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TRIBUTES

PROLIFIC: A TRIBUTE TO PROFESSOR R. GEORGE WRIGHT

ANDREW R. KLEIN*

How does one start when writing a tribute for George Wright? In so many aspects of life, George is simply prolific—the number of subjects on which he is knowledgeable, the quantity of articles he has published, his untold acts of kindness, his unflagging support of students and colleagues. And much, much, much more. "Well, shucks," as George might say. Perhaps that should be the theme for this Tribute: George Wright is *prolific*!

It is hard not to look back at George's forty-plus years in academics without noting the sheer volume of his written work. I am not sure if anyone keeps a list, but few legal scholars have published more than George Wright. George's work is also fun to read. Perusing anything George writes is like having a conversation with him. His pieces are thoughtful, often infused with a touch of whimsy, and always make you think. It is no understatement to say that George is among the leading scholars of his generation.

But I will let others elaborate on George's impact as a scholar. Because focusing *only* on his scholarship would vastly underestimate George's influence on those around him and who he is as a person. George Wright is every bit as prolific in his humanity as he is at producing scholarship. And I would assert that George's prolific kindheartedness is ultimately even more important that his impressive body of published work.

I started my academic career in the early 1990s at Samford University's Cumberland School of Law. I was not quite thirty years old at the time and had the privilege of joining a highly supportive faculty. I felt comfortable in my new environment and enjoyed the classroom right away. However, I was less confident about entering the marketplace of ideas through my scholarship. Enter George Wright. Even though George had arrived at Samford only six years before me, he seemed like a towering figure at the time—and not just because he was tall. George was always in the building, always available, and stood out as the model of an engaged scholar. George probably does not even remember this (because it is routine for him), but he was the first person with whom I

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shared a draft of a law review article. The topic did not seem in George's wheelhouse, so I hoped for general comments within a few weeks. Well, the *very next day* after I gave George my draft, I received the manuscript back, filled with handwritten suggestions, both substantive and stylistic, plus genuine encouragement about what I was doing. It meant the world to me, and it started a decades-long habit of leaning on George Wright to provide both insight and a morale boost on almost anything I did. How lucky I have been to find someone like George as a colleague.

As it turned out, George and I remained colleagues for a long time. I left Cumberland to join the Indiana University McKinney School of Law faculty in 2000. The following year, George confided in me that he would be interested in making a similar transition. George was an alum of the school (and a former editor-in-chief of the Indiana Law Review). Indiana was also home to his late wife, Mary, which made a transition appealing professionally and personally. I served on the IU McKinney faculty appointments committee during my first year there and could barely contain my enthusiasm for having George join us. Thankfully, my new colleagues saw the light and extended an offer to George to become a member of our faculty. Ever since, the IU McKinney community has been better because of his presence. To me, it also meant that—with just a brief intermission—I got to be faculty colleagues with George Wright for more than thirty years!

Thinking back over those years brings a flood of memories. Here are a few in no particular order—and friends of George will appreciate the rapid-fire presentation, jumping from topic to topic.

- I think of George in his office, students flowing in and out, George talking to them about everything under the sun while nibbling on Cheetos or some other unhealthy snack food.
- I remember George walking into a classroom one afternoon after I had just taught an hour of Torts. George looked at my writing on the whiteboard and told me not to erase it. Later, I learned he taught the next hour, using my notes on the board, and somehow connected them perfectly to his Constitutional Law lesson, which, on its face, seemed completely unrelated.
- I think of George handwriting article after article after article, longhand on a legal pad, only slowly getting used to the world of word processing.
- I remember an evening when George joined my two sons and me at Victory Field for a couple of innings of a baseball game. Before he left, my sons had new baseball gloves courtesy of Uncle George. I later received a baseball signed simply "Professor Wright."

George knows so much about so many things. He can talk as easily to someone about the current state of the New York Yankees as he can talk to another person about the intricacies of music performed by the Indianapolis Symphony Orchestra. He knows about art, popular culture, and social media.

He probably tinkered with AI before his students even knew what it was. George is also a master in the classroom, having taught Constitutional Law and Administrative Law to generations of lawyers. But if the school struggled to fill a hole in the schedule, George would step up and teach just about anything. He is the consummate team player.

That last point makes me reflect on what a joy it was to have someone like George on the faculty when my own career moved toward administration. For a dean, it is nice to have a colleague who can cover wide swaths of the curriculum, is willing to teach without complaint in any time slot (even on Friday nights), who gives unlimited time to students, all while publishing more than anyone in the academy. George also took on one of the most thankless tasks for the school by serving on the campus Promotion and Tenure committee. Unsurprisingly, soon after beginning his service, George became one of the group's most trusted members. He could thoughtfully review a dossier from a medical school professor as well as he could that of a philosopher. He earned the respect of everyone on the committee, year after year.

Actually, George has earned the respect of everyone with whom he has interacted throughout his remarkable career. And though I wish George the best as he heads into retirement, it will be a loss for future students and those who will not see him around Inlow Hall on a regular basis. That said, I imagine we will still hear from George, be it in writing, by email, or otherwise. I hope that will happen often—indeed, *prolifically* if at all possible. Godspeed, George. You are one of the best and I am grateful to count you as a friend and colleague for life.

PROFESSOR WRIGHT STUDENT TRIBUTES

FOREWORD[*]

In Spring 2024, Professor Richard George Wright announced his retirement from the IU McKinney School of Law. After forty-eight years of teaching, his retirement was well earned, but his announcement brought deep sadness to McKinney's student body, particularly the second-year students who could not fathom graduating from McKinney without Professor Wright's presence. After numerous pleas from students, Professor Wright's golden heart showed through, and he agreed to remain at McKinney (if only to teach one course per semester for the next three years). However, his partial retirement marked the end of his remarkable twenty-three-year tenure as advisor to the *Indiana Law Review*.

As if an eternal presence, Professor Wright's connection with the *Indiana Law Review* dates back over forty years to his own law student days as a member and, later, the Editor-in-Chief of Volume Fifteen.

In response to his announcements, multiple professors proposