the same way that an observed other is feeling—or something very like it." Batson, *supra*, at 304. Other definitions focus primarily on a cognitive phenomenon—"perspective taking," which entails "the tendency to seek to understand the circumstances from another person's viewpoint" or "the attempt by one . . . self to comprehend unjudgmentally the positive and negative experiences of another self." Bersheid & Reiss, *supra*, at 229–30; *see also* Batson, *supra*, at 304 ("the cognitive process of seeing a situation from another person's perspective"). In addition, the term empathy is sometimes defined more broadly to encompass sympathy, a "heightened awareness of the suffering of another person as something to be alleviated," Bersheid & Reis, *supra*, at 229 (internal citation omitted), or "feeling not *as* the other feels but *for* the other," Batson, *supra*, at 304. In this Article, I use the term empathy broadly, understanding it to entail both the cognitive and emotional features described above, but I do not use it to encompass sympathy, which I discuss separately, below.

Some accounts of empathy, then, emphasize its cognitive features; these accounts emphasize that the empathizer comes to perceive circumstances in a way similar to the way the empathizee perceives those circumstances. Other accounts emphasize empathy's emotional features: these accounts emphasize that the empathizer comes to feel the emotions of the empathizee. And still others fold another emotional experience – sympathy – into the definition of empathy. Batson, *supra*, at 282–316. In this Article, I use the term empathy broadly, understanding it to entail both the cognitive and emotional features described above, but I do not use it to encompass sympathy, which I discuss separately, below.

101. Perceptions of similarity catalyze empathy. *See, e.g.*, SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 335 (1991) (internal citations omitted) ("People empathize with another person's perspective when both are in the same mood, have similar personalities, share cooperative goals, or take the role of the other.").

102. Robert M. Gordon, *Empathy*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 261 (2d ed., Robert Audi ed., 1999) (defining empathy in part as "imaginative projection into another person's situation"); THOMAS GILOVICH, DACHER KELTNER, & RICHARD E. NISBETT, SOCIAL PSYCHOLOGY 545 (2006) (when empathizing with another, "we imagine what their experience is like").

experience his feelings as our own.[103] If he appears to be sad, we feel sad too.[104]

Identification also involves the related response of *sympathy*.[105] Seeing the other as similar to myself, I feel a greater concern for her well-being and a stronger desire that she be happy.[106] I become more likely to have compassionate or merciful impulses toward her and to pity her suffering,[107] and less likely to have punitive, retaliatory, or destructive thoughts and feelings about her.[108] I will want to protect and help her.[109]

Intertwined with empathy and sympathy is a kind of *appreciation*.[110] Seeing the other as similar amplifies the other's value to me, not only because I am likely to have a positive view of myself (such that attributing my features to him makes him seem "better") but also because we often find our own traits attractive and appealing in others.[111]

Alongside these other-affirming feelings, the similarity judgment triggers a set of *self-affirming* ones. Some are feelings of *affiliation* or connection. To see another as like myself can make me feel that I am a member of a set or group (insofar as there are others "out there" like me). More particularly, I am part of a dyad—there is an important actual or potential link between me and another person. As deeply social creatures, we welcome (even cherish) the discovery of such connections between

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103. *See, e.g.*, FISKE & TAYLOR, *supra* note 101, at 334–35 ("Empathy is defined as the ability to share in another's feelings."); GILOVICH ET AL., *supra* note 102, at 545 (empathy entails "feeling and understanding what that person is experiencing"); Gordan, *supra* note 102, at 261 (defining empathy in part as "vicarious capture of [another's situation's] emotional and motivational qualities").

104. GILOVICH ET AL., *supra* note 102, at 545 ("[W]e respond to others' distress with our own distress.").

105. Sympathy is a "heightened awareness of the suffering of another person as something to be alleviated," Berscheid & Reis, *supra* note 100, at 229 (internal citation omitted), or "feeling not *as* the other feels but *for* the other." Batson, *supra* note 100, at 304. Sympathy is associated with compassion, tenderness, and "motivation with an ultimate goal of benefiting the [other] person." Batson, *supra* note 100, at 300. Fletcher and Dressler both associate compassion with something like identification. FLETCHER, *supra* note 5, at 808 (associating compassion with "recogniz[ing] our essential equality with the accused and identify[ing] with his situation.").

106. Batson, *supra* note 100, at 304 (noting the theory that "sympathy emerges out of empathy"); GILOVICH, ET AL., *supra* note 102, at 545 (when empathizing, "we are motivated to have that person's needs addressed, to enhance that person's welfare.").

107. *See, e.g.*, Berscheid & Reis, *supra* note 100, at 229–30 (sympathy involves awareness of the other's suffering and the sense that his suffering should be alleviated, and therefore "enhances helping and other prosocial behaviors" and "supportiveness"); Batson, *supra* note 100, at 300–01 (empathic and sympathetic attitudes increase helping behavior and involve the "ultimate goal of reducing the other's suffering"); *Excusing*, *supra* note 5, at 682 (the compassion triggered by a sense of affinity makes us "aware of the other's pain or distress" such that we "desire to alleviate it"). This passage appears in Dressler's argument that excuse is associated with compassion. Dressler subsequently repudiated this argument.

108. *See, e.g.*, Bennett, *supra* note 23, at 66–67 (discussing sympathy and punishment).

109. *See, e.g.*, GILOVICH, ET AL., *supra* note 102, at 538, 549 (noting the relationship between similarity judgments and helping behavior: "people are more likely to help others who are similar to themselves").

110. *See* GILOVICH, ET AL., *supra* note 102, at 538.

111. *See, e.g., id.* (noting that "interpersonal attraction . . . is enhanced by similarity," and that such attraction "is also likely to increase helping behavior").

ourselves and other people. They buttress us against isolation, validate and normalize our thoughts and experiences,[112] and help confirm our fitness for interpersonal relations and social life generally.

Finally, the similarity judgment gives us a sense of *competence*. In identifying the similarity, we begin to organize the chaotic jumble of data we have about the other person. Moreover, the similarity encourages us to look for other features of the self in the other. (Seeing some of the features of my self-schema in the other, I have reason to check for other features of that schema.)[113] We feel a "spark of recognition," marking the move from uncertainty to knowledge and the reestablishment of a social facility that is especially important to social creatures like us.

3. Identification as a "Connective Attitude"

Identification, then, begins with a comparison between oneself and another person, and a judgment that the other person is similar to the self in some significant way. This judgment, in turn, triggers an array of distinctive feelings, including empathy, sympathy, appreciation, affiliation, and competence. Taken together, these judgments and feelings constitute identification.

On this account, identification is a natural fit for our deeply social psychology. It makes sense that creatures with fundamentally social characters, a deep concern for the attitudes of others, and a psychic and moral life filled out with participant reactive attitudes would also have a robust susceptibility to identifying with others. It is natural that we scrutinize others and look for points of contact with them. And the feelings associated with identification facilitate and motivate the interpersonal relationships that are so central to the social psyche and the social life. In identification, we come to know the other better, to understand her feelings and attitudes, to care about her well-being, to value her, and to feel affirmed by her. These are motivations to connect with the other, and they equip us to do so more easily and more deeply. Identification, then, can catalyze and drive social connection. It fits seamlessly into our deeply social psychology.

Thus, where the objective attitude takes the other as an alien object, identification moves the other closer to the self. Where the objective attitude atomizes and isolates, identification networks and integrates. Where objectification is fundamentally opposed to social connection,

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112. We sometimes say, triumphantly, "See, it is not just me!" or "I knew I was not the only one who thought that," as though the fact that another shares our thoughts, feelings, traits, or experiences adds to their validity or confirms that we are not abnormal or deviant.

113. Of course, we can recognize and categorize others' traits even if we do not identify with them. But recognition and categorization are especially powerful when they are intertwined with identification, for we are more likely to feel that we have deep knowledge about another if we think we have discovered that they are similar to ourselves—on the premise that we know ourselves more deeply than we know others.

identification is a fundamentally social phenomenon. In this sense, we might call identification a "connective attitude."[114]

B. How Identification Can Drive Excuse

With this model of identification in mind, we can now see how identification can drive excuse. First, identification involves feelings and attitudes that tend to diffuse resentful and indignant attitudes. Second, these feelings and attitudes encourage ethical insights that work against resentment and indignation. As a result, the more we identify with a wrongdoer, the more inclined we are to excuse the wrongdoer.

1. Identification Activates Feelings and Attitudes that Diffuse Resentment and Indignation

One way that identification drives excuse is by activating feelings and attitudes that tend to diffuse resentment and indignation (the reactive attitudes that drive blame).

For example, the *empathy* integral to identification supplies a strong and visceral counter to resentment and indignation. When we empathize with a person, we are more likely to empathically anticipate and experience the pain they will experience in being the target of resentment and indignation (and the blame and punishment these attitudes drive). The more we stand in the wrongdoer's shoes, the more we feel his anxiety and pain and the more averse we will be to feeling resentment and indignation toward him. We withdraw from these feelings the same way we pull our hand away from a hot stove.

Likewise, the *sympathy* in identification works against resentment and indignation. In sympathizing with him, we see him compassionately, care for his well-being, and want to reduce his suffering. Full-bodied resentment and indignation threaten and frustrate these objectives. Resentment and indignation are, then, in tension with something we want, and this conflict can diminish them and sap their power.[115]

The *appreciative* aspect of identification has a similar effect. When we identify with another person, we see him more positively. He becomes more attractive, appealing, and valuable. Such positive attitudes do not coexist easily with negative attitudes like resentment and indignation. It is hard to see another person as valuable, appealing, and attractive while at the

114. I use this label gesturally, and do not mean to suggest by it systematic categorical distinctions between identification and the reactive or objective attitudes (beyond those already suggested in the text). Thus, for example, I do not mean to suggest that the reactive attitudes lack a connective character—for they indeed play an important role in creating and maintaining interpersonal connections.

115. Watson notes that sympathy can oppose resentment and indignation. Watson, *supra* note 31, at 244. Fletcher and Dressler note that compassion (one of the products of sympathy) can fuel excuse (though Dressler subsequently withdrew from this view); *see* FLETCHER, *supra* note 5 at 808; *Excusing*, *supra* note 5, at 682.

same time feeling a "withdrawal of goodwill" and a "preparedness to acquiesce in that infliction of suffering"[116] on that person. Once again, resentment and indignation are in tension with other significant feelings, and this can sap their energy.

The *affiliative* aspects of identification also work against resentment and indignation. As social creatures we cherish our affiliations with others, which stave off isolation and confirm our normalcy and our fitness for social life. Resentment and indignation threaten these affiliative benefits. Though resentment and indignation may be intrinsic to social relationships, they are also volatile and hurtful feelings, and can drive off or destroy the other. Moreover, marking the other as a transgressor not worthy of goodwill, they strip affiliation of its validating and normalizing value (our affiliation with him, it turns out, does not validate or normalize us after all). Our investment in affiliation, then, may drain the passion from resentment and indignation.

Identification, then, involves an array of feelings and attitudes that do not coexist easily with resentment and indignation. When these feelings and attitudes are strong (i.e., when identification is strong), their conflict with resentment and indignation may suck the energy out of those reactive attitudes, diminishing or entirely defusing them. In such cases, blame will evaporate, and we will excuse the wrongdoer.

2. Identification Catalyzes Ethical Insights that Oppose Resentment and Indignation

Identification works against blame in another way too, for in generating the feelings described above, it also catalyzes ethical insights that tend to oppose resentment and moral indignation.

The experience of identification with a wrongdoer is often associated with thoughts like "that could have been me" and "there but for the grace of God go I."[117] These ideas express poetically some of the judgments and feelings we have when we identify, including the thought that we are similar to the wrongdoer in important ways and the empathetic experience of standing in the wrongdoer's shoes. But these thoughts do something else too, for the realization that "that could have been me" sensitizes us to an array of ethically relevant considerations that are not

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116. *Freedom*, *supra* note 4, at 77. As Russell points out, Hume had a similar view, for similar reasons: Hume "argue[d] that our moral sentiments naturally give rise to 'benevolence or anger; that is, with a desire of making happy the person we love, and miserable the person we hate.'" RUSSELL, *supra* note 2, at 138 (*quoting* DAVID HUME, A TREATISE OF HUMAN NATURE 591).

117. Though Watson does not discuss identification, he does describe the related experience of realizing "if I had been subjected to such circumstances, I might well have become as vile." *Freedom*, *supra* note 4, at 245. Fletcher describes something similar. FLETCHER, *supra* note 5, at 808 (describing the realization we sometimes have that "if any one of us were forced to act at gunpoint or to steal in order to survive, we would do the same," a realization that leads us to see our "essential equality with the excused").

always accessible to us, and these considerations can undercut resentment and moral indignation.[118]

For example, realizing that "it could have been me" amplifies our sensitivity to the hostile, threatening, and destructive aspects of resentment and indignation. In realizing that "it could have been me," we stand in the other's shoes, and part of standing in the other's shoes is seeing our attitudes and their consequences from his perspective. In this stance, we see that for the wrongdoer, the suspension of our goodwill and our willingness to see him suffer are hostile[119] and hurtful. Resentment and indignation appear as violent and destructive passions, bound up with exclusion and punishment, palpably threatening his psychological and physical well-being.[120] Seeing these features of our blaming attitudes can be like catching a glimpse of our own face in a mirror during a rage—a startling and momentum-checking discovery that we are in the throes of something corrosive to human well-being. A new hesitation about our blaming attitudes might now set in.

In realizing that "it could have been me," we also see more clearly how deep a role luck plays in who we are and how we act. The thought "it could have been me" expresses the recognition that, had circumstances been different, I could have ended up doing the same thing the wrongdoer did.[121] Though we are quite different, the similarities between us highlight that we are molded from similar clay, and that, had I been placed in the wrongdoer's circumstances, I might have come out similarly shaped. This, we see, is a matter of luck, in the sense that it is determined by phenomena

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118. Though Strawson's characterization of the reactive attitudes as brute, inevitable feelings might suggest that they would not be influenced by insights and reasons, Strawson and subsequent theorists have generally treated resentment and moral indignation as susceptible to being dispelled by various sorts of realizations and discoveries. *Freedom*, *supra* note 4, at 245. Bennett, for example, suggests that thinking about the causes of a person's acts "dispels reactive feelings"; "when we contemplate someone's action as the upshot of deterministic causes . . . our frame of mind encourages questions like 'what do we have here?' 'How did this come about?' Which naturally goes with the question 'How can we lessen . . . the chance that this will happen again?' That objectivity of attitude dispels reactive feelings." Bennett, *supra* note 23, at 57. Thus, an "intellectual operation can dispel" a reactive attitude. *Id.* at 58.

119. Bennett uses "hostility" to characterize blaming reactions. *See* Bennett, *supra* note 23, at 52.

120. This characterization of the blaming attitudes is not meant to exclude the view that they also carry potentially positive or reintegrative meaning for the wrongdoer as well. It is only to highlight that whether or not blaming attitudes have such positive implications for the wrongdoer, they also have hostile, threatening, and destructive implications for him.

121. Watson describes part of this thought process as an "ontological shudder": "I might well have become as vile. . . . This thought induces . . . an ontological shudder." *Freedom*, *supra* note 4, at 245. Though Watson does not discuss the phenomenon of identification, he associates this shudder with identifying thoughts and feelings—"a sense of equality with the other. I too am a potential sinner"; "[t]he awareness that . . . the others are or may be like oneself," a reaction that opposes "distancing" (and thus presumably involves drawing nearer or assimilation). *Id.* at 245. And, indeed, in a postscript added in 2004 (twenty years after the article was published), Watson comes even closer to invoking identification, reporting that at the time of his villain's death, it was apparent that "he was one of us." *Id.* at 259. Fletcher also connects the realization that "we would do the same" with a sense of our "essential equality" with the wrongdoer. FLETCHER, *supra* note 5, at 808.

over which we have no control or influence.[122] Neither of us had any say in which parents we were born to, which genes met at our conception, whether we grew up in a poor neighborhood or a rich one, whether we were raised in a peaceful village or a war zone, whether a parent died of cancer, whether someone entrusted us to an abusive babysitter, or whether a drunk driver caused us a brain injury. All these things—and an infinity of like things—were given to us by lottery; and everything we do, it appears, can be traced back to our lottery ticket.

Seeing that who we are and how we act is pervasively influenced by luck, in turn, primes serious questions about the propriety of resentment and indignation, and about the fairness of blaming and punishing the wrongdoer.[123] If the things that make me an apt target for these reactions are allocated to me arbitrarily, is it not unfair to subject me to them? If a roll of the dice or a deal of the cards determines how blame and punishment will be allocated among us, is that not unfair? Identification puts us in a position to see that the inextricable element of luck bound up with our blaming attitudes and practices raises serious fairness concerns about those attitudes and practices. Again, we come upon reasons for hesitation. Seeing how deeply luck invades these attitudes and practices may dampen our taste for them.[124]

Finally, realizing "it could have been me" sensitizes us to the possibility that resentment and indignation direct our passionate reactions to wrongdoing at the wrong target. Standing in the other's shoes, we become more sensitive to the way the particular circumstances of the other's life have channeled the other to his wrongdoing.[125] We appreciate more deeply the role that grinding poverty played in his conduct, the impact of the babysitter's abuse, and the power of the peer group's incessant threats and commands. And as we come to imagine and appreciate these influences, it

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122. It is, as Bennett suggests, a matter of "ultimately hands that were dealt to him by God or nature." And this realization, says Bennett, tends to undermine the impulse to blame. Bennett, *supra* note 23, at 55.

123. *Id.* at 56 ("many people . . . hold that if a person is as God or nature made him, and if how he is determines what he does, then it is 'in some ultimate sense hideously unfair' that he should be blamed for bad things that he does," *quoting* Bernard Williams, *Morality and the Emotions*, *in* PROBLEMS OF THE SELF 207, 207–09 (1973)); *Freedom*, *supra* note 4, at 245–46 (noting that concerns about moral luck undercut blaming reactions).

Watson does not identify fairness problems, but points to problems of standing. If I would have been "as vile" as the wrongdoer had I been exposed to the same formative influences, perhaps I do not have standing to blame him? *Id.* at 245–46.

124. Dressler urges us to resist these sorts of reactions to moral luck. *Exegesis*, *supra* note 40, at 1370. His argument, however, assumes that the primary reason moral luck seems to undercut blame is that it makes us worry that we have no standing to blame others, given our own good luck. Here, I have argued that moral luck undercuts blaming attitudes for a different reason, having to do with arbitrariness and fairness. I contend that when blame entails serious problems of fairness, this undercuts the reactive attitudes that constitute blame.

125. Dressler associates a similar shift in perspective with being an "exceptionally compassionate person[]." Such people, he says, are "broad contextualizers" who "are unwilling to fix their gaze . . . narrowly" on the offender alone. *Excusing*, *supra* note 5, at 685. However, Dressler warns that such perspective shifting should not drive excuse doctrine. *Id.* at 686.

is natural for our attitude toward the wrongdoer to change.[126] Before we stood in his shoes, we were satisfied to identify him as the source of the offense or injury and to direct our negative reactions against him alone. But now, seeing from his vantage all the forces and circumstances that channeled him to his wrongdoing and seeing how he is but the last link in a web of chains pervading his personal history and converging at the moment of his wrongful act, it seems stranger to focus all our attention on him. In an important way, he is not the source of the wrongdoing—at most, he is a component in a complex web. And, it seems to follow, he should not be the sole target of our reactions to the wrongdoing.[127] We wanted to hurt, change, or reform him; now, perhaps, we want to hurt, change, or reform the whole complex web. Circumstances channeled this actor to his wrong; those circumstances become the target of our strongest reactions. Resentment and indignation drift to the margins.

In these ways, then, identification positions us to appreciate ethically significant aspects of blame and wrongdoing that are not always immediately accessible to us. Putting us in the wrongdoer's shoes, identification helps us imagine and experience the consequences of blame and punishment, and thus helps us appreciate what is at stake when we blame and punish. Moreover, identification helps us see what a profound role luck plays in who does wrong, and thus in who is eligible for blame and punishment. This raises fairness questions, at least if we have the intuition that significant pain and unhappiness should not be allocated in accord with a lottery. And identification helps us see that the wrongdoer is but a piece of a complex web of circumstances and phenomena, such that directing our negative reactions to the wrongdoer but not the rest of the web raises serious fairness concerns.

All of this contributes to the push against blame and punishment. All these realizations tend to undercut resentment and moral indignation, and thus to diminish the inclination to blame. In this way, these ethical considerations make us more likely to excuse a wrongdoer.

C. Identification, Particularistic Detail, and *Tout Comprendre, C'est Tout Pardonner*

Seeing how identification inclines us to excuse can help us understand a nettlesome problem for objectification accounts of excuse.

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126. Though Bennett does not make the argument that I am making here, he makes the related observation that thinking about the causes of a wrongdoer's actions tends to "dispel[] reactive feelings." Bennett, *supra* note 23, at 57–58 (emphasis omitted). Bennett suggests that this is because this sort of "naturalist" inquiry is "psychologically immiscible with the frame of mind in which the question is asked." (emphasis omitted). In the text below, I offer a different explanation.

127. *See, e.g.*, *id.* at 56 (noting the discomfort we might feel about blaming wrongdoers if we know their acts can be traced to God, an observation that highlights the way we can come to see the original source of the wrongdoing as the proper target for our negative reaction to wrongdoing).

The problem is *tout comprendre, c'est tout pardonner*[128]—that is, the inclination to excuse wrongdoers seems to grow as we learn more about them. Objectification accounts have not adequately accounted for this phenomenon. Identification, on the other hand, can, for our capacity for identification makes excuse highly susceptible to detailed, particularistic information about the wrongdoer.

As theorists have often noted, it appears that the more we learn about a wrongdoer's personal history and circumstances, the more inclined we are to excuse the wrongdoer. Michael Moore, for example, has written, "Common sense often adopts . . . the French proverb, 'tout comprendre c'est tout pardonner.' This common sense urges that we should excuse whenever we come to know the causes of behavior."[129] Philosopher Gary Watson's seminal commentary on Strawson's piece demonstrates this especially vividly: Watson presents extensive detail from the personal history of a person who has done a terrible wrong and shows convincingly that as we learn more of his personal history, our moral indignation begins to dissipate.[130] The reactive attitudes, he says, seem to be inhibited by "explanations of why . . . individuals display qualities" that normally offend.[131]

Some theorists treat this phenomenon as a nettlesome mystery.[132] But even those who grapple with this phenomenon most seriously are often perplexed by it. Watson, for example, carefully catalogs several of the

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128. "To understand all is to forgive all." Theorists frequently invoke this phrase. *See, e.g.*, MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (2010); FLETCHER, *supra* note 121, at 513; Bennett, *supra* note 23, at 60.

129. MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 488 (2010); *see also* FLETCHER, *supra* note 5, at 513 (discussing a belief "many people" have that "if we know everything about the defendant, we will invariably excuse him.").

130. *Freedom*, *supra* note 4, at 233–59.

131. *Id.* at 228. Putting the point more abstractly, Jonathan Bennett has written,

> many careful and intelligent people are influenced by lines of thought in which a person is presented as a natural object whose structure and behavior ultimately results from nothing but the behavior of parts of the universe other than himself; and in which his behavior is presented as wholly predictable. Such lines of thought lead many people to say that the person is not really accountable for what he does. . . .

Bennett, *supra* note 23, at 55; *see also id.* at 58 ("I cannot imagine anyone thinking hard about the causation of behavior while continuing to boil with rage against the malefactor."). Bennett explains this phenomenon in a different way than I will. He argues that the reason that learning the causes of a person's acts leads us to excuse him is that this sort of knowledge leads us to take the objective attitude toward him: "When we contemplate someone's action as the upshot of deterministic cause, we adopt the objective attitude towards him. . . . That objectivity of attitude dispels reactive feelings, and their disappearance presents itself to us as the judgment that the person is not morally accountable." *Id.* at 57.

As my discussion in the text below suggests, I do not think Bennett's explanation correctly explains this phenomenon. Thus, while I agree with Bennett's observation that the phenomenon occurs, I do not agree that it is best explained by reference to the objective attitude.

132. *See e.g.*, *id.* at 55 (referring to this phenomenon as "the old issue about determinism" which we can now "settle[] (at last!)").

ways in which detailed personal history seems to undermine blame: it diminishes our antipathy, generates sympathy,[133] shows how the wrongdoer is a victim too,[134] ignites anxieties about moral luck, sensitizes us to the connection between un-chosen formative experiences and subsequent conduct, and reminds us that we might have done the same had we been in the wrongdoer's shoes.[135] However, Watson observes, on Strawson's account, none of these reactions should detract from blame, for none suggest that any Strawsonian excuse applies.[136] None show that the wrongdoer offended by accident or that the offender is so psychologically abnormal as to be incapable of participation in normal human relationships or community.[137] None should trigger the objective attitude.[138] So why, then, do such details seem to undermine the attribution of responsibility?[139]

Linking excuse to identification demystifies and normalizes this phenomenon. If identification can drive excuse, then it makes perfect sense that the more we learn about a wrongdoer, the more likely we are to excuse him, for the more we learn about him, the more likely we are to identify with him (and to do so deeply). It is hard to identify with someone we know only as a "wrongdoer"; most of us will not have done what he has done, so he will not appear similar to us. In contrast, particularistic details about the other's characteristics and experiences invite identification, and the more such detail we learn, the stronger the inducement and opportunity to identify.[140] This is so because such details provide the raw material necessary for the identification-triggering cognition that the other is similar to the self.[141] Each detail can be a point of comparison between the self and the other, a trigger for the spark of recognition.

At the very least, learning that he has a recognizably human personal history will make it more salient that he is a human and a person, like us, rather than the abstractly conceived author of a wrongdoing. But we are also likely to discover more than that. If the story is told in any meaningful detail, we will learn that he was once a child, malleable,

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133. Watson, *supra* note 31, at 244–45.

134. *Id.*

135. *Id. See also* McKenna, *supra* note 33, at 210–11 (summarizing and approving Watson's observations).

136. Watson, *supra* note 31; *see also* McKenna, *supra* note 31, at 210–11 (following Watson on this point).

137. Watson, *supra* note 31; *see also* McKenna, *supra* note 31, at 210–11.

138. *See supra* notes 57–66 and accompanying text.

139. Perhaps because he cannot resolve this mystery, Watson concludes that these phenomena cannot entirely dissipate the inclination to blame. Watson, *supra* note 31, at 243–44. This observation, and the conclusion Watson derives, are at least contestable. We might disagree with the observation itself—learning the offender's personal history may, in fact, completely dissipate resentment and moral indignation. Or we may suspect that it would do so if a more complete history was provided.

140. Bennett gestures at the same idea—while using the term "identify" differently—when he writes that we have stronger reactions to harm to "an identified person" than to harm to "an unidentified group." Bennett, *supra* note 23, at 67. It is harder to connect with abstractions and easier to connect with a person we know concretely.

141. *Supra* note 118 and accompanying text.

powerless to shape his environment, hungry for love, and vulnerable to physical and psychological force—and therefore shares something vitally important with us.[142] We will learn that as an adult, he craves acceptance, affection, love, and respect; that he yearns for the power to protect himself, feed himself, support himself, and acquire material comforts—things nearly all of us hunger and yearn for. If a mother or father was brutal or cold, if one of his parents was missing or died, or if a parent was mentally ill or alcoholic, these details will trigger that spark of recognition in many of us because we have experienced these things ourselves or because other experiences we have had enable us to vividly imagine ourselves in his shoes. If he has been very poor or addicted to drugs; if he has been discriminated against because of his religion, race, or national origin; if he has struggled with dyslexia, attention deficit hyperactivity disorder, depression, or bipolar disorder; or if he has been ostracized by his social group or persecuted by bullies, then these details will each open new opportunities for intense identification.

Taking account of identification, then, helps us work through the puzzle that perplexed Watson. Indeed, we might say that Watson had all (or most of) the pieces but did not put them all together. Watson recognized that personal history undercuts indignation.[143] More than that, Watson identified several of the ways in which it does so—by triggering sympathy, sensitizing us to moral luck problems, helping us stand in the other's shoes, and so on.[144] For Watson, these phenomena were a disorganized hodgepodge, a messy collection of organic human reactions, none of which should have excusing significance in Strawson's objective schema for excuse (or in Watson's extension of it).[145] As a result, Watson could not resolve their relation to blame and excuse. Taking account of identification, however, helps us cast new light on Watson's puzzle. We can see that each of the discrete phenomena Watson noted were components of a coherent and important psychological phenomenon: identification. Having identified identification as an alternative avenue to excuse, we need not be perplexed by the disconnect between these discrete phenomena and the objective attitude. It may be true that the phenomena have little connection to the objective attitude, but they are closely tied to identification, and that is why they undercut blame.

In short, all the standard details in the life story of the wrongdoer

142. This phenomenon emerges especially vividly from Watson's piece, in which we discover that learning about the murderer's childhood—one involving great vulnerability—undercuts our indignation at the wrong he committed. Watson, *supra* note 31, at 235–44.

143. *See id.*

144. *Id.* at 244–46.

145. *See id.* at 244 (noting that seeing the accused as a victim appropriately opposes, but does not dispel, the reactive attitudes elicited by the actions and character of that person, leading to a complicated and conflicted emotional response); *cf. id.* at 224–25 (explaining that under Strawson's "objective view," people incapable of adult relationships because of mental illness or extraordinary circumstances *inhibit* reactive attitudes on the part of the observer).

present opportunities and inducements to bridge the chasm between the wrongdoer and the self; to see how we are similar to each other; and to empathize, sympathize, appreciate, and affiliate. The more extensive the detail, the more likely and the more powerful the opportunity for identification. Identification, then, is the hidden link between "the more we learn" and "the more we excuse." We excuse when we learn about another because learning catalyzes identification.

D. Identification at Work in the Excuses

Identification is a basic and robust psychological phenomenon that and it is conducive to excuse. Indeed, taking identification into account can help us understand and explain many of the excuses. This is especially easy to see with the excuses that seem to involve understandable emotion, but it is also (perhaps unexpectedly) true of excuses involving incapacity.

1. Understandable Emotion Excuses and Identification

It is easy to see identification at work in excuses involving what I will call "understandable emotion"[146]: cases of (for example) duress, provocation, and entrapment.[147] These excuses arise where the wrongdoer was in a situation that elicits powerful emotions in most people, and the wrongdoer experienced those emotions. (He was threatened and he felt fear; he was provoked and he felt passion; he was lured to commit a crime and he felt tempted to do so.) In such cases, the wrongdoer did wrong while he was in the throes of a powerful emotion that arose in an understandable way.

In such cases, we are especially likely to identify with the wrongdoer. Insofar as the wrongdoer's emotional experience was understandable, it provides a ready point of identification between him and us. It is understandable in that it is the sort of feeling that people normally have when they encounter the situation he encountered, so it should be easy for us to imagine ourselves having the same feeling. This will highlight an

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146. *See* Reid G. Fontaine, *Adequate (Non)Provocation and the Heat of Passion as Excuse not Justification*, 43 U. MICH. J.L. REFORM 27, 43 (2009). Fontaine characterizes the provocation partial excuse in terms of an "understandable" emotion because ". . . given the circumstances, a similarly placed individual would likely experience emotional disturbance similar to that of the defendant's, and that such an emotionally aroused state can undermine one's rationality and limit one's self-control." *Id.* However, not everyone would characterize these excuses as emotion-based excuses. For example, some might prefer to characterize them as excuses for understandable reactions (with the term reaction encompassing not only emotional but also cognitive reactions and perhaps even behavioral reactions). Adopting such alternative characterizations, however, would not change the argument in the text.

147. We might also include other excuses here. For example, we might think that a good explanation for the defense of self-defense is that it is really an excuse for killings committed under the sway of understandable emotions associated with self-preservation. And even if we are not tempted by this excuse account of self-defense, we might still think that "true-man" and "stand your ground" rules about retreat in self-defense cases are really excuses for cases in which understandable emotions are in play.

important similarity between us. More than that, many of these understandable emotion cases come with narratives that strongly invite identification. In such cases, wrongdoers often have straightforward, easy-to-understand descriptions of the emotion-triggering situations they faced—descriptions filled out with dramatic and emotionally salient details. ("As I was walking back from the corner store I saw my daughter riding her tricycle in the cul-de-sac, and then I saw the victim run over her in his car . . . . .") Such descriptions are strong invitations to stand imaginatively in the wrongdoer's shoes and to see an important scene through his eyes. Moreover, such wrongdoers can usually tell us simple, accessible, and plausible stories about the intense emotions they experienced. ("When I saw him run over my daughter I was so scared and angry I thought I was going to explode. It hurt so much I just went crazy . . . .") Such stories induce us—as social creatures naturally interested in the feelings and attitudes of other persons—to enter into and imaginatively reconstruct important parts of the wrongdoer's private subjective experience.[148] This is a strong inducement to identification.

The ease of identifying with wrongdoers in these cases helps explain why we excuse them. Though we would normally feel resentment or indignation for the wrongs they commit, identifying with them steers us in another direction. Identification makes us more sensitive to their psychic and physical experience and more appreciative of their value—undercutting our impulse to inflict suffering on them. Moreover, in reminding us that "that could have been me," ("I would have been overwhelmed by passion, too, if I'd seen someone run over my daughter in the cul de sac . . ."), identification foregrounds the wrongdoer's bad luck. This energizes fairness concerns about penalizing bad luck, which may defuse resentment and indignation. Additionally, in putting us in the wrongdoer's shoes, identification induces us to think more carefully about the criminogenic forces and circumstances that moved the wrongdoer (e.g., the threat, provocation, or inducement[149]) so that our negative reactions to the wrong are drawn away from the wrongdoer and toward the criminogenic forces around him (e.g., the threatener, provoker, or inducer). It is not hard to see, then, how identification might fuel excuses in understandable emotion cases.[150]

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148. For a fuller discussion of the way particularistic narratives impact attitudes and moral intuitions about wrongdoing, see Anders Kaye, *Powerful Particulars: The Real Reason The Behavioral Sciences Threaten Criminal Responsibility*, 37 FLA. ST. U. L. REV. 539, 562–66 (2010).

149. Identification may also lead us to think more carefully about less immediate criminogenic influences. For example, standing in the wrongdoer's shoes, we might think about the cultural influences that made him sensitive to threats, provocations, or inducements.

150. Criminal theorists have sometimes discussed excuses like duress in language that is compatible with the identification account. Kadish, for example, says that in these excuses "the actor has shown himself no different from the rest of us." Kadish, *supra* note 92, at 262. Dressler made similar points while developing a compassion-based account of excuse (though he subsequently rejected this account). *See Excusing*, *supra* note 5, at 683 (in duress cases we "feel a strong connection to the coerced wrongdoer. . . . His weakness is our weakness. We find it impossible to separate him from

2. Incapacity Excuses and Identification

Identification helps explain another set of excuses that might appear, at first glance, to be beyond the reach of the identification account: the incapacity excuses.[151] This group of excuses applies where the wrongdoer has significant disabilities or deficiencies compared to a normal person.[152] It most obviously includes insanity, subnormality, and immaturity.[153] It also includes temporary impairments like intoxication.[154]

At first glance, it might appear that identification is especially unlikely where the incapacity excuses are in play. After all, these wrongdoers are flagrantly different from most of us, and different in ways that are vivid and important.[155] They do not see the world the way we do. They do not understand what we understand. They do not want what we want. It is tempting, then, to say that they are more like wolves or tornadoes than full-fledged persons.[156] Indeed, most theorists hold that we recognize these excuses for exactly that reason: the actor is not a moral agent and therefore cannot be held responsible.[157]

Nevertheless, identification may play an important role in these excuses for the excuses offered in these cases actually reestablish (rather

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ourselves; there, but for the grace of God or good fortune, go the rest of us."); *Exegesis*, *supra* note 40, at 1360 ("[The] tragic circumstances" in duress cases "create unmitigated compassion for the defendant. We can identify with him and imagine ourselves in the same predicament."). Dressler repudiates the compassion-based account. *Id.* at 1361 ("Ultimately, excusing is a matter of justice, not of compassion.").

151. It is conventional to cluster these incapacity excuses separately from the understandable emotion excuses discussed above. Kadish, for example, characterizes duress as an excuse for "deficient but reasonable actions," while characterizing insanity and immaturity as "nonresponsibility" excuses. Kadish, *supra* note 92, at 259–62. John Gardner suggests these incapacity excuses are not really excuses at all, insofar as such incapable actors "are not responsible for their actions and therefore need no excuses for what they do." John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 589 (1998).

152. *See Freedom*, *supra* note 4, at 81.

153. *Id.*

154. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. Rev. 1587, 1642 (1994) (finding that intoxication weakens self-protective self-consciousness, which makes people less responsible for their actions).

155. *See, e.g.*, Kadish, *supra* note 92, at 262 ("the basis of the insanity excuse is that he has shown himself very different from the rest of us" (emphasis omitted)).

156. Dressler struggles with this in his discussion of compassion and insanity. According to Dressler, it is a problem for the compassion account of the insanity excuse that "the more severe the mental disease—e.g., the more the defendant is like a wild beast rather than a human being—the more difficult it is to feel oneness with him . . . [and] the more likely it is that the emotions we feel will be revulsion and fear rather than compassion." *Excusing*, *supra* note 5, at 682–83 n.71. Dressler subsequently repudiated the view that excusing and compassion are associated. Dressler resolves this problem for his compassion account by suggesting, somewhat awkwardly, that in such cases we know we "should" feel compassion. *Id.* Here, I offer a quite different resolution.

157. *See, e.g.*, Stephen J. Morse, Excusing And The New Excuse Defenses: A Legal And Conceptual Review, 23 Crime & Justice 329, 333 (1998); Peter Arenella, *Convicting The Morally Blameless: Reassessing The Relationship Between Legal And Moral Accountability*, 39 U.C.L.A L. REV. 1511, 1533 (1992); *Exegesis*, *supra* note 40, at 1358; Peggy Sasso, *Criminal Responsibility In The Age Of "Mind-Reading"*, 46 AM. CRIM. L. REV. 1191, 1194 (2009).

than break) the connections between such wrongdoers and us. This counter-intuitive dynamic emerges if we look closely at what makes such wrongdoers seem alien to us in the first place. Such wrongdoers become alien to us not when their excuses become apparent, but prior to that when they do their wrong. It is at the moment of wrongdoing that the wrongdoer most forcefully severs himself from us and our community. It is at that juncture that the wrongdoer does something that most of us do not and would not do. In killing his rival or stealing a stranger's wallet, he shows himself capable of and drawn to violence and cruelty, or greed and deception in ways that we are not. He displays a disconnection from or disdain for community norms that the rest of us assiduously learn, follow, and cherish. Moreover, in at least some of these cases, this is the moment at which he shows himself flamboyantly bizarre and unintelligible. (In that he acts for bizarre and unintelligible reasons or in bizarre and unintelligible ways—e.g., he shoots the president in front of a crowd in order to impress a movie star he has never met.) It is at the moment of the wrongdoing that he becomes alien to us.

Against this backdrop, the incapacity excuses help *rebuild* the connection severed by the wrongdoing.[158] They do so by helping us see that the wrongdoer may be a recognizable human person despite his utterly alien conduct. His excuse—that he was insane, subnormal, an infant, or intoxicated—is an explanation. It points to a discrete and understandable deficiency that helps us understand how a recognizable human person could produce such (otherwise) inexplicable behavior. Of course, such excuses highlight that there is something strange and different about the wrongdoer, but that strangeness and difference was already evident to us (because of his wrongdoing). What was not evident (in the aftermath of the wrongdoing) was that he might nevertheless also be a recognizable human person. The incapacity excuse restores this possibility. In tying the wrongdoing to a discrete and understandable deficiency, it diminishes the possibility that the wrongdoing stems from a complete and thoroughgoing inhumanity. It enables us to reopen the possibility that, beyond this discrete difference, the rest of him is recognizably human. We can recapture the thought that, though he is delusional or cognitively impaired, the wrongdoer still feels pain and joy, still wants security and love, still has recognizably human fears and projects, is still a fundamentally social creature, and so on. He is not a wolf or a demon after all. He is a human being who has a mental illness or a cognitive impairment or who was impaired by intoxication. At the moment of his wrongful act, he became incomprehensible and thus alien, but his incapacity excuse makes him comprehensible again—thus

158. Dressler captures part of this dynamic when he writes about our need to "make sense" of why a person does wrong. *See Excusing, supra* note 5, at 695. Dressler thinks we feel this need when we believe the apparent wrongdoer has good character. *Id.* Here, I suggest that our interest in sense-making explanations of wrongdoing is broader than that: we are interested in explanations of wrongdoing that help us reconcile the wrongdoer's bad act and his essential humanity (whether or not he has a "good character").

restoring the potential for identification.

Imagine, for example, that you learn two things about me. First, you learn that I have committed a brutal killing and took sadistic pleasure from the suffering I inflicted on my victim. Learning this shatters any actual or possible connection between us. It makes me utterly mysterious and strange. I have done something you would never do. I have completely disregarded communal norms you care deeply about. It seems entirely plausible that my psychic life is as different from yours as a wolf's or a demon's. Then you learn that, at the time that I committed this atrocious act, I suffered from a profound mental illness such that I believed my victim was a murderous demon who had been hounding me for years. Learning this will not make me normal in your eyes. Indeed, it affirms that I am very strange and different from you. But, nevertheless, it makes me *less* mysterious and strange than I seemed before. Now you have an explanation for how I came to do something you would never do and how I came to disregard the communal norms you care so deeply about. This explanation is compatible with my being recognizably human in many ways. Per this explanation, my actions are not the products of random chance; they are not the incomprehensible cruelty of a wolf or a demon. Rather, they come from distortions of recognizably human motivations which are traceable to an identifiable and understandable source (my insanity). Moreover, while the source of the distortion does mark me as very different from you, it also limits the extent of the difference. It assures that I am not a wolf or a demon after all. It allows you to return to many of the default expectations you had about me before you found out about my wrongdoing: that I feel pain and joy; that I want security and love; that I have recognizably human fears and projects; and that I am a fundamentally social creature.

In short, in the aftermath of my connection-shattering transgression, my incapacity excuse restores some of the possibility for connection between us. That is, it restores the potential for identification. This can help us understand the incapacity excuses. Like the understandable emotion excuses, the incapacity excuses apply where the wrongdoer offers us a way to connect with him, to understand him, and to see his humanity and the ways in which he may be like us.[159] The understandable emotion excuses do this directly by spotlighting something important that we have in common with the wrongdoer.[160] The incapacity excuses do this in a more complex way by diminishing an obstacle to identification (the alienation generated by the wrongful act).[161]

159. *See supra* Part III.D.2.

160. *See supra* Part III.D.1.

161. *See supra* Part III.D.2.

E. Identification as an Essential Piece of the Puzzle

Identification can help us explain the excuses. It has a strong tendency to incline us toward excuse; it helps us understand why the more we understand, the more we excuse; and we can see it at work in more than one kind of excuse. This is not to say that we excuse solely when and because we identify. Rather, it is to say that—from the naturalist perspective—identification is a piece of the excuse puzzle.

It may be that identification is only one piece. Nothing said here precludes the possibility that there are other important psychological drivers of excuse. For example, it may be that objectification also drives some excuses.

The important thing, however, is to recognize that identification should be an essential piece of the naturalist account of the excuses. Traditionally, the objectification account of excuse has neglected this possibility—building its account of excuse around the dichotomy between reactive and objective attitudes. This dichotomy has left no room for identification. It has, then, neglected a powerful part of the psychology of excuse.

IV. The Diverging Ramifications of the Objectification and Identification Accounts of Excuse

As we have seen, the objectification and identification accounts offer quite different explanations of excusing practices. In this Part, I show that these differences have far reaching implications for the theory of excuse.

I focus on three important issues in excuse theory and show how the objectification and identification accounts handle these issues in very different ways. First, the identification account casts our excusing attitudes in a more reputable light than the objectification account, and thus favors a less conservative approach to innovation in excuse. Second, the identification account is more accommodating to excuses rooted in the wrongdoer's hard personal history. Third, the identification account is more receptive to concerns about the significance of causation and determinism for excuse—concerns that the objectification account almost entirely suppresses.

A. Are Excusing Attitudes Suspect?

One important issue for the theory of excuse has to do with the attitude we should have toward our excusing attitudes. Should we trust and embrace those attitudes? Should we temper them? Should we resist them? Our answer will have significant implications for the theory of excuse. It will influence whether we take a (theoretically) liberal or conservative view of interpretations and proposals that seem to expand the universe of the

excuses.[162]

On this issue, the objectification account and the identification account suggest different answers. Central features of the objectification account suggest that an important cohort of our excusing attitudes is suspect in important ways such that we should take a theoretically conservative view of innovations that extend the reach of the excuses. In contrast, the identification account casts our excusing attitudes in a more appealing light, deflating some of the arguments for theoretical conservatism about the excuses.

1. The Stakes

As the vast literature on excuse shows, there are many unresolved issues in excuse law and theory. Much rides on how these issues are resolved. Our view of the excusing attitudes is likely to have an important influence on how we resolve these issues.

Just to illustrate, our view of the excusing attitudes may influence how we come out on some important issues on which there are currently disagreements among American jurisdictions, such as whether volitional impairments can constitute legal insanity; whether the defense of duress should be available in homicide cases; whether "mere words" are sufficient provocation to reduce murder to manslaughter; whether mental or emotional disturbance should be excusing in the absence of provocation; whether we should recognize an excuse for diminished capacity; whether and how psychological syndromes like the battered woman's syndrome should excuse; and whether retreat should be required in self-defense cases (at least insofar as this aspect of the self-defense doctrine seems excuse-like).[163] Our view of the excusing attitudes might also influence our positions on some other long-standing debates about the contours of the existing excuses such as whether the insanity defense should be available to sociopaths or drug addicts;[164] whether duress should be available in cases

162. This is an issue that looms over the excuses generally, and excuse theorists frequently reference it. *See, e.g.*, Douglas Husak, *A Liberal Theory of Excuse*, 3 OHIO ST. J. CRIM. L. 287, 293 (2005) (reviewing JEREMY HORDER, EXCUSING CRIME (2004)) (noting that "courts and commentators have been loathe to broaden the range of excusing conditions"); *Excusing*, *supra* note 5, at 715 ("We should be cautious about recognizing new excuses and expanding old ones."); *Wrongdoers*, *supra* note 5, at 253 (posing the question "whether we should construe excuses broadly or narrowly").

163. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 25.04[C][1][b] (discussing debate about volitional impairment and insanity); § 23.04 (discussing debate about whether duress should be a defense to homicide); § 31.07[B][2][b][i] (discussing debate about whether "mere words" should be considered adequate provocation); § 31.10[C][3][a] (discussing Model Penal Code shift from provocation to mental disturbance approach to manslaughter); § 26.01 (discussing ongoing uncertainty about status of diminished capacity defense); § 23.07 (discussing debate about Battered Woman Syndrome and duress excuse); § 18.02[C] (discussing long-standing debate about retreat rule in self-defense).

164. *See, e.g.*, WAYNE LAFAVE, CRIMINAL LAW, § 7.2(b)(1) (discussing judicial reluctance to determine contours of definition of "disease of mind" for insanity defense and doctrinal struggles regarding drug addiction and psychopathic personality).

involving nonhuman threats or threats to property;[165] and whether the entrapment defense should be available for inducements offered by a private citizen rather than a police officer.[166] Our view of the excusing attitudes also bears on what we think about more obviously revisionary proposals to add entirely new excuses[167] such as excuses for brainwashing,[168] "rotten social background,"[169] and acting from conscience.[170] These views also have implications for more theoretically framed (but still important) questions, such as whether—and to what extent—we are willing to individualize the reasonable person in excuses like duress and provocation;[171] whether cultural differences can be excusing;[172] and whether causation or determinism should be considered excusing.[173]

Of course, our views of the excusing attitudes do not mandate particular positions on these issues. But many of these issues have proven to be stubborn and difficult to resolve, so our general attitudes toward the excusing attitudes may exert an important influence on how we choose among the available positions. If we are generally skeptical about the attitudes that drive excuse, we may generally prefer theoretically conservative answers to these sorts of questions—answers that limit or contract the scope of the excuses. If we see excusing attitudes more favorably, then we may be more comfortable with solutions that appear to extend the reach of the excuses.

2. Objectification Account: Excusing Attitudes are Suspect

The objectification account of excuse casts an important cohort of our excusing attitudes in an unappealing light so that they appear demeaning to the excused and self-serving for the accuser.[174]

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165. *See, e.g.*, Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 69–73 (2003) (discussing some of the arguments for and against treating non-human threats as duress).

166. *See, e.g.*, LAFAVE, *supra* note 164, § 9.8(a) (discussing, *inter alia*, whether private inducements should be recognized as entrapments).

167. Many theorists take a generally conservative view toward the creation of new excuses. *See, e.g.*, *Wrongdoers*, *supra* note 5, at 253 ("I see no good reason for creating new excuse defenses, such as brainwashing or severe economic deprivation (i.e., rotten social background).").

168. *See, e.g.*, DRESSLER, *supra* note 163, § 23.06[B] (discussing proposals to recognize defense for brainwashing).

169. Discussed further in Part III.B, *infra*.

170. *See, e.g.*, Douglas Husak, *A Liberal Theory Of Excuses*, 3 OH. ST. J. CRIM. L. 287, 294–95 (2005) (discussing Jeremy Horder's proposed defense for wrongdoing from conscience).

171. *See, e.g.*, DRESSLER, *supra* note 163, § 23.08[B][4] (discussing individualization of reasonable person standard in Model Penal Code duress context); § 31.07[B][2][b][ii] (discussing individualization of reasonable person standard in provocation context).

172. *See, e.g.*, Elaine Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006).

173. Discussed further in Part III.C, *infra*.

174. Criminal theorists commonly suggest that excusing has negative implications for the excused—at least in cases of incapacity. One commonly given reason is that it is better to have done no

a.Excusing Attitudes as Demeaning to the Excused

On the objectification account, our excusing attitudes normally entail a view of the excused that most people would find demeaning, hurtful, or threatening. As we have seen, this account holds that we excuse when we take the objective attitude, and that we naturally take the objective attitude toward those who are psychologically abnormal and unfit for participation in normal adult human relationships. If so, to have an excusing attitude toward a person is to mark that person as deviant in an important way—he is psychologically abnormal. Moreover, it is to cast that person as deficient in a particularly humiliating way—he is unfit for normal relationships with others (an especially painful and embarrassing deficiency for a naturally social creature).[175] Thus, to have an excusing attitude toward a person is in many cases to deem him seriously flawed and to exile him from the social activity essential to human happiness.[176] In these ways, the excusing attitudes can be demeaning and hurtful to the excused.

Such attitudes are demeaning in another way: they seem to strip the excused of the privileged and protected status of a person.[177] As Strawson

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wrong (as when justified) than to have done wrong blamelessly (as when excused). *See, e.g.*, Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 389–90 (2005). But other common reasons are resonant with the objectification account. For example, theorists often connect excusing with disability and lack of personhood—reasoning that excuses are therefore denigrating. *See, e.g.*, Kent Greenawalt, Distinguishing Justifications from Excuses, 49 LAW & CONTEMP. PROBS. 89, 89 (1986) (noting that excuses paint wrongdoers as weak or defective); *id.* at 96 (arguing that, given the negative implications of excuse, "one should refer to acts as 'justified'" when there is a choice between labels); Kadish, *supra* note 92, at 284–85 (suggesting that we excuse those whom we see as "an infant, a machine, or an animal," and that this can be "an insult" to the excused person"); Gardner, *supra* note 151, at 590–91 (arguing that it is denigrating to be held non-responsible due to incapacity); *id.* at 592 (incapacity defenses show the defendant to be "an incapable and pathetic specimen"); *Excusing*, *supra* note 5, at 672 ("[E]xcusing says something less complimentary about the wrongdoer . . . since 'to examine excuses is to examine cases where there has been some abnormality or failure.'"); *id.* at 682 (we excuse an insane person because "he suffers from a disabling condition . . . that renders him unsuitable for condemnation . . . [he] is not a 'whole' human being. We sense this inadequacy . . ."); Chiu, *supra* note 243, at 1331–32 ("excuse is built upon a disability. . . [t]he cost is public portrayal as an individual who is flawed . . . he is. . . brand[ed]. . . as an individual who is defective and weak and therefore, lesser in some serious way. . . . [T]he substantive message of excuse produces negative overtones."); *id.* at 1370–71 (excuse can imply wrongdoers are "compelled" by their excusing condition like "automatons" and thus lack "will or choice" which denigrates them). Explanations such as these tap into the intuitions at work in the objectification account—that excused wrongdoers are excused because they are so deficient or so different from us that we cannot see or engage them as persons—and very plausibly take these intuitions to be denigrating to the excused.

Husak raises questions about the conventional wisdom that incapacity excuses are "the worst kinds of defenses to have." Husak, *supra* note 162, at 297–99.

175. Indeed, even if we take the objective attitude non-naturally, as a "refuge from the strains of such involvement," we seem to say that involvement with the other is especially or unusually undesirable. *See Freedom*, *supra* note 4, at 86.

176. *See, e.g.*, *Exegesis*, *supra* note 40, at 1360 (discussing the insanity excuse in terms resonant with the objectification account, noting that "insane people do not seem like the rest of us . . . ; figuratively, they are pushed away. In a more fundamental sense, they are already apart from the rest of society . . . .").

177. Tapping into this, Chiu presents cultural excuses as depersonalizing when she suggests they fail to "respect[] defendants as moral agents." Chiu, *supra* note 172, at 1317, 1371.

tells us, when we take the objective attitude toward someone, we view and treat him as natural phenomenon—like a wolf or a tornado. He becomes an object: a target for control or treatment, a thing to be avoided, a means rather than an end. He is no longer special in the way that persons are, no longer separate from and above the rest of nature, no longer qualitatively different from and more valuable than other natural things. Thus, even as we excuse him, we also demote him—stripping him of value and status. This demotion is not just demeaning, it is also threatening. Persons generally enjoy privileges and protections (e.g., of their autonomy, well-being, and privacy) that non-persons do not. Casting the excused as an object, excusing attitudes undercut the excused's claim to these privileges and protections.

b. Self-Serving for the Excuser

At the same time, objectification seems self-serving for the excuser. According to the objectification account, the excuser judges the excused abnormal and unfit for human relationships. In most cases, this judgment will be made by a normal person (since most people are normal on the objectification account). Consequently, the person having the excusing attitude will generally see himself as normal where the excused is abnormal socially fit where the excused is socially defective, a person where the excused is just a natural phenomenon or thing. The excusing person seems to reinforce his own privilege and status at the expense of the excused. This seems self-serving.

Moreover, taking the objective attitude casts the excusing person as the one who manages, treats, or avoids the other.[178] In so doing, it seems to encourage or authorize the excuser to interfere with and manipulate the life of the excused. Thus, it shifts power and authority to the excuser at the expense of the excused. Again, this seems self-serving.

In this light, such excusing attitudes take on a greedy hue. They feed the excuser's hunger for status, privilege, power, and authority. They also seem disingenuous in that they gratify the excuser under the cover of consideration for the excused. In this light, they seem conducive to other ugly attitudes like elitism and paternalism.

c. Ramifications for Excuse

The objectification account of excuse puts the excusing attitudes in a very unappealing light. In many cases, it shows them to be insulting, hurtful, and threatening to the excused while being self-serving for the excuser.

This ugly portrait of the excusing attitudes has important

178. *Freedom*, *supra* note 4, at 79. Strawson tells us that these are the things we think about doing when we take the objective attitude. *Id.*

ramifications for excuse theory. At first glance, excusing attitudes might seem to come from innocent or admirable sources like compassion; but, once we see their connection to the objective attitude, we wonder if this virtuous sheen obscures more sordid origins. This worldly-seeming concern makes us suspicious of innovations and proposals that would expand the scope of excuse, and channels us toward a theoretically conservative approach. On disputed doctrinal issues and on related debates about the contours of the excuses, we should favor approaches that limit or reduce cases of excuse. Proposed new excuses should be viewed with great skepticism; and theoretical claims that might expand the scope of the excuses (e.g., by individualizing the reasonable person or treating causation as excusing) should be resisted.

3. Identification Account: Restoring Respectability to Our Excusing Attitudes

Things look quite different on the identification account. Once we take identification into account, the excusing attitudes seem more respectable and appealing, and we can be more receptive to innovation and expansion in excuse.[179]

For one thing, the identification account does not make excusing demeaning to the excused. As we have seen, objectification labels the excused person as abnormal and different. Identification, in contrast, does something almost the opposite: it discovers and places importance on the similarities between the excused and the excuser. It puts a spotlight on points of contact, not points of divergence. Likewise, while objectification entails a determination that the excused person is unfit for participation in interpersonal relationships, and thus seems to exile the excused person from normal social life identification fosters affiliation and connection between the excuser and the excused. Thus, where objectification severs social connection on the demeaning premise that that the excused is deviant and deficient, identification highlights grounds for ongoing social connection with the wrongdoer (despite her wrongdoing). In this way, identification affirms rather than demeans the value of the excused person.

Nor does identification entail the self-serving features of objectification. As we have seen, objectification involves the self-serving view that the excuser is superior to the excused. That is, the excuser is normal and fit for social life while the excused is not. Identification does not entail such a self-serving view. In identification, the excuser does not

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179. Dressler's discussion of the compassion-based account of excuse suggests that associating excuse with compassion may lead us to take a more favorable view of excuse generally. *Excusing*, *supra* note 5, at 682–83 ("Since compassion is a moral virtue, it is good that we excuse. Excusing demonstrates that we are humane. . . . It might seem to follow that . . . it is morally better to excuse everyone for whom we feel compassion."). (Dressler subsequently repudiated the compassion-based account of excuse). However, Dressler resists these implications, warning that "[c]ompassion is good, but is not a sufficient reason to excuse wrongdoers." *Id.* at 683.

represent himself as superior to the excused. On the contrary, the excuser represents himself as similar or equivalent to the excused. The identifying excuser's view, after all, is that he might have done the same thing had he faced the same circumstances as the excused. The fact that the excuser has not done wrong is a testament to his circumstantial luck—not a reason to judge himself superior to the excused. Likewise, the objectifying excuser accrues to himself authority to control or manipulate the excused. The objectifying excuser sees the excused as something less than a person—something to be managed and controlled. Again, the identifying excuser does not make this self-serving move. The identifying excuser does not demote the excused from the category of person. He does not equate her to a tornado or a wolf; nothing in his identification with the excused suggests a right to manipulate or control the excused. Indeed, seeing the excused as similar to himself, the identifying excuser is likely to resist rather than endorse attempts to treat the excused as an object rather than a person.

Thus, identification does not involve either the demeaning or the self-serving aspects of objectification. Instead, identification is rooted in much more appealing and reputable facets of human psychology: our social impulses to connect with others and our natural desire to understand others.[180] It draws on our interest in and desire for other people, and our capacity for imaginative vicarious experience. In short, identification springs from some of our best features.

It follows that this portrait of the excusing attitudes has very different ramifications for excuse than the objectification account did. Where the objectification account inspired skepticism about excusing attitudes, this account puts those attitudes in an appealing and encouraging light. Where the objectification account inspired resistance to innovations and proposals that might expand the scope of excuse, this account raises no special objection to the expansion of excuses. Indeed, seeing how excuse connects to some of our best features—e.g., our appetite for connection and community, our capacity for empathic imagination—the identification account may even argue in favor of a theoretically open or liberal approach to excuse. This is a very different attitude toward excusing, and it may steer our answers to excuse theory's many hard questions in a very different direction.

B. Character Influence Excuses

The objectification and identification accounts also differ with respect to their implications for an important issue in contemporary excuse theory: whether formative circumstantial influences on character ("character influences") should be excusing. While the objectification account makes little or no room for treating such influences as excusing, the

180. *Skepticism*, supra note 22, at 39.

identification account is considerably more receptive.

1. The Problem of Character Influences and Excuse (In a Nutshell)

Broadly speaking, the influences at issue here are circumstantial influences that shape the wrongdoer's desires, preferences, attitudes, values, perceptual biases, interpretive biases, behavioral scripts, and other features of (what we might loosely call) his character.[181]

Excuse theory has long struggled with whether these sorts of character influences can have excusing significance.[182] Suppose that a mentally and emotionally competent person is moved to wrongdoing by feelings or values cultivated in her by brutal parental abuse or by intensive cult indoctrination. Relentlessly battered by her parents as a child, she reacts to her own child's misbehavior with the violence her parents taught and fueled in her. Saved from suicidal depression by the support of a highly insular, rigid cult and barraged with cult values while isolated from alternative views, she willingly obeys a cult leader's instruction to commit an act of anti-government terrorism in "defense" of the cult's values. Or suppose such a person is moved to wrongdoing by an attitude, belief, or interpretive schema he acquired while immersed in a community favoring that attitude, belief, or interpretive schema. Raised from earliest childhood in a community saturated with a rigid code of honor or a violent gang ideology (or both), a young man physically attacks a stranger who bumps him on the street. Maybe he does so because he has absorbed from his community a hyper-aggressive attitude or a belief that violence is a proper response to another's disregard; maybe he does so because he has internalized an interpretive schema that treats ambiguous physical contact as threatening imminent violence.

Scenarios like this give rise to some of the most debated questions in modern excuse theory. Should we excuse wrongdoers who can show that their "rotten social background" influenced or brought them to their offense?[183] Can the wrongdoer's prior exposure to crushing poverty,

181. I have discussed such character influences at some length elsewhere. *See* Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365, 396–99 (2007) (noting the challenge such influences pose for some theories of responsibility); Anders Kaye, *Schematic Psychology and Criminal Responsibility*, 83 ST. JOHN'S L. REV. 565 (2010) (discussing significance of circumstantial influences on interpretive and perceptual biases for responsibility.); Anders Kaye, *Does Situationist Psychology Have Radical Implications For Criminal Responsibility?*, 59 ALA. L. REV. 611 (2007) (discussing significance of situational influences on perceptions, interpretations, beliefs, and desires).

182. *See, e.g.*, Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); Kadish, *supra* note 92, at 283–85; Patricia Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996); Chiu, *supra* note 172, at 1317.

183. *See, e.g.*, Delgado, *supra* note 182 (arguing in favor of a form of "rotten social background"

frequent acts of violence, or oppressive discrimination and degrading social stereotyping supply a basis for excuse?[184] If we can trace the offense back to the wrongdoer's indoctrination into an insular subculture's antisocial beliefs, values, and practices, should we excuse him? What about formative years spent in a foreign culture with values different from our own?[185] Or a childhood dominated by emotionally, physically, or sexually abusive parents? Or unusual exposure to violence-themed pornography? What about systematic exclusion from educational and economic opportunities? Drug addiction?

In these sorts of cases, we can see that the wrongful act was influenced by features of the wrongdoer's character (e.g., his feelings, values, interpretive schema, etc.), and we can see that these features of his character were shaped by formative experiences outside his control (e.g., parental abuse, cult indoctrination, immersion in a community's values, etc.). Should we treat such circumstantial character influences as excuses? While legal criteria for excuse appear unsympathetic to such claims, some theorists have argued that these influences should have excusing force generally,[186] and many theorists have said or implied that such influences should be excusing in at least some extreme cases.[187]

2. The Objectification Account Leaves Little Room for Character Influence Excuses

The objectification account leaves little room for such excuses. As we have seen, the objectification account posits that we excuse acts of disregard or malevolence only in those cases where it is natural for us to take the objective attitude; that it is natural for us to take the objective attitude only where wrongdoers are abnormal in a way that renders them unfit for social relations; and that we cannot sustain the objective attitude in other sorts of cases.[188]

On this schema, we generally should not recognize character influence excuses for character influences generally do not render wrongdoers psychologically unfit[189] for social relations.[190] Although such

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defenses); Bazelon, *supra* note 182; (same); Morse, supra note 182 (arguing against such defenses); Kadish, *supra* note 92, at 283–85 (same).

184. Patricia Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996) (arguing in favor of such defenses).

185. *See, e.g.*, Chiu, *supra* note 172, at 1317 (surveying arguments for cultural excuses, but favoring a cultural justification instead).

186. *See e.g.*, Delgado, *supra* note 182; Falk, *supra* note 184.

187. R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 232–34 (1994).

188. *See supra* Part II.

189. *Skepticism*, *supra* note 22, at 66; *see also* McKenna & Russell, *supra* note 23, at 27 (describing the phenomena that trigger the objective attitude). Strawson suggests that, in these cases, objectivity is a "natural" response: it is the attitude we "naturally tend to fall into . . . where participant attitudes are . . . inhibited by abnormalities." *Freedom*, *supra* note 4, at 79; *see also Skepticism*, *supra*

character influences can have profound influence on how people act, they generally do not exert this influence by incapacitating people for normal human relationships.[191] Such phenomena may have an enormous influence on attitudinal and emotional predispositions, perceptual and interpretive tendencies,[192] values and beliefs, preferences and desires. They may instill anger, resentment, grudges and hatred. But such influences generally do not leave individuals so mentally or emotionally disturbed or so intellectually impaired that they cannot participate in interpersonal relationships or human communities.[193] To use Strawson's words, they do not leave the wrongdoer "warped or deranged, neurotic or just a child,"[194] or "compulsive in behaviour."[195] They do not make him a person "whose picture of the world is an insane delusion," or "whose behavior . . . is unintelligible to us . . . in terms of conscious purpose" or "wholly lacking . . . in moral sense."[196]

After all, most wrongdoers—even wrongdoers from the worst and most traumatic backgrounds—function successfully as social persons.[197] They form genuine friendships, participate fully in social groups, fall in love, marry, parent children, debate values and beliefs, and so on. Their harsh or distinctive formative experiences may have a profound influence

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note 23, at 27 (the objective attitude is "humanly natural" in cases where the other suffers from "extreme abnormality," e.g., "someone who is quite out of his mind").

190. McKenna and Russell flag this as an especially important problem for Strawson:

> Perhaps the most fundamental problem with Strawson's theory in the eyes of his critics is that he has too little to say about the extent to which our reflections concerning the (historical) origins or sources of character and conduct can inhibit—if not altogether undermine—the (normal) operation of our reactive attitudes. . . . Strawson's theory, the critic continues, simply presupposes that (historical) considerations of this kind are irrelevant to . . . our reactive attitudes. Most philosophers maintain that this view of things is neither psychologically credible nor philosophically defensible.

McKenna & Russell, *supra* note 23, at 13–14.

191. *See Freedom*, *supra* note 4, at 79.

192. *See* Kaye, *supra* note 181.

193. *See Freedom*, *supra* note 4, at 79.

194. *Id.* Strawson subsequently explains that parents must have both objective and reactive attitudes to their children: "[A] kind of compromise, constantly shifting in one direction." *Id.* at 75.

195. *Id.* at 79.

196. *Id.* at 73. As critics have pointed out, there is an important ambiguity (or unappreciated shift) in how Strawson describes these cases. At some points, he suggests that "abnormality" triggers the objective attitude; at other points, he suggests that it is "incapacity" that triggers the objective attitude. *See* RUSSELL, *supra* note 2, at 153–54; McKenna & Russell, *supra* note 23, at 12–13. This is an important problem for a number of reasons. For example, Strawson's later argument that we cannot take the objective attitude toward everyone makes more sense if abnormality is required for the objective attitude. After all, by definition, everyone cannot be abnormal. It makes less sense if lack of capacity is the trigger because it is perfectly possible that all humans lack some capacity necessary to the reactive attitudes. *See* RUSSELL, *supra* note 2, at 153–54; McKenna and Russell, *supra* note 23, at 12–13.

197. For further discussion of this point, see Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365 394–98 (2007).

on their character and conduct, but not by stripping them of the basic capacities associated with human social life.[198] The abusing parent may follow the behavioral scripts laid down by his parents or vent the rage that abuse instilled in him, but this does not mean he is likely to be a sociopath or delusional or unable to reason. The young man raised in a community saturated with violence may very well have strong and nuanced social instincts despite his non-mainstream attitudes about violence. As a result, learning that the wrongdoer's act can be traced in some way to such character influences will generally not trigger in us the objective attitude. And since it will not trigger the objective attitude, it will not support excuse on the objectification account.

Strawson did think that we might sometimes have the objective attitude toward a person due to his being "peculiarly unfortunate in his formative circumstances."[199] In so saying, he may have been thinking of cases like the ones described here, but he did not explain how or when the objective attitude would arise in such cases. Given his reactive-objective psychological model, the most natural explanation is that Strawson thought that unfortunate formative circumstances sometimes leave a person unfit for social life in a way consistent with the other kinds of unfitness in his list. That is, it seems most likely that he thought that such unfortunate circumstances could render a person deficient for social life in the sense of lacking a feature, capacity, or skill necessary for social life. He may have believed that such circumstances could render a person so cognitively or emotionally disabled that we might say his motives were unintelligible or that he was delusional or he could not be communicated with.[200] Indeed, it seems entirely plausible that this may sometimes happen. Extraordinary trauma may leave a person so psychologically shattered that that person becomes delusional, unintelligible, or otherwise beyond the reach of communication.[201]

Even if this is true, however, it does not offer much support for character influence excuses. These sorts of cases are likely to be extremely rare compared to the class of cases in which socially competent wrongdoers do wrong due to formative character influences. For example, it may be that some abused children whose behavioral scripts and emotional states are influenced by abuse grow into adult sociopaths or slip into multiple personality disorder as a result of their trauma, but most do not. Perhaps some heavily indoctrinated cult members whose values are profoundly

198. *See Exegesis*, *supra* note 40, at 1380-83.

199. *Freedom*, *supra* note 4, at 79. There are hints in Strawson (and in works building on Strawson) that we sometimes will take the objective view toward such people. *See* R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 232–33 (1994); SUSAN WOLF, FREEDOM WITHIN REASON 75–88 (1990). As I have argued elsewhere, I think these hints are unconvincing. *See* Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365 (2007).

200. *See Freedom*, *supra* note 4, at 79.

201. *See, e.g.*, Wallace, *supra* note 199, at 233 (noting that intense deprivation may produce profound psychological pathology).

shaped by indoctrination have psychotic breaks, but most surely do not. Thus, within the class of wrongdoers whose characters were shaped by these sorts of formative experiences, there may be a handful whom are left unfit for social life, but most probably are not. In short, while the objectification account may anticipate that we will excuse some wrongdoers who were exposed to hard formative influences, it also limits such excuse to a very small subset of the class of people whose conduct can be traced to such influences on character.

Thus, if the excuses are tethered to the objective attitude, the excuses will be limited to a narrow universe of cases: those involving incapacity for social relations. Such excuses will not be able to reach the large majority of cases involving significant character influences.

3. The Identification Account is More Receptive to Character Influence Excuses

The identification account is much more receptive to character influence excuses. The identification account does not tie excuse to the objective attitude; thus, it does not limit excuse to cases involving abnormal incapacity for social relations. Instead, we excuse when the feelings and insights catalyzed by identification are sufficiently strong to dissolve or overwhelm resentment and moral indignation. This opens the door to excuses based on character influences.[202]

Learning that a person's act can be traced to circumstantial character influences is conducive to identification. One reason for this is that claims about such formative character influences generally depend on personal, particularistic narratives about a wrongdoer and his experiences. To be plausible, such claims must present the wrongdoer during a formative period and bring out his vulnerability to formative influences. At the same time, such claims must also describe the distinctive and powerful influences to which he was exposed and by which he was shaped. By necessity, then, such claims depend on detailed and personal descriptions of the wrongdoer and detailed descriptions of some of his most important experiences. As we have seen, these are the sorts of descriptions that make us especially likely to identify. Supplying and organizing a wealth of personal detail, they give us ample opportunity to see points of similarity between ourselves and the wrongdoer; and, focusing on formative times and formative circumstances, they are likely to spotlight points of similarity we consider especially important.

Indeed, the narratives involved in these cases are likely to be

202. Dressler observes that compassionate feelings about people from hard social backgrounds may make it "emotionally tempting" to excuse such people when they do wrong, and he warns that we should not give in to this temptation. *Exegesis*, *supra* note 40, at 1383 n.265. Dressler does not, however, grapple with the various attitudes and insights associated with identification, or with their impact on the reactive attitudes that constitute blame.

especially inviting, for they naturally put a spotlight on a poignant and common human experience: the experience of being vulnerable to powerful formative influences. If we learn that a wrongdoer was raised in grinding poverty or by cruel parents and that these experiences influenced him deeply, we may recall similar experiences of our own and find a ready point of significant identification. But, even if we do not share these particular experiences, we are vividly reminded of something else deeply important that we do share. Such stories remind us that we share the experience of a childhood subject to influences beyond our control, including all the helplessness, dependence, vulnerability, and malleability such a childhood entails. Like soldiers who survived a grueling battle, we have in common a profound experience—one that has left its mark on both of us. This is a point on which we can identify in a deep way.

The narratives offered in these cases are also especially suited to stimulate some of the excuse-favoring insights associated with identification. For example, in reminding us of the wrongdoer's vulnerability, they make us more sensitive to the hostile and destructive aspects of our blaming attitudes. Having been reminded of the malleable and vulnerable child the wrongdoer was, we are more likely to acknowledge his present vulnerability and to contemplate the ways blame and punishment may damage him now. Such narratives also put a powerful spotlight on the role that luck plays in determining who does wrong. As we come to understand how circumstantial character influences made the wrongdoer who he is, we realize that those experiences might have formed us in similar ways had we been as unlucky as he. Seeing luck's power in our two life stories brings out the fairness problem in blaming him while we skate by untouched. Finally, the more we learn of such formative circumstances, the more we wonder whether our reactions to wrongdoing should be directed not at the wrongdoer but at the formative phenomena that channeled him to the wrongdoing. Formative influence narratives, then, are especially suited to catalyze ethical insights that tend to drain the reactive attitudes of their power and steer us toward excuse instead.

Thus, taking identification into account opens the door to character influence excuses. It is true that seeing a wrongdoer's character influences rarely leads us to take the objective attitude toward him, but character influence stories will often provide the fuel for identification. Such identification can drive excuse. Seeing that identification can play a role in excuse helps us understand why the possibility of character influence excuses has been such a persistent concern in modern moral and legal theory. Such excuses seem so plausible and imminent because personal histories provide ample basis for identification, and identification can drive excuse.

C. Determinism, Causation, and Excuse

Finally, the objectification and identification accounts have different implications for one of the most fundamental and timeless issues in the theory of excuse: Is causation excusing?[203] That is, should we excuse wrongdoers whose acts were caused by forces and circumstances beyond their control? The issue is often raised as an anxiety about determinism. If "everything is caused" (as determinism holds), does that mean people do not have "free will"—requiring us to excuse every human wrongdoing? But the issue is not just (or even primarily) about determinism and free will. Even putting those notions aside, if we believe that some individual act is caused by forces beyond the actor's control, should we excuse that act?

The objectification and identification accounts have different implications here. The objectification account is associated with one of the most influential arguments against treating determinism as an excuse, and has been used to argue that causation is not excusing in individual cases. The identification account undercuts these arguments and gives more credence to anxieties about determinism, causation, and excuse.

1. Objectification Account: Against Excuses for Determinism and Individual Cases of Causation

The objectification account has been an important source of arguments that neither determinism nor individual instances of causation call for excuses.

a. Objectification and Determinism

One of P.F. Strawson's primary projects in his seminal discussion of the reactive and objective attitudes, *Freedom and Resentment*, is to dispel anxiety about the significance of determinism for responsibility and excuse.[204] In the wake of increasingly powerful scientific and naturalist explanations of our world, some observers have worried that determinism is true, that we therefore do not have "free will," and that everyone who does wrong must therefore be excused.[205] Strawson responds that, given our reactive-objective psychology, even determinism cannot drive us to such universal excuse.[206]

Strawson's argument is grounded in two basic claims from the

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203. For arguments on either side of the issue, see Moore, *Causation*, *supra* note 92 (arguing that causation and determinism cannot be bases for excuse); Kaye, *supra* note 199 (critiquing the view that causation cannot be a basis for excuse); Anders Kaye, *Resurrecting the Causal Theory of the Excuses*, 83 NEB. L. REV. 1116 (2005) (arguing that causation can be a basis for excuse in the criminal law).

204. *See Freedom*, *supra* note 4, at 72–73.

205. *See id.* at 80–81.

206. *See id.* at 93.

objectification account: (1) that we will not excuse a person who acts from malevolence or disregard unless we take the objective attitude toward that person; and (2) that we do not naturally take the objective attitude toward a person unless that person is psychologically unfit for ordinary human relationships.[207] If so, determinism should not lead us to universal excuse, for determinism does not entail that wrongdoers are psychologically abnormal (a psychologically normal person may be determined to do a wrong),[208] and thus gives us no reason to take the objective attitude toward wrongdoers. Determinism, then, does not require us to excuse wrongdoers.[209]

Strawson acknowledges that, even where the wrongdoer is not psychologically abnormal, it is possible for us to summon (non-naturally) an objective attitude toward him.[210] This raises the possibility that, upon learning that determinism is true, we might (non-naturally) summon an objective attitude toward everyone[211]—thus arriving at universal excuse.[212]

On the objectification account, however, this possibility is "practically inconceivable."[213] In order to take up a universal objective attitude, we would have to "repudiate" the reactive attitudes.[214] This, in turn, would mean giving up normal adult interpersonal relationships for the reactive attitudes are essential to such relationships.[215] But, given our social

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207. *Freedom*, *supra* note 4, at 81.

208. *Id.* To illustrate, suppose he was determined to do what he did by the interaction of his genes, his formative experiences, and the circumstances of his act. These forces may have made him the sort of person who chooses to do exactly what he did in the situation he was in—thus determining his action. In such a case, it would be perfectly natural to say that he chose to do what he did, and that there was nothing abnormal about his choice-making machinery. The determination of his act would not induce us to see him objectively.

209. Watson, *supra* note 31, at 225. Russell characterizes this as Strawson's "rationalistic" argument (which, Russell says, Strawson weds to "naturalist" argument). *See* RUSSELL, *supra* note 2, at 146. It is "rationalistic" in the sense that it shows that determinism (in itself) gives us no "reason" for excusing wrongdoers. *Id.*

210. *Freedom*, *supra* note 4, at 81.

211. *Id.* ("We can sometimes . . . look on the normal . . . in the objective way. . . . And our question reduces to this: could, or should, the acceptance of the determinist thesis lead us always to look on everyone exclusively in this way?"). *See also* Watson, *supra* note 31, at 225 ("In effect, incompatibilists insist that the truth of determinism would require us to take the objective attitude universally.").

212. "[T]his," Strawson says, "is the only condition worth considering under which the acceptance of determinism could lead to the decay or repudiation of participant reactive attitudes." *Freedom*, *supra* note 4, at 81.

213. *Id.* Russell characterizes this as Strawson's "naturalist strategy," which supplements Strawson's "rationalistic strategy" for refuting incompatibilism. RUSSELL, *supra* note 2, at 146; *see also* McKenna & Russell, *supra* note 21, at 7 (examining this step in Strawson's naturalist argument).

214. *Freedom*, *supra* note 4, at 81.

215. As Strawson wrote, "being involved in inter-personal relationships . . . precisely is being exposed to the range of reactive attitudes." *Freedom*, *supra* note 4, at 81. Moreover, because we cannot give up the participant reactive attitudes, we cannot give up their moral analogs: "[A]s general human capacities or pronenesses," these two categories of attitudes "stand or lapse together." *Id.* at 87. Giving up the latter without giving up the former would require an extraordinary "change in our social world" and a "generalization of abnormal egocentricity." *Id.*

character, giving up such relationships would be intolerable for us; we would not be able to bear the "human isolation" that giving up these relationships would entail.[216] Thus, we cannot adopt "a sustained objectivity of interpersonal attitude," not even if "theoretical convictions"[217] (like the truth of determinism) give us reason to do so.[218]

Per these arguments, determinism cannot drive us to universal excuse. Determinism does not entail that all offenders are psychologically abnormal so determinism does not (in itself) naturally trigger an objective attitude, and our intrinsically social nature would make it impossible for us to (non-naturally) adopt a universal objective attitude. Thus, "the truth of determinism" cannot drive us to the objective attitude or universal excuse.[219]

b. Objectification and Causation in Individual Cases

These arguments suggest that causation should not be an excuse in individual cases.

The first argument here closely tracks the first argument regarding determinism. As we saw above, that an act is determined does not lead us to take the objective attitude toward the actor for determinism does not mandate that actors be psychologically abnormal. The same thing can be said about individual cases of caused action. The fact that an act was caused in an individual case does not lead us to take the objective attitude toward the actor, for the fact that the act is caused does not mandate that the wrongdoer is psychologically abnormal. It follows that particular instances of causation are no more excusing than universal causation.

The second argument here springs from the second argument regarding determinism—though an extra twist is required. It may be that we can (non-naturally) push ourselves to take the objective attitude when we see that a particular act was caused even though the actor is psychologically normal and fit for social life. But proponents of the objectification account argue that we cannot go down this road. They say that if *any* conduct is caused, then determinism must be true because "partial determinism"—the idea that some acts are caused, but not all acts—is metaphysically absurd. It follows that we cannot treat a particular act as

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216. *Freedom*, *supra* note 4, at 81; *see also id.* (arguing that our "human commitment to participation in ordinary inter-personal relationships" is so "thoroughgoing and deeply rooted" that we would not be capable of such isolation); Bennett, *supra* note 23, at 54 ("If our lives are to have a measure of warmth and engagement and spontaneity," then we cannot not keep our reactive attitudes "continuously under objective-teleological control."); *id.* at 58 ("[I]f we try to imagine our lives without reactive feelings we find ourselves . . . confronted by a bleak desolation.").

217. *Freedom*, *supra* note 4, at 81.

218. *See id.* at 74 (arguing that "it is not in our nature" to be able to give up the moral reactive attitudes); RUSSELL, *supra* note 2, at 146 ("[O]n this account . . . our 'commitment' to reactive attitudes is . . . insulated from skeptical doubts by our inherent nature or constitution.").

219. *Freedom*, *supra* note 4, at 80.

caused without holding that determinism is true. If this is right, then taking the objective attitude regarding a single act as being caused would mandate taking the objective attitude regarding all acts (because all acts would be caused), resulting (again) in the intolerable isolation entailed by universal objectivity.[220] Thus, we cannot excuse individual acts for being caused.

2. Identification Account: More Sympathetic to Concerns about Causation and Determinism

A number of theorists have attacked these objectificationist arguments regarding determinism, causation, and excuse. For example, some have challenged the assumption that universal objectivity would be intolerable or impossible.[221] Here, I raise a different sort of challenge to the objectificationist arguments regarding determinism, causation, and excuse. I argue that if identification can drive excuse, then neither of the two objectificationist arguments described above has much force.[222]

a. Identification Undercuts the First Argument from the Objectification Account by Showing that Psychological Abnormality is not a Prerequisite for Excuse

On the first argument from the objectification account, determinism and causation are not excusing because they do not entail that wrongdoers are psychologically abnormal. This argument would be compelling if psychological abnormality were a prerequisite for excusing wrongdoers, but the identification account shows that this is not true. On this account, we also excuse wrongdoers with whom we identify, and identification does not require that the wrongdoer be psychologically abnormal. In fact, we can identify with wrongdoers who are not psychologically unfit for social life or psychologically abnormal in any way. If this is correct, then psychological abnormality is not a prerequisite for excuse, and the fact that determinism and causation do not entail psychological abnormality does not foreclose excusing determined and caused actors.

In fact, our tendency to have excusing attitudes when we identify

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220. *See* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1129–39 (1985); *Excusing*, *supra* note 5, at 687. I have argued that the universalizing move in this argument is in error. *See* Kaye, *supra* note 203.

221. These theorists have argued that universal objectivity would not, in fact, entail intolerable isolation, and it would actually be compatible with deep connections. DERK PEREBOOM, LIVING WITHOUT FREE WILL 199–213 (2001); TED HONDERICH, THE CONSEQUENCES OF DETERMINISM (1988); Tamler Sommers, *The Objective Attitude*, 57 PHIL. Q. 321 (2007).

222. Although Dressler does not engage the various arguments for and against causal excuse in laying out his (subsequently repudiated) compassion-based account of excuse, he does speculate that there may be a connection between compassion and causal excuse. *Excusing*, *supra* note 5, at 688 ("Stripped of its sophisticated veneer, the causal theory of excuses degenerates into, simply, the compassion theory of excuse."). Dressler also warns, in this context, that compassion should not be the touchstone of excuse. *Id.* at 689.

may increase our tendency to excuse determined and caused actors. Consider how we come to see another's act as determined or caused. A defense attorney or a psychologist or a novelist explains a man's violent outburst in causal terms. She gives a detailed account of certain formative incidents in the violent man's childhood; she describes certain psychological mechanisms implicated in the act; she spotlights certain situational triggers, telling a story about how those triggers interacted with the violent man's psychological mechanisms. As this picture highlights, our deterministic and causal explanations of specific acts are usually particularistic narratives full of personal detail. And, as we have seen, such detailed, personal narratives about a person can catalyze identification. The more we know about another's psychology and history, the more potential points of contact and similarity there are between us and him. In this light, the conventional form of a causal explanation is one that is conducive to identification. If this is right, then our susceptibility to identification may make us susceptible to excusing those about whose acts we know a detailed, particularistic causal story.

In short, the identification account shows that the first argument from the objectification account stumbles on its unduly narrow psychology of excuse. Because that account assumes we only excuse the psychologically abnormal, it assumes we have no reason to excuse the determined or caused actor. The identification account shows that psychological abnormality is not a prerequisite for excuse and thus that we cannot dismiss the possibility that we have reason to excuse the determined or caused actor. Further, the identification account suggests that we may actually be characteristically susceptible to excusing determined or caused acts insofar as deterministic or causal explanations of such acts are typically well-suited to catalyze our identifying attitudes.

b. Identification Undercuts the Second Argument from the Objectification Account Because It Shows Excusing Determined and Caused Acts Need Not Lead to Intolerable Isolation

The second argument from the objectification account is that excusing determined or caused actors would result in a social isolation intolerable to social creatures like ourselves. The identification model undercuts this argument. It does so by showing that excusing the determined or caused actor need not entail a universal objective attitude, and thus need not result in intolerable isolation.

The objectificationist argument here is that that excusing determined or caused acts requires us to take the objective attitude toward everyone, and that this would result in an intolerable isolation. The identification account of excuse shows, however, that to excuse someone is not necessarily to take the objective attitude toward that person. Rather, we can excuse because we identify with the wrongdoer. Thus, even if it were true that excusing caused conduct required us to excuse everyone, it would

not follow that this would entail taking the objective attitude toward everyone. We may identify with wrongdoers rather than objectify them.

Therefore, like the first objectificationist argument, the second argument fails because it is grounded in an impoverished account of the moral psychology driving excuse. On the objectification account, we cannot excuse caused action because that would mean taking a universal objective attitude, and that would be intolerable for us. But the identification account shows that we can excuse without taking the objective attitude. It follows that we could excuse universally without immersing ourselves in intolerable isolation.

Indeed, on the identification account, it appears that universal excuse might involve not total isolation, but something that tends in the other direction. Identification, after all, strengthens interpersonal bonds—connecting and integrating individuals rather than severing and isolating them. Thus, it might be that we would universally excuse not for the intolerably isolating reason that we have taken the objective attitude toward all our fellow persons, but for the connecting and integrating reason that we identify with them. That is, we might cease to blame in a way that would make life better, not worse, filling life out with richer and more frequent connections to other people.

3. Not Resolving the Issue, but Reviving It

On this timeless issue, the objectification account and the identification account suggest quite different views. The objectification account funds arguments that causation is not excusing (either universally or in particular cases), while the identification account undercuts these arguments (and even offers some reason to think that causation can fuel excusing attitudes).

Of course, this is not to say that taking identification into account definitively resolves this notoriously difficult issue. But it is to say that if we take identification into account, the resolution offered by the objectification account loses some of its power and competing resolutions become more plausible. Thus, taking identification into account revives the possibility that causation might be excusing—a possibility the objectification account seemed to suppress.

D. Ramifications – In Sum

The objectification and identification accounts have different ramifications for three important issues in the theory of excuse. While the objectification account presents our excusing attitudes as suspect, the identification account shows them to be rooted in some of our most appealing features. While the objectification account resists character influence excuses, the identification account is receptive to such excuses. And while the objectification account has been used to fend off causal

excuses, the identification account shows that the objectification account can only do so by virtue of an impoverished account of the psychology of excuse.

In several different ways, then, the objectification account favors a theoretically conservative account of the excuses. In contrast, the identification account invites a more flexible and receptive attitude toward innovations—expanding the scope of the excuses.

V. Conclusion

As fundamentally social creatures, healthy and normal human persons have a deep and well-developed capacity for identification with other persons. We are susceptible to such identification when we see others as similar to ourselves and especially when we have extensive particularized knowledge about such other persons. In this Article, I have argued that identification can play an important role in excusing and that naturalist psychological accounts of excuse should therefore take identification into account.

To date, the leading naturalist accounts of excuse have made no room for identification. Instead, they hew to the rigidly bifurcated psychology of the objectification account in which our excuses are explained by reference to either our reactive attitudes or the objective attitude. While criminal theorists have sometimes speculated or suggested that other social attitudes might play an important role in the excuses, none have tried to give a systematic account of those attitudes or the role they play in excuse.

In this Article, I have made a preliminary attempt to do so. I have set out a detailed description of one such attitude—identification—and I have parsed it into component judgments and attitudes. I have shown how these component judgments and attitudes— and some of the insights they generate—are conducive to excusing. I have explained how taking identification into account helps us understand a long-standing mystery in excuse law—*tout comprendre, c'est tout pardoner*—and how identification might drive or contribute to some of our most central excuses (those involving understandable emotions and those involving incapacity). I have also suggested that taking identification into account helps us understand why certain long-standing controversies in excuse theory persist, including debates about rotten background excuses and about the significance of causation and determinism for excuse. These controversies persist, at least in part, because the dominant, objectification-based accounts of excuse offer intuitively unsatisfying answers—answers that do not take into account identification's important role in excuse. The conflict between dominant theory and powerful but inconsistent intuitions fuels perpetual controversy.

Having laid out this detailed and systematic account of

identification and its role in excuse, I have also shown that identification has important ramifications for excuse theory. For one thing, where the conventional objectification account makes excusing a disreputable practice sprung from suspect regions of the human psyche, the identification account shows how excusing is connected to our social and imaginative capacities—some of the best parts of the human psyche. As a result, taking identification into account should make us more receptive to innovation in, and expansion of, the criminal law excuses. For another thing, where the objectification account resists character influence excuses, the identification account is open to such excuses. And where the objectification account denies the possibility of causal excuses, the identification account offers powerful reasons to think such excuses are possible. These are deep and important differences between the two accounts that only emerge clearly once we have a systematic account of identification in mind.

Once we have this account in mind, and once we have seen these differences, we can also see one more important advantage of taking identification into account: doing so gives us a naturalist account of the excuses we can identify with. The objectification account yokes excuse to a weird and detached psychological outlier (the objective attitude). It is not easy to see this attitude as an important part of who we are our how we live. We do not naturally see ourselves in the objective attitude. In contrast, the identification account connects excuse to a central and valued feature of our social psychology. It is easy to see identification as an important part of ourselves and our lives. It is something we can easily identify with. In this sense, the identification account of the excuses gives us a naturalist account of the excuses that is natural, not jarring, and helps us understand why we value and persist in the practice of excusing.

Article

One-Book, Two Sentences: *Ex Post Facto* Considerations of the One-Book Rule After *United States v. Kumar*

Andrew C. Adams*

Abstract

This article addresses the ongoing discord among the federal courts of appeals with respect to the implications of the U.S. Sentencing Guidelines' "one-book rule" and its constitutionality under the Ex Post Facto Clause. A recent decision by the Second Circuit, *United States v. Kumar*, produced the most extreme position in a three-way split among the circuits by holding that the application of a single Guidelines manual to multiple offenses—even offenses predating that manual's publication—is always permissible under the Ex Post Facto Clause. The issue brings together two separate and difficult areas of jurisprudence applying the Ex Post Facto Clause: the permissibility of allowing one crime to "trigger" heightened punishments for previous crimes and the ongoing circuit split over the application of the Ex Post Facto Clause to the Sentencing Guidelines.

This Article explores the history of the application of the Ex Post Facto Clause in order to establish that, contrary to the assertions of courts and commentators, the single concern of the Ex Post Facto Clause has been putting people on notice of the consequences of their actions. The Article then argues that *Kumar*, though an outlier amongst the circuits, was indeed correct in its constitutional analysis of the one-book rule. Nevertheless, the same constitutional concepts at work in *Kumar* ultimately imply that the one-book rule runs counter to the goals of the Sentencing Guidelines

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themselves—uniformity of sentencing—even if its application is ultimately constitutional. The Article concludes by advancing two potential resolutions to the problems left unresolved by *Kumar*, the courts of appeals, and the Sentencing Guidelines themselves.

I. Introduction

In April of 2006, Sanjay Kumar, the former CEO of Fortune 500 software company Computer Associates, and Stephen Richards, Computer Associates' top salesman, each pled guilty to orchestrating a long-running accounting fraud, as well as to obstructing the government's investigation into that fraud.[1] Kumar and Richards's crimes were separated by several years, the accounting fraud having concluded in 2000 and the obstruction occurring during the government's subsequent investigation. In the time

1. Alex Berenson, *Software Chief Admits to Guilt in Fraud Case*, N.Y. TIMES, Apr. 25, 2006, *available at* http://www.nytimes.com/2006/04/25/technology/25fraud.html?ref=sanjaykumar#.

between the commission of their first offense and their second offense, the United States Sentencing Guidelines were amended to provide for a substantially higher recommended punishment based on the amount of financial "loss" resulting from frauds for most loss amounts.[2] Nevertheless, the Guidelines instructed the district court to apply the amended, and arguably retroactive, edition of the Guidelines to Kumar and Richards's fraud offense as well as their obstruction offenses.[3] This instruction is known as the "one-book rule."[4] The district court followed that instruction, applied the heightened sentencing range, and was affirmed on appeal in a decision by the Second Circuit, *United States v. Kumar*.[5]

The Ex Post Facto Clause of the United States Constitution[6] poses considerable difficulties for deriving a single, coherent sentence in the case of multiple offenses occurring over the course of one or more changes to the penalties for those offenses. *Kumar* is among the most recent cases requiring the courts to grapple with the application of the Ex Post Facto Clause to such offenses, referred to here as "Straddle Offenses."[7] *Kumar* grapples with the ex post facto implications of a particular provision of the Sentencing Guidelines, namely the "one-book rule."[8] This rule instructs district courts to apply the most recent version of the Guidelines when calculating a recommended sentence, even if one of the offenses subject to calculation occurred prior to the publication of that version.[9] Despite a first-blush appearance of retroactivity, this Article argues that *Kumar* properly upheld the application of the one-book rule in the face of an Ex Post Facto Clause challenge.

Nevertheless, the one-book rule's constitutionality does not render its application to past offenses perfectly fair and reasonable. Because the Sentencing Guidelines are cognizable "laws" for purposes of the Ex Post Facto Clause, as a majority of the circuit courts of appeals have held,[10] courts must consider the punishment for a given offense frozen as of the

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2. In the circumstances of Kumar and Richards's offenses, a Guidelines recommended sentence of 97 to 121 months imprisonment changed to a recommendation of life imprisonment. *See* United States v. Kumar, 617 F.3d 612, 625 n.10 (2d Cir. 2010).

3. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2004).

4. *Id.* § 1B1.11(b) (2011).

5. 617 F.3d 612, 624 (2d Cir. 2010). Further details of Kumar and Richards's offenses and the specifics of their sentencing are discussed below, *infra* Part V.C.

6. U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."). Though the Constitution actually contains two "Ex Post Facto Clauses," the content of each clause has been interpreted identically, and I will refer throughout this article to "the Ex Post Facto Clause" as if it were a single provision.

7. I borrow the term "Straddle Crime" and "Straddle Offense" from Professor J. Richard Broughton's article *On Straddling Crimes and the* Ex Post Facto *Clauses*, 18 GEO. MASON L. REV. 719, 720 (2011).

8. *See Kumar*, 617 F.3d at 625–28 (discussing the diverse holdings from many courts of appeals on the issue of the one-book rule).

9. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2011); *see also infra* Part V.

10. *See infra* Part V.

time the offense is completed.[11] In order to constitutionally apply the one-book rule where prior offenses are involved, therefore, *Kumar* rightly notes that the second offense—committed after a revised and harsher version of the Guidelines is published—becomes the offense to which greater punishment is applied, even if that punishment is calculated by reference to a prior offense.[12] Though this is in line with centuries of precedent,[13] the application of heightened punishment to a second crime results in sentencing disparity and a lack of uniformity that the Sentencing Commission appears never to have intended. The one-book rule is suspect, therefore, not because it is unconstitutional, but because its application runs counter to the expected goals of the Sentencing Guidelines themselves.

This Article examines the issues faced by district courts in sentencing defendants convicted of straddle offenses, and the circuit courts of appeals' various approaches to handling such offenses in light of ex post facto challenges. Part II describes the underlying concerns of the Ex Post Facto Clause and attempts to demonstrate that the provision of prospective notice to defendants of the consequences of their actions is the primary—indeed, the sole—concern of the Ex Post Facto Clause. Part III addresses the application of the Ex Post Facto Clause to "procedural" rules, and particularly to the now-advisory Sentencing Guidelines. Part IV addresses the courts' long history of jurisprudence with respect to straddle crimes, and particularly with respect to statutes that increase the punishment for second or subsequent offenses on the basis of prior offenses. Part V turns to the ex post facto problems posed by the application of the Sentencing Guidelines, and specifically the one-book rule, to straddle offenses, and concludes that the application of the one-book rule to straddle offenses does not violate the Ex Post Facto Clause. Part VI argues that in spite of the one-book rule's constitutional acceptability, the rule nevertheless undermines the goal of uniformity underpinning the Guidelines themselves. The contradiction posed by the one-book rule warrants redress by the district courts, if not the Sentencing Commission, in order to devise a system of punishment that prevents a form of "double-counting" for culpability based on recidivism and to promote the important goal of sentencing uniformity.

II. The Ex Post Facto Clause as a Notice Requirement

The Constitution expressly prohibits Congress and the States from passing ex post facto criminal laws.[14] The text of the Constitution suggests that the meaning of the Latin phrase was plain to, or widely agreed upon by, its authors as there is no definition provided along with the cursory

11. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 cmt. n.2 (2011).
12. *Kumar*, 617 F.3d at 629–30.
13. *See infra* Part III.
14. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

prohibition.[15] Indeed, courts faced with interpreting the Clause have long agreed on its basic prohibition. Justice Chase, in 1798, provided the now-standard definition of an ex post facto law:

> 1st. Every law that makes an action done, before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[16]

During the two hundred years since Justice Chase's opinion in *Calder*, courts have adhered to this definition and commented on the concerns that underlie the Clause.[17] In *Weaver v. Graham*, the Supreme Court identified the chief concern of the Ex Post Facto Clause: by including the Clause in the Constitution, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[18] The Court also noted that the Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[19]

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15. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1, ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

16. Calder v. Bull, 3 U.S. 386, 390 (1798).

17. *See, e.g.*, Cummings v. Missouri, 71 U.S. 277, 325–26 (1866) ("By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."); *see also* Lindsey v. Washington, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re* Medley, 134 U. S. 160, 171 (1890) (internal citations omitted) ("[I]t may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased."); *cf.* Rooney v. North Dakota, 196 U.S. 319, 325 (1905) ("[T]he statute of 1903 is not repugnant to the constitutional provision declaring that no state shall pass an *ex post facto* law. It did not create a new offense, nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense.").

18. Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

19. *Id.* at 29. The Court, in a footnote to this discussion, also mentioned a third concern underlying the Clause, namely that "[t]he *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Id.* at n.10.

This second concern bears no substance beyond that borne by the first and primary concern for notice. The Clause does not prohibit the passage of arbitrary or vindictive legislation generally, but only legislation that is arbitrary or vindictive *on account of* its retroactive application.[20] A law may be condemned as irrationally spiteful[21] or as an impermissible breach of restrictions on legislative power,[22] but the constitutional basis for that review will not be the Ex Post Facto Clause unless the spitefulness or overreach takes the form of retroactive punishment. Thus, the overarching concern is with fair notice of the consequences of one's actions: does the state already prescribe criminal sanctions for the action at the time of action, and if so, is the actor on prospective notice of the quantum of punishment applicable under those sanctions?

On occasion, commentators ascribe some independent substance to the *Weaver* court's second concern, but without a convincing explanation as to why the ex post facto prohibition should be considered a general bar on arbitrary or unfair legislation, in the manner of a substantive due process provision.[23] For instance, commentators occasionally emphasize the "goal" of substantive restraint as paramount to a proper ex post facto analysis. For example, one commentator has argued for the unconstitutionality of the one-book rule, which provides the subject of the main discussion below,[24] on the ground that, even if the provision were to satisfy the requirements of fair notice, "there remains a problem with a lack of governmental restraint."[25] The question remains: restraint from doing what exactly?

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20. A law is retroactive, or "retrospective," if it "changes the legal consequences of acts completed before its effective date." *Id.* at 31.

21. *See, e.g.*, United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

22. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.").

23. *See* William P. Ferranti, *Revised Sentencing Guidelines and the* Ex Post Facto *Clause*, 70 U. CHI. L. REV. 1011, 1031 (2003) ("Even if retrospective application of revised guidelines under § 1B1.11(b)(3) satisfies the fair warning element of the Ex Post Facto Clause, there remains a problem with a lack of governmental restraint. . . . While it might be fair to apply revisions retrospectively where they are triggered only by continued criminal conduct, doing so still runs up against the Clause's concern with governmental restraint."); *id.* ("The Clause restrains the legislature from increasing the punishment for a particular offense after that offense is completed. The hallmark of such unconstitutional action is typically a lack of notice. However, the focus on notice, what the individual was warned of and when, threatens to convert the Ex Post Facto Clause into a right to warning enjoyed by the individual, rather than a limit on action suffered by the government."). *Id.*

24. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2011) (explaining the contours of the "one-book rule"). *See infra* Part V.

25. *See* Ferranti, *supra* note 23, at 1031. Ferranti continues by arguing that "the focus on notice, what the individual was warned of and when, threatens to convert the Ex Post Facto Clause into a right

Justice Chase's opinion in *Calder* recognized that the Ex Post Facto as a bar on retroactivity itself, without regard for the substance of any law:

> The prohibition against [the federal government] making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties . . . . Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed, at other times, they violated the rules of evidence (to supply a deficiency of legal proof) . . . at other times they inflicted punishments where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offense . . . . With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.[26]

Thus, the only restraint at issue is the ban on retroactivity itself.[27] Any assertion that "[t]he *Ex Post Facto* Clause is a substantive restraint on government action"[28] is incorrect.[29] The Clause and the courts interpreting it are wholly unconcerned with the kinds of actions punished or the manner of punishment, but rather with *when* criminality or the "quantum" of punishment is enacted. [30] As such, the Clause acts as a particular variety of "procedural" due process, empty of any substantive prohibition.[31]

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to warning enjoyed by the individual, rather than a limit on action suffered by the government. Although this concern of the Clause is not typically analyzed separately from the fair warning concern, the *Miller* Court did reject Florida's attempt to reshape the Clause in this way." *Id.* at 1031–32. *Miller* involved the Supreme Court's as applied rejection of a Florida statute asserting simply that the legal consequences of certain actions *may* change in the future, without providing notice of the content of those changes. Miller v. Florida, 482 U.S. 423, 431 (1987) ("The constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed."). As such, the statute provided notice of nothing at all, and *Miller* remains a case focused solely on that lack of notice. *See id.*

26. Calder v. Bull, 3 U.S. 386, 389 (1798).

27. As discussed below, *infra* Part VI, retroactivity is necessary, but may not be sufficient to invalidate the application of a law to a particular defendant. In certain circumstances where courts apply a plainly retroactive law to prior conduct, the Ex Post Facto Clause will only provide relief in the event that the retroactive application poses a "significant risk" of increasing the punishment.

28. Ferranti, *supra* note 23, at 1031.

29. *But see* Broughton, *supra* note 7, at 757 (arguing that the prevention of arbitrary and vindictive legislation is a purpose of the Ex Post Facto Clause with independent content).

30. *See* Miller v. Florida, 482 U.S. 423, 433–34 (1987).

31. The opening arguments of Professor William J. Stuntz's recent book on American criminal justice provide the history and reasoning behind the Founders' preeminent concern with criminal procedure rather than with limitations on substantive criminal law. Reviewing the Fourth, Fifth, Sixth, and Eighth Amendments, Prof. Stuntz notes that "[p]rocedure dominates these texts. Save for the First

Based on its text and the overriding concern for prospective, fair notice of criminal sanctions, the application of the Constitution's proscription is straight-forward in paradigmatic cases: if smoking cigarettes is permissible today, I may not be punished for smoking today under an anti-smoking law passed tomorrow; if anti-smoking laws impose a $500 penalty for violations today, I may not be punished for smoking today with a $1,000 penalty enacted tomorrow.

That much is clear, but the application of the Ex Post Facto Clause is more complicated with respect to two different, recurring situations. First, judges continue to struggle with the question of just which laws actually implicate the Ex Post Facto Clause, and particularly with the question of whether sentencing procedures rise to the level of "laws" to which the Ex Post Facto Clause may apply. Second, both of the paradigmatic cases assume that the person protected by the Ex Post Facto Clause has stopped smoking before the legislature enacts the new prohibition or heightened penalty. Courts have struggled to apply the Ex Post Facto Clause where criminal conduct continues past, or "straddles," the enactment of new or heightened penalties.[32] In Justice Chase's words, this second question requires a court to determine when an action is finally "done."[33]

III. Application of the Ex Post Facto Clause to Procedural Rules

As in the case of straddle offenses, the application of the Ex Post Facto Clause becomes complicated by punishments derived from some source other than a formal statute aimed directly at defining crimes or prescribing specific types of durations of punishment. Laws that are not facially "penal" but that carry punitive consequences, rules that redefine the procedures governing prosecutions or trial, and procedures for determining or adjusting sentences all raise the question of the Ex Post Facto Clause's applicability.

Judges are generally not formalists in assessing whether a law, rule, or regulation amounts to a punishment sufficient to offend the Ex Post Facto Clause.

Amendment's protection of speech and religion, nothing in the Bill of Rights limits legislators' ability to criminalize whatever they wish. Save for the mild constraints of the Eighth Amendment, nothing in the Bill limits the severity of criminal punishment. . . . Along with the similar language that appears in state constitutions, these texts place substantive criminal law in the hands of politicians." WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 75–76 (2011). Although he does not specifically address the Ex Post Facto Clause in this argument, the procedural concerns motivating Madison's Constitution, catalogued by Prof. Stuntz, are equally apparent in Justice Chase's opinion in *Calder*. The Ex Post Facto Clause itself fits the pattern of the Constitution's criminal justice provisions: it is a procedural safeguard, not a substantive proscription.

32. Broughton, *supra* note 7, at 721–24.

33. *Calder v. Bull*, 3 U.S. 386, 390(1798).

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, *the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment.[34]

The traditional understanding of the Ex Post Facto Clause plainly bars even those retroactive laws that may be described as "procedural" rather than substantive. Thus, the Ex Post Facto Clause prohibits "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."[35] Certainly, the removal of "any defense available according to law at the time when the act was committed, is prohibited as ex post facto."[36]

This bar on disadvantageous changes has extended beyond the deprivation of particular defenses and into areas even less easily distinguished as "procedural" or "substantive." For example, a retroactive change to the number of jurors, or the unanimity of a verdict, has been held to constitute a law subject to ex post facto prohibition.[37] On the other hand, a range of retroactive, disadvantageous procedural rules have been litigated and held to be permissible under the Ex Post Facto Clause. For example, the reshuffling of courts or judges who may preside over a criminal trial does not offend the Ex Post Facto Clause.[38] Courts have upheld, against ex

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34. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866) (emphasis added).

35. *Calder*, 3 U.S. at 390.

36. Beazell v. Ohio, 269 U.S. 167, 169–70 (1925); *see also* Thompson v. Missouri, 171 U.S. 380, 383–84 (1898) ("A careful examination of the opinion in *Kring v. Missouri* shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree—the accused being charged with murder in the first degree—was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that protection against punishment for murder in the first degree which was given him at the time of the commission of the offense. The right to such protection was deemed a substantial one—indeed, it constituted a complete *defence* against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation."); Kring v. Missouri, 107 U.S. 221, 225 (1883) ("The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that as to that offense it is *ex post facto*.").

37. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 355 (1898) ("In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is ex post facto in its application to felonies committed before the territory became a state, because, in respect of such crimes, the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.").

38. *See, e.g.*, Duncan v. State, 152 U.S. 377, 383 (1894) (stating, in dicta, that "the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the

post facto challenges, laws that expand the class of permissible trial witnesses, even if enacted following the crime on trial;[39] laws changing the rules of evidence so as to make admissible evidence previously held inadmissible;[40] and laws changing the place of trial.[41]

A. The Ex Post Facto Implications of Sentencing Rules

Rules for determining an appropriate sentence length, whether by a court at sentencing or by parole officials after sentencing, have been the subject of an ongoing debate over the Ex Post Facto Clause's application to the non-statutory laws for decades. The cases addressing these rules provide the context for current debates among the circuit courts of appeals concerning the ex post facto implications of the Sentencing Guidelines.

1. *California Department of Corrections v. Morales*

The first case for consideration dealt with rules for adjusting a sentence within California's parole system. In *California Department of Corrections v. Morales*, the Supreme Court reviewed a change to the procedures used by the California Board of Prison Terms permitting the Board to delay an inmate's parole rehearing so long as the inmate had been convicted of multiple homicides.[42] At the time that Morales had committed the crime for which he was convicted—the murder of an elderly woman whom Morales had married following his release from a previous incarceration for murder[43]—he was entitled to an initial parole hearing, followed by subsequent hearings on an annual basis in the event the Board denied him release.[44] After Morales's crime, however, the California Legislature authorized the Board to defer subsequent parole hearings "for up to three years if the prisoner ha[d] been convicted of 'more than one offense which involve[d] the taking of a life' and if the Board '[found] that it [was] not reasonable to expect that parole would be granted at a hearing during the following years . . . .'"[45] The Board denied Morales parole at his initial hearing in 1989 and determined that it was not reasonable to expect that he would be suitable for parole in 1990 or 1991.[46] Morales was therefore scheduled for a subsequent parole hearing in 1992.[47]

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existing law surrounds the person accused of crime, are not considered within the constitutional inhibition").

39. Hopt v. Utah, 110 U.S. 574, 588–90 (1884).

40. Thompson v. Missouri, 171 U.S. 380, 387 (1898).

41. Gut v. Minnesota, 76 U.S. 35, 36–37 (1869).

42. 514 U.S. 499, 503 (1995).

43. *Id.* at 502.

44. *Id.* at 502–03 (citing Cal. Penal Code Ann. § 3041 (West 1982)).

45. *Id.* at 503 (citing Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

46. *Id.* at 503.

47. *Id.*

Morales filed a federal habeas petition asserting that, as applied to his incarceration, the amended parole procedures constituted an ex post facto law.[48] As the amended law provided no new definition of a crime, the relevant question was whether the amended parole procedures retroactively increased the punishment attached to Morales's second homicide.[49]

In a split decision, the Supreme Court held that the change to California's parole procedures did not violate the Ex Post Facto Clause.[50] The Court reaffirmed its rulings in two earlier decisions that the Ex Post Facto Clause "forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range."[51] The Court rejected Morales's claim that the California parole procedure amendments had effected such a change to his sentencing "formula":

> Both before and after the 1981 amendment, California punished the offense of second-degree murder with an indeterminate sentence of 'confinement in the state prison for a term of 15 years to life.' The amendment also left unchanged the substantive formula for securing any reductions to this sentencing range . . . . The amendment had no effect on the standards for fixing a prisoner's initial date of 'eligibility' for parole, or for determining his 'suitability' for parole and setting his release date.[52]

In order to avoid reading the Ex Post Facto Clause to encompass mundane adjustments to parole procedures—for example, the replacement of particular parole officials[53]—the Court provided that the Ex Post Facto Clause applies only to those legislative adjustments that "produce[] a sufficient risk of increasing the measure of punishment attached to the covered crimes."[54] The Court declined to define "sufficient" in *Morales*, but held, on the basis of a detailed analysis of the mechanics and applicability of the amended California parole procedures, that "the

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48. *Id.* at 504.

49. *Id.* at 505.

50. *Id.* at 514.

51. *Id.* at 505 (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937), Miller v. Florida, 482 U.S. 423, 429 (1987), and Weaver v. Graham, 450 U.S. 24, 24 (1981)).

52. *Morales*, 514 U.S. at 507 (internal citations omitted).

53. *Id.* at 509. The Court describes as "innocuous" certain procedural adjustments, such as:

> [C]hanges to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Id.

54. *Id.*

amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause."[55]

2. *Garner v. Jones*

Garner v. Jones,[56] another recent Supreme Court case to grapple with legislative changes to the determination or adjustment of sentences, considered the ex post facto implications of changes to Georgia's parole procedures substantially similar to those reviewed in *Morales*. In *Garner* the Court provided a two-step framework for analyzing an ex post facto claim, and included a critical discussion of the importance of official discretion in assessing whether a rule is comprehended by the Ex Post Facto Clause.[57]

Garner's analysis began with a reassertion of the "sufficient risk" language from *Morales* and then quickly catalogued the factors from the earlier case that weighed against a finding of a sufficient risk of retroactive increased punishment: the amendment at issue did not change the basic structure of California's parole law; it did not prohibit requests for earlier reconsideration of parole; and it was unlikely, given the empirical evidence of low rates of parole for offenders in Morales's situation, that the change would actually effect anyone to whom it applied.[58] The Court then acknowledged, and immediately minimized the importance of, several differences between the California and Georgia rules: the span of time between parole reconsiderations; the broader category of prisoners covered by the Georgia rule; and Georgia's lack of "formal hearings in which counsel [could] be present."[59] The Court stated that none of these differences was dispositive, and tweaked the *Morales* standard by stating, "[t]he question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration."[60]

The Court then articulated a two-pronged inquiry for determining whether a rule violates the Ex Post Facto Clause.[61] The first prong of the

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55. *Id.* Although the Court was divided on the outcome of *Morales*, both the majority and the dissent appear to accept the majority's requirement that a challenged law attain some threshold level of "sufficient risk" of imposing increased punishment before that law, though retroactive, can be found to contravene the Ex Post Facto Clause. Both opinions engage in an examination of the mechanics and application of the law, but differ on the applicable standard of review, *see id.* at 522 (Stevens, J., dissenting), and on which party should bear the burden of persuasion in the event that a law's effects are "speculative." *Compare id.* at 510 n.6, *with id.* at 526 (Stevens, J., dissenting).

56. 529 U.S. 244 (2000).

57. *See id.* at 250–54.

58. *Id.* at 250–51.

59. *Id.* at 251.

60. *Id.*

61. *Id.*; *see also* James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV. 1033,

Garner inquiry requires a court to determine whether "the operation of the [challenged rule] within the whole context" of the system in which the rule operates (in *Morales* and *Garner*, the state parole systems) creates a significant risk of retroactively prolonging incarceration.[62] This inquiry requires a court to consider the entirety of the mechanics of a system of punishment when judging whether a specific amendment will have any significant impact on sentencing.

In *Garner*, the Court considered the means of reaching parole determinations available to and adopted by the Georgia parole board, noting that the amended rules had set eight years as a *maximum* span between considerations and that the parole board was empowered to expedite reviews in the event of changed circumstances "or where the Board receives new information that would warrant a sooner review."[63] In preparing the reader for understanding the import of these factors, the Court made a remarkable logical move. The foundation for the Court's consideration of the "whole context" of the Georgia parole system was the wide discretion granted to the parole board by the Georgia legislature.[64] On one reading, the import of this passage is that, because Jones was on notice before committing his crime that his parole could be withheld without notice, there could be nothing retroactive about that withholding. Indeed, the Court seemed to advance that reading just a few paragraphs later: "The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience."[65] On this reading, a grant of discretion by the legislature to another branch—in *Garner*, the executive branch's parole board—could potentially insulate against even egregious retroactive changes in punishment.[66]

Such a reading has obvious and regrettable implications, and the Court specifically disavowed it. The Court was careful to state that "[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause . . . ."[67] Nevertheless, lingering in the background of *Garner* is the notion that retroactive changes to parole procedures are "inherently" beyond the scope of the Ex Post Facto Clause because the "whole context" of the parole system is discretionary.[68] As discussed below, this idea apparently motivated the Seventh Circuit's determination that the advisory Guidelines are beyond the Ex Post Facto Clause's purview,[69] and the same concern is echoed in the *Kumar* dissent, as well.[70]

1065 (2008).

62. *See Garner*, 529 U.S. at 251.

63. *Id.* at 254 (quotation marks omitted).

64. *Id.* at 252–53.

65. *Id.* at 253.

66. *See id.* at 252.

67. *Id.*

68. *See id.*

69. *See infra*, Part III.B.1.

70. *See infra* Part IV.B.

Garner's second prong requires the challenger to demonstrate that "the rule's practical implementation" will result in a significant risk of increasing the individual litigant's incarceration—a kind of redoubled "as applied" analysis.[71] In almost every paradigmatic ex post facto case, the challenge will be advanced as an "as applied" constitutional challenge.[72] Few criminal laws apply expressly and only to conduct that happened in the past. Instead, particular litigants will challenge the application of an otherwise prospective, and therefore constitutional, law to their conviction.[73] But in the paradigmatic case, the law or rule under review obviously disadvantages the challenger. *Garner*, because it addresses rules that arguably do not prejudice the challenger, requires not only that a challenger demonstrate that a law applies retroactively in his case, but that the particular retroactive application increases the risk to that challenger of more severe punishment as a result of some particular interaction of the rule and the individual's circumstances.[74,75]

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71. *Id.* at 255.

72. An "as applied challenge" requires a litigant to demonstrate that the application of a law to his or her particular circumstances results in a violation of the Constitution. A successful "as applied" challenge leaves the law in place, but limits the set of situations in which the law may constitutionally apply. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986) ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."). By contrast, a "facial challenge" to a statute asserts that the statute is unconstitutional under any set of circumstances. United States v. Salerno, 481 U.S. 739, 745 (1987). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Id.*

73. Only a particularly vindictive or inept legislator would draft a facially retroactive criminal punishment in light of the Constitution's prohibition. However, such laws have occasionally emerged. *See, e.g.*, Cummings v. Missouri, 71 U.S. 277 (1866).

74. *Garner*, 529 U.S. at 255–56. How a litigant might go about demonstrating that he, individually, would be retroactively disadvantaged by the operation of an otherwise acceptable rule was not addressed by *Garner*: the Court remanded on that point. *Id.* at 256–57. One unspoken difference between *Garner* and *Morales* is evident in the fact of the *Garner* Court's remand. *Garner* remanded because "[w]ithout knowledge of whether retroactive application of the amendment to Rule 475-3-.05(2) increases, to a significant degree, the likelihood or probability of prolonging respondent's incarceration, his claim rests upon speculation." *Id.* at 256. Speculation was at the heart of *Morales* too, but the Court did not believe that speculation warranted a remand and found, rather, that it weighed against the defendant. *Morales*, 514 U.S. at 509 (1995). *Garner*, on the other hand, suggests that such speculation may actually sustain a claim until it is dispelled one way or the other.

75. *Garner*'s second prong analysis seemed to collapse into the first prong review of the "context" of the rule when the Court corrected the circuit court's failure to consider the parole board's internal policy statements when determining whether "in fact" the amendment created a significant risk of increased punishment, despite the rule's lack of "inherent" risk in that regard. *See Garner*, 529 U.S. at 256. After having come dangerously close to promoting discretion as an ex post facto cure-all, the Court decided to hold the Georgia parole board to its word: "At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment . . . created a significant risk of increased punishment." *Id.* Thus, policy statements and actual practice are required factors for consideration when assessing a changed rule "in its operation" upon a particular individual.

B. The Circuit Split on the Ex Post Facto Implications of the Sentencing Guidelines

The question of whether a rule governing the length of a sentence creates a "significant risk" of increased punishment has lately arisen in the context of the Federal Sentencing Guidelines. The United States Sentencing Guidelines are the product of the U.S. Sentencing Commission, an agency created by Congress through the Sentencing Reform Act of 1984.[76] The Commission operates as an agency of the Judicial Branch and has, as its most prominent role, the task of preparing recommended sentencing guidelines, with the goal of promoting "fairness through the establishment of sanctions proportionate to the severity of the crime and the avoidance of unwarranted disparity by setting similar penalties for similarly situated offenders."[77] The original Sentencing Guidelines were submitted to Congress and became effective in 1987.[78] The Commission continually reviews and amends the Guidelines, often in response to commands from Congress,[79] and publishes a new version of the Guidelines every year.[80]

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76. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

77. U.S. SENTENCING COMMISSION ANNUAL. REPORT 1 (2010) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap1.pdf. The Supreme Court has also examined the role of the Sentencing Commission:

> Helpful in our consideration and analysis of the statute is the Senate Report on the 1984 legislation. The Report referred to the 'outmoded rehabilitation model' for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed. It observed that the indeterminate-sentencing system had two 'unjustifi[ed]' and 'shameful' consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system.

United States v. Mistretta, 488 U.S. 361, 366 (1989) (internal citations omitted).

The Court further stated that in addition to the duty the Commission has to promulgate determinative-sentence guidelines, it is under an obligation periodically to "review and revise" the guidelines. § 994(o). It is to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress "any amendments of the guidelines." § 994(p). It is to make recommendations to Congress whether the grades or maximum penalties should be modified. § 994(r). It must submit to Congress at least annually an analysis of the operation of the guidelines. § 994(w). It is to issue "general policy statements" regarding their application. § 994(a)(2). And it has the power to "establish general policies . . . as are necessary to carry out the purposes" of the legislation, § 995(a)(1); to "monitor the performance of probation officers" with respect to the guidelines, § 995(a)(9); to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel" and others, § 995(a)(18); and to "perform such other functions as are required to permit Federal courts to meet their responsibilities" as to sentencing, § 995(a)(22).

Mistretta, 488 U.S. at 369.

78. U.S. SENTENCING COMMISSION ANNUAL REPORT 1 (2010) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap1.pdf.

79. *See, e.g.*, Notice of Temporary Amendment to Methamphetamine and Club Drug Anti-

Upon their original promulgation, the Guidelines were essentially mandatory:

> [The Sentencing Reform Act] makes the Sentencing Commission's guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines. [28 U.S.C.] §§ 3553(a) and (b). The Act also requires the court to state its reasons for the sentence imposed and to give 'the specific reason' for imposing a sentence different from that described in the guideline. § 3553(c).[81]

The mandatory nature of the original Guidelines was successfully challenged in *United States v. Booker*.[82] *Booker* held that the mandatory use of the Guidelines in fixing enhanced sentences violated the Sixth Amendment's requirement that all facts supporting an enhanced sentence be found by juries rather than judges.[83] In order to remedy the Sixth Amendment violation, the Court severed the portion of the Sentencing Reform Act that made the Guidelines binding on district court judges, as well as a related appellate review provision.[84]

Despite the excision of those provisions that had rendered the Guidelines mandatory, the Court noted the continued influence that the Guidelines would exert over sentencing decisions:

> Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims.[85]

The remedy was expressly designed to respect Congress's "basic statutory goal—a system that diminishes sentencing disparity."[86]

Proliferation Act of 2000, 65 Fed. Reg. 80474 (Dec. 21, 2000).

80. *See* U.S. SENTENCING COMMISSION, *Data and Statistics* http://www.ussc.gov/Data_and_Statistics/index.cfm (last visited Mar. 1, 2012) (including an archive of annual reports from years 1995–2010).

81. *Mistretta*, 488 U.S. at 367–68.

82. 543 U.S. 220 (2005).

83. *Id.* at 233–38.

84. *Id.* at 259–60 (opinion of Breyer, J.).

85. *Id.* (internal citations omitted).

86. *Id.* at 250.

Moreover, the Supreme Court, subsequent to *Booker*, has emphasized the Guidelines' continued and proper influence over judges' sentencing decisions, despite their now-advisory status. In *Rita v. United States*,[87] the Court held that the courts of appeals may apply a presumption of reasonableness when asked to review a within-Guidelines sentence imposed by a district court.[88] And in *Gall v. United States*,[89] the Court reiterated that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark" for every sentence.[90]

Prior to *Booker*, the Supreme Court had never addressed the application of the Ex Post Facto Clause to the Federal Sentencing Guidelines, but it held in 1987 that a substantially similar regime of mandatory sentencing guidelines in effect in Florida were comprehended by the Ex Post Facto Clause.[91] Relying on that decision prior to *Booker*, the courts of appeals uniformly held that the Ex Post Facto Clause applied to the retroactive application of an increased sentencing range under the Guidelines.[92] Post-*Booker*, however, whether the Ex Post Facto Clause continues to apply to retroactively applied versions of the Guidelines is a question that has split the circuits.

1. *United States v. Demaree*: Rejecting the Ex Post Facto Clause's Application to the Advisory Guidelines

The first post-*Booker* court of appeals case to address this issue was the Seventh Circuit's decision in *United States v. Demaree*.[93] The Seventh Circuit, though acknowledging that "[t]he applicable guideline nudges [the sentencing judge] toward the sentencing range," found that "his freedom to impose a reasonable sentence outside the range is unfettered."[94] *Demaree* rejected any reliance on the "significant risk" standard of *Garner* by offering a series of examples of other non-binding congressional actions

87. 551 U.S. 338 (2007).

88. *Id.* at 347 ("[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.").

89. 552 U.S. 38 (2007).

90. *Id.* at 49.

91. *See* Miller v. Florida, 482 U.S. 423 (1987).

92. *See, e.g.*, United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); United States v. Kopp, 951 F.2d 521, 526 (3d Cir. 1991); United States v. Morrow, 925 F.2d 779, 782–83 (4th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021–22 (5th Cir. 1990); United States v. Nagi, 947 F.2d 211, 213 n.1 (6th Cir. 1991); United States v. Seacott, 15 F.3d 1380, 1386 (7th Cir. 1994); United States v. Swanger, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam); United States v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); United States v. Lam Kwong-Wah, 924 F.2d 298, 304–05 (D.C. Cir. 1991).

93. 459 F.3d 791 (7th Cir. 2006).

94. *Id.* at 795.

(joint resolutions, statutes requiring the introduction of victim impact statements, etc.) in order to cast the application of the Ex Post Facto Clause to the advisory Guidelines as absurd.[95]

2. The Majority Position: Circuits Disagreeing with *Demaree*

The majority of circuits, however, have either explicitly rejected the reasoning of *Demaree* or ruled in such a way as to signal that the advisory nature of the Guidelines is not dispositive of the applicability of the Ex Post Facto Clause. In finding the advisory Guidelines subject to the Ex Post Facto Clause, these circuits have split into two camps. The first camp has held that, as a blanket rule, the application of post-conduct Guidelines manuals is a violation of the Ex Post Facto Clause when the more recent sentencing manual recommends a higher sentence. For example, the Third Circuit has "consistently held as improper the direct application of an amended guideline to conduct that occurred *prior* to the amendment."[96]

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95. *Id.* at 794; *see also* United States v. Favara, 615 F.3d 824, 829 (7th Cir. 2010) (internal citation omitted) ("In *Demaree*, we held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend *ex post facto*. We find no reason to abandon that conclusion today."); United States v. Barton, 455 F.3d 649, 655 n.4 (6th Cir. 2006) (addressing the issue of whether the *Booker* decision itself could be applied retroactively).

In *Barton*, though in dicta, the Sixth Circuit stated that "[n]ow that the Guidelines are advisory, the Guidelines calculation provides no such guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness. As such, the Ex Post Facto Clause itself is not implicated." *Id.* at 655 n.4. Having found the Ex Post Facto Clause to be irrelevant, and the Due Process Clause to be the correct basis for constitutional evaluation of the advisory Guidelines, the court found that the Due Process Clause concerns itself only with "insuring that defendants have sufficient notice of illegal activity," but not with notice of the possibility of enhanced punishment. *Id.* This dictum is riddled with problems. There is no discussion in *Barton* of the fact that the Guidelines are actually applied through a *legislative* mechanism, namely 18 U.S.C. § 3553(a)(4), which requires a sentencing court to consider "the kinds of sentence and the sentencing range established for" a particular crime. Nor is there much discussion of whether the Due Process Clause, even if it were the correct constitutional basis for evaluation of the application of retroactive Guidelines, protects a defendant's notice of the possibility of enhanced punishment, rather than notice of criminalization.

In any case, subsequent cases from the Sixth Circuit rejected the claim that *Barton* is binding with respect to the question of whether retroactive application of the advisory Guidelines may violate the Ex Post Facto Clause. *See, e.g.*, United States v. Duane, 533 F.3d 441, 446 (6th Cir. 2008) ("Although we recognize that some language from the above quoted *Barton* footnote could be read to suggest that a change to the Guidelines does not raise an *ex post facto* concern, we decline to read Barton as announcing such a broad rule."). The Circuit has recently held that the advisory Guidelines are susceptible to ex post facto challenges. United States v. Lanham, 617 F.3d 873, 890 (6th Cir. 2010) (citations omitted) ("Only when the Guidelines range is unable to meet the goals of the Sentencing Guidelines is a sentencing court expected to vary from the Guidelines sentence. As a result, the advisory nature of Guidelines does not completely eliminate Ex Post Facto concerns.").

96. United States v. Larkin, 629 F.3d 177, 194 (3d Cir. 2010); *see* United States v. Saferstein, No. 10-4092, slip op. at 14 (3d Cir. Jan. 24, 2012) ("[W]e have held that the ex post facto clause requires that a sentencing court apply the Guidelines Manual in effect at the time the offense was committed if retroactive application of the later Manual would result in harsher penalties."); The Eighth, Ninth, and Tenth Circuits have acted consistently with the Third Circuit's blanket approach. *See, e.g.*, United States v. Carter, 490 F.3d 641, 643 (8th Cir. 2007) (acknowledging *Demaree* but applying the Ex Post Facto Clause to a post-*Booker* Guidelines challenge); United States v. Rising Sun, 522 F.3d 989, 997 (9th Cir. 2008) ("[T]he district court abused its discretion in applying the two-level 'obstruction of

The second camp accepts that the retroactive application of even an advisory Guideline may violate the Ex Post Facto Clause, but assesses such application on a case-by-case basis using *Garner*'s "significant risk" standard. The D.C. Circuit was the first to adopt this "as applied" standard in *United States v. Turner*.[97] In rejecting *Demaree*, the D.C. Circuit relied in large part on the empirical fact that "most federal sentences fall within Guidelines ranges even after *Booker*—indeed, the actual impact of *Booker* on sentencing has been minor."[98] Rather than holding that any retroactive application of an increased Guidelines range violates the Ex Post Facto Clause, however, the D.C. Circuit asked whether such an application created a substantial risk of the imposition of a more severe sentence, citing *Garner* in support.[99] The circuit noted that it was "obvious that the court decided to sentence Turner at the low end of the 2006 Guideline sentencing range" and "[h]ad the court used the 2000 Guidelines, Turner's sentencing range would have been 21–27 months, *and it is likely* that Turner's sentence would have been less than 33 months."[100] The remaining two circuits, the First and the Fifth, have yet to adopt a position on this issue.[101]

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justice' enhancement solely on the basis of actions that Rising Sun took before an investigation had begun."); United States v. Thompson, 518 F.3d 832, 870 (10th Cir. 2008) (assessing a post-*Booker* Guidelines application under the Ex Post Facto Clause without reference to the circuit split on this issue); United States v. Montoya, No. 10-1285, 2011 WL 2279726, at *3–*4 (10th Cir. Jun. 10, 2011) (same).

97. 548 F.3d 1094, 1100 (2008) ("The proper approach is therefore to conduct an 'as applied' constitutional analysis, see *Miller*, 482 U.S. at 435, not the sort of facial analysis conducted in *Demaree*.").

98. *Id.* at 1099 (citing U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 57 (2006)).

99. *Id.* at 1100.

100. *Id.* (emphasis added). The D.C. Circuit's case-by-case "substantial risk" standard has been applied by the Second, Fourth, and Eleventh Circuits. *See, e.g.*, United States v. Ortiz, 621 F.3d 82, 87 (2d Cir. 2010) ("[The 'substantial risk'] standard does not invalidate every sentence imposed after a Guidelines range has been increased after the date of the offense, but, unlike the approach of the Seventh Circuit, which rejects an *Ex Post Facto* challenge to any non-Guidelines sentence, it recognizes that there may be circumstances where an amended Guidelines range can influence a sentence that violates the *Ex Post Facto* Clause."); United States v. Lewis, 606 F.3d 193, 203 (4th Cir. 2010) ("[G]iven the importance our precedent places on the proper calculation of the advisory Guidelines range, the retroactive application of an upwardly amended advisory sentencing range poses a significant risk of an increased sentence. And Lewis was not required to 'show definitively' that he would have received a higher sentence had the sentencing court utilized the amended 2008 Guidelines edition. It was sufficient that he show that application of the 2008 edition 'created a substantial risk' that his sentence would be more severe.") (citing United States v. Turner, 548 F.3d 1094, 1100 (D.C. Cir. 2008)); United States v. Wetherald, 636 F.3d 1315, 1321 (11th Cir. 2011) ("Because it is consistent both with our interpretation of Supreme Court precedent and this circuit's jurisprudence, we find the approach taken by the D.C. Circuit more compelling than that of the Seventh Circuit.").

101. *See* United States v. Rodriguez, 630 F.3d 39, 41 (1st Cir. 2010); United States v. Marban-Calderon, 631 F.3d 210, 211–12 (5th Cir. 2011).

Finally, the Sixth Circuit and the district courts within it appear to be in some doubt as to whether that circuit has addressed the issue or not. *Compare* United States v. Barton, 455 F.3d 649, 655 n.4 (6th Cir. 2006), *and* Amundson v. United States, Nos. 1:10–CV–165, 1:07–CR–141–01, 2011 WL 1630905, at *4 (W.D. Mich., Apr. 29, 2011) (internal quotation marks omitted) (internal citations omitted) ("The Court recognizes that most circuits have continued, post-*Booker*, to analyze whether applying revised Guidelines retroactively violates the *Ex Post Facto* Clause, but agrees with the reasoning and holding of

The import and effect of *Turner*'s standard is relatively clear in the context of appellate review. The standard acts as a type of "harmless error" review of ex post facto sentencing challenges by the court of appeals. Less straightforward is its application by sentencing courts in the first instance. A district court attempting to apply the *Turner* standard in the face of a potential ex post facto problem will need to determine first whether an actual ex post facto problem exists and, second, whether its consideration of the amended version of the Guidelines would pose a "substantial risk" of influencing its ultimate sentence. The sentencing court must perform this second step while recognizing that if it chooses to apply the post-amendment version, then the court *must* consider that version of the Guidelines when arriving at its sentence pursuant to 18 U.S.C. § 3553(a).[102]

Prior to actually conducting its § 3553(a) analysis, only those district court judges who are perfectly certain that they will ultimately impose a non-Guidelines sentence due to the overwhelming influence of § 3553(a) factors–other than the Guidelines factors–would be able to make the determination that the post-amendment version of the Guidelines poses no "substantial risk" of influencing their sentencing determination under § 3553(a). Yet, relying on such certainty would cause the district court to violate *Gall* and § 3553(a) through a failure, or a refusal, to consider the Guidelines as a basis for sentencing.[103] In practice, it appears likely that, in cases before the district courts of even those circuits adopting the *Turner* approach, a district court will be obligated to apply a pre-amendment version of the Guidelines whenever a post-amendment Guideline would increase the recommended sentence.[104]

Demaree, and the dicta of *Barton*."), *with* United States v. Goff, 400 F. App'x 1, 26 n.4 (6th Cir. 2010) (internal citations omitted) ("[I]n *Duane*, we refused to hold that such claims are no longer cognizable, noting that we have continued to consider such claims post-*Booker*; that, in an analogous context, discretionary parole guidelines can give rise to *Ex Post Facto* claims; and that a number of other circuits have continued to analyze such claims post-*Booker*. We find the Government's argument unpersuasive. Although Goff's *Ex Post Facto* claim fails, we continue to recognize the viability of such claims in the Guidelines context."), *and* United States v. Duane, 533 F.3d 441, 446, n.1 (6th Cir. 2008) ("Although we recognize that some language from the above quoted *Barton* footnote could be read to suggest that a change to the Guidelines does not raise an *ex post facto* concern, we decline to read *Barton* as announcing such a broad rule.").

102. *See* Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

103. *See id.*

104. In one case applying the *Turner* standard as adopted by the Second Circuit in *Ortiz*, a district court reviewed an increase to the Guidelines range for counts of bank and wire fraud. *See* United States v. Peters, No. 03-CR-211S, 2011 WL 280988 (W.D.N.Y. Jan. 26, 2011). The application of the current version of the Guidelines to Peters's crimes would have resulted in a recommended range of 188–235 months (my calculation), while the 2000 version resulted in a recommended range of 135–168. *Id.* at *2. The district court held, with essentially no discussion of the "substantial risk" standard—and reflexively in the face of a meritorious claim of a retroactively enhanced sentencing recommendation—that the application of a pre-amendment Guidelines version was required under *Ortiz*. *Id.* at *2 ("Here, due to amendments to the Guidelines Manual since 2000, Peters undoubtedly faces a substantial risk of a more severe sentence, because the advisory guideline range has increased."); *see also* Comment, *Second Circuit Holds That Imposing Below-Guidelines Sentence Using Retroactive Guidelines Range Increase Does Not Violate Ex Post Facto Clause*, 124 HARV. L. REV. 2091, 2091 (2011) ("A better approach [for

Although the merits of the various positions as to the applicability of the Ex Post Facto Clause to the post-*Booker* Guidelines are beyond the scope of this Article, commentators have split along the same lines as the courts.[105] For present purposes, the difficulty in settling the question demonstrates the courts' continued difficulty in grappling with sentencing rules that may seem more procedural than traditional "laws" retroactively imposing an enhanced sentence. Moreover, that the majority of the circuits requires an ex post facto analysis of the post-*Booker* Guidelines—and that three of those circuits do so on a case-by-case basis—emphasizes the continued relevance of the problems of a variation on ex post facto jurisprudence posed by offenses that span a period of time encompassing two different versions of the Guidelines. This problem is treated in the following section, which discusses the courts' application of the Ex Post Facto Clause in the case of straddle offenses.

IV. The Ex Post Facto Clause and "Straddle" Offenses

For discretionary or procedural rules, especially the now-advisory Federal Sentencing Guidelines, the application of the Ex Post Facto Clause has also been hotly disputed in the case of "straddle" offenses.

A. Defining "Straddle" Offenses

A straddle offense is a single crime, the elements of which occur both before and after a change in law that either criminalizes the combination of elements or increases the punishment for their completion.[106] Take, for example, a criminal racketeering enterprise. In order to establish the existence of such an enterprise, the Government must prove a pattern of racketeering consisting of at least two racketeering acts.[107] Congress passed the Racketeer Influenced and Corrupt

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Ortiz] would have been to recognize that increasing the Guidelines range presumptively creates a significant risk of increasing a defendant's sentence, and therefore that retroactive application of such a range usually violates the Ex Post Facto Clause.").

105. *Compare* Daniel M. Levy, Note, *Defending* Demaree*: The Ex Post Facto Clause's Lack of Control over the Federal Sentencing Guidelines After* Booker, 77 FORDHAM L. REV. 2623 (2009), *and* Benjamin Holley, *The Constitutionality of Post-Crime Guidelines Sentencing*, 37 WM. MITCHELL L. REV. 533 (2011) (arguing that neither the requirement that district courts consult the Guidelines nor empirical evidence of district court adherence to Guidelines sentencing supports the application of the Ex Post Facto Clause to post-*Booker* Guidelines), *with* James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV. 1033 (2008).

106. *See* Broughton, *supra* note 6, at 720 (defining straddle crimes as "those offenses for which the defendant satisfies one or more elements of the crime before the date of enactment, and yet the crime is not fully completed—that is, all of the elements are not satisfied—until after the date of enactment").

107. *See* 18 U.S.C. § 1962 (2006); United States v. Delatorre, 581 F. Supp. 2d 986, 976–77 (N.D. Ill. 2008) (holding that "the government need only prove that the defendant . . . [conspired to] commit two or more predicate acts of racketeering").

Organizations Act ("RICO") in 1970.[108] If a defendant committed one racketeering act in 1969 and a second in 1971, would prosecution under RICO violate the Ex Post Facto Clause?

Or consider a business, begun in 2008, to distribute caffeinated alcoholic beverages. In 2009, public outrage at the over-caffeinated drunken destruction of public property prompted state legislatures to ban the drinks' production, as well as any conspiracy to engage in such production. Assume further that New York requires proof of an overt act in order to convict a defendant for conspiracy, that the business continues to produce its product through 2010, and that the employees of the business are eventually prosecuted on the basis of a conspiracy–the overt acts of which span from 2008 through 2010. May the state prosecute based on overt acts occurring prior to the enactment of the ban? May they prosecute for a conspiracy with an origin predating the ban?

The answer in each case is "yes"; courts consistently hold that the Ex Post Facto Clause does not bar prosecution of straddle crimes, regardless of the timing of a given element of that crime.[109] Thus, in the first example, the commission of one element prior to the criminalization of the crime as a whole is not a bar to prosecution under the new law, assuming that the defendant completes some second element after the law's enactment. Courts have consistently reached this conclusion with respect to prosecutions under RICO[110] and federal mail and wire fraud statutes,[111] in each case permitting the conviction of a defendant under a law enacted after the completion of one discrete and necessary element of the newly enacted crime.

In cases resembling the second example, in which conduct continues over a period during which that conduct is criminalized, courts essentially moot any ex post facto challenge by viewing the crime as occurring after, as well as before, the relevant criminalization.[112] Conspiracy cases are the classic example. A conspiracy to distribute ecstasy that began in 2009 and continued through 2011 does not end or change in any material respect simply because a new law criminalizing the conspiracy is passed in 2010: in 2011, a member of the conspiracy

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108. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (2006)).

109. *See* United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002) (noting the well established rule that there is no ex post facto violation when a defendant is charged with conspiracy that continues after the effective date of a new criminal law).

110. *E.g.*, United States v. Torres, 901 F.2d 205, 226 (2d Cir. 1990); United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (per curiam); United States v. Brown, 555 F.2d 407 (5th Cir. 1977); United States v. Boffa, 688 F.2d 919 (3d Cir. 1982).

111. *E.g.*, United States v. Manges, 110 F.3d 1162 (5th Cir. 1997); United States v. Alkins, 925 F.2d 541 (2d Cir. 1991).

112. *See, e.g.*, United States v. Harris, 79 F.3d 223, 229 (2d Cir. 1996) ("It is well-settled that when a statute is concerned with a continuing offense, 'the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of [the statute].' (quoting United States v. Torres, 901 F.2d 205, 226 (2d Cir. 1990)).

continues to commit acts sufficient to satisfy each element of the crime, just as he had been doing in 2009. Conceptually, the crime does not actually straddle the criminalizing law at all, but continues to be constantly or repeatedly committed unless and until a defendant withdraws from the conspiracy.[113]

In the case of conspiracies or other crimes with elements that continue past the enactment of a new criminal law, it may be said that all of the relevant conduct actually occurs after the new law comes into effect, and therefore no ex post facto problem actually exists.[114] The justification is different for those decisions permitting prosecutions in the scenarios presenting discrete, non-continuing elements that straddle a criminal enactment: in each instance, the criminal was on notice that an act committed after the criminalization of that act, either in itself or as one element in a criminalized series of acts, would incur criminal consequences.[115]

B. Justifying Punishment for Straddle Crimes: Notice and Recidivism.

Heightened punishment imposed on the basis of activity that predates the enactment of the heightened punishment may operate in the same manner as the straddle crimes described above. For example, RICO may be amended to include a higher statutory maximum punishment at a time falling between two predicate racketeering acts.[116] Litigants have often raised challenges to a particular variant of such punishment enhancing laws, namely those that increase punishment for the commission of a second crime on the basis of a prior conviction for a first crime.

Courts have upheld prior-conviction enhancements for over a century. These courts often assert that prior-conviction enhancements merely reflect the heightened culpability inherent in the subsequent crime. For example, in *Gryger v. Burke*,[117] the Supreme Court found no ex post facto or double-jeopardy issues raised by a prior-conviction enhancement:

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113. *See* Broughton, *supra* note 6, at 732–38 (providing examples); *see also* United States v. Harris, 79 F.3d 223, 229 (2d Cir. 1996) (holding that a series of criminal violations did not violate the Ex Post Facto Clause).

114. *See id.*, *supra* note 6, at 737 ("If we view the pre-enactment conduct as continuing, it is fair to conclude that each day thereafter, it is as if the conduct begins afresh. The continuing-offense doctrine essentially turns a straddle offense into one that does not straddle; all of the relevant conduct can now be said to occur post enactment, even if, in reality, it began beforehand.").

115. *See, e.g.*, United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (per curiam) ("[A]ppellants were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970; rather they were convicted for having performed post-October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed.").

116. *See, e.g.*, 18 U.S.C. § 1963(m) (2007).

117. 334 U.S 728, 732 (1948).

> Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.[118]

That the stiffened penalty may have been applied at the time of the subsequent crime, or that it was purportedly applied to the subsequent crime, did not alter the fact that *Gryger* contemplated—in fact, relied upon—the defendant's pre-enactment conduct. The actual justification for the constitutionality of these enhancements is that the offender was on notice of the consequences of committing the second offense, though the consequences are designed to punish the cumulative wrongdoing of both the earlier and subsequent offenses. This reasoning is explicit in the earlier cases on which *Gryger* relied.[119]

Gryger, which directly addresses the Ex Post Facto Clause, relies in large part on prior cases addressing challenges brought under the Double Jeopardy Clause.[120] For example, in *State v. Moore*, the Supreme Court of Missouri upheld a mandatory sentence of life imprisonment based on the defendant's prior conviction for grand larceny.[121] The defendant challenged his conviction and sentence as violations of the Double Jeopardy Clause[122] and the Cruel and Unusual Punishment Clause[123] of the Constitution.[124] The law in question did not appear to raise ex post facto concerns as there is no indication in *Moore* that the prior-conviction enhancement came into effect after the defendant's commission of his first offense. Nevertheless, the Missouri Supreme Court relied on the defendant's notice of the consequences of his subsequent offense—having already been convicted of a prior offense—in rejecting his challenges. First, the court held that "[t]he increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense," thereby neutralizing Moore's

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118. *Id.*

119. *Id.* (citing Carlesi v. New York, 223 U.S. 51, 57–58 (1911); Moore v. Missouri, 159 U.S. 673 (1895); McDonald v. Massachusetts, 180 U.S. 311 (1901); Graham v. West Virginia, 224 U.S. 616 (1912); Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937)).

120. *Id.*

121. 26 S.W. 345 (Mo. 1894).

122. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .").

123. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

124. *Moore*, 26 S.W. at 346.

double jeopardy challenge.[125] The court further stated that Moore's conviction and sentence were not cruel or unusual insofar as he was on notice of the consequences of his latter crime: "the law . . . imposes the increased punishment *being presumed to be known by all persons and to deter those so inclined from the further commission of crime.*"[126] This passage, and its focus on notice, was quoted by the United States Supreme Court in its opinion affirming *Moore*.[127]

Both the Missouri Supreme Court and United States Supreme Court in the *Moore* case relied on prior state court cases similarly based on the concept of notice to the defendant as nullifying any constitutional challenge to a sentencing enhancement premised on prior convictions. The Missouri Supreme Court relied on *Rand v. Commonwealth*, an old case even at the time *Moore* was decided.[128] The Supreme Court of Virginia decided *Rand* under the Ex Post Facto Clause, rather than under the Double Jeopardy or Cruel and Unusual Punishment Clauses.[129] The *Rand* court also relied on the notice given to the defendant as to the consequences of committing his second crime by the enactment of the enhanced punishment law:

> The first conviction . . . was had in 1843, and the second offence is alleged and found to have been committed in 1852; whilst the law under consideration was passed in 1848 and reenacted in 1849 . . . . One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. *He knew or is presumed to have known, before the commission of the second offence, all the penalties denounced against it*; and if in some sense the additional punishment may be said to be a consequence of the first offence, (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction,) still it is not a necessary consequence; but one which could only arise on the conviction for the second offence, and one therefore, which being fully apprised of in advance, the offender was left free to brave or avoid.[130]

In cases not explicitly invoking notice as the constitutional salve for prior-conviction enhancements, courts have invoked the directly related concept of avoidance. That is, a defendant whose sentence is enhanced as a result of a prior conviction could have avoided the enhancement by refraining from committing the subsequent crime, just as the defendant

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125. *Id.*

126. *Id.* (emphasis added).

127. Moore v. Missouri, 159 U.S. 673, 676–77 (1895).

128. *See* State v. Moore, 26 S.W. at 346 (citing Rand v. Commonwealth, 9 Gratt. 738 (Va. 1852)); *see also* Moore v. Missouri, 159 U.S. at 677 (same).

129. *Rand*, 9 Gratt. at 743, 755.

130. *Id.* at 743 (emphasis added).

could have avoided *any* criminal repercussions attached to that subsequent crime. The passage from *Rand* quoted above relies on both notice and avoidance as grounds for upholding the enhancement in light of an ex post facto challenge, and indeed the two are actually different ways of explaining the importance of notice to potential defendants.[131] The connection between notice and avoidance is plain in *Blackburn v. State*, cited by the United States Supreme Court in *Moore*:

> Had he abandoned his evil practices after his first imprisonment, or even after his second term had ended, the consequences of which he now complains would not have followed. This he did not do, but instead chose to commit a third offense, and that, too, with his eyes wide open; for he knew, or was bound to know, when he committed this last offense, that he had become one of a class against whom severer measures had been declared to be necessary if he should again be convicted.[132]

From *Rand* to *Moore* to *Gryger*, courts have relied on the notice provided to a recidivist offender to justify punishment for the subsequent offense, even though that punishment is increased on the basis of prior actions. These cases continue to support the constitutionality of prior-conviction enhancements and recidivist punishments. In every modern case to consider ex post facto challenges to such laws, often by express reliance on the principle of notice, and always in reliance on the premise that the punishment is heightened because the subsequent offense is rendered more culpable as a result of recidivism, rather than because of the commission of the first crime in itself—despite the logical overlap between those two concepts.[133]

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131. Blackburn v. State, 36 N.E. 18, 21 (Ohio 1893).

132. *Id.* (cited in *Moore*, 159 U.S. at 677); *see also* People v. Stanley, 47 Cal. 113, 116 (1873) (citing, *inter alia*, *Rand*, 9 Gratt. at 743); *In re* Ross, 2 Pick. 165, 170 (Mass. 1824) ("A party ought to know, at the time of committing the offence, the whole extent of the punishment; for it may sometimes be a matter of calculation, whether he will commit the offence, considering the severity of the punishment.").

133. *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 28–29 (1981) ("Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."); *see also* United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997) ("The three-strikes law was enacted before Washington committed the bank robberies, so he had fair warning of the consequences attached to new violent offenses."); United States v. Patterson, 820 F.2d 1524, 1527 (9th Cir. 1987); United States v. Ahumada-Avalos, 875 F.2d 681, 684 (9th Cir. 1989) (per curiam) (upholding a repeat offender statute); United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999) (en banc) (alteration in original) (internal quotation marks omitted) ("The Supreme Court and this court uniformly have held that recidivist statutes do not violate the Ex Post Facto Clause if they are on the books at the time the [present] offense was committed."); United States v. Rosario-Delgado, 198 F.3d 1354, 1356 (11th Cir. 1999); United States v. Rasco, 123 F.3d 222, 227 (5th Cir. 1997); United States v. Farmer, 73 F.3d 836, 841 (8th Cir. 1996).

V. The One-Book Rule: Merging Sentencing Rules and Straddle Crimes

All of the foregoing ex post facto difficulties—its application to discretionary sentencing procedures and to straddle crimes—converge in the application of a particular provision of the Sentencing Guidelines: the one-book rule.[134] The Guidelines provide that "[t]he [sentencing] court shall use the Guidelines Manual in effect on the date that the defendant is sentenced."[135] The Guidelines also provide that "[i]f the court determines that the use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed."[136] In the event that a court is contemplating the application of two different versions of the Guidelines, it is instructed that it should choose one manual, to be applied "in its entirety."[137] The Guidelines further instruct that, in the event that "the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses."[138] In the background commentary to this provision, the Commission relies on the logic of *Gryger* in asserting that the Ex Post Facto Clause is not a bar to the application of the later Guideline version in the event of crimes that straddle the publication of an amended (and harsher) Guideline manual: "Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines."[139] Indeed, the Commission cites a case expressly addressed to recidivist statutes in support of its position.[140] Finally, the Commission has taken the position that subsection (b)(3)—the "one-book rule"—"should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under § 3D1.2(d) [as, *inter alia*, a continuing offense]" because "[t]he ex post facto clause does not distinguish between groupable and nongroupable offenses."[141]

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134. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(3) (2011).

135. *Id.* § 1B1.11(a).

136. *Id.* § 1B1.11(b)(1).

137. *Id.* § 1B1.11(b)(2).

138. *Id.* § 1B1.11(b)(3).

139. *Id.* § 1B1.11(b)(3), cmt.

140. *Id.* (citing United States v. Ykema, 887 F. 2d 697 (9th Cir. 1989)); *see also Ykema*, 887 F.2d at 700 (citing Gryger v. Burke, 334 U.S 728(1948)).

141. *Id.* § 3D1.2 states:

> All counts involving substantially the same harm shall be grouped together into a single Group [for purposes of determining an applicable offense level and Guideline range]. Counts involve substantially the same harm within the meaning of this rule . . . (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other

The effect of the one-book rule may be to require the application of a heightened punishment to a crime committed prior to the publication of that amended punishment. The courts have split in three directions over the constitutionality of the one-book rule and the Commission's application instructions in light of the Ex Post Facto Clause.

A. Circuits Barring Retroactive Application of the One-Book Rule

The Ninth Circuit has held the one-book rule to violate the Ex Post Facto Clause in every circumstance in which it would apply a heightened Guideline range to a crime committed prior to that increase in punishment. In *United States v. Ortland*, the Ninth Circuit found each separate count of mail fraud to be a "completed offense" and concluded that the "[a]pplication of the [one-book rule] in this case would violate the Constitution; its application would cause Ortland's sentence on earlier, completed counts to be increased by a later Guideline."[142] The Ninth Circuit criticized the Commission's reasoning with respect to the one-book rule, stating that "[t]he harm caused by the earlier offenses *can* be counted in sentencing the later one[, but] [t]hat does not mean that the punishment for the earlier offenses themselves can be increased, simply because the punishment for the later one can be."[143]

The position of the court in *Ortland* rests, of course, on the court's belief that the result of the one-book rule's application is a heightened punishment for conduct that occurred prior to the harsher Guidelines manual's publication; and at first blush that appears to be correct. After all, in calculating the Guidelines' recommended sentencing range—at least when the Guidelines' "grouping" rules are not applicable[144]—a district court does indeed calculate a separate offense level and sentencing range for each offense. Moreover, at the sentencing itself, a district court will pronounce a sentence for each offense separately, even if the court ultimately rules that the sentences shall run concurrently.[145] Each of these factors would, on their face, suggest that the *Ortland* position is correct.

Nevertheless, *Ortland*'s outcome is counter to the long history of

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measure of aggregate harm, or *if the offense behavior is ongoing or continuous in nature* and the offense guideline is written to cover such behavior.

142. 109 F.3d 539, 547 (9th Cir. 1997). The one-book rule's effect and its constitutionality are identical after *Booker* in those Circuits that acknowledge the ex post facto implications of the now-advisory Guidelines. In the Seventh Circuit, the issue is moot in light of *Demaree*.

143. *Id.* at 547 (citations omitted). The Ninth Circuit also provided an example of a situation that it believed demonstrated the perversity of the one-book rule: "were the later count to fall at some time [after appeal or pardon] after sentencing, all that would remain would be the earlier sentences, which would be too long." *Id.*

144. *See infra* Part III.

145. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(c) ("If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.").

cases upholding the application of heightened punishment that depends on the existence of a past offense, but is only triggered by the commission of a post-enactment offense.[146] Defendants are on notice of the consequences of their actions, even if those consequences include punishment "for" prior offenses, as is the case with the one-book rule. That a district court must calculate an offense level and sentencing range and pronounce a sentence specifically for the pre-amendment crime does not alter the fact that the post-amendment crime is the sole and necessary action that brings that consequence to bear.

The procedures for calculating a separate sentence for each offense suggests an intent that sentencing ranges under the Guidelines be considered separately for pre- and post-amendment offenses, as the *Ortland* court held. There is, however, no constitutional relevance in the fact that the Guidelines may be intended to calculate a separate sentence level for each individual crime. The intent and purpose underpinning a given rule is as irrelevant to the issue of whether a defendant was on notice of the rule's effects as it is to the issue of whether the rule actually results in higher punishment.[147] Thus, the procedures for calculating an offense level and the intent to assign each offense with a sentencing range are irrelevant under the Ex Post Facto Clause, although the issue of the Guidelines' intents and purposes still poses significant problems for the application of the Ex Post Facto Clause, constitutional or not.[148]

B. Circuits Permitting Application of the One-Book Rule to "Groupable" Offenses

The second position taken on the one-book rule among the circuits holds that the Ex Post Facto Clause is not offended by application of the one-book rule, "at least as applied . . . to a series of similar offenses."[149] Thus, the Seventh Circuit in *Vivit*, a pre-*Booker* opinion, held that the one-

146. *See infra* Part IV.

147. *See* Lynce v. Mathis, 519 U.S. 433, 443–44 (1997) (internal quotation marks omitted) (citations omitted) ("Our determination that the new guideline was more onerous than the prior law rested entirely on an objective appraisal of the impact of the change on the length of the offender's presumptive sentence.").

Although *Lynce* holds that legislative purpose is irrelevant to the issue of whether a rule in fact increases punishment, courts have routinely looked to legislative intent and purpose in ruling on a separate question relating to ex post facto challenges, namely the issue of whether a law is "punitive," a necessary precedent to the application of the Ex Post Facto Clause. Seling v. Young, 531 U.S. 250, 261 (2001) ("A court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention."). However (and unsurprisingly), there appears to be no example of a court applying a similar legislative intent analysis to the issue of notice or to whether punishment has in fact increased.

148. *See infra* Part III.

149. United States v. Santopietro, 166 F.3d 88, 96 (2d Cir. 1999) (declining to rule on the issue, but noting the position of other circuits).

book rule, *in combination with* the grouping rules, provided adequate notice to defendants of the consequences of their subsequent offenses sufficient to satisfy the requirements of the Ex Post Facto Clause.[150]

This holding is, in fact, an attempt to rewrite the one-book rule so as to avoid the implications of the Ex Post Facto Clause altogether. Just as "continuing" straddle crimes do not actually involve any retroactive application of increased punishments because the elements of the crime occur *after* the enactment of the heightened punishment, these circuits attempt to cabin the one-book rule to situations in which there is arguably no retroactive application at all.[151] This position has become the majority position among the circuits.[152]

This attempt to quietly avoid ex post facto problems under the one-book rule is less than satisfying. First, *Vivit*'s reliance on the grouping rules does not really extinguish ex post facto concerns in the way that "continuing" straddle crimes normally would. A single crime of conspiracy that carries over the enactment of heightened punishment for that conspiracy involves a single, unified criminal activity that is completed after the enactment of heightened punishment. The grouping rules, on the other hand, do not necessarily involve such a conceptually neat arrangement of criminal conduct. For example, the grouping rules may apply to "all counts involving substantially the same harm."[153] "Substantially the same

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150. United States v. Vivit, 214 F.3d 908, 919 (7th Cir. 2000) ("[W]e believe that the enactment of the grouping rules provides fair notice such that the application of §§ 1B1.11(b)(3) and 3D1.2 does not violate the Ex Post Facto Clause. To violate the Ex Post Facto Clause, the application of amended Guidelines must disadvantage the defendant without providing the defendant with prior notice."); *see also* United States v. Cooper, 35 F.3d 1248, 1250 (8th Cir. 1994) ("In our view, Cooper had fair warning that commission of the January 23, 1992, firearm crime was governed by the 1991 amendments that provided for increased offense levels *and new grouping rules* that considered the aggregate amount of harm. Utilizing the *Miller* analysis, it was not the amendments to the Sentencing Guidelines that disadvantaged Cooper, it was his election to continue his criminal activity after the 1991 amendments became effective.") (emphasis added).

151. *See infra* Part III.A.

152. In addition to the Seventh and Eighth Circuits, see United States v. Saferstein, No. 10-4092, slip op. at 5 (3d Cir. Jan. 24, 2012) ("Even [t]he fact that various counts of an indictment are grouped cannot override ex post facto concerns, although our ex post facto concerns are assuaged when counts are properly grouped under § 3D1.2(d) as 'continuing, related conduct' and the sentencing court applies the Guidelines Manual relevant to the latest count.")(citations ommited)(internal quotation marks); United States v. Siddons, 660 F.3d 699, 707 (3d Cir. 2011) ("Due to the grouping rules at § 3D1.2(d) and the one-book rule at § 1B1.11, Siddons was on constructive notice that the November 1, 2003 enhancement could apply to his entire scheme, should he continue the conduct after the date of enactment."); United States v. Bailey, 123 F.3d 1381, 1404–05 (11th Cir. 1997) ("[T]he one book rule, together with the Guidelines grouping rules and relevant conduct, provide that related offenses committed in a series will be sentenced together under the . . . Manual in effect at the end of the series."); United States v. Sullivan, 255 F.3d 1256, 1262-63 (10th Cir. 2001); United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000) (finding no ex post facto violation in the application of a later-enacted Guidelines Manual to a series of similar tax evasions, and relying on *Vivit* and similar opinions, though not discussing the relevance of the grouping rules); United States v. Kimler, 167 F.3d 889, 893–95 (5th Cir. 1999) ("Simply put, Kimler had adequate notice at the time he committed the counterfeiting offense in 1990 that his mail fraud offenses would be grouped with the counterfeiting offense and therefore that the 1990 guidelines would apply.").

153. U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2011)

harm" is a defined term meaning, in part, a situation where:

> the offense level [for a set of crimes] is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, *or* if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.[154]

Note that under this definition, offenses may be wholly unconnected by a common criminal purpose or a common victim; widely disparate counts of fraud ("total amount of harm or loss") or drug offenses ("the quantity of a substance involved") may be grouped under this rule.[155] Some circuits attempt to ease this difficulty with the grouping rules by expressly or impliedly requiring that offense conduct be linked by a common scheme or be part of a unified series of offenses.[156] Neither approach—reliance on the grouping rules or reliance on a series of similar offenses—satisfactorily addresses the situation in which the one-book rule is applied as written and to offenses that raise a true possibility for retroactive punishment.

C. *United States v. Kumar:* The Second Circuit's Blanket Approval of the One-Book Rule

The third and final approach to evaluating the one-book rule was announced by the Second Circuit's decision in *Kumar*.[157] *Kumar* arose from the Securities and Exchange Commission ("SEC") and Department of Justice ("DOJ") investigations of fraudulent accounting practices at Computer Associates ("CA").[158] Defendant Sanjay Kumar joined CA in 1987, became CEO in 2000, and head of the Board of Directors in 2002; defendant Stephen Richards joined CA in 1988 and became Head of North American sales in 1999.[159] From the beginning of their tenure through 2000,[160] the two defendants continued an already-existing accounting practice known as the "35-day month, whereby CA backdated contracts

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154. *Id.* § 3D1.2(d) (emphasis added).

155. *Id.*

156. *See* United States v. Bailey, 123 F.3d 1381, 1404–05 (11th Cir. 1997) ("[T]he one book rule, together with the Guidelines grouping rules and relevant conduct, provide that related offenses *committed in a series* will be sentenced together under the . . . Manual in effect at the end of the series.") (emphasis added); *see also* United States v. Santopietro, 166 F.3d 88, 96 (2d Cir. 1999) (a pre-*Kumar* opinion noting that several circuits had upheld the application of the one-book rule in circumstances involving a "series of similar offenses," but declining to rule on the issue of the one-book rule's constitutionality).

157. United States v. Kumar, 617 F.3d 612, 617 (2d Cir. 2010).

158. *Id.*

159. *Id.*

160. *Id.* at 618 n.2 (noting—and the Government appears to have accepted—that the accounting practices underlying the investigation and indictments concluded in 2000).

executed in the first few days of a financial quarter to recognize that revenue in the prior quarter."[161] The SEC/DOJ investigation began in 2002, and the agencies subpoenaed the defendants for interviews in 2003.[162] "On September 22, 2004, CA entered into a deferred prosecution agreement with the United States Attorney's Office ("USAO") and a civil settlement with the SEC."[163] The next day, an indictment was unsealed charging Kumar and Richards.[164] A superseding indictment followed on May 17, 2005, charging Richards with conspiracy to commit, and substantive counts of, securities and wire fraud; filing false public statements with the SEC and perjury; and with obstruction of justice arising out of false exculpatory statements to CA's counsel and the SEC.[165] Kumar was charged with the same offenses, although his obstruction offense was premised on different actions, with "the government alleg[ing] that Kumar, in an effort to cover up the existence of the 35-day month practice, lied to CA's outside counsel, instructed CA's general counsel to coach CA employees to lie, authorized CA's general counsel to pay a $3.7 million bribe to an individual to procure his silence, and lied to FBI agents and others during his interview at the USAO's office."[166]

In the case of each defendant, the underlying fraud was completed in 2000, but the obstruction of the government's investigation began in 2002 and continued through the time of the superseding indictment.[167] In April of 2006, they each pled guilty to the indictment and were sentenced under the then-current 2005 version of the Guidelines Manual.[168] The defendants objected to the use of the 2005 Manual on the grounds that changes made to the Guidelines in 2001, 2002, and 2003[169] resulted in a 20-point increase in their offense levels in comparison to their offense levels under the 1998 Manual, which was in force at the time the 35-day month scheme ended in 2000.[170] The Government contended that the one-book rule obviated any ex post facto problems in the application of the later Manual because the defendants' obstruction offenses had been committed after the publication of the increased offense levels.[171]

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161. *Id.* at 617.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 618.

167. *See id.* at 641 ("Beginning in September 2002 and continuing until April 2004, the defendants engaged in various acts designed to cover up their previously committed conspiracy and fraud. In a 2005 superseding indictment—the original indictment had been handed down in 2004—the defendants were charged with committing fraud and conspiracy . . . .") (internal citation omitted).

168. *Id.*

169. *See id.* at 624, 625 n.10. No further, relevant increases to offense levels existed as between the 2003 and 2005 Manuals. Thus, the district court and Second Circuit considered the 2005 Manual's application—as the then-current Manual—rather than the application of the 2003 Manual. *Id.*

170. *Id.* at 618 n.2.

171. *Id.* at 625.

The Second Circuit began its analysis by describing the two positions of its sister circuits, as outlined above.[172] The court then focused squarely on the Ex Post Facto Clause's overriding concern: notice to the defendant of the consequences of his actions. The court found that the one-book rule—regardless of the applicability of the grouping rules or the similarity of the crimes at issue—had been in force prior to the defendants' obstruction offenses and, therefore, had placed them on notice of the applicability of the later Guidelines Manual to both their pre- and post-amendment offenses.[173] The Second Circuit's explanation echoed the justifications long articulated with respect to other straddle offenses:

> As to notice, we observe that prior to the commission of their obstruction offenses the defendants could have altered their conduct so as to avoid any heightened punishment imposed on the basis of the one-book rule by choosing not to obstruct the government's investigation of their prior fraud.[174]

The Second Circuit also relied on an analogy between the one-book rule's effect and the effect of recidivist statutes that increase punishments for subsequent crimes on the basis of former crimes.[175] The court rejected the relevance of any contention that recidivist statutes merely increase punishment of the subsequent offense because that offense is more culpable than prior offenses:

> It might also be argued that the recidivist statutes impose punishment upon only a single crime, the prior offenses having already been committed and for which the defendant had been sentenced . . . . [This] distinction between the recidivist statutes and the one-book rule makes neither a practical nor a logical difference for purposes of an analysis under the *Ex Post Facto* clause. In both cases, prior conduct becomes the basis for imposing a heightened sentence only upon conviction for a later criminal act.[176]

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172. *Id.* at 626–27; *see infra* Part V.A.–B.

173. *Id.* at 628.

174. *Id. See supra* Part IV.B; *see also* Moore v. Missouri, 159 U.S. 673, 676–77 ("[T]he law . . . imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime."); Rand v. Commonwealth, 9 Gratt. 738, 743 (Va. 1852) ("One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew or is presumed to have known, before the commission of the second offence, all the penalties denounced against it; and if in some sense the additional punishment may be said to be a consequence of the first offence, (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence; but one which could only arise on the conviction for the second offence, and one therefore, which being fully apprised of in advance, the offender was left free to brave or avoid [it].").

175. *Kumar*, 617 F.3d at 630.

176. *Id.* at 629–630.

Judge Sack authored a dissent to the *Kumar* opinion's ex post facto holding. The core of his objection was that, although the defendants were provided constructive notice of the consequences of their subsequent crimes, such notice was not "fair."[177] The dissent contended that "the notice that the defendants received here was notice as to punishment for the wrong crime: not as to the fraud and conspiracy crimes for which punishment was revised markedly upward, but the subsequent obstruction offenses for which the Guidelines have not changed."[178] Judge Sack found this notice "inconsequential" because "the defendants were not subjected to an increased sentence for obstruction; they were subjected to an increased sentence for already completed frauds."[179] The dissent, therefore, attempted to freeze the punishment for an earlier crime regardless of the then-extant consequences of that defendant's subsequent acts. Responding to Judge Sack's dissent, the majority repeated its rejection of this attempt to render subsequent acts irrelevant to the ex post facto analysis, noting that the dissent "fails to acknowledge that the stiffer penalty is imposed only because the defendant committed earlier crimes."[180]

The *Kumar* analysis varies from those of other circuits upholding the application of the one-book rule to straddle crimes in that it rejects any reliance on the grouping rules of the Guidelines or the similarity of the offenses. "[T]he government's assertion that the sentences do not violate the *Ex Post Facto* clause because the[] counts were properly grouped pursuant to § 3D1.2 is misplaced. If the sentences do not offend the *Ex Post Facto* clause, it is only because the application of the one-book rule is not retrospective."[181] This conclusion is the logical result of the justifications underpinning the court's maintenance of heightened punishments in cases of straddle crimes. The relevant question for purposes of establishing constitutionality under the Ex Post Facto Clause is whether the defendant had notice of the consequences of his actions; what those actions are, or what the consequences may be, are irrelevant to an ex post facto analysis. The issue of "when" predominates the separate issue of "what."

The Second Circuit's holding in *Kumar* was correct as an application of the Ex Post Facto Clause. It will be interesting to see whether those circuits that have upheld the one-book rule with respect to groupable offenses will adopt the *Kumar* approach when ultimately faced

177. *Id.* at 646 (Sack, J., dissenting).

178. *Id.* at 643 (Sack, J., dissenting).

179. *Id.* As previously mentioned, *see supra* note 175, Judge Sack's concerns were also motivated in part by his concern that the defendants had essentially been notified that their punishments may be retroactively increased. *Kumar*, 617 F.3d at 648 (Sack, J., dissenting). The majority's response demonstrated its understanding that the consequences of the defendants' second offenses were not ambiguous in the way the dissent implied. *Id.* at 629 n.15.

180. *Id.* at 630 n.16.

181. *Id.* at 625–26 n.11 (internal quotation and citation omitted).

with the one-book rule's application to offenses not susceptible to grouping.[182]

VI. The *Kumar* Problem

Though *Kumar* may be correct as an application of the Ex Post Facto Clause, the application of heightened punishment to previous conduct—despite the triggering event of a subsequent offense—is nevertheless problematic and even unfair. Contrary to the assertions of the *Kumar* dissent, however, the unfairness of the one-book rule's application to straddle offenses does not inhere in any notion of retroactivity, as the *Kumar* majority rightly contended. Rather, the application of the one-book rule to offenses straddling an amendment to the Guidelines contravenes the central justification for enacting the Guidelines themselves: uniformity of punishment for defendants convicted of similar actions. Unlike the *Kumar* dissent or the decisions of the Third and Ninth Circuits, however, the incongruity of the one-book rule's application is a function of its treatment of the *post-amendment* crime, rather than the pre-amendment crime. As such, this problem does not raise an ex post facto concern, but rather a concern with the purported rationality and fairness of the Guidelines as policy.

The Guidelines were originally enacted to combat the problem of widely disparate and, therefore, seemingly arbitrary treatment of similar crimes by different defendants.[183] "Reduction of 'unwarranted sentencing disparities' was a—probably *the*—goal of the Sentencing Reform Act of 1984."[184] In order to provide for a more fair and rational system of punishment, the Sentencing Commission originally undertook the task of creating the Guidelines to provide similar punishments for similar acts. "The guidelines are intended to promote fairness through the establishment

182. *Kumar* briefly addresses, and dismisses, the hypothetical raised in *Ortland* in which the post-amendment offense is somehow dropped or expunged after a sentence is imposed. *See supra* note 143; *Kumar*, 617 F.3d at 631. Although *Kumar* does not address the hypothetical in any substantive way, presumably a circuit governed by the *Kumar* rule would expect that in the event the one-book rule triggering offense were overturned (for example, on appeal, on collateral review, or by pardon), the sentence for the remaining pre-amendment crime would be reassessed by the reviewing court or official.

183. *See, e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1255 (2011) ("The Guidelines are to further the statutes' basic objective, namely greater sentencing uniformity, while also taking account of special individual circumstances, primarily by permitting the sentencing court to depart in nontypical cases."); *see also* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990) ("The purpose of the [Sentencing Reform] Act was to attack the tripartite problems of disparity, dishonesty, and for some offenses, excessive leniency, all seemingly made worse by a system of near unfettered judicial discretion.").

184. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 104 (1998); *see also id.* ("Congress's concern with reducing perceived or assumed disparities in federal sentencing is reflected in the debates leading up to the Act's passage, in the Senate report accompanying it, and in the text of the Act itself. Indeed, the virtue of reducing sentencing disparity stemming from the exercise of judicial discretion was one thing that both conservatives and liberals in Congress could readily agree on, if for different reasons.") (internal citations omitted).

of sanctions proportionate to the severity of the crime and the avoidance of unwarranted disparity by setting similar penalties for similarly situated offenders."[185] Commensurate with the goal of uniformity, the Guidelines were originally mandatory, and even after *Booker*, the Commission continues to gauge its own success in part on the district courts' reliance on the uniformity of sentencing ranges recommended by the now-advisory Guidelines.[186]

The application of the one-book rule in situations where two offenses straddle an increase in punishment for the first offense contravenes the Guidelines' goal of uniformity. As a result of the Ex Post Facto Clause's operation, the punishment for a crime is frozen at the time of commission.[187] Every circuit to consider the issue, with the single exception of the Seventh Circuit in *Demaree*, has concluded that application of a Guidelines Manual to offenses completed prior to that Manual's publication at least poses a risk of unconstitutionally retroactive punishment.[188] This ex post facto implication of the Guidelines, coupled with the Commission's stated goal of uniformity, implies that the concept of uniformity must have a temporal element in the context of assessing punishments under the Guidelines. Indeed, the Guidelines themselves recognize as much and instruct district courts not to apply a more severe version of the Guidelines to offenses completed prior to that version's publication in situations not involving the one-book rule.[189]

Thus, the Commission's concern for uniform treatment of similar actions necessarily implies a concern for uniform treatment of similar actions committed *in the same relevant timeframe*. Necessarily, the Ex Post Facto Clause bars uniformity of treatment of any single offense across Guidelines versions differing in severity; the virtues of consistent sentencing are simply prohibited from trumping the constitutional ban on ex post facto increases to punishment. The Commission's instruction for district courts regarding retroactive application of the Guidelines may be

185. U.S. SENTENCING COMMISSION ANNUAL. REP. at 1 (2010); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A.1(3) (2010) ("After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system."). *See also* Blakely v. Washington, 542 U.S. 296, 316 (2004) (O'Connor, J., dissenting) ("[L]awmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise labyrinthine sentencing and corrections system that lacked any principle except unguided discretion.") (internal quotation marks and alterations omitted).

186. *See* U.S. SENTENCING.GUIDELINES MANUAL § 1A2 (2010) ("[T]he guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.").

187. *See supra* note 97 and accompanying text.

188. *See supra* Part II.B.

189. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2010) ("If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.").

understood as the Commission's endorsement of this understanding of uniformity. As a constitutional matter, the Guidelines may not attempt to impose uniformity of treatment as between defendants each committing the same crime, one in 1990 and one in 2000, if the punishment for that crime was increased under the Guidelines regime in 1995.

Because the punishment for the first crime is frozen in time, the application of heightened punishment under the one-book rule necessarily increases the punishment for the commission of the post-amendment offense. After all, this is the standard justification for upholding increased punishments in the case of straddle crimes. The *Kumar* dissent identifies this fact as a source of unfairness, claiming that it undermines the quality or substance of any notice with respect to the punishments applicable to the pre-amendment crime.[190] Nevertheless, as explained above, *Kumar* correctly holds that the one-book rule immunizes the application of an amended Guidelines Manual from an ex post facto challenge.[191] The punishment punishes the second offense more severely than it otherwise would, even as it relies on the fact of a prior offense—just as every recidivist statute relies on the fact of prior offenses.

This formulation, so often repeated in the ex post facto analyses of courts reviewing recidivist statutes,[192] demonstrates that the disuniformity created by the one-book rule is actually the punishment applied *to the second offense*. Taking an example structured like the situation in *Kumar*, this disuniformity becomes clear. Assume that a defendant commits tax fraud in 1990 at a time when the penalty under the Guidelines is one to five years of imprisonment. In 1995, the Guidelines are amended to provide that tax fraud of the same nature and degree is punishable by six to ten years of imprisonment. In 1996, an investigation begins and the defendant endeavors to obstruct its progress, an offense that, alone, would carry a penalty under the Guidelines of one to five years. If convicted for either of the crimes alone, the defendant would face one to five years of imprisonment for a maximum of ten years total (assuming that the offenses were not grouped and that the sentences would run consecutively). However, under the one-book rule, the defendant faces a maximum of fifteen years imprisonment. Because our understanding of the Ex Post Facto Clause requires a court to attribute that added five years to the second crime, the one-book rule increases the punishment for that second crime.

The *Kumar* dissent argues that the majority's reliance on recidivist statutes to justify its understanding of the historical application of the Ex Post Facto Clause is misplaced precisely because the statutes at issue in

190. United States v. Kumar, 617 F.3d 612, 638–50 (2d Cir. 2010) (Sack, J., concurring in part and dissenting in part).

191. *Id.* at 612.

192. *See, e.g.*, State v. Moore, 26 S.W. 345, 346 (Mo. 1894) ("The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense.").

those cases were meant to increase the punishment for the second crime, rather than justify an increased penalty for the first.[193] The dissent's point is irrelevant to the Ex Post Facto Clause analysis, but it does identify why the disuniformity at work in the *Kumar* situation is troublesome. Namely, the Guidelines do not intend, through the mechanism of the one-book rule, to increase the punishment of subsequent offenses on the basis of past criminality. Indeed, the Guidelines' calculation of ranges of punishment already takes into account past criminal behavior in the form of the Criminal History Category.[194]

This tension between the effect of the one-book rule and the Guidelines' overarching concern with uniformity and rationality is troublesome in two respects. First, it may result in a kind of "double counting" for recidivism that the Guidelines do not purport to condone. By increasing punishment for later sentences under both the one-book rule and via the Criminal History Category calculations, the Guidelines seem to unintentionally increase punishment without any justification corresponding to their stated goals of honesty, uniformity, equity, or proportionality.[195] Second, this tension serves to weaken the concept of constructive notice that otherwise supports the constitutionality of the one-book rule under the Ex Post Facto Clause. Although very little in the way of actual notification is required to satisfy the requirements of "fair" or "constructive" notice,[196] for the Guidelines to contradict themselves in such a basic way certainly frays any thread of constructive notice that might otherwise support the application of the Guidelines under fundamental principles of legality.[197]

VII. Conclusion: Solving the *Kumar* Problem

The problem posed by the one-book rule has at least two possible solutions, both of which would resolve the disuniformity in punishment promoted by the one-book rule's application in the *Kumar* situation. First, district courts, faced with the application of an amended Guidelines manual

193. *Kumar*, 617 F.3d at 648–49 (Sack, J., dissenting).

194. U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2010) ("A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.").

195. U.S. SENTENCING GUIDELINES MANUAL § 1A.1(3) (2010).

196. Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 255 (1982) ("Under an ancient Anglo-American common-law doctrine, a law may take effect from the moment it is signed, or an administrative rule may penalize conduct immediately after it is voted on, with no obligation on the lawmakers to publicize or promulgate their enactments. If a citizen acts in unavoidable ignorance of such an unpublicized enactment and runs afoul of the new law, his ignorance may offer him no legal defense.") (footnotes omitted).

197. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189–90 (1985) ("The principle of legality, or *nulla poena sine lege*, condemns judicial crime creation. . . . [A] fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.") (footnotes omitted).

to a pre-amendment crime as a result of the one-book rule's application, could simply refuse to accept the Commission's instruction to apply the amended version. This would be an exercise of the district court's enhanced discretion, post-*Booker*, to vary from the instructions of the Guidelines on the basis of a policy disagreement or finding that the Guidelines themselves fail to reflect the broader sentencing concerns of § 3553(a).[198] Pursuant to § 3553(a)(4), a district court must consider "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . that . . . are in effect on the date the defendant is sentenced . . . ."[199] Despite that direction, a district court adopting the reasons for jettisoning the one-book rule could ignore this requirement without risking a remand for resentencing so long as its reasoning clarified that it would have, in furtherance of § 3553(a)(6),[200] entirely discounted any Guidelines calculation relying on the one-book rule's application.[201] Once the district court settles on the application of two separate sentencing manuals, it would need to calculate a sentencing range for each and synthesize those ranges into a coherent sentence, just as it would in any situation involving non-groupable offenses.

For cases involving the one-book rule's application to a series of similar offenses,[202] district courts would be in a position to gauge whether the normal policy justifications for heightened punishment of subsequent crimes (i.e., greater culpability evidenced by recidivism) should apply so as to require a higher punishment than would be recommended by a calculation involving both a pre- and post-amendment Guidelines manual. In such cases, the criminal history category calculations may—and likely would—already capture a reasonable degree of heightened punishment. But a reasoned, categorical rejection of the one-book rule's application to straddle offenses would place district courts in a better position to grapple

198. *Cf.* Spears v. United States, 555 U.S. 261, 264 (2009) ("That was indeed the point of *Kimbrough:* a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." (emphasis in original)); Kimbrough v. United States, 552 U.S. 85, 101 (2007) ("The Government acknowledges that the Guidelines are now advisory and that, as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.") (alteration in original) (internal quotation marks omitted); Rita v. United States, 551 U.S. 338, 351 (2007) (district courts may determine that a "Guidelines sentence itself fails properly to reflect § 3553(a) considerations").

199. 18 U.S.C. § 3553(a)(4) (2010).

200. "The court, in determining the particular sentence to be imposed, shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C § 3553(a)(6) (2010).

201. The fact that the one-book range was calculated at all would not, of course, open the district court's sentence to attack under the Ex Post Facto Clause. First, as described above, the one-book rule poses no ex post facto problem. And second, the one-book range would be expressly disclaimed, removing any risk, much less a "significant risk," that such calculation would affect the defendant's ultimate sentence.

202. *See supra* note 150.

with these issues than the current Guidelines regime provides.

A second approach would involve an amendment to the Guidelines by the Sentencing Commission. Specifically, the Commission should revise § 1B1.11(3) to read:

> If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, *and the revised edition would result in a higher guideline range for the first offense than would be the case under the edition in force at the time of the first offense, the court shall apply the revised edition only to the second offense.*

This approach would remedy the effective double-counting of recidivism under both the one-book rule and the Criminal History Category calculations. It would also bring the Guidelines into closer conformity with their stated goal of uniformity, and would avoid the need for district courts to perform the logical acrobatics required to comply with § 3553(a) in their determination of a reasonable sentence.

The courts are still in the process of developing a standard application of the Ex Post Facto Clause to the Sentencing Guidelines in general and the one-book rule in particular. For the time being, the Supreme Court has declined to offer a ruling specifically addressing either issue.[203] In the meantime, the lower courts and the Sentencing Commission have an opportunity to develop an approach to sentencing multiple offenses that will respect the constitutional prohibition of the Ex Post Fact Clause, lend substance to the post-*Booker* grant of rational discretion to the lower courts, and advance the Guidelines' predominant goals.

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203. *See, e.g.*, United States v. Kumar, 617 F.3d 612 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2931 (2011); United States v. Favara, 615 F.3d 824 (7th Cir. 2010) (reaffirming the Seventh Circuit's prior holding in *Demaree*), *cert. denied sub nom.* Custable v. United States, 131 S. Ct. 1812 (2011). At the time of this Article's publication, the petition for certiorari in *Gabayzadeh v. United States*, seeking review of a sentence imposed pursuant to the Second Circuit's decision in *Kumar*, is pending before the Court. Gabayzadeh v. United States, Petition for Certiorari, No. 11-1034 (petition filed Mar. 13, 2012).

ARTICLE

The Decision Zone: The New Stage of Interrogation Created by *Berghuis v. Thompkins*

Meghan Morris*

Abstract

This Article addresses a new stage of interrogation, approved of for the first time in the Supreme Court's 2010 decision, *Berghuis v. Thompkins.* This stage—the "decision zone"—is the period, however brief or prolonged, after officers have read a suspect his rights but before the suspect has decided whether to waive or to invoke those rights. In *Thompkins*, the Supreme Court allowed interrogation during this stage, which lasted almost three hours in that case. In *Thompkins,* the Supreme Court implicitly assented to prolonged interrogation before a suspect decides whether to invoke or to waive his rights, thus creating the decision zone.

This Article argues that existing precedents regarding trickery in interrogations address police behaviors only before a suspect is read his rights or after he has waived his rights and agreed to talk to police. These precedents do not directly address trickery in the decision zone. Such precedents are, in fact, overbroad when applied to interrogation in the decision zone because this interim period is the crucial time in which a suspect is deciding whether or not to waive his rights. Courts must look at the constitutionality of police trickery during this period as a new question not controlled by existing precedents.

Under *Maryland v. Seibert,* police officers may not intentionally

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undermine the effectiveness of Miranda warnings. This Article argues that trickery in the decision zone may be barred by *Seibert* and other precedents in certain instances. This Article proposes a two-factor test for deciding when trickery in the decision zone should be found unconstitutional. First, a court must ask whether a given police practice has the intent and effect of undermining Miranda warnings. Second, the court must ask whether the police practice has a tendency to produce false confessions. These factors, rather than existing precedents regarding trickery in interrogations, should control the new constitutional inquiry into police behavior within the decision zone.

I. Introduction

On June 1, 2010, the Supreme Court handed down an important decision that limited the rights of criminal suspects. In *Berghuis v. Thompkins*, the Court held that a suspect does not invoke his right to silence by remaining silent through two hours and forty-five minutes of interrogation.[1] Officers were allowed to question Thompkins for this prolonged period, despite his refusal to sign a card waiving his rights to silence and counsel.[2] They were allowed to continue questioning him despite his stubborn silence through almost three hours of interrogation.[3] The Supreme Court held that Thompkins did not invoke his right to silence

1. 130 S. Ct. 2250, 2258–60 (2010).
2. *Id.* at 2255–56.
3. *Id.*

through this long silence,[4] and that he then validly and voluntarily waived his right to silence in the following exchange:

> [Detective] Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away.[5]

The Court held that these statements were constitutionally admitted into evidence at Thompkins's trial for first-degree murder.[6]

The *Thompkins* decision applied the standard from *Davis v. United States*, which involved the right to counsel and required suspects to clearly and unambiguously invoke their constitutional rights.[7] The Court reasoned that since interrogation must cease when a suspect invokes either the right to counsel or the right to silence, courts should apply the *Davis* standard in both cases.[8] Requiring clear invocation "'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity."[9]

The *Thompkins* decision has one particularly important implication. Supreme Court precedent allows implied waivers of the right to silence, which means that police may interrogate a suspect without an explicit written or verbal waiver.[10] But *Thompkins* is the first decision to explicitly allow police to interrogate a suspect before obtaining *any* waiver, whether implied or explicit, of a suspect's constitutional rights.[11] This is a new and important limitation on suspects' rights. It creates a new stage of interrogation—a legal limbo—during the window, however brief or prolonged, when a suspect has heard his *Miranda* warnings but has not yet waived his rights.[12]

Thompkins does not tell us what police actions or interrogation techniques are constitutional in this limbo. The legal landscape here is different from the period before a suspect has been read *Miranda* warnings

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4. *Id.* at 2259–60.

5. *Id.* at 2257 (alterations in original) (citations omitted).

6. *Id.* at 2264.

7. *See id.* at 2259–60; Davis v. United States, 512 U.S. 452, 458–59 (1994). In *Davis*, the Court held that the statement "[m]aybe I should talk to a lawyer" was not clear or unambiguous enough to invoke the accused's right to counsel. *Id.* at 462.

8. *Thompkins*, 130 S. Ct. at 2259–60.

9. *Id.* at 2260 (alteration in original) (quoting *Davis*, 512 U.S. at 458–59).

10. *See* North Carolina v. Butler, 441 U.S. 369, 374–75 (1979).

11. *Thompkins*, 130 S. Ct. at 2263.

12. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). In *Miranda*, the Court stated that unless other effective procedural safeguards were devised, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

as well as from the period after a suspect has validly waived his rights. The interval between *Miranda* warnings and a valid waiver, which I will call the "decision zone," is the period in which a suspect mulls over whether to waive or to invoke his rights to silence and counsel. The decision zone is thus a critical time for a suspect—it is when he considers whether to speak freely to the police or to preserve his rights to silence and counsel. This stage may last just seconds, or it may last hours, as it did in *Thompkins*.[13] In *Thompkins*, the Supreme Court approved of interrogation in the decision zone.[14] However, the Court's decision does not imply that all police interrogation tactics that are acceptable after a suspect validly waives his rights are necessarily allowable in the decision zone. Instead, the decision zone is a prime target for *Miranda*'s warning that a waiver may not be procured through cajoling or trickery.[15] I propose that the limit on *Thompkins*'s seemingly sweeping implications is *Miranda*'s language regarding "trickery."

Miranda bars police from tricking a suspect *into* a waiver of his rights.[16] This language particularly applies to police actions in the decision zone—during the minutes or hours of an interrogation before a suspect waives his rights. Under existing precedent, lying about evidence, pretending not to be an adversary, and minimizing the importance of *Miranda* warnings are generally constitutionally acceptable interrogation techniques.[17] Meanwhile, knowingly exploiting a suspect's mental illness, youth, or cognitive disability may be unconstitutional depending on the circumstances.[18] But what police can do before a suspect waives his or her rights is a completely different issue from what they can do during interrogation after a waiver.[19] *Miranda* only states that a suspect may not be "threatened, tricked, or cajoled *into* a waiver[.]"[20] Therefore, police have more latitude after a suspect voluntarily, knowingly, and intelligently waives his rights.[21] Under existing precedent, it is far worse for police to taint a suspect's decision to waive his rights than it is for them to influence his post-waiver decision to confess.[22] Put simply, precedents regarding

13. *Thompkins*, 130 S. Ct. at 2258–60.

14. *Id.* at 2264.

15. *Miranda*, 384 U.S. at 476 ("[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

16. *See id.*

17. *See infra* notes 88–89, 134–138 and accompanying text.

18. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432–35 (2000) (chronicling the development of "the law governing the admission of confessions"); Colorado v. Connelly, 479 U.S. 157, 163–67 (1986) (noting the development of the Supreme Court's "involuntary confession" jurisprudence, describing mental condition as a "significant factor in the 'voluntariness' calculus").

19. *See Miranda*, 384 U.S. at 444 (describing custodial interrogation and requiring procedural safeguards prior to interrogation to ensure protection of the privilege against self-incrimination).

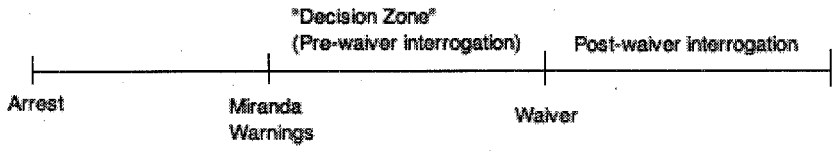
20. *Id.* at 476 (emphasis added).

21. *See id.* at 479.

22. *See Dickerson*, 530 U.S. at 432–36 (recognizing that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements" and describing the *Miranda*

post-waiver police actions are overbroad when applied to pre-waiver interrogation. Thus, this Article considers what otherwise acceptable interrogation tactics might be unconstitutional in the decision zone.

Figure 1: Timeline of an interview involving interrogation between warnings and waiver.



II. Background

The *Thompkins* decision is the latest in a line of cases that have retreated from or cabined the protective principles of *Miranda v. Arizona*.[23] In that seminal case, the Supreme Court promulgated warnings to ensure that police "use . . . procedural safeguards effective to secure the privilege against self-incrimination."[24] The Court went on to say that "if [an accused] is alone and indicates *in any manner* that he does not wish to be interrogated, the police may not question him."[25] In addition to the lack of "full warnings of constitutional rights," the Court was concerned with "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements . . . ."[26] Further, the Court specifically stated that most modern coercion was mental, and not physical.[27] Indeed, the psychological tactics employed by detectives seemed of particular concern because they were less obviously coercive.[28] Finally, the Court worried about the pressures inherent in custodial interrogation: "Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of

decision as providing "concrete constitutional guidelines" requiring law enforcement to provide specific warnings pre-interrogation).

23. *See, e.g.*, *id.* at 433–35 (suggesting a distinction between involuntary confessions and *Miranda*-violating confessions); Colorado v. Connelly, 479 U.S. 157, 164 (1986) (holding that official coercion is necessary to vitiate the voluntariness of an accused's confession); Lego v. Twomey, 404 U.S. 477, 486 (1972) (holding that the prosecution must only prove voluntariness by a preponderance of the evidence).

24. *Miranda*, 384 U.S. at 444.

25. *Id.* at 445 (emphasis added).

26. *Id.*

27. *Id.* at 448–49.

28. *See id.* at 445–49.

individuals."[29]

The Court even seemed to preemptively address the situation that arose in *Thompkins*:

> [T]he fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.[30]

Clearly, this dictum has been superseded by the *Thompkins* decision. *Thompkins* stands at least for the proposition that if the police question an accused who has not yet waived his rights for over two hours before he makes a statement, the accused may still voluntarily, knowingly, and intelligently waive his rights simply by responding to questioning.[31] However, it is unclear how far the decision reaches.

In *Thompkins*, the accused knew he was being interrogated. Police officers questioned Thompkins about discrete, named crimes. Thompkins responded to questioning that was clearly meant to incriminate him.[32] When Thompkins made inculpatory statements, he presumably understood that he was being interrogated and that his statements incriminated him. This will not always be the case. The proliferation of deceptive techniques, including feigned sympathy for the suspect, may lead to situations in which a suspect who has received *Miranda* warnings does not understand that a detective is acting as his adversary.[33] One might think that it would be obvious to a suspect, arrested and interrogated by the police, that the officers are his opponents.[34] But many common interrogation techniques are designed to make an accused forget that fact and to believe that it is in his best interest to speak to—and to confess to—the police.[35]

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29. *Id.* at 455.

30. *Id.* at 476.

31. *Thompkins*, 130 S. Ct. at 2262–63.

32. *See id.* at 2256–57 (quoting a detective who asked "[d]o you pray to God to forgive you for shooting that boy down?" Thompkins responded "Yes.").

33. A leading interrogation manual recommends this technique, stating that an interrogator should ask to interview the suspect in a way that "appears beneficial to the suspect," like "Tom, I've been able to eliminate a number of people in this case by having them come in to talk to me. I'd like to arrange a time to meet with you as well." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 89–90 (4th ed. 2004). The manual also recommends that an interrogator establish a rapport with a suspect and offer possible moral excuses for having committed the offense. *Id.* at 93, 213. These techniques are meant to help a suspect forget that the interrogator is his adversary.

34. *See* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 811 (1997) [hereinafter Slobogin, *Deceit*].

35. Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808–09 (2006); *see also*

Some of the limiting language in *Miranda* retains vitality. In particular, the Court has not repudiated its statement that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[36] The tactics the Court described and disapproved of in *Miranda*—isolating the suspect, projecting confidence in the suspect's guilt, lying about the existence of evidence against the suspect, and minimizing the seriousness of the offense—have been generally accepted tactics in obtaining a confession.[37] However, if suspects may be questioned without a waiver, and if they may then waive their rights solely by responding to questioning, then it is time to revisit *Miranda*'s language regarding trickery and consider how it applies in such interrogations. To ensure that suspects' rights are protected, it is essential that an implied waiver after a long interrogation not be obtained through deceit or trickery. Interrogations in which suspects are read their rights but refuse to waive them are a minority of all interrogations conducted,[38] but they are prime targets for *Miranda*'s admonition that suspects may not be tricked into a waiver of their constitutional rights.

III. Unconstitutional Trickery in the Decision Zone: A Two-Factor Test

The *Miranda* Court disapprovingly noted that "interrogators sometimes are instructed to induce a confession out of trickery."[39] The Court also surveyed a range of interrogation techniques, including displaying complete confidence in the suspect's guilt, offering excuses for why he might have committed the crime, and interrupting questioning to place the suspect in a line-up, possibly with fictitious witnesses to identify him.[40] But the Court did not say that these techniques were unconstitutional, nor did it say that they constituted "trickery" per se. So what exactly is trickery? It must be some subset of psychologically coercive interrogation practices, but the Court did not define it in *Miranda* and has illuminated its contours only vaguely through case-by-case

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INBAU ET AL., *supra* note 33, at 419 ("Ordinary people do not act against self-interest without at least a temporary perception of a positive gain in doing so."). The interrogation manual reassuringly states that "[i]t must be remembered that none of the [prescribed interrogation] steps is apt to make an innocent person confess and that all the steps are legally as well as morally justifiable." INBAU ET AL., *supra* note 33, at 212.

36. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

37. *See id.* at 450; *see also* Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 391–95 (2007) [hereinafter Kassin, *Police Interviewing*]; *see generally* INBAU ET AL., *supra* note 33.

38. Kassin, *Police Interviewing*, *supra* note 37, at 394. In Kassin's study, police officers estimated that 81% of people waive their *Miranda* rights. *Id.* at 389. Kassin surveys other research to show that this estimate is fairly accurate: most studies estimate that about four-fifths of suspects waive their rights at the beginning of an interrogation. *Id.* at 383. Only one to four percent of people waive their rights but then invoke them during the interrogation. *Id.* at 394.

39. *Miranda*, 381 U.S. at 453.

40. *Id.* at 449–55.

determinations.[41] Commentators and scholars have catalogued police interrogation techniques,[42] critiqued or supported the use of deception in police interrogation,[43] and discussed the exploitation of suspects' weaknesses, particularly youth.[44] But few have explored the range of tactics that might be considered trickery, or how the use of *Miranda*'s language regarding trickery might limit precedents, like *Berghuis v. Thompkins*, that curtail suspects' rights and allow police interrogation before a suspect has waived his or her rights.

Several post-*Miranda* cases have considered what constitutes unconstitutional trickery, but all, apparently, only after the suspect has executed a waiver of his rights. The Burger and Rehnquist Courts handed down a few clear limitations on what might be considered trickery in the post-waiver context. In *Moran v. Burbine*, the Court confronted a situation in which police failed to inform an accused that a lawyer had been hired for him and that she had asked officers not to question him without her.[45] The Court found that this was not "the kind of 'trick[ery]' that can vitiate the validity of a waiver."[46] In *Colorado v. Connelly*, the Court required some sort of police coercion to render a confession invalid.[47] Thus, a spontaneous confession prompted by psychosis was admissible at the suspect's trial.[48] The Court has also found that a suspect's confession to murder in response to interrogation was voluntary even though he did not realize that the questioning would cover that offense.[49] The Court explicitly declined to hold that "mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a

41. *See, e.g.*, Missouri v. Seibert, 542 U.S. 600 (2004); Colorado v. Connelly, 479 U.S. 157 (1986); Colorado v. Spring, 479 U.S. 564 (1987); Frazier v. Cupp, 394 U.S. 731 (1969). For a discussion of some of these determinations, see *infra* notes 45–52 and accompanying text.

42. *See, e.g.*, Kassin, *Police Interviewing*, *supra* note 37 (describing police interrogation techniques); Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 401–02, 403–04 (1999) (same).

43. *See, e.g.*, Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1254–66 (2007) (describing potential tests for judging the significance of implied and explicit deception practiced before *Miranda* warnings and waiver); Gohara, *supra* note 35, at 831–40 (critiquing police interrogation techniques involving use of deception); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1185 (2001) (justifying lying during a police interrogation); Slobogin, *Deceit*, *supra* note 34, at 778–88 (discussing both the merits and moral dilemmas of police lying during interrogations).

44. *See, e.g.*, Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 233, 315 (2006) (describing the exploitation of youth witnesses); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992 (2005) (describing the difficulties that youth face during police interrogations).

45. 475 U.S. 412, 417 (1986).

46. *Id.* at 423 (citing Miranda v. Arizona, 384 U.S. 436, 476 (1966)).

47. Colorado v. Connelly, 479 U.S. 157, 164 (1986).

48. *Id.* at 161, 167.

49. Colorado v. Spring, 479 U.S. 564, 575 (1987).

suspect's waiver of *Miranda* rights."[50] The Court noted, however, that in some cases, "affirmative misrepresentations by the police" might invalidate a suspect's waiver of his rights.[51]

Even with these limitations, a wide variety of investigative techniques could be considered unconstitutional trickery if the suspect has refused to waive his or her rights. Deceptive police department-wide practices meant to procure a suspect's waiver of *Miranda* rights are suspect under *Missouri v. Seibert*.[52] Lying about the existence of evidence incriminating the suspect, minimizing the importance of *Miranda* warnings, and pretending to be a friend rather than an adversary before the suspect has waived his rights might be examples.[53] Knowingly exploiting a suspect's youth, inexperience, low IQ, or mental illness could also be considered unconstitutional trickery.[54] Many of these techniques are quite common,[55] which might weigh in favor of considering them constitutional. But we also need to consider what the *Miranda* Court disapproved of or feared when it spoke of trickery,[56] and what the average person might think of as duplicitous or unfair when considering police tactics.

I propose the following two-factor analysis for determining whether police actions in the decision zone constitute unconstitutional trickery: First, courts should consider whether an interrogation technique is meant to undermine the *Miranda* warnings previously given, and whether the technique has the effect of tricking or cajoling a suspect into a waiver of his constitutional rights; second, courts should consider whether a given interrogation practice may induce false confessions.[57] As Miriam Gohara has cogently argued, the tendency of coercive tactics to produce false confessions should be a key factor in determining whether those tactics constitute unconstitutional trickery.[58] I would add that such a tendency is

50. *Id.* at 576.

51. *Id.* at 576, n.8.

52. Missouri v. Seibert, 542 U.S. 600, 609–10 (2004).

53. *See* sources cited *supra* note 43.

54. *See* sources cited *supra* note 44.

55. *See* INBAU ET AL., *supra* note 33, at 89–90, 93, 213, 419–22; Kassin, *Police Interviewing*, *supra* note 37, at 388 Table 2.

56. The *Miranda* Court did not want existing coercive methods of interrogation to persist. "The requirement of warnings and waiver of rights is a fundamental [sic] with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Miranda v. Arizona, 384 U.S. 436, 476 (1966).

57. As even interrogators have begun to realize, innocent people may falsely confess when subjected to certain interrogation methods. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 195–236 (2008). In this chapter, Leo discusses two main types of false confessions: coerced and persuaded. Coerced confessions occur when the suspect does not actually believe that he is guilty, but nonetheless decides to confess to escape the interrogation or to gain a more lenient sentence. Persuaded confessions occur when police convince a suspect to temporarily doubt his innocence and believe it is more likely than not that he committed the crime of which he is accused. Although the suspect does not necessarily internalize false memories, he comes to doubt his sanity or his memory, and thus becomes willing to take responsibility for the crime. *Id.*

58. *See generally* Gohara, *supra* note 35.

particularly problematic in the decision zone—when the suspect is weighing whether to remain silent or to speak to the police. It is at this time when the suspect is determining the best course forward, and thus when he may be most susceptible to police trickery—such as the production of false evidence against him—that may make it appear rational to confess falsely. The remainder of this Article explores the precedential basis for the two-factor test and then applies the test to common interrogation practices.

A. Factor One: Intent to Undermine *Miranda*

When a person refuses to waive his rights directly after receiving *Miranda* warnings, this creates the decision zone scenario. Officers may begin the interrogation without a waiver. A person who fails to waive his rights immediately expresses some reluctance to speak with the police, and police may interpret this reluctance suspiciously—believing that the suspect has something to hide. They may actually attempt to press the suspect harder than if he had waived his rights. But, in the decision zone, police should not be able to use tactics that undermine the previously given *Miranda* warnings.

The first factor in my proposed test for unconstitutional police trickery in the decision zone is whether a given police tactic is intended to undermine *Miranda* warnings and prompt a suspect to speak. After *Berghuis v. Thompkins*, an incriminating statement can alone constitute a waiver of a suspect's right to be silent, even if that suspect has previously refused to waive his rights.[59] Thus, with suspects who refuse to waive their rights, police will be tempted to use tactics that cajole or trick a suspect into speaking. When interrogators do this, courts should evaluate police officers' actions by asking whether the interrogation practice was intended to undermine the suspect's *Miranda* warnings.

The Supreme Court has set a strong precedent of looking to police department practices and intentions in determining whether interrogation techniques are constitutional. In *Missouri v. Seibert*, the Court invalidated a confession obtained through a two-step procedure.[60] It was the police department's practice to first interrogate the suspect until he confessed; then, an officer would administer *Miranda* warnings and the interrogation would continue until the suspect confessed again.[61] This practice was not limited to a single police department, but was promoted by "a national police training organization" and organizations like the Police Law Institute.[62] Officers successfully used the two-step process against

59. *See supra* notes 1–6 and accompanying text.

60. 542 U.S. 600, 616–17 (2004).

61. *Id.* at 604.

62. *Id.* at 609–10, 610 n.2. Though note that not all interrogation experts advocated this "question-first" practice. Interestingly, a later edition of the interrogation manual dissected in *Miranda* understood *Oregon v. Elstad*, 470 U.S. 298 (1985) only to salvage unwarned confessions where there was a good-faith failure to give *Miranda* warnings. *See* INBAU, ET AL., *supra* note 33, at 297. Thus, the

Seibert.[63] Missouri police interrogated her, procured a confession, and then gave her *Miranda* warnings, after which she confessed again.[64]

The plurality held that *Miranda* warnings delivered in the middle of an interrogation were sufficient if they were "effective enough to accomplish their object," which is to inform a suspect of his rights and his ability to invoke those rights.[65] In the case of the two-step procedure, the Court held that the meaning and purpose of *Miranda* warnings were so weakened by the prior interrogation that the mid-interrogation warnings were ineffective.[66] A suspect may have even reasonably believed that she did not have the rights to silence or counsel in the preceding interrogation, before she was given warnings.[67] Justice Kennedy concurred on narrower grounds, holding that *Miranda*-defective statements were inadmissible only if police deliberately limited the effectiveness of the *Miranda* warnings.[68] The existence of a department-wide strategy meant to undermine *Miranda* warnings in *Seibert* seemed to make the difference to Justice Kennedy.[69] Most lower courts have followed Justice Kennedy's reasoning.[70]

The logic of *Seibert* extends to procedures beyond the two-step interrogation used in that case. A driving concern of both the plurality and Kennedy's concurrence in *Seibert* apparently is that police ought not to purposefully undermine the effectiveness of *Miranda* warnings. If such behavior were allowed, then *Miranda* warnings would be rendered a meaningless exercise—"simply a preliminary ritual"—to otherwise coercive interrogation.[71] As the *Seibert* Court explained: "The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed . . . . it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance."[72]

Similarly, in his concurrence, Justice Kennedy stated that the case involved "a deliberate violation of *Miranda*. The *Miranda* warning was

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manual disavowed the deliberate use of the two-step procedure to undermine the effect of *Miranda* warnings. *Id.*

63. *Seibert*, 542 U.S. 604–06.

64. *Id.*

65. *Id.* at 615.

66. *Id.* at 615–16.

67. *Id.* at 620 (Kennedy, J., concurring).

68. *Id.* at 622 (Kennedy, J., concurring).

69. *See id.* at 621–22 (Kennedy, J., concurring).

70. *See, e.g.*, United States v. Williams, 435 F.3d 1148, 1157–58 (9th Cir. 2006) ("[W]e hold that a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights."); United States v. Kiam, 432 F.3d 524, 532 (3d Cir. 2006) (holding that the Court would apply the test from Justice Kennedy's opinion, requiring a deliberate flouting of *Miranda* and even then allowing certain measures to cure this unconstitutional action); United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004).

71. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966).

72. Missouri v. Seibert, 542 U.S. 600, 611 (2004).

withheld to obscure both the practical and legal significance of the admonition when finally given."[73]

Both the *Seibert* plurality and the concurrence focus on police intent to minimize the importance of *Miranda* warnings.[74] *Seibert*'s focus on intent limits the tactics that police may use in interrogating suspects going forward.[75] Under the reasoning of *Seibert*, officers may not purposefully work to limit the effectiveness of *Miranda* warnings.[76] Thus, police intent should be one factor in determining whether a particular tactic constitutes unconstitutional trickery meant to deceive a person into waiving his rights to counsel or silence.

A bare intent to deceive or trick, however, will rarely be sufficient to find police actions unconstitutional. The application of *Seibert* is limited by the clear pattern and practice of undermining *Miranda* warnings in that case.[77] Not long after *Miranda*, the Supreme Court decided *Frazier v. Cupp*, a case in which police officers falsely told a suspect that his cousin had confessed to a crime and had implicated him.[78] The suspect subsequently confessed to a murder, perpetrated along with his cousin.[79] One could argue that police also tricked Frazier by feigning sympathy for him, "suggest[ing] that the victim had started a fight by making homosexual advances."[80] However, the Court did not mention this directly in its voluntariness analysis. Also unmentioned in that part of the opinion is the fact that Frazier had indicated he wanted a lawyer, but was rebuffed by the interrogating officer.[81] The Court used a totality of the circumstances test in evaluating the voluntariness of Frazier's confession and found that an outright, knowing lie by police officers about evidence implicating the accused was insufficient to render his confession involuntary.[82] The Court stressed that Frazier had "received partial warnings of his constitutional rights; this is, of course, a circumstance quite relevant to a finding of voluntariness."[83] The fact that police had lied about his co-defendant's statements was "relevant" to the inquiry, but was insufficient to render his

73. *Id.* at 620 (Kennedy, J., concurring).

74. *See id.* at 616–17; *id.* at 620–21 (Kennedy, J., concurring).

75. *See id.* at 617 ("Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's post-warning statements are inadmissible.").

76. *See id.*

77. *See id.* at 617; *id.* at 620 (Kennedy, J., concurring).

78. Frazier v. Cupp, 394 U.S. 731, 737–38 (1969); *see also* Gohara, *supra* note 35, at 796.

79. *Frazier*, 394 U.S. at 732, 738.

80. *See id.* at 738.

81. *Id.* Frazier stated "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." *Id.* The interrogating officer replied, "You can't be in any more trouble than you are in now," and continued the interrogation. *Id.*

82. *Id.* at 739.

83. *Id.*

confession involuntary.[84] The Court did not specifically mention the officer's feigned sympathy in its voluntariness analysis, but one can imagine that this, too, weighed in the calculus, and was also found insufficient.

Frazier reveals the central role that warnings play in the modern-day voluntariness calculus. Frazier's arrest and interrogation occurred before the *Miranda* decision, so officers were not bound to give the specific warnings that the Court later found constitutionally required.[85] But officers did give Frazier "partial warnings" about his constitutional rights, and this weighed heavily in favor of finding his confession voluntary.[86] Even though the interrogating officers had knowingly lied to Frazier, far overstating their evidence against him by saying his cousin had implicated him, and even though the officers supplied Frazier with what they suggested was an understandable motive for committing a murder, the Court still concluded that Frazier's confession was voluntary because he had been informed of his constitutional rights.[87]

Thus, it cannot be that an officer's intent to deceive a suspect will independently be a decisive factor in determining where unconstitutional trickery exists. Clearly, there are some cases in which officers may constitutionally knowingly deceive a suspect.[88] But an interrogating officer's deceptive intent is—and should be—a factor in the analysis. Under *Seibert*, the relevant intent is not the intent to deceive, but the intent to undermine *Miranda* warnings.[89] If officers intend to undermine the effectiveness of *Miranda* warnings through their actions, this factor should and does make any technique they use constitutionally suspect.

B. Factor Two: Tendency to Produce False Confessions

There is less precedent for using the likelihood of false confessions as a factor in evaluating police tactics, but it is a current judicial consideration for particular categories of suspects. The possibility of false confessions by vulnerable populations such as juveniles and the mentally retarded has been a factor in judicial analyses of punishments for these

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84. *Id.*

85. *See id.* at 732 (Frazier was convicted in an Oregon state court in 1964, two years before the Supreme Court's ruling in *Miranda*).

86. *Id.* at 739.

87. *Id.*

88. *See, e.g.*, United States v. Fleming, 225 F.3d 78, 91 (1st Cir. 2000) (holding that a confession was voluntary when given in response to a promise of immunity from an FBI agent without authority to grant immunity); United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990) ("[I]t is well settled that police may use small deceptions while interrogating witnesses . . . . [and] police are free to solicit confessions by offering to reduce the charges against the defendant."); United States v. Matthews, 942 F.2d 779, 782 (10th Cir. 1991) (finding the suspect's statements voluntary where he was led to believe that if he cooperated, no charges would be brought against him).

89. Missouri v. Seibert, 542 U.S. 600, 622 (2004).

groups.[90] Any particular deceptive interrogation tactic should be more likely to be considered unconstitutional trickery if knowingly employed against these vulnerable groups. However, courts should also extend their analysis to particular police practices that are more likely to induce false confessions, regardless of the suspect's characteristics.

Courts might think of this analysis as similar to an entrapment inquiry. In entrapment cases, a court asks whether given police actions were likely to make a person who was not predisposed to commit a crime act criminally.[91] Part of this inquiry is whether "the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it."[92] The inquiry into police interrogation tactics would be similar: did the government's conduct create a substantial risk that a confession would be made by a person who did not commit the crime?

Certain police tactics may change an innocent suspect's analysis of his options and make it seem rational for him to confess to a crime he did not commit. Obviously, physical coercion can affect the innocent suspect's choices in this way, which is in part why the Supreme Court and the public have disavowed using force in interrogations.[93] But non-physical police coercion can also lead a suspect to confess falsely. In some instances, confessing falsely may seem to be the most rational option.[94] If a particular police tactic is likely to induce false confessions, this should be a factor in a court's trickery analysis.

IV. Application of the Two-Factor Test

A. Lying About Evidence

A common (and commonly critiqued) method of police

90. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) (noting the problem of false confessions with particular concern to those of juveniles); Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) (noting the problem of false confessions and exonerations of people with mental disabilities); In re Jimmy D., 938 N.E.2d 970, 979 (N.Y. 2010) (Lippman, J., dissenting) ("So long as juveniles cannot be altogether preserved from rigors of police interrogation, it would behoove us not to minimize the now well-documented potential for false confessions when suggestible and often impulsive and impaired children are ushered into the police interview room."); State v. Lawrence, 920 A.2d 236, 264 (Conn. 2007) (Palmer, J., concurring) (stating that "children and mentally disabled persons are especially vulnerable to police overreaching . . . [and] it appears that they also are more likely than others to confess falsely even in the absence of improper government coercion").

91. United States v. Hall, 608 F.3d 340, 343 (7th Cir. 2010); United States v. Orisnord, 483 F.3d 1169, 1178 (11th Cir. 2007).

92. United States v. Ryan, 289 F.3d 1339, 1343–44 (11th Cir. 2002) (quoting United States v. Brown, 43 F.3d 618, 623 (11th Cir. 1995)).

93. *See* Chambers v. Florida, 309 U.S. 227, 231–36 (1940); *see also* Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991) ("It has long been held that beating and threatening a person in the course of custodial interrogation violates the fifth and fourteenth amendments of the Constitution.") (citing Adamson v. California, 332 U.S. 46, 54 (1947); Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

94. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 998 (1997).

interrogation involves lying to a suspect about the evidence against him by exaggerating the strength of the State's case.[95] Only a few years after *Miranda*, the Supreme Court considered and upheld the admissibility of a confession when police falsely told the suspect that his accomplice had confessed.[96] In a study by Saul Kassin, in which police self-reported various actions that they took in interrogations on a one (never) to five (always) scale, the average score for "[i]mplying or pretending to have independent evidence of guilt" was a 3.11.[97] This put lying to the suspect regarding the evidence against him below some more widely-accepted techniques like "[c]onducting the interrogation in a small, private room" or "[i]dentifying contradictions in the suspect's story."[98] But, perhaps surprisingly, this tactic was more common than "[a]ppealing to the suspect's religion or conscience" or "[s]howing the suspect photographs of the crime scene or victim."[99] The authors of the study note that because this result is based on self-reporting, it may actually under represent the frequency of this and other possibly coercive tactics.[100] In fact, overstating the evidence police have against the accused is a recommended tactic in at least two widely used interrogation training manuals.[101]

Police officers can and do lie about evidence in a variety of ways. For example, they can give an accused a polygraph and then tell him that he failed. Three percent of officers in Kassin's study reported that this is a tactic they "always" use.[102] Police could state that another person has implicated the suspect in a crime, as the officers did in *Frazier v. Cupp*.[103] They may place a suspect in a line-up where several false witnesses identify him as the perpetrator of crimes other than the one of which he has been accused.[104] They might even go so far as to tell an accused that his

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95. *See* Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1285 (2007) (noting that police lie during interrogations about the strength of the case against the suspect); Gohara, *supra* note 35, at 835 (recommending that laws should prohibit police from misrepresenting the presence or strength of forensic evidence against a suspect); Magid, *supra* note 43, at 1198 (noting that confessions usually occur only after some form of deception by the officer, including exaggerating the strength of the evidence); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1242 (2001) (noting that misrepresenting the strength of the evidence against a suspect is an interrogation tactic); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429 (1996) (noting that police lie about sources of testimonial evidence to convince suspects that they have a solid case).

96. *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969).

97. Kassin, *Police Interviewing*, *supra* note 37, at 388.

98. *Id.*

99. *Id.*

100. *Id.* at 397.

101. INBAU, ET AL., *supra* note 33, at 290–92; CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 142–44 (6th ed. 1994). These are both later editions of training manuals that the Court critiqued in *Miranda v. Arizona*. *See* 384 U.S. 436, 449 n.9 (1966).

102. Kassin, *Police Interviewing*, *supra* note 37, at 388.

103. 394 U.S. 731, 737–38 (1969).

104. *Miranda*, 384 U.S. at 453. The *Miranda* Court quotes another popular interrogation manual from the time, which states that "[i]t is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." O'Hara, FUNDAMENTALS

fingerprints or DNA was found at the scene. In the well-known Central Park Jogger case, a detective falsely told one of the suspects that his fingerprints had been found on the jogger's shorts.[105] In that case, interrogations including false evidence and insinuations that admitting the crime would be in the best interest of the suspects led to five false confessions.[106] All five defendants were exonerated over a decade later through DNA evidence and a confession from the actual perpetrator.[107]

A few courts have invalidated confessions obtained through the presentation of false evidence.[108] These courts seem to be particularly concerned with fabricated documentary evidence that appears to come from reputable sources, rather than simple verbal misrepresentations. For example, in *State v. Cayward*, a Florida appeals court considered false lab reports shown to a nineteen year old suspected of sexual assault.[109] Both reports purported to show that the suspect's semen had been found on the victim's underwear.[110] The police showed the false reports to the defendant during his interrogation intending to procure a confession, and the defendant confessed to the assault.[111] The trial court found that this tactic violated the Due Process Clause, and the court suppressed the ensuing confession.[112] The court stated that police deception did not automatically render a suspect's confession involuntary—particularly when the suspect had been given *Miranda* warnings.[113] The court also noted that several other Florida courts had upheld confessions even when officers made "incorrect, misleading statements to suspects."[114] However, the court found that police acted unconstitutionally when they manufactured documents that appeared to come from respected, independent sources.[115] The court found

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OF CRIMINAL INVESTIGATION 106 (1956).

105. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 897 (2004).

106. *Id.* at 896.

107. *Id.* at 898–99.

108. *See, e.g.*, Commonwealth v. Baity, 237 A.2d 172, 177 (Pa. 1968) ("[A] trick which has no tendency to produce a false confession is a permissible weapon in the interrogator's arsenal."); State v. Cayward, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989); State v. Patton, 826 A.2d 783, 784 (N.J. Super. Ct. App. Div. 2003); State v. Chirokovskcic, 860 A.2d 986, 987 (N.J. Super. Ct. App. Div. 2004).

109. *Cayward*, 552 So. 2d at 972.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 973.

114. *Id.* at 973.

115. *Id.* at 974. The court noted:

> It may well be that a suspect is more impressed and thereby more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him. If one perceives such a difference, it probably originates in the notion that a document which purports to be authoritative impresses one as being inherently more permanent and facially reliable than a simple verbal statement.

that the appearance of impartial reliability in these documents, as opposed to the statements of police who the suspect knows are his adversaries, crossed the line of deception allowed under the Due Process clauses of the Fifth and Fourteenth Amendments.[116]

However, most courts have been unwilling to proscribe the use of false evidence to procure confessions.[117] Lying to a suspect and even presenting him with false documentary evidence have been consistently allowed by the courts. According to the First Circuit, "trickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect."[118]

Courts have found confessions voluntary when police have falsely told the suspect that his fingerprints were found at the scene of the crime, or even showed him a photograph of a fingerprint, pretended it was found at the crime scene, and presented him with false documentation that an expert had determined the fingerprint was his.[119] Similarly, courts have found that falsely suggesting that DNA evidence implicates the suspect does not vitiate the voluntariness of his confession.[120] Courts have allowed a confession to be admitted when police arranged for the suspect to be falsely identified in a line-up or falsely told that he has been identified in some other way.[121] A mock polygraph falsely indicating that the defendant failed the test also does not render a suspect's subsequent confession

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Id.

116. *Id.* at 974.

117. *See, e.g.*, State v. Jackson, 304 S.E.2d 134 (N.C. 1983), *rev'd on other grounds*, 479 U.S. 1077 (1987); Moore v. Hopper, 389 F.Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975); Roe v. People, 363 F.Supp. 788 (W.D.N.Y. 1973).

118. United State v. Byram, 145 F.3d 405, 408 (1st Cir. 1998).

119. Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998); Ledbetter v. Edwards, 35 F.3d 1062, 1066 (6th Cir. 1994); Green v. Scully, 850 F.2d 894, 903–04 (2d Cir. 1988); Sovalik v. State, 612 P.2d 1003, 1007 (Alaska 1980); *see also* Oregon v. Mathiason, 429 U.S. 492, 493–94 (1977) (where an officer falsely told a suspect that his fingerprints were found at the scene before giving *Miranda* warnings).

120. United States v. Bell, 367 F.3d 452, 462 (5th Cir. 2004); Conde v. State, 860 So. 2d 930, 952 (Fla. 2003); Nelson v. State, 850 So. 2d 514, 521–22 (Fla. 2003). As a side note, the Fifth Circuit's analysis in *Bell* seems to require the defendant to prove his innocence before a court can find that confronting him with false evidence in interrogation made his confession involuntary. *See Bell*, 367 F.3d at 460–61.

121. *Ledbetter*, 35 F.3d at 1066; Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992). Like in *Bell*, the *Holland* court seems to require that a suspect show evidence of his innocence to show that presenting false evidence violated Due Process. The court stated that the false evidence "did not lead [Holland] to consider anything beyond his own beliefs regarding his actual guilt or innocence," and thus was not unduly coercive. *Id.*; *see also* Beasley v. United States, 512 A.2d 1007, 1008 (D.C. 1986); People v. Bush, 278 A.D.2d 334, 334 (N.Y. App. Div. 2000), *aff'd sub nom.* Bush v. Portuondo, No. 02-CV-2883(JBW), 2003 WL 23185751 (E.D.N.Y. Oct. 29, 2003); People v. Walker, 278 A.D.2d 852, 853 (N.Y. App. Div. 2000). *But see* Miranda v. Arizona, 384 U.S. 436, 453 (1966) (describing, with seeming disapproval, an interrogation tactic from *O'Hara*, *supra* note 104, where "[t]he accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses").

involuntary.[122] Following the lead of *Frazier v. Cupp*, many courts have upheld confessions when a suspect was falsely told that an alleged accomplice confessed.[123]

It turns out that the most directly deceitful tactic police can use—the one most likely to be considered trickery as that term is commonly used—is not considered by the courts to be unconstitutional trickery per se under a voluntariness analysis.[124] It is only a factor in the totality of the circumstances analysis after a suspect waives his or her *Miranda* rights. However, the same tactics might be regarded differently if employed to undermine *Miranda* warnings and to procure a suspect's waiver of his rights to counsel and silence. Again, precedents regarding voluntariness and police actions after a suspect voluntarily waives his *Miranda* rights are overbroad when applied to situations where the same actions are used to trick or cajole a suspect into waiving those rights.

Some argue that it does not matter whether police lie to a suspect at any point in a custodial interrogation, because this sort of deceit alone does not undermine the suspect's perception of his relationship with the detectives as an adversarial one.[125] If the suspect knows that his interrogators are his "enemies," and they do not challenge this perception, then he will remain on his guard and be skeptical of what they say.[126] He will probably expect his interrogators to lie to him. As long as the evidence does not change the suspect's perception of his own guilt or innocence, the resulting statements will be voluntary.[127] If this is the relevant distinction, then police may deceive a suspect with impunity as long as their relationship is clearly adversarial.

But the relevant distinction is a different one. In the above cases, the suspects had already waived their rights before police lied to them about evidence or used other deceptive tactics. *Miranda*'s language requires being tricked *into* a waiver.[128] Thus, if police use false evidence to *obtain* a waiver of a suspect's rights rather than using this tactic after a waiver, this

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122. People v. Mays, 95 Cal. Rptr. 3d 219, 229 (Dist. Ct. App. 2009); People v. Serrano, 14 A.D.3d 874, 874–75 (N.Y. App. Div. 2005); Contee v. United States, 667 A.2d 103, 104 (D.C. 1995); State v. Farley, 452 S.E.2d 50, 54 (W.Va. 1994).

123. *See, e.g.*, United States v. Montgomery, 555 F.3d 623, 632 (7th Cir. 2009); United States v. Velasquez, 885 F.2d 1076, 1088–89 (3d Cir. 1989); United States v. Petary, 857 F.2d 458, 461 (8th Cir. 1988); United States v. Hill, 701 F. Supp. 1522, 1525 (D. Kan. 1988); United States ex rel. Brandon v. LaVallee, 391 F. Supp. 1150, 1151–52 (S.D.N.Y. 1974); Burch v. State, 343 So. 2d 831, 833 (Fla. 1977).

124. *See, e.g.,* State v. Jackson, 304 S.E.2d 134 (N.C. 1983), *rev'd on other grounds*, 479 U.S. 1077 (1987); Moore v. Hopper, 389 F.Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975); Roe v. People, 363 F.Supp. 788 (W.D.N.Y. 1973).

125. *See* Christopher Slobogin, *Deceit, supra* note 34, at 811. Slobogin writes, "the arrest threshold both limits police deception to openly identified 'enemies' and alerts the potential dupe to the adversarial relationship, [so] such trickery is not inherently immoral . . . ." *Id.*

126. *Id.*

127. *See* Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992).

128. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

would render a suspect's subsequent statements involuntary.[129] Consider the facts in *Berghuis v. Thompkins*, in which the suspect had refused to sign a waiver of his *Miranda* rights.[130] The Court found that Thompkins did not waive his rights until he spoke in response to a detective's question about whether he prayed to God to forgive him for shooting and killing a boy.[131] Thompkins's response to this question constituted an implied waiver of his rights. Thompkins's interrogator appealed to his religious beliefs in a successful effort to obtain inculpatory statements.[132] But Thompkins spoke in response to questioning that was clearly intended to implicate him in a murder.[133] There is no indication that police employed false evidence or lied to Thompkins in his interrogation. They did not use trickery to goad him into speaking and thus waiving his rights.

In the alternative case, if a suspect refuses to waive his rights and police introduce false evidence into the interrogation, I believe that this deception would be directly barred by *Miranda*'s prohibition against using trickery to obtain a waiver.[134] Under the two-factor test outlined above—intent to undermine *Miranda* warnings and a probability of false confessions—presenting false evidence in the decision zone would be found unconstitutional. First, if police present false evidence in the decision zone, this would seem a clear attempt to undermine the previously read warnings about the rights to silence and counsel. The purpose of confronting a suspect with false evidence at this point would be to goad him into speaking, either to defend himself or to confess. Further, given the frequency of this practice and its recommendation in widely-used interrogation manuals, the use of false evidence seems to have the same official approval that accompanied the two-step procedure in *Seibert*. Second, the use of false evidence as an interrogation tactic has been a key factor in several false-confession cases.[135] Confronting a suspect with false evidence implicating him in a crime may change the innocent suspect's cost-benefit analysis. Given the large number of well-publicized exonerations in the last decade, he will know that conviction is a realistic possibility even if he is innocent. The suspect may believe his best option

129. *See id.*

130. 130 S. Ct. 2250, 2262–63 (2010).

131. *Id.* at 2263.

132. *Id.*

133. *Id.* at 2257. The detective asked "Do you pray to God to forgive you for shooting that boy down?" *Id.*

134. *See Miranda*, 384 U.S. at 476. This is a different situation from what Robert P. Mosteller considers in his article. *See* Mosteller, *supra* note 43. Mosteller considers deception after arrest but before police read a suspect *Miranda* warnings. *Id.* at 1257. In contrast, the situation presented here is analogous to the one in *Thompkins*: the suspect has been read *Miranda* warnings, but has refused to waive his rights.

135. Drizin & Leo, *supra* note 105, at 897; Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 197 (2005); *see also* Saul M. Kassin & Katherine L. Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125–26 (1996).

is to confess falsely and remain in the interrogator's good graces, rather than to insist on his innocence and receive a longer sentence due to his refusal to cooperate. A false confession when presented with seemingly valid evidence of guilt can be a rational choice.[136] Thus, presenting false evidence in the decision zone should be considered unconstitutional trickery that taints any subsequent waiver of the suspect's rights to counsel and silence.

B. Pretending Not to Be an Adversary

Virtually all court decisions regarding the voluntariness of confessions in the face of detectives' ploys and stratagems are premised on a suspect's recognition that his interrogator is his adversary.[137] The idea is that since a suspect knows that the interrogator's interests are contrary to his own, he will distrust the interrogator and will not be susceptible to her pressures, tricks, or lies. But, in practice, interrogators work to develop a rapport and to get suspects to believe that the interrogators are working to help them.[138] The Inbau Manual recommends attempting to connect with suspects in a natural way, to express sympathy for their situation, and to offer seemingly understandable reasons for committing the crime at issue.[139] The manual instructs interrogators to induce confessions out of "self-interest" and help suspects forget that the interrogator is their adversary.[140]

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136. Ofshe & Leo, *supra* note 94, at 1007–08.

137. *See* Slobogin, *Deceit, supra* note 34, at 811.

138. *See* Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 261–62 (1996); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 614–617 (1979). An extreme example of this is documented in an article by Peter Carlson, where he writes about a particular interrogator who questioned a man suspected of murdering a woman. *See* Peter Carlson, *You Have the Right to Remain Silent . . . But in the Post-Miranda Age, the Police Have Found New and Creative Ways to Make You Talk*, WASH. POST, Sept. 13, 1998, at W6. The interrogator spoke to the suspect about home repairs, something they both did, and then, after a while,

> the killer mentioned that he'd dated a woman whose house he'd repaired and she dumped him. [The detective] loved that. That was his opening. He started talking about his ex-wife, how rotten she was, how much he hated her. He started getting all worked up. Pretty soon, he sounded like a psycho killer himself, saying he'd love to blow her head off if only he could get away with it.

Id. The detective then "eased into the subject of the woman that the killer had shot twice in the head during a carjacking." *Id.* He asked what happened with her, and when the suspect said that the woman was screaming and wouldn't shut up, the detective said, "I don't blame you. I hate it when [bleep] women start running their [bleep] mouths." *Id.* The suspect then confessed to shooting the woman to shut her up. *Id.* The man was convicted and still sometimes calls the interrogator because he doesn't have anyone to talk to in prison. *Id.* When he calls, the interrogator doesn't say "what no interrogator would ever tell a suspect because it would give away one of the secrets of the trade: 'Hey, I'm not your friend. It was a [bleep] put-on.'" *Id.*

139. INBAU ET AL., *supra* note 33, at 89–90, 93, 213.

140. INBAU ET AL., *supra* note 33, at 93, 419.

Courts seem to approve almost uniformly of feigning sympathy for suspects to encourage confessions.[141] In *Miller v. Fenton*, a case on remand from the Supreme Court, the Third Circuit found that a "friendly approach" did not render a confession involuntary.[142] The Court did recognize that:

> Excessive friendliness on the part of an interrogator can be deceptive. In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily make only to a friend, not to the police.[143]

But the Court found that playing the "good guy" was an acceptable interrogation tactic, and that other circumstances would have to add to the interrogation's non-adversarial feel to render it coercive.[144] Similarly, in *Anders v. State*, a sheriff pretended to befriend the suspect in an effort to get him to confess.[145] The court found that this pretension was acceptable, and did not render the suspect's confession invalid, because the suspect testified that he knew that the officer was not actually his friend.[146] Though the atmosphere was not adversarial, the suspect still knew, in retrospect, that the officer was his adversary, and that recognition was enough to preserve the voluntariness of the suspect's statements.[147]

The main case in which an officer's friendly attitude was found to be constitutionally problematic was *Spano v. New York*.[148] The interrogator and the suspect actually were friends.[149] The Court found that the interrogator exerted improper influence over his friend, the suspect, by suggesting that if the suspect failed to confess, the interrogator would lose his job.[150] But—barring an actual, pre-existing relationship between the suspect and his interrogator that the interrogator attempts to exploit (surely a rare situation, especially in non-rural areas)—false concern for the suspect's well-being or other attempts at creating a non-adversarial atmosphere have not been considered unconstitutional trickery.

One could consider Detective Helgert's interrogation in *Thompkins*

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141. *See* Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1554–64 (2008); Mosteller, *supra* note 43, at 1254–66; *see also* Roberts v. State, 102 S.W.3d 482, 488 (Ark. 2003) (where police officers told a suspect: "Get it off your chest, we'll help."); Anders v. State, 445 S.W.2d 167, 171 (Tex. Crim. App. 1969) (where the officer testified that he tried to "make [the suspect] think he had a friend there, and get him to admit something").

142. 796 F.2d 598, 607 (3d Cir. 1986).

143. *Id.*

144. *Id.*

145. *Anders*, 445 S.W.2d at 171.

146. *Id.*

147. *Id.*

148. 360 U.S. 315 (1959).

149. *Id.* at 323.

150. *Id.* at 319.

to be a form of non-adversarial questioning designed to get Thompkins to confide in him. The detective asked about Thompkins's belief in God to soften him up for the punchline: "Do you pray to God to forgive you for shooting that boy down?"[151] The implicit approval of this sort of questioning in *Thompkins* makes it less likely that a non-adversarial tone would be considered unconstitutional trickery even in the decision zone.

This tactic is meant to undermine prior *Miranda* warnings, and therefore fulfills the first prong of the two-factor test. Playing the "good cop" is an extremely common technique that is taught and trained, just like the two-step interrogation strategy was common practice and procedure in *Seibert*.[152] Its purpose is generally to procure a confession. But particularly when a person has been read his rights but has refused to waive them, the purpose of the "good cop" is to undermine the significance of *Miranda* warnings. In this situation, the false friendliness is meant to obtain a waiver that has thus far been refused and to avoid an invocation of the suspect's rights, which the interrogator surely fears because it would end the interrogation. It is a widespread practice meant to undermine the importance of the *Miranda* warnings already given.

However, being friendly to a suspect without more seems unlikely to produce a false confession, and thus it fails the second prong of the two-factor test.[153] This tactic is not mentioned in the false confession literature, nor does it involve confronting the suspect or suggesting details of the crime that could be woven into a false confession.[154] Instead, an officer using the non-adversarial approach generally offers excuses for committing the crime or appeals to the suspect's moral or religious beliefs. Because this tactic is unlikely to lead to false confessions and because the Supreme Court tacitly approved of it in *Thompkins*, courts probably will find that creating a non-adversarial atmosphere is constitutional, even in the decision zone.

C. Exploiting a Suspect's Known Weaknesses

Up until this point, I have focused on particular police actions, but I

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151. Berghuis v. Thompkins, 130 S. Ct. 2250, 2257 (2010).

152. *See supra* notes 60–70 and accompanying text.

153. I distinguish the friendly approach from what Richard Leo calls "[t]he most potent psychological inducement," which is the suggestion of leniency. LEO, *supra* note 57, at 202. It is possible to appear friendly or non-adversarial without appearing to offer leniency. In fact, I would argue that this is exactly what Detective Helgert did when he asked Thompkins whether he prayed to God to forgive him for shooting someone.

154. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1054–55 (2010). Garrett discusses how most false confessions of exonerated people contain a great deal of detail, including facts that only the perpetrator could have known. *Id.* at 1054. Garrett concludes that these details could only have been introduced by interrogators, whether purposefully or not. *Id.* at 1052–54. He argues that to avoid convincing false confessions, police should implement safeguards such as recording entire interrogations and "double blind" questioning in order to prevent the disclosure of key facts. *Id.* at 1115–16.

turn now to suspect attributes that may be relevant to trickery. In particular, mental illness, mental retardation, and youth are factors that may lead a suspect to be more vulnerable to psychologically coercive interrogation. If interrogators knowingly exploit one or more of these attributes, then the tactics used should be more likely to be considered trickery. These attributes are also relevant to the "totality of the circumstances" voluntariness analysis, but the inquiry here is different.[155] Instead of looking at whether these vulnerabilities contributed to a lack of voluntariness, the question here is whether police knowingly exploited a suspect's mental illness, cognitive disability, or youth.[156] Using these factors as part of the trickery analysis should reach situations in which the suspect's statements would not be considered involuntary, but where police obtain either a waiver or a statement by purposefully exploiting a suspect's vulnerability.

Under *Colorado v. Connelly*, a suspect's confession is considered voluntary and admissible if his mental illness prompted him to spontaneously confess.[157] Because of the state action requirement of the Fifth and Fourteenth Amendments, a confession is involuntary only if some police coercion drives the suspect to confess.[158] However, *Colorado v. Connelly* does not address the situation in which police know of a suspect's mental illness (or other weakness) and still choose to interrogate the suspect or knowingly exploit this weakness in their interrogation. In fact, the *Connelly* court took care to note that there was no indication of Connelly's mental illness when he arrived at a Denver police station and spontaneously confessed to a murder.[159] So what happens if, knowing that a suspect is mentally ill, the police question him? What if they purposefully use his instability or delusions in order to obtain a waiver or a confession?

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155. For examples of the post-*Miranda* "totality of the circumstances" inquiry, see Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that police misrepresentations, while relevant, were not sufficient to render the confession inadmissible under the "totality of the circumstances"); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (noting that prior decisions "reflected a careful scrutiny of all the surrounding circumstances").

156. Suspects who are mentally ill, have cognitive deficiencies, or are young are the most vulnerable to police trickery, and I believe the voluntariness analysis does not do enough to protect them. Indeed, their situation sounds much like Stephen Schulhofer's assessment of the state of the world before *Miranda*:

> The voluntariness test ostensibly took account of special weaknesses of the person interrogated, but because it did permit the use of substantial pressures, suspects who were ignorant of their rights, unsophisticated about police practices and court procedures, easily dominated, or otherwise psychologically vulnerable were more likely to be on the losing end of a successful police interrogation.

Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871–72 (1981).

157. 479 U.S. 157, 164 (1986).

158. *Id.* at 163–64.

159. *Id.* at 160–61. Connelly approached a uniformed police officer in downtown Denver and stated that he wanted to talk to someone about a murder he had committed. *Id.* at 160. He was given *Miranda* warnings and asked questions about whether he had been drinking or taking drugs. *Id.*

At this point I want to return to the argument, suggested by Miriam Gohara and others, that whether a tactic induces false confessions should be a key element of whether that tactic is unconstitutional.[160] This factor is particularly salient for certain vulnerable populations, such as people with mental illness or cognitive disabilities and young people. These groups are particularly likely to confess falsely.[161] This is in part because they are more susceptible to suggestions than fully-functioning adults, and may be more likely to bend to authority figures.[162] They may also be more susceptible to the tactic of feigned sympathy and understanding.[163] Thus, a full analysis of police trickery must account for situations in which police know of the vulnerabilities of those they interrogate and exploit them to obtain a confession.

1. Mental Illness

Most scholarship on the general topic of interrogations of the mentally ill concerns the possibility of people with mental illnesses making false confessions.[164] I suspect that this focus is in part due to the range of possible mental illnesses. A person might be competent to waive his or her rights and be able to withstand coercive interrogation with minor depression, whereas someone with severe delusions may not. Thus, there can be no per se rule regarding the trickery of mentally ill people. It may also often be the case that there is no documentation of a suspect's mental

160. *See* Gohara, *supra* note 35, at 817–20; *see also* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3–4 (2010) [hereinafter Kassin, *Police- Induced Confessions*] (noting "serious questions concerning a chain of events by which innocent citizens are judged deceptive in interviews and misidentified for interrogation . . . and are induced into making false narrative confessions that form a sufficient basis for subsequent conviction"); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 492 (1998) (arguing that training manuals and practices "teach police to use tactics that have been shown to be coercive and to produce false confessions"); Ofshe & Leo, *supra* note 94, at 997 (explaining improper use of interrogation procedures that can result in four types of false confession: stress-compliant, coerced-compliant, non-coerced persuaded, and coerced-persuaded).

161. Kassin, *Police-Induced Confessions*, *supra* note 160, at 19–22.

162. *Id.*; LEO, *supra* note 57, at 195–96.

163. Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCHOL. SERVS. 19, 20–21 (2004) (noting the susceptibility of the mentally ill); Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 417 (2008) (noting the vulnerability of youth to police interrogation techniques).

164. *See* Kassin, *Police-Induced Confessions*, *supra* note 160, at 5, 21–22 (finding that 10% of false confessors have a diagnosed mental illness, and that depressed mood and traumatic life experiences were linked to giving a false confession); Drizin & Leo, *supra* note 105, at 971 (finding that people who are mentally ill are more likely to confess falsely, because they are more vulnerable to suggestions, pressure, and false evidence); Redlich, *supra* note 163, at 19–21 (writing that suspects with mental illness may perceive implicit threats or promises as explicit statements; that they may be less likely to understand their rights; that they may be more susceptible to the ruse of interrogator-as-friend; and that they may be more likely to give the cues interrogators perceive as indicating guilt or deception, leading the interrogator to press harder).

illness until after he or she is arrested and interrogated.[165] This post-hoc evidence may not be enough to show that police saw indications of a suspect's mental illness and exploited it during an interrogation. However, there may be cases when police knowingly exploit the mental illness of a suspect to extract a confession, and this should be considered unconstitutional trickery, even if courts do not describe it in this language.

Allison Redlich relates an instance of clear police coercion in interrogating a person known to be mentally ill.[166] A paranoid schizophrenic who was committed to an institution developed an interest in an ongoing rape case.[167] Because of his interest, police came to the mental hospital to interrogate him three separate times.[168] They fed him the facts of the crime and told him that by confessing he would help to "smoke out" the real perpetrator.[169] The suspect was tried on the basis of his confession and his "knowledge" of the facts of the crime and was convicted and imprisoned for seventeen years before being exonerated by DNA evidence.[170] This incident, in which officers clearly knew that their interrogation subject was mentally ill and exploited his condition to procure a confession, should be considered unconstitutional trickery.

A Washington court has stated that "when police are aware of a condition that impacts a suspect's ability to either understand or validly waive *Miranda* rights, exploitation of that condition would constitute police misconduct which would make the resulting confession inadmissible."[171] However, in that case the court found the interrogation in question constitutional, in part because "the precautions taken by the detectives in conducting the interview were clearly intended to take [the suspect's] mental impairments into account."[172] These precautions included reading the suspect his rights at least four times, going over the waiver "with care," and asking the suspect "primarily . . . open-ended questions."[173]

Similarly, the Georgia Supreme Court has written that "[a] person who is mentally ill can be competent to make a voluntary confession."[174] However, the court previously had found involuntary the confession of a man who suffered a severe stroke which left him psychotic, depressed, and incapable of living on his own.[175] Because this case arose before *Colorado v. Connelly*, the court used the prior "free will" analysis, but the case would

165. *See, e.g.*, Hendricks v. State, 660 S.E.2d 365, 366 (Ga. 2008).

166. *See* Redlich, *supra* note 163, at 19.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. State v. Cushing, 842 P.2d 1035, 1037 n.3 (Wash. Ct. App. 1993).

172. *Id.* at 1038.

173. *Id.*

174. Hendricks v. State, 660 S.E.2d 365, 366 (Ga. 2008) (quoting Johnson v. State, 347 S.E.2d 584, 585 (Ga. 1986)).

175. State v. Gardner, 328 S.E.2d 546, 546–47 (Ga. 1985).

almost certainly come out the same way using *Connelly*'s analysis.[176] Police interrogated the defendant while he was confined to a Veterans Affairs psychiatric ward, and therefore they had clear notice of his mental illness.[177] In fact, the police had been notified of the defendant's original, spontaneous confession by a social worker at the psychiatric ward.[178] Yet the police chose to interrogate the defendant, knowing of his serious mental illness.[179] No mention is made in the court's opinion of any special precautions to ensure the truthfulness or voluntariness of his statements in response to that interrogation.[180] This seems to be a case of police knowingly exploiting a suspect's mental illness to obtain a confession.

However, there must be circumstances in which police can constitutionally interrogate mentally ill people, even those who are committed to institutions. We cannot expect all confessions from mentally ill people who have committed crimes to come with little or no prompting as in *Connelly*.[181] The distinction is that police must not knowingly exploit the suspect's mental illness to obtain a confession. To avoid such exploitation, police officers interrogating mentally ill suspects ought to take precautions such as adopting an "investigative," instead of a "confrontational" interviewing method, not feeding facts to the suspects (especially false evidence), and mandating the presence of an attorney during interrogation.[182]

2. Youth

In contrast to mental illness, there has been much judicial and academic scrutiny of the interrogation of young people. The Supreme Court recognized, well before *Miranda*, that the interrogation of juveniles presented particular constitutional challenges.[183] The Court recently reaffirmed this principle in holding that a person's youth is relevant in

176. *See* Colorado v. Connelly, 479 U.S. 157, 166–67 (1986) ("Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed . . . . We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws . . . .").

177. *Gardner*, 328 S.E.2d at 546.

178. *Id.*

179. *Id.*

180. *See, e.g.*, Kassin, *Police-Induced Confessions*, *supra* note 160, at 22 (discussing protections for vulnerable suspects in England, including the presence of adults and a judicial determination of "fitness for interview").

181. *See Connelly*, 479 U.S. at 160; *see also* United States v. Raymer, 876 F.2d 383, 386–87 (5th Cir. 1989) (holding a confession voluntary despite known mental illness because there was little questioning of the suspect, and he testified that he was aware of his rights).

182. *See* Kassin, *Police-Induced Confessions*, *supra* note 160, at 27–32.

183. *See* Haley v. Ohio, 332 U.S. 596, 599–601 (1948) (finding a Fourteenth Amendment Due Process Clause violation when police elicited a confession of a fifteen year-old boy in the middle of the night without an attorney or parent present); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (finding a fourteen year-old to be unable to appreciate the consequences of a confession or his constitutional rights without the presence of an attorney or parent).

determining when *Miranda* warnings are required.[184] Many scholars have addressed the permissibility of trickery in interrogating juveniles,[185] so I will address it only briefly here.

Youth, unlike mental illness, will almost always be readily apparent to interrogators. Therefore, as a vulnerability, it is more likely to be exploited. Further, courts have recognized that juveniles have a less developed sense of consequences and are more vulnerable to outside pressure.[186] Because of these developmental differences, the Supreme Court has categorically exempted juveniles from the death penalty.[187] Because of these same developmental differences, "adolescents are particularly vulnerable to the classic interrogative techniques of confronting the suspect with false evidence and utilizing other forms of 'trickery.'"[188] They are more likely than adults to confess falsely.[189] All I want to add to this already well-developed discussion regarding the interrogation of juveniles is that because they are readily identifiable and because of their still-developing personalities and minds, juveniles are perhaps the most easily exploited group in interrogations. Because they are more likely to succumb to authority figures and to act impulsively, it is particularly important that courts not allow interrogators to obtain waivers from juveniles through trickery or deceit.

3. Low IQ and Mental Retardation

The legal situation of people with cognitive disabilities is in many ways similar to that of juveniles. The Supreme Court has exempted people with mental retardation from the death penalty under the Eighth Amendment, citing the high risk of false confessions.[190] Like juveniles, people with cognitive disabilities are often susceptible to suggestion, deferential to authority figures, and they fail to understand the long-term consequences of their actions.[191] Mental disabilities are consistently a

184. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011) (stating that youth is a permissible factor in the analysis as long as "the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer").

185. *See, e.g.*, Birckhead, *supra* note 163; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 312 (2006); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992 (2005).

186. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005).

187. *Id.*

188. Birckhead, *supra* note 163, at 418–19.

189. Kassin, *Police-Induced Confessions*, *supra* note 160, at 5; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 66 (2008) (noting a study that found the demographics of the innocence group are not representative of the prison population, much less the general population).

190. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002); *see also* Kassin, *Police-Induced Confessions*, *supra* note 160, at 20–21 (nothing that the U.S. Supreme Court has explicitly cited the possibility of false confession as a rationale underlying their decision to exclude low IQ and mental retardation categorically from capital punishment); Drizin & Leo, *supra* note 105, at 970–73 (same).

191. Kassin, *Police-Induced Confessions*, *supra* note 160, at 20–21; Drizin & Leo, *supra* note

factor in courts' voluntariness analyses.[192]

However, it is less likely that police will knowingly extract a confession from a person with a cognitive disability because this characteristic is less apparent than a person's youth. Again, it is the *knowing* exploitation that is relevant to the trickery analysis. It may appear to police that a suspect is slow, or that he is having trouble answering questions in a rational manner. But unless the suspect's cognitive disability is very severe, it is likely that police would never recognize such a disability during an interrogation.

If police do learn of a suspect's mental retardation, then, as with mental illness, interrogation alone probably will not qualify as trickery. But to avoid knowingly taking advantage of a suspect's mental deficiency, interrogators should take steps to ensure that the suspect's statements are both voluntary and reliable. For instance, empirical studies show that people with mental retardation are unable to understand *Miranda* warnings as they are commonly given and so they are not effectively apprised of their rights to silence and to an attorney.[193] Thus, an important step would be taking time to more fully explain the suspect's constitutional rights in cases where suspects have mental disabilities. Other ways to avoid exploiting a suspect's mental disability might include having an independent observer present in the interrogation room, avoiding leading questions, and not lying to the suspect or presenting false evidence.[194] In failing to take such precautions during interrogations of suspects with known mental disabilities, police run the risk, under this analysis, of tricking a suspect by knowingly exploiting his disability.

4. Under the Two-Factor Test

Unlike the prior specific tactics, exploiting a suspect's mental illness, mental retardation, or youth to procure a confession is already unconstitutional in some contexts. But these practices are particularly problematic in the decision zone. To allow police to exploit suspects' vulnerabilities in order to procure a waiver of their constitutional rights would render *Miranda* warnings a meaningless ritual and would result in a return to the pre-*Miranda* practice for these particularly vulnerable

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105, at 971.

192. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 742 (1966) (considering defendant's third or fourth grade education and low IQ); Reck v. Pate, 367 U.S. 433, 441 (1961) (noting the defendant's "subnormal intelligence").

193. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 495–96, 572 (2002).

194. *See* Drizin & Leo, *supra* note 105, at 971–73. In their article, the authors relate an incident where the suspect's mother told police of the suspect's low IQ before his interrogation. *Id.* When detectives interrogated the suspect, he gave nearly incomprehensible statements, but subsequent statements typed by detectives provided increasing amounts of detail. *Id.* The suspect signed the statements, but DNA evidence eventually exonerated him. *Id.*; *see also* Kassin, *Police-Induced Confessions, supra* note 160, at 21 (discussing suggestibility and reliance on authority figures).

suspects.[195] This would severely taint the waiver decision. Further, there is a particular risk of false confessions among young people, the mentally ill, and people with cognitive disabilities, since these groups are more suggestible and tend to rely more heavily on authority figures.[196] Under the two-factor test, the knowing exploitation of a suspect's mental weaknesses to procure a waiver of the suspect's right to silence would be considered unconstitutional. Again, the two factors in this analysis are (1) whether police knowingly undermine *Miranda* warnings; and (2) whether the practice at issue has a tendency to produce false confessions. Though it would be a fact-based analysis, knowingly exploiting a suspect's youth or mental defect to procure a waiver of his *Miranda* rights would fulfill both factors in many situations.

V. Conclusion

Berghuis v. Thompkins implicitly held that police could interrogate suspects after giving *Miranda* warnings but before obtaining a waiver of the suspect's constitutional rights. In that case, when the suspect responded with an incriminating answer over two hours later, the Court found that he had waived his rights by implication. This is a new and important limitation on suspects' rights. However, *Thompkins* is itself limited by *Miranda*'s language regarding trickery. Since *Thompkins* allows police to interrogate a suspect before he waives his rights, *Miranda*'s exhortation that a suspect may not be tricked *into* a waiver has particular force. This language strongly limits what actions and statements interrogators may make during the legal limbo after they have given *Miranda* warnings but before the suspect waives his rights. Interrogation tactics that have previously been held constitutional when used after a suspect waives his rights are not necessarily constitutional in this interim period. Thus, courts must carefully consider, as a new question not controlled by existing precedent, what constitutes unconstitutional trickery in the decision zone.

195. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966); Schulhofer, *supra* note 156, at 871–72.

196. Kassin, *Police-Induced Confessions*, *supra* note 160, at 20–21; Drizin & Leo, *supra* note 105, at 970–73.

NOTE

DORMANT DATA: WHY AND HOW TO MAKE GOOD USE OF DEATHS IN CUSTODY REPORTING

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I. Introduction

From 2001 to 2006, roughly 3,000 individuals died each year while in the custody of state prison facilities across the United States.[1] Another 1,000 died in locally run jails.[2] Many of these roughly 4,000 annual deaths are inevitable, but many are also preventable. The latter category (i.e., preventable deaths) should never be viewed as an acceptable statistic. The United States federal and state governments are, through their own criminal justice policies, responsible for who gets placed in custody and for how long. They are also ultimately responsible for the conditions of such confinement. Consequently, governments are obliged to meet the needs of individuals they place behind bars, and preventable deaths represent a categorical failure to meet that obligation.

Although courts have explicitly recognized this burden, they have promulgated a counterproductive standard for enforcing it. By requiring a subjective showing of "deliberate indifference"[3] to the plight of prisoners on the part of officials, courts have encouraged prison and jail officials to be ignorant of any systemic issues that have not become catastrophic. There is no single solution to this conundrum, but significant progress can be made with a relatively simple step. Deaths in custody ("DIC") information can be used to encourage transparency and accountability in a system that currently lacks it. This is information that we already have, and it can be used to assess and address major problems (on the national, state, and local scale) before they become catastrophic. If DIC data is analyzed and findings are submitted to the relevant officials, willful ignorance becomes much less viable as a defense. But more importantly than that, using DIC data in this way espouses a more constructive criminal justice policy—that justice officials should look towards affirmatively meeting their obligation to care for those in its custody, rather than doing just enough to avoid civil liability to inmates.

In Part II of this Note, I begin by discussing the current "deliberate indifference" standard that governs whether detainees' conditions of

1. Christopher J. Mumola & Margaret E. Noonan, *Deaths in Custody Statistical Tables*, BUREAU OF JUSTICE STATISTICS, 3 (2009), *available at* http://www.bjs.gov/content/dcrp/dcst.pdf.

2. *Id.* at 21.

3. *See infra* Part II.B.

confinement constitute cruel and unusual punishment. This discussion will include the United States Supreme Court's reasoning behind the standard, as well as the problems that having such a standard create. Next, in Part III, I examine the current requirements governing the reporting of deaths in custody at both the federal and state levels. In Part IV, I discuss realistic options concerning how DIC data may be used to have an immediate positive impact on our federal and state detention facilities, and how this impact may undo much of the danger associated with the United States Supreme Court's "deliberate indifference" standard. Finally, I provide a few illustrations using currently existing DIC data in Part V.

II. The Current Standard for Conditions of Confinement, and the Incentives It Creates

A. Governments Have an Obligation to Meet the Basic Needs of Those in Custody

The moment an inmate is placed behind bars, it is the duty of the State to provide for his or her basic needs.[4] Sharon Dolovich provides a compelling reason for placing such a burden on governments: "For the duration of the sentence, prisoners may not go where they would like, associate with whom they choose, or otherwise freely define the terms of their own existence. But perhaps even more debilitating, incarcerated prisoners are deprived of the capacity to provide for their own needs."[5] This final deprivation—preventing inmates from providing for their own needs—is so fundamental that it is often overlooked. States cannot take away a person's ability to feed, clothe, protect, or care for himself without subsequently meeting those very basic needs.

The United States Supreme Court has recognized this "basic needs" obligation—most often in the context of Eighth Amendment, "cruel and unusual punishment,"[6] cases: "The [Eighth] Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"[7] The Court sees the State

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4. As used in this Note, the term "basic needs" refers to those things (tangible or intangible) that are necessary to maintain adequate physical and mental health for the individual inmate as well as the inmate population at large. This includes biological health, as well as personal safety and security. *See* DeShaney v. Winnebargo Cnty. Dept. of Soc. Services, 489 U.S. 189, 199–200 (1989). In a sense this could be considered synonymous with providing the "bare minimum." However, it is important to note that there is a significant difference between the bare minimum for survival and the bare minimum for adequate overall health.

5. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911 (2009).

6. U.S. CONST. amend. VIII.

7. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

as being directly responsible for meeting such needs: "[H]aving stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."[8] This applies to medical care[9] as well as conditions and treatment in correctional facilities: "Taken together, [the Supreme Court cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[10]

Each of these cases (and note that these are not the only ones)[11] articulates the same unambiguous principle: when a government imposes its coercive power to deprive an individual of his ability to provide for himself, the government has an unavoidable obligation to meet that individual's basic needs. The issue of whether and how a government meets this burden is discussed in Part III. But from the outset, it should be observed that while the precise standard of meeting basic needs may be up for debate, it is clear that preventable deaths in custody demonstrate an institutional failure to meet those basic needs. This is precisely why information regarding DIC can be extremely useful toward assessing and addressing conditions-of-confinement issues.[12]

B. At What Point Does a Government Fail to Meet its Obligation?

Practically speaking, there is no clearly-defined threshold where conditions or treatment in correctional facilities are such that they are deemed inadequate to meet the basic needs of inmates. Substantial litigation on the subject, however, does provide at least an indication of what is adequate as a matter of fundamental right. Nearly all of the cases dealing with such conditions are brought under 42 U.S.C. § 1983, which provides a mechanism through which individuals can sue in civil court when they have been deprived of a fundamental (often constitutional) right or liberty.[13]

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8. *Id.* at 833.

9. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (1976) (noting that failure to meet certain medical needs "may actually produce physical 'torture or a lingering death'" (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890))).

10. DeShaney v. Winnebago Cnty. Dept. of Soc. Services, 489 U.S. 189, 199–200 (1989).

11. In articulating the above principles in *Farmer*, *Estelle*, and *Deshaney*, the Court cites to numerous other Supreme Court cases for support. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 317 (1982); Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983); Hudson v. Palmer, 468 U.S. 517, 526–27 (1984); Washington v. Harper, 494 U.S. 210, 225 (1990).

12. *See infra* Part IV.

13. *See* 42 U.S.C. § 1983 (2010). The statute provides in part that "[e]very person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." *Id.*

Estelle v. Gamble[14] is the seminal United States Supreme Court case dealing with prison conditions and the Eighth Amendment. J.W. Gamble was an inmate of the Texas Department of Corrections.[15] Gamble injured his back while on a prison work assignment.[16] Although Gamble received medical care while in prison, he brought suit under Section 1983 to contest the poor quality of the medical treatment.[17] Gamble was in and out of administrative segregation and solitary confinement because he refused to work due to his medical issues, and, on several occasions, he was denied the opportunity to see the medical staff despite being in severe pain.[18]

Denying Mr. Gamble's claim, the Supreme Court initially recognized the obligation of the states to meet the basic needs of those in its custody.[19] And while the Court acknowledged that some level of deficient medical care could constitute an Eighth Amendment violation, it held that Gamble would have to "allege acts or omissions sufficiently harmful to evidence *deliberate indifference* to serious medical needs," in order to make a successful claim.[20] Later, in *Wilson v. Seiter*, the Supreme Court extended this holding to cases dealing with prison conditions generally (as opposed to a single individual's treatment, which was the issue in *Estelle*).[21]

While the term "deliberate indifference" became widely used in Eighth Amendment conditions-of-confinement cases after *Estelle* and *Wilson*, it took nearly eighteen years for the Supreme Court to actually define the term.[22] In *Farmer v. Brennan*, the Supreme Court did not address the issue on the macro level (i.e., conditions of confinement), but it did resolve a long-standing dispute between lower courts concerning what exactly "deliberate indifference" entailed.[23] Dee Farmer, a federal prisoner, was a transgender inmate who complained that corrections officers placed her in the general population of male prisoners despite knowledge that (1) the facility had a violent environment, and (2) that individuals projecting female characteristics (like Farmer) were especially vulnerable.[24]

In deciding how to articulate a cohesive standard for deliberate indifference, the Supreme Court ultimately determined that the proper test was akin to a criminal recklessness standard: i.e., an actor is only liable where he "disregards a risk of harm of which he is aware."[25] The Court

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14. 429 U.S. 97 (1976).
15. *Id.* at 98.
16. *Id.* at 99.
17. *Id.* at 99–101.
18. *Id.* at 100–01.
19. *Id.* at 103–04.
20. *Id.* at 106 (emphasis added).
21. Wilson v. Seiter, 501 U.S. 294, 302–04 (1991).
22. *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994) (acknowledging that "we have never paused to explain the meaning of the term 'deliberate indifference'").
23. *See id.* at 832.
24. *Id.* at 831.
25. *Id.* at 837.

chose this standard because it maintained a level of subjective intent (in contrast to the civil recklessness standard),[26] which is consistent with the Court's earlier opinions in *Estelle* and *Wilson* (among other cases).[27] This subjective element, however, exists only to the extent that the defendant is aware of a substantial *risk*; it does not require absolute knowledge or belief that a specific harm *will* occur.[28] The Court summarized its holding by stating that, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[29]

C. Perverse Incentives

The above holdings establish the current jurisprudence regarding conditions of confinement cases. Unfortunately, these cases tell very little about what actually constitutes cruel treatment or inadequate care (at either the micro or macro levels). Indeed, making this determination appears to be so deeply rooted in specific facts that promulgating a single standard may be impossible. Nonetheless, there is at least one critical lesson that can be taken away from the cases of *Estelle*, *Wilson*, and *Farmer*: there is an extremely high threshold for holding corrections officers and facilities accountable for their failure to adequately provide for inmates' basic needs. The subjective "deliberate indifference" standard introduced in *Estelle*,[30] expanded in *Wilson*,[31] and explained in *Farmer*,[32] places a significant burden on the plaintiff by requiring him to demonstrate both that corrections officers or officials (1) were *in fact* aware of a dangerous situation, and (2) that they made no *attempt* to avoid or remedy the situation.[33]

This effectively creates a perverse incentive for correctional officers and facilities. Under this regime, there are logically two ways for officials to avoid getting in trouble: (1) be diligent in meeting the basic needs of all the inmates in their custody; or (2) keep their heads buried in the sand.[34] One of these is far more difficult than the other. In fact, option (1) is becoming increasingly difficult as jail and prison funding decreases

26. *See id.*

27. *See id.* at 839–40.

28. *Id.* at 842.

29. *Id.* at 847.

30. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

31. Wilson v. Seiter, 501 U.S. 294, 302–04 (1991).

32. *Farmer*, 511 U.S. at 835.

33. *See id.* at 834.

34. Joanne Mariner provides a critical look at how such perverse incentives play out in the context of one facet of conditions of confinement: prison rape. *See* Joanne Mariner, *Deliberate Indifference, State Authorities' Response to Prisoner-on-Prisoner Sexual Abuse, in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 232 (Tara Herivel & Paul Wright eds., 2003).

without any change in criminal justice policy.[35] It is true that, regardless of what a corrections officer or official *claims* to know, a fact-finder may always determine that he or she was at least aware enough of a certain risk to satisfy the subjective element of the test.[36] But this concession, if it does anything meaningful, only changes the degree to which the current system creates a perverse incentive.

Ideally, we want corrections officers and officials—at both the micro and macro levels—to take an active interest in what is going on in their facilities and how they can be improved. The deliberate indifference standard discourages any such measures because, by their very nature, they will make officials aware of problems that they are ill-equipped to deal with at that point in time. The line of cases from *Estelle* to *Farmer* encourages officials to wait until any underlying problems percolate to the point that the officials cannot make a plausible excuse for ignorance of the inadequate conditions. The obvious problem with this method is that, by that point, very little can be done by officials to remedy the problem without significant immediate costs.

D. When Things Go Really Wrong: A California Case Study

One could argue that this is precisely what happened in the recent high-profile case of *Brown v. Plata*.[37] *Plata* involved a class action suit brought by California prisoners to contest the poor medical care in California prisons that has resulted from severe overcrowding.[38] As of 2010, California prisons were operating at about 195% capacity.[39] The implications of this were sweeping and devastating,[40] but they were also foreseeable. In 1996, Congress passed the Prison Litigation Reform Act (PLRA).[41] One of the provisions of this legislation was to provide very limited circumstances under which a court order could be used to release inmates from custody.[42] The Supreme Court held that all these conditions were met in *Plata*.[43] Consequently, the Court upheld an order for California

35. *See, e.g., infra* Part II.D.

36. *See supra* notes 25–29 and accompanying text.

37. 131 S. Ct. 1910 (2011).

38. *See* Solomon Moore, *California Prisons Must Cut Inmate Population*, N.Y. TIMES, Aug. 5, 2009, at A10, *available at* http://www.nytimes.com/2009/08/05/us/05calif.html; Bob Egelko, *State Submits Plan to Reduce Prison Population*, SAN FRANCISCO CHRON., Nov. 13, 2009, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/13/MNMV1AJNHV.DTL&type=printable.

39. Lyle Denniston, *Argument Preview: Crowded Prisons, Inmates' Rights*, SCOTUS BLOG (Nov. 28, 2010, 5:20 PM), http://www.scotusblog.com/?p=109414.

40. An oft-quoted statistic by the courts was that, due to California's inadequate medical care, "[a]s of mid-2005, a California inmate was dying needlessly *every six or seven days*." *See, e.g., Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P., C01-1351 TEH., 2009 WL 2430820, at *1 (E.D. Cal. and N.D. Cal. Aug. 4, 2009).

41. 18 U.S.C. § 3626 (2010).

42. Denniston, *supra* note 39.

43. Brown v. Plata, 131 S. Ct. 1910, 1942–43 (2011).

to reduce its inmate population to about 137.5% in two years.[44]

It would be difficult to prove whether the California corrections debacle was the result of the current deliberate indifference standard's encouragement of ignoring problems until they become unavoidable and catastrophic. Whether the standard did or did not have an impact on *Plata*, however, is unimportant in this discussion. For our purposes, *Plata* represents two concepts: (1) conditions-of-confinement problems are just as relevant today as they were when cases like *Estelle*, *Wilson*, and *Farmer* were decided; and (2) the result of being *reactive* rather than *proactive* toward conditions of confinement can truly be devastating.[45] Hence, even if the deliberate indifference standard did not directly lead to the issues involved in *Plata*, the case does represent a trend against proactive policies. This is a trend that needs to be reversed.

Had policymakers been better informed by prison officials regarding impending dangers, they may have been able to formulate a more successful proactive response. An in-depth look at California's corrections policy reveals that *Plata* was more of an inevitable result than it was a freak occurrence. There was no shortage of ways in which California policymakers could have actively avoided this result. For example, California likely could have made substantial progress toward improving overcrowding if it had addressed something experts had been pointing to for years: improving parole policy. First, California could simply have started paroling more inmates.[46] Second, California could have changed its policy regarding technical parole violations (i.e., violations solely because the parolee breaks a term of the parole agreement, not because he or she broke any law or is deemed to be a threat to society). Particularly in the face of its current overcrowding problem, it is astonishing to realize that over 66% of all individuals paroled in California return to prison over a three-year period.[47] Thirty-nine percent out of that 66% are sent back to prison for technical parole violations.[48] Such violations might include failing to meet with a parole officer or leaving the supervision area (such as the city or state) without notice.[49]

Policymakers also could have enacted changes to California's three strikes laws, which were responsible for much of the overcrowding in the

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44. *Id.* at 1945–47. This is estimated to be about 40,000 prisoners. *See* Denniston, *supra* note 39.

45. California chose a reactive policy by waiting until conditions became so bad that they constituted a violation of basic human rights. *See supra* notes 38–39 and accompanying text. As a result, the remedy will be a tough pill to swallow for the state. *See supra* notes 40–44 and accompanying text.

46. *See generally* Rachel F. Cotton, Comment, *Time to Move On: The California Parole Board's Fixation with the Original Crime*, 27 YALE L. & POL'Y REV. 239 (2008) (arguing for a more lenient parole system in California).

47. RYKEN GRATTET, JOAN PETERSILIA & JEFFREY LIN, PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA 5 (2008), http://www.ncjrs.gov/pdffiles1/nij/grants/224521.pdf.

48. *Id.*

49. *Id.* at 12.

state's prisons.[50] Finally, an increased reliance on probation could likewise have led to substantial reductions in prison populations.[51] In times when states had fewer budget woes, policymakers could address overcrowding by building more facilities; but in today's budget climate, building new jails and prisons is not a feasible option for many states. In light of *Plata*, California will now apparently have to implement a rushed—and far less effective—combination of the above suggestions.[52]

Undeniable problems exist with our current jurisprudence toward conditions of confinement. And while improvements may be made at the court level by revising the current standard,[53] part of the problem may be the very fact that we are relying on the courts to oversee such conditions. It is difficult to imagine a realistic standard of liability that does *not* lead to corrections officers and officials being focused on avoiding litigation rather than affirmatively meeting their obligation to care for inmates' basic needs. Fortunately, DIC data can be used regardless of the legal standard adopted by the courts. If that standard remains "deliberate indifference" (which seems likely for the foreseeable future), then DIC data may be used to at least partially overcome the perverse incentives that currently exist. Additionally—regardless of the legal liability standard imposed—DIC data can be used to affirmatively address potential problems before they become uncontrollable. The best part, however, is that the data is available right now.

III. Deaths in Custody Information is Available and Valuable

A. Deaths in Custody Reporting at the Federal Level

1. Birth of the Death in Custody Reporting Act

Congress took a huge step toward uniform reporting of inmate deaths in jails and prisons when it passed the Death in Custody Reporting Act of 2000 ("DICRA 2000").[54] This legislation amended 42 U.S.C. § 13704 to add the condition that, for a state to be eligible to receive a "truth-in-sentencing incentive grant,"[55] the state must "follow guidelines . . . in

50. *See, e.g.*, Sara J. Lewis, Comment, *The Cruel and Unusual Reality of California's Three Strikes Law:* Ewing v. California *and the Narrowing of the Eighth Amendment's Proportionality Principle*, 81 DENV. U. L. REV. 519 (2003); Solomon Moore, *The Prison Overcrowding Fix*, N.Y. TIMES, Feb. 11, 2009, at A17, *available at* http://www.nytimes.com/2009/02/11/us/11prisons.html (touching on California's parole policy as well).

51. *See generally* James Q. Wilson, *Dealing with the High-Rate Offender*, 72 PUB. INT. 52, 66–70 (1983) (endorsing a view of "selective incarceration" in which more low-rate offenders are put on probation instead of behind bars).

52. *See supra* notes 38–39, 43–44 and accompanying text.

53. *See* Dolovich, *supra* note 5, at 964–79 (proposing a legal standard to replace "deliberate indifference").

54. Pub. L. No. 106-297, 114 Stat. 1045 (2000).

55. *See* 42 U.S.C. § 13704 (2010). Before DICRA, eligibility was conditioned almost entirely on

reporting, on a quarterly basis, information regarding the death of any person who is in the process of arrest, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, or other local or State correctional facility . . . ."[56] DICRA 2000 required that, at a minimum, such reporting include "(A) the name, gender, race, ethnicity, and age of the deceased; (B) the date, time, and location of death; and (C) a brief description of the circumstances surrounding the death."[57]

DICRA 2000 passed both the House and Senate with very little opposition.[58] There are several potential explanations for this widespread support. First, the support could have simply reflected that the bill would have very little financial or political impact.[59] Second, the Department of Justice had already investigated the feasibility of such a measure and had reported that the goal to have a single source for annual death in custody statistics was achievable.[60] Third, such statistics were already being "gathered on an annual and a voluntary basis for Federal and State deaths and on a 5-year voluntary basis for county and local jails."[61] Fourth, officials may have recognized that having such a reporting system constitutes a good policy for overseeing and improving conditions in prisons and jails nation-wide. While DICRA 2000's support was undoubtedly due to some combination of these four factors, it is the fourth factor—i.e., policy—that this Note examines in more depth.

DICRA 2000's sponsor, Rep. Asa Hutchinson of Arkansas, expressed both a micro and macro purpose for the bill. On its micro purpose, Rep. Hutchinson articulated a deep concern for the lack of accountability and transparency in United States jails and prisons regarding inmate deaths.[62] According to Rep. Hutchinson, "[a]n estimated 1,000 men and women die questionable deaths each year while in police custody or in

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the State's participation in enacting truth-in-sentencing laws that require certain offenders to serve at least 85 percent of their sentence imposed (hence the title of the grant award). *Compare* Omnibus Consolidated Rescissions and Appropriations Act of 1996, 42 U.S.C. 13704 (1996) (having no provision in 42 U.S.C. § 13704 requiring state Attorney Generals to report information of inmate deaths), *with* Death In Custody Reporting Act of 2000, 42 U.S.C. § 13704(a)(2) (2000) ("[A] State has provided assurances that it will follow guidelines established by the Attorney General in reporting, on a quarterly basis, information regarding the death of any person who is in the process of arrest, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, or other local or State correctional facility (including any juvenile facility) that, at a minimum, includes—(A) the name, gender, race, ethnicity, and age of the deceased; (B) the date, time, and location of death; and (C) a brief description of the circumstances surrounding the death.").

56. 42 U.S.C. § 13704(a)(2) (2010).

57. *Id.* The Attorney General would, however, be able to establish guidelines in addition to these criteria. *See id.*

58. *See* 146 CONG. REC. H6736 (daily ed. July 24, 2000).

59. After all, its enforcement mechanism was to withhold funds that would already have been appropriated for States eligible for truth-in-sentencing grant money. *See* 42 U.S.C. § 13704(a)(2) (2010).

60. 146 CONG. REC. H6736 (daily ed. July 24, 2000) (statement of Rep. Asa Hutchinson).

61. *Id.*

62. *Id.*

jail."[63] Though he did not explain what made this grouping of deaths "questionable," he did offer anecdotes of two Arkansas individuals whose deaths were listed as suicides while the circumstances surrounding their deaths—particularly in light of the relatively minor nature of their offenses—suggested otherwise.[64] Rep. Hutchinson believed that DICRA 2000 could "serve as a deterrent to future misconduct by wrongdoers who will know that someone will be monitoring their actions."[65] On the bill's macro purpose, Rep. Hutchinson believed it would "provide openness in government and . . . bolster public confidence and trust in our judicial system."[66]

Cosponsor Rep. Bobby Scott of Virginia also saw a clear macro purpose for the bill, arguing that "with no one looking at these deaths from a systematic point of view, we do not know whether there is any pattern or practice relating to such deaths nor whether there is any training needed amongst law enforcement officials which could limit such occurrences or anything else."[67] Rep. Scott expressed hope that such reporting would allow Congress "to get a handle on the nature and extent of what I believe to be a serious problem; we just do not know the extent."[68] Rep. Scott additionally saw a micro benefit to the legislation, in that requiring such a report and description of the incident for all deaths would "discourage the misconduct, or questionable conduct, against those in custody by their custodians."[69]

Although this Note strongly advocates DIC reporting measures for macro benefits, it is unclear to what extent such measures can have the micro benefits endorsed by Rep. Hutchinson and Rep. Scott. The idea that a federal law like DICRA 2000 can have a direct effect on custodians' treatment of those in custody runs into two problems: (1) custodians themselves have no direct incentive to fully and accurately report deaths in custody;[70] and (2) even to the extent that they do, descriptions of circumstances can be manipulated so as to avoid incriminating evidence against the custodian. On the first, the federal legislation itself contains no penal sanctions for failing to fully and accurately report on DIC—nor could it.[71] The best the federal government can do is to threaten to withhold

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. 146 CONG. REC. H6736 (daily ed. July 24, 2000) (statement of Rep. Bobby Scott). Whether Mr. Scott realized it or not, this turns out to be a great characterization of the utility of such information when it comes to improving incarceration conditions and addressing Eighth Amendment concerns. *See infra* Part IV.

68. 146 CONG. REC. H6736 (daily ed. July 24, 2000) (statement of Rep. Bobby Scott).

69. *Id.*

70. *See infra* Part IV.B.

71. While it is true that DICRA does threaten to withhold federal funding from states not in compliance, this enforcement provision in and of itself does little to deter *individual* wrongdoers—who are the primary focus of the micro approach. This is a major reason that individual states need to have

certain grant awards.[72] The second concern is admittedly an issue for both micro and macro uses of the data, but it stands to reason that falsifying reports is a much more likely phenomenon where the data may be used to sue or prosecute a custodian. From a broad perspective, the aggregate of such reports may still be able to produce meaningful insights into incarceration conditions despite the presence of a small number of falsified reports.[73] The specific macro benefits of DIC reporting are discussed in more detail in Part IV.

2. Death of the Death in Custody Reporting Act of 2000

According to the U.S. Department of Justice, DICRA 2000 expired in 2006.[74] Regardless, the legislation was rendered impotent long before when no funds were appropriated for the Truth in Sentencing Incentive Grant fund as of FY 2002.[75] Fortunately, neither of these events killed the collection of data. The Bureau of Justice Statistics (BJS)[76] initiated the Deaths in Custody Reporting Program (DCRP) in 2000 in response to DICRA.[77] Since that time, BJS has continued to collect and analyze statistics on DIC.[78] Not only has BJS carried on the DCRP past both the elimination of Truth in Sentencing Incentive Grant funds and the expiration of DICRA 2000, but it has done so with remarkable success.[79] According to BJS, the agency has been able to obtain participation of nearly all local jail jurisdictions (roughly 99%), and 100% of state departments of corrections.[80] Although BJS has historically collected data pertaining to deaths occurring during the process of arrest as a part of the DCRP, such

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similar reporting requirements: they can attach penal sanctions to the failure to comply. *See infra* Part IV.B.

72. Another option for the federal government is to conduct hearings and require non-compliant jurisdictions to explain themselves. This is currently what is happening with another justice system reporting statute: the Prison Rape Elimination Act. *See, e.g.*, *Fluvanna Women's Prison Testifies on Rape Report*, ASSOCIATED PRESS, Apr. 26, 2011, *available at* http://www.newsplex.com/home/headlines/120693019.html.

73. It is worth noting that this is purely a theoretical critique. Little, if any, evidence exists that reports sent to the Bureau of Justice Statistics contain falsified data. The problem, of course, is that even if a report was falsified, it would be extremely difficult to prove.

74. *See* U.S. Dep't of Justice, Office of Justice Programs, *Deaths in Custody Reporting Program, 2012–2015 Solicitation* 4, http://bjs.ojp.usdoj.gov/content/pub/pdf/dcrp15_sol.pdf (last visited Mar. 5, 2011) [hereinafter DCRP Solicitation] ("BJS has obtained the participation of almost all jail jurisdictions, including post-2006 when the DICRA expired.") (describing reporting programs by the Office of Justice Programs).

75. U.S. Dep't of Justice, Office of Justice Programs, *Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Program*, http://www.ojp.usdoj.gov/BJA/grant/voitis.html (last visited Mar. 5, 2012).

76. The Bureau of Justice Statistics (BJS) is a part of the Office of Justice Programs (OJP). The OJP is itself a branch of the Department of Justice (DOJ).

77. DCRP Solicitation, *supra* note 74, at 3.

78. *Id.*

79. *See id.* at 4 ("BJS has obtained the participation of almost all jail jurisdictions, including post-2006 when the DICRA expired.").

80. *Id.* at 5.

data is now collected under a separate BJS program.[81]

One can only speculate as to why BJS has been able to maintain such a high rate of participation in what now appears to be a completely voluntary program. One explanation is simply that the bureaucracy for making the reports was already put in place when reporting was required, making it a relatively low administrative burden to continue doing so. Another explanation is that many states have laws requiring that such reports be made and submitted to certain government agencies or officials.[82]

Regardless of why this is the case, one thing is clear: the high participation rate in the DCRP is a good thing. While high participation is just one of several goals the BJS hopes to accomplish through the DCRP, it is a prerequisite benchmark to achieving one of the most important "main goals" of the DCRP: to "[p]rovide accurate, timely, and relevant statistics on and studies of mortality in correctional settings."[83] With a high participation rate, we can be that much more confident that BJS is sufficiently equipped to meet this goal on a national scale.

3. The Birth of a New Death Reporting Act

Recently, Rep. Bobby Scott (cosponsor of DICRA 2000) introduced the Death in Custody Reporting Act of 2009.[84] In many ways, this legislation is an attempt to reauthorize DICRA 2000. However, it is also more expansive in at least three major aspects. First, it is a stand-alone bill, not an amendment to a presently existing statute (as DICRA 2000 was).[85] Second, it broadens the reporting requirement to include Federal law enforcement agencies.[86] Third, it *requires* the Attorney General to study and report on the information produced in compliance with the new DICRA.[87] Such study includes determining how the information can be used to lower deaths in custody; and "examin[ing] the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths."[88] The proposed legislation uses a similar enforcement mechanism to DICRA 2000, but with a different funding source.[89]

One may wonder how necessary such a bill is considering BJS's

81. *Id.* at 4. While much can be learned from the collection of such statistics, this Note focuses almost exclusively on the conditions of incarceration. For an example of how arrest-related deaths can be analyzed in a concise and practical way, see generally *Across the Nation*, 24 No. 11 QUINLAN, L. ENFORCEMENT EMP. BULL. art. 10 (2007).

82. *See infra* Part III.B.

83. DCRP Solicitation, *supra* note 74, at 5.

84. H.R. 738, 111th Cong. (2009) (as passed by the House, Feb. 4, 2009).

85. *See id.*

86. *Id.* at Sec. 3.

87. *Id.* at Sec. 2(f), Sec. 3(b)–(c).

88. *Id.*

89. *See id.* at Sec. 2(c)(2).

success in voluntarily attaining and analyzing information on DIC. Along these lines, the second and third changes listed above are significant. Requiring the inclusion of federal law enforcement agencies is a significant step toward having a comprehensive reporting system. Perhaps more importantly—in contrast to state-level reporting—the federal government is able to directly address any deficiencies it perceives in the federal corrections system. Furthermore, in requiring the Attorney General to affirmatively study and report on the statistics ensures that BJS's efforts on collection and analysis are not entirely in vain. An argument for a practical application of such analysis can be found in Part IV of this Note; but for now, it ought to be sufficient to say that nearly *any* analysis and report by the Attorney General is preferable to none. DICRA 2009, like its predecessor, received much support in the House of Representatives: passing with a vote of 407 to 1.[90] The bill currently sits in the Senate Committee on the Judiciary.[91]

B. Deaths in Custody Reporting at the State Level

DIC reporting requirements vary widely from state to state. Many states (about half) do not appear to have any statute that directly addresses reporting requirements of DIC.[92] Among the states that do have such statutes on a statewide level, the requirements tend to fit into one of three general categories: (1) investigation; (2) reporting; and (3) notification. While many statutes include all three components, these categories are helpful primarily to illustrate the *depth* to which states deal with DIC. Statutes with investigative components will usually also have reporting and notification components (Category One), whereas other statutes have only reporting and notification requirements (Category Two), or merely notification requirements (Category Three).

1. Category One: State Statutes with Investigation Components

Statutes with investigative components generally promote both transparency and accountability. The reporting statutes of Texas, New York, and Kansas serve these two functions more than any other state statutes. As such, these statutes provide a good model for other state legislators.

Texas has a detailed statute regulating the reporting of inmate deaths,[93] with a corresponding penal code provision for those who act in

90. Guadalupe A. Lopez, *Legislative Updates*, 5 MOD. AM. 57, 58 (2009).

91. *See id.*

92. The statutes in this section were recovered by running the following Westlaw "terms and connectors" search: "(death w/20 inmate or incarcerat! or custody) and record or report." Admittedly, several states may address deaths in custody indirectly, but this Note is only interested in statewide statutes that explicitly address deaths in custody.

93. *See* TEX. GOV'T CODE ANN. § 501.055 (West 2011).

violation of the reporting statute.[94] The Texas statute covers the entire reporting process: from the requirement that the facility employee in charge of the inmate notify the nearest justice of the peace of the death, to the inspection and investigation the justice of the peace is to conduct, to the report the justice of the peace must file with the local district judge.[95]

New York's reporting statute deserves particular attention. The statute deals primarily with the "functions, powers, and duties" of the Correction Medical Review Board within the State Commission of Corrections.[96] Under the statute, the board is to investigate the cause and circumstances surrounding the death of *any* inmate of a correctional facility.[97] The board is also required to report specifically on the condition of medical care systems in correctional facilities and recommend potential improvements.[98] The statute does contain one clearly mandatory provision, and that is for correctional facility administrators to immediately report the death of an inmate to the board and to submit an autopsy report.[99] The most praiseworthy aspect of the New York statute is that it may be unique by containing provisions governing not only reporting of inmate deaths, but also for using such information to suggest improvements in correctional facilities generally and healthcare more specifically.[100]

The Kansas Bureau of Investigation is required to investigate the circumstances surrounding inmate deaths in Kansas and to prepare a report of its findings.[101] This report is then "made available to the chairperson of the senate judiciary committee and the house corrections and juvenile justice committee of the Kansas legislature . . . ."[102] The report is also subject to Kansas' open records act.[103] An identical statute exists for deaths occurring in the custody of the secretary of corrections or the commissioner of juvenile justice.[104]

While not at the level of the Texas, New York, or Kansas statutes, some state statutes are still more properly considered a part of Category One. For example, North Dakota and Ohio have statutes primarily concerned with reporting, but they also contain implicit investigative components. North Dakota's statute requires the furnishing of all information surrounding a death in custody to the Bureau of Criminal Investigation.[105] Ohio, on the other hand, requires that such information be

94. *See* TEX. PENAL CODE ANN. § 39.05 (West 2011).
95. *See* TEX. GOV'T CODE ANN. § 501.055 (West 2011).
96. *See* N.Y. CORRECT. LAW § 47(1) (McKinney 2011).
97. *Id.* at § 47(1)(a).
98. *Id.* at § 47(1)(e).
99. *Id.* at § 47(2).
100. *Id.* at § 47(1)(e).
101. KAN. STAT. ANN. § 19-1935 (West 2011).
102. *Id.*
103. *Id.*
104. *See* KAN. STAT.ANN. § 75-52,147 (West 2011).
105. *See* N.D. CENT. CODE § 12-60-16.2 (2011).

kept in the Department of Rehabilitation and Correction.[106] In the case of certain types of inmate deaths in Ohio, however, the managing officer is required to make a "special report to the department . . . giving the circumstances as fully as possible."[107] Such information is still not made public.[108]

In contrast to statutes like North Dakota's and Ohio's, some states explicitly require investigation, but have only implicit reporting requirements. Pennsylvania's statute contains a provision requiring the local coroner to investigate the circumstances surrounding deaths in custody "to determine whether or not there is sufficient reason" to believe that the death "resulted from criminal acts or criminal neglect of persons other than the deceased."[109] Vermont's statute is primarily focused on notice, with the exception that it requires the state's attorney of the local county to take charge of the body and conduct a preliminary investigation along with the medical examiner.[110] The Maryland statute is similar, but it is concerned specifically with investigation of deaths in custody suspected to be homicides.[111] Arkansas requires that deaths in custody be reported to "[t]he county coroner, prosecuting attorney, and either the county sheriff or the chief of police of the municipality" in which the death occurs.[112] If previous medical history does not explain the cause of death in a correctional facility, Arkansas further requires that the state police are notified.[113]

2. Category Two: State Statutes with Primarily Reporting Components

Several state statutes lack investigative components, but require something more than mere notice of deaths in custody. Such statutes evidence states' concerns with transparency over accountability. Like all the state statutes in this category, California's statute is concerned with reporting information of the circumstances surrounding deaths in custody.[114] Unlike many of these states, however, the California statute requires the agency in charge of the correctional facility to report *directly* to the Attorney General "all facts in the possession of the . . . agency . . . concerning the death."[115] Such reports are public records in California.[116]

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106. *See* OHIO REV. CODE ANN. § 5120.21(A) (West 2011).

107. *Id.* at § 5120.21(A)–(B).

108. *See id.*

109. 16 PA. STAT. ANN. § 1237(a)–(b) (2011).

110. 18 VT. STAT. ANN. § 5205 (West 2011).

111. MD. CODE ANN., PUB. SAFETY § 2-301(a)(2)(viii) (West 2011).

112. ARK. CODE ANN. § 12-12-315 (West 2011).

113. *Id.* at § 12-12-315(b). Violation of the Arkansas statute constitutes a Class A misdemeanor. *Id.* at § 12-12-315(c).

114. *See* CAL. GOV'T CODE § 12525 (West 2011).

115. *Id.*

116. *Id.*

The South Carolina reporting statute requires the facility manager to notify the local coroner and to submit a report of the "death and circumstances surrounding it . . . to the Jail and Prison Inspection Division of the Department of Corrections" for all deaths in custody.[117] The Division must retain a permanent record of such reports—although it is unclear what (if anything) is to be done with them.[118] Knowing and willful violation of the South Carolina statute constitutes a misdemeanor and is punishable by a fine not more than one hundred dollars.[119]

Tennessee's statute is primarily a notice statute (i.e., it requires that the district attorney or medical examiner be notified of deaths occurring in custody),[120] but it also requires that the Commissioner of Correction "provide a report of any death of any person in the custody of the department at a department facility . . . to the state senator and representative representing such person."[121] This facet of the Tennessee statute is rare. Indeed, Kansas is the only other state requiring that such reports be made directly to state legislators.[122] What state legislators intend to do with such information is unclear, but the Tennessee and Kansas statutes indicate a very direct interest that their state legislators have taken in local deaths in custody.

3. Category Three: State Statutes with Only Notification Requirements

Many states include death in custody reporting requirements in broad statutes that enumerate several "types" of deaths requiring special notification.[123] While several of these state statutes do contain an "investigative" component, any investigation in this context is geared more toward record keeping than accountability.[124] Consequently, these statutes do not belong in Category One.

Georgia, New Hampshire, and Oklahoma require that a medical examiner be notified so that he or she may determine the cause of death in all cases involving deaths in custody.[125] Colorado and Nebraska contain

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117. S.C. CODE ANN. § 24-9-35 (2011).

118. *See id.*

119. *Id.*

120. TENN. CODE ANN. § 38-7-108 (West 2011).

121. TENN. CODE ANN. § 4-3-611 (West 2011). Inmates' representatives are determined by their home address. *Id.* For those residing outside of Tennessee, this reporting requirement is not mandatory. *Id.*

122. *See* KAN. STAT. ANN. § 19-1935 (West 2011). The author was unable to find any other statutes with such a requirement.

123. The "types" of deaths enumerated in these statutes commonly include two broader themes: (1) those in which public health is concerned (e.g., disease, poison, drugs), and (2) those occurring under suspicious circumstances (e.g., sudden deaths, unintentional injury, suicide). *See, e.g.*, GA. CODE ANN., § 45-16-24 (West 2011); MASS. GEN. LAWS ch. 38, § 3 (2011); MINN. STAT. ANN. § 390.11 (West 2011); N.H. REV. STAT. ANN. § 611-B:11(II) (2011); OKLA. STAT. ANN. tit. 63, § 938 (West 2011).

124. Many of the "investigations" in these statutes appear to be for the purpose of determining cause of death rather than any legal culpability.

125. GA. CODE ANN., § 45-16-24(b) (West 2011); N.H. REV. STAT. ANN. § 611-B:11(II) (2011);

similar provisions but instead require a local coroner to make the determination.[126] Massachusetts requires any person knowledgeable of a death in custody to notify the chief medical examiner of the location and all "known facts concerning the time, place, manner, circumstances and cause of" deaths in custody.[127] Minnesota's statute is very similar, although it specifically requires that "[f]or deaths occurring within a facility licensed by the Department of Corrections . . . a forensic pathologist . . . [shall] review[] each death and perform[] an autopsy on all unnatural, unattended, or unexpected deaths . . . ."[128]

Connecticut and Rhode Island require that certain government entities simply keep records of deaths occurring in custody and the details surrounding them.[129] The primary difference between the two statutes is that Connecticut expressly provides that "no person may be denied access to records concerning a person in the custody of the state at the time of death,"[130] while the Rhode Island records "shall be accessible only to the director of the department . . . ."[131]

Upon examination of the various Category One, Two, and Three state statutes, a few common themes emerge: First—and perhaps most significantly—only New York's statute requires that anything be done toward improving conditions of confinement with DIC information.[132] Many states have detailed statutes dealing with DIC, but more should contain improvement provisions like New York's. Second, very few statutes include penalties for noncompliance.[133] This is one of the greatest advantages to having states regulate reporting of DIC—they have the ability to compel individual compliance by threatening criminal sanctions.[134] Third, only half of U.S. states even *address* the issue of DIC. And fourth, no state statute attempts to incorporate the information *already attained* by BJS to assess or improve conditions of confinement within the state. As Part IV suggests, all of these deficiencies can and should be remedied by the states.

OKLA. STAT. ANN. tit. 63, § 938 (West 2011).

126. *See* COLO. REV. STAT. ANN. § 30-10-606 (West 2011); NEB. REV. STAT. ANN.§ 23-1821 (LexisNexis 2012) (including a penalty for noncompliance).

127. MASS. GEN. LAWS ch. 38, § 3 (West 2011). Noncompliance with the Massachusetts statute for certain medical or law enforcement officials may result in a fine of not more than five hundred dollars. *Id.*

128. MINN. STAT. ANN. § 390.11 (Subd. 1a.) (West 2011).

129. *See* CONN. GEN. STAT. ANN. § 19a-411 (West 2011); R.I. GEN. LAWS § 40-2-1 (2012). These statutes have not been placed in Category Two because they merely require that certain information be retained by medical examiners—not compiled and submitted.

130. CONN. GEN. STAT. ANN. § 19a-411(b) (West 2011).

131. R.I. GEN. LAWS § 40-2-1 (2012).

132. *See supra* notes 99–100 and accompanying text.

133. Texas and South Carolina are the only two states with such provisions. *See supra* notes 94, 119.

134. This is in contrast to federal legislation, which only makes the broader threat of taking away certain funding. *See* 42 U.S.C. § 13704(a)(2).

IV. Using DICRA to Promote Greater Transparency and Accountability in Corrections Systems

So far, this Note has articulated the Government's unique burden to provide for the basic needs of those it holds in custody, explored the current standard to which governments are held in order to meet this burden, and examined current reporting practices regarding inmate deaths. As we have seen, there are problems that arise every step of the way, but I will argue that—with some feasible improvements—current DIC reporting practices can be used to promote greater transparency and accountability in corrections systems nationwide.

A. Congress Should Pass the Death in Custody Reporting Act of 2009

Passage of DICRA 2009 may be imminent given the wide support of its predecessor in both the House and Senate, and the wide support for the current legislation in the House.[135] As discussed above, the legislation appears to be the same as DICRA 2000 with just a few alterations.[136] Particularly significant is the requirement that the Attorney General study and report on statistical findings.[137] Having such a requirement in place is beneficial because ideally it means the Attorney General will utilize the hard work that went into collecting such information to directly address how the justice system as a whole is satisfying its burden of meeting the basic needs of those in custody. The government has a burden to meet the needs of those it holds in custody, and any information that can be used to measure the government's success at meeting those needs should be fully utilized. No information more directly addresses this issue on a system-wide scale than DIC statistics. After all, the preventable death of an inmate must be the most clear-cut and pure expression of the government failing to meet an inmate's most basic needs.[138]

If the Attorney General does study and report on this information, a second benefit could be realized: it would help defeat perverse incentives on at least the federal level. Again, there is no clear way to tell what effect the low "deliberate indifference" standard of care has had on prison officials' efforts (or lack thereof) to improve conditions of confinement, but it seems clear that the current standard at least allows or encourages ignorance of such conditions. DICRA 2009 is far from a comprehensive

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135. *See* Lopez, *supra* note 90, at 58.

136. *See supra* notes 84–89 and accompanying text. In reality, these alterations may be the only reason for even passing the bill, considering BJS's success in voluntarily acquiring death statistics from jails and prisons. *See* DRCP Solicitation, *supra* note 74, at 3–4.

137. *See supra* note 87 and accompanying text.

138. Of course, many inmates will die of entirely natural causes (e.g., cancer, heart disease, old age). Such data is generally not significant for assessing or improving prison conditions. This information *could* be useful for examining policy decisions such as whether elderly or dying patients should be incarcerated until death, but that is not the focus of this Note.

solution, but it would make the relevant federal officials (and ideally other prison officials) less able to claim ignorance of any systemic issues revealed in the data.

B. Policymakers Should Implement DICRA-like Requirements at the State and Local Levels

For all the reasons listed directly above, similar reporting requirements should be put in place at both state and local levels. Recall that information about inmate deaths is collected at the individual level (i.e., on an inmate-by-inmate basis).[139] Therefore, the exact same statistics that BJS filters through every year can be subcategorized and utilized by states and counties for similar purposes. This is a critical step toward fully utilizing DIC statistics because it results in two benefits *in addition* to those described above under DICRA 2009: (1) since states run their own correctional systems, they would be better positioned to both identify and respond to state-wide and even localized problems; and (2) states are in a position to actually enforce the accurate collection of this data.

The first benefit is a huge one. Under DICRA 2009, even if the Attorney General does study and report on the data collected, it would be much more difficult to identify and respond to systemic issues both because different states can have very different deficiencies, and because any changes will be far more effective if they are implemented at the state level (in contrast to simply conditioning eligibility for certain funds on compliance as the federal government must often do).

The second benefit may not be a pressing need, but it is a practical concern. Particularly when budgets are tight, correctional officers and officials may not have any incentive to accurately report on inmate deaths where there is no penalty for the failure to do so. Perhaps more concerning, it may work to discourage the reporting of deaths that are truly symptomatic of a larger problem under a cost-benefit analysis from the correctional officer's perspective. Since there is generally no penalty to the individual officer for inaccurate reporting, even a minor benefit (such as the desire to not draw negative attention to the facility) may encourage a corrections officer to falsely report a death as the result of "natural causes" that was actually the result of a lack of proper treatment. It is worth noting once again that this is not to assert that such falsified reports are actually made; this critique merely acknowledges that these negative incentives exist in the current system.

From a practical standpoint, implementing a statute analogous to DICRA 2009 should be neither difficult nor costly. Corrections officers in every state are already collecting this data.[140] Instead of only sending it to BJS, the state may require that such information be sent to both BJS and

139. *See supra* notes 77–81 and accompanying text.

140. *See supra* notes 80–81 and accompanying text.

whatever agency the state designates to analyze the information. States would most likely give the data to currently existing state agencies capable of refining the data. Which state agency this is will likely vary widely from state to state. Implementation costs would likely be low considering the hard part (collection of information) is already done. Alternatively, Congress, rather than the states, can take the initiative by requiring BJS to analyze DIC data on more jurisdiction-specific grounds and report those findings to the proper state officials.

Precisely *how* DIC data is analyzed is another issue that states must determine. Although this information can be analyzed in a near infinite number of ways, two types of analysis are particularly useful: (1) discerning trends; and (2) comparing different jurisdictions. On the first, DIC data can reveal whether a certain jurisdiction (state, county, or even an individual facility) experiences an abnormal or disproportionate rise or fall in a certain type of death. A spike in suicides, for example, would raise immediate red flags. More subtle trends could be a disproportionate amount of deaths related to drug use (indicating a need for stricter contraband policies) or otherwise preventable medical issues (indicating understaffed or lax medical services). The second type of analysis—comparing different jurisdictions—will often be a component of the first, but such studies may also be used more generally. For example, suppose a state or county has a suicide rate of ten people per one hundred inmates. On its own, this information does not say much. Now suppose surrounding states or counties all have a suicide rate around one person per one hundred inmates, or fifteen people per one hundred inmates. Suddenly, this initial number is meaningful to local officials and policymakers who may see an obligation to act accordingly. DIC data can be used in these two ways to examine each type of preventable death (e.g., drugs, suicide, homicide, etc.).

After DIC information is received and analyzed by the designated organization, the state can require the findings to be forwarded to any number of state or local officers, officials, or independent correctional oversight mechanisms.[141] This may include the respective state attorney General, Governor, Lieutenant Governor, certain legislators, or directors of prisons on the state level. Policymakers in general can be an ideal audience for certain findings, since they are some of the best equipped to deal with conditions of confinement issues.[142] On the local level, recipients could include managers of individual jails or prisons, state legislators on a criminal justice policy committee, or even congressional representatives of relevant districts—as the Tennessee statute requires.[143] In each of these

141. *See generally* Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010) (containing a thoroughly compiled list of organizations that would likely be good candidates for receiving and responding to the findings of DIC analysis).

142. *See, e.g.*, *supra* Part II.D.

143. *See* TENN. CODE ANN. § 4-3-611 (West 2011).

cases, some or all of the persons presented with the information may be required to study and respond to the information (as the attorney general under DICRA 2009 must do) by, for example, developing an action plan for addressing any concerns raised by the report. Exactly who should receive and respond to which findings can be left to the determination of the agency (obviously, for example, a local jail manager would not need to respond to a finding that the state's prison system is the national leader in drug-related deaths).

V. Using Deaths in Custody Data: A Few Examples

As described in Part IV above, there is no shortage of ways in which DIC Data can be used by policy makers and officials. The following three examples illustrate practical analysis that may be derived from readily available data.

A. Example One: Examining Leading Causes of Deaths in Custody

The Bureau of Justice Statistics has published several helpful statistical tables regarding causes of deaths in custody. Among these is a table listing the average annual mortality rate for various causes of death in state prisons.[144] This table identifies the following causes of death from most to least common: illness, AIDS, suicide, homicide, drug/alcohol intoxication, accident, and other/unknown.[145] Among these, illness is far and above the leading cause of death in state prisons—accounting for over 82% of all state prison deaths.[146] AIDS and suicide are tied for the second most common cause of death at about 6% each.[147] The remaining causes of death are roughly equivalent in their rate of occurrence.[148]

Interestingly, these percentages do not hold true for causes of death in local jails (as opposed to the state prisons discussed above). The most notable difference is the rate of suicides. Specifically, there are roughly 43 suicides per 100,000 local jail inmates.[149] This is in contrast to the 16 suicides per 100,000 state prison inmates.[150] The heightened suicide rate in local jails comes with correspondingly lower rates of both illness and AIDS causes of death as compared to the state prison rates.[151]

This data can and should be very valuable to prison officials and policy makers alike. First, it indicates that the most efficient way to prevent

144. Christopher J. Mumola & Margaret E. Noonan, *Deaths in Custody Statistical Tables*, BUREAU OF JUSTICE STATISTICS, 5 (2009), *available at* http://www.bjs.gov/content/dcrp/dcst.pdf.

145. *Id.*

146. *Id.* at 4.

147. *Id.*

148. *Id.*

149. *Id.* at 23.

150. *Id.* at 5.

151. *See id.* at 22–23.

deaths in state prisons is to address the administration of medical care. Illness is admittedly a broad category, but it seems likely that a significant proportion of deaths attributed to "illness" could have been prevented by either more efficient emergency care or by more effective preventative care.

Second, this data indicates that a policy aimed towards reducing deaths in state prisons may not be effective for reducing deaths in local jails (and vice versa). Suicide is a much greater concern in local jails than it is in state prisons.[152] Similarly, illness is a much lesser concern in local jails.[153] Consequently, policies aimed at lowering deaths in local jails should put much more focus on preventing suicides.

B. Example Two: Comparing Deaths in Custody Nationwide Across States

Identifying the leading causes of mortality in jails and prisons can provide valuable information, but it is far from the only use of DIC data. Nationwide comparison of deaths in custody across states can also be very valuable for at least two reasons: First, it can identify state systems that are over-performing relative to the national average. Such state systems can be used as models for other states that want to improve their prison systems. Second, comparison can identify state systems that are under-performing relative to the national average. These states may be held accountable—particularly by their own policy makers.

As described above, illness is the leading cause of death in state prisons by a wide margin.[154] Consequently, it may be useful to compare state prison systems by relative rates of medical causes of death. Indeed, the Bureau of Justice Statistics has prepared a table that makes such a comparison.[155] In this table, we can see that the national average annual mortality rate for all illnesses is 223 per 100,000 state prison inmates.[156] Most states are fairly close to this rate.[157] The largest deviations come from Louisiana and Vermont. Louisiana boasts the highest illness-related mortality rate at 388 per 100,000,[158] while Vermont has the lowest mortality rate at 108 per 100,000.[159]

These numbers can also be broken down into specific causes of illness-related death. For example, in addition to being the overall leader in illness-related mortality rate, Louisiana has the second highest rate of

152. *See id.* at 23; *id.* at 5.

153. *Id.*

154. *See id.* at 4.

155. *See* Christopher J. Mumola, *Medical Causes of Death in State Prisons*, BUREAU OF JUSTICE STATISTICS, 9 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mcdsp04.pdf.

156. *Id.*

157. *See id.*

158. *Id.*

159. *Id.* It should be noted that from 2001–2004, there were only twelve total illness-related deaths among Vermont state prisoners. *Id.* The rate per 100,000 inmates may be easily skewed in such a small jurisdiction.

AIDS-related deaths.[160] While several states have no AIDS-related deaths per 100,000 inmates, Louisiana has 53.[161] This is in contrast to the national average of 18 AIDS-related deaths per 100,000 inmates.[162]

These numbers may not say much on their own, but they can lead to important questions and discoveries. For example, take Louisiana's mortality rates. It is probably not a coincidence that Louisiana prisons have both the highest rate of illness-related deaths and the second highest rate of AIDS-related deaths. AIDS may be a serious problem in certain prison systems within Louisiana. This is not a condemnation on Louisiana. Rather, it indicates that policy makers in Louisiana may need to focus particularly on preventing the spread of AIDS within the state prison populations if they want to lower deaths in custody.

C. Example Three: Comparing Deaths in Custody Statewide Across Jurisdictions

The process for comparing deaths in custody statewide across jurisdictions should function much like comparing nationwide across states. Just to illustrate the point, however, I look to suicide rates in the six largest jail jurisdictions within one of the nation's largest states: Texas.

Among the six largest jurisdictions in Texas, we see a very uniform number and rate of jail suicides.[163] In fact, the two largest jurisdictions in Texas—Harris and Dallas Counties—reported an identical number of suicides from 2001–2002 at seven each.[164] The remaining jurisdictions—Bexar, Tarrant, Travis, and El Paso Counties—reported two suicides each.[165] This is somewhat surprising, considering that the overall mortality rate for these jurisdictions varied substantially: from 92 per 100,000 inmates in Tarrant County, to 243 per 100,000 inmates in Harris County.[166] This may indicate a relatively successful statewide approach to curbing suicide rates in Texas.[167]

VI. Conclusion

None of the proposals suggested above are intended to be a cure-all for a corrections system that needs much improvement nationwide. Rather,

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160. *Id.* Maryland has the highest rate at fifty-five per 100,000. *Id.*

161. *Id.*

162. *Id.*

163. Christopher J. Mumola, *Suicide and Homicide in State Prisons and Local Jails*, BUREAU OF JUSTICE STATISTICS, 4 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf.

164. *Id.*

165. *Id.*

166. *Id.*

167. This hypothesis is somewhat corroborated by looking at nationwide data. The state of Texas reports 17 suicides per 100,000 jail inmates—a number only marginally higher than the national average at 14. *See id.* at 3.

this is a proposal to utilize information we *already have* in a cost-effective way that encourages accountability and transparency in our nation's prisons and jails. To do so would take a significant step toward improving the functioning of the criminal justice system. Current prison and jail administration policies (particularly in the face of budget concerns) can be viewed as too litigation focused—for example, avoiding liability under the Eighth Amendment. It would be a great help to encourage a more proactive system, where officials actively work toward improving the system rather than wait to react when things get out of hand. We should never forget that governments have an absolute obligation to meet the basic needs of individuals in their custody. Reasonable minds may differ over what constitutes acceptable conditions of confinement—even what constitutes a "basic need"—but it should be beyond dispute that governments have a per se obligation to minimize preventable deaths in custody as best they can. Deaths in custody data allows us not only to see *whether* something is fundamentally wrong with jurisdictional or nationwide conditions of confinement, but it also helps us determine *what* is wrong. The data is valuable, it is available, and it is our duty to make full use of it.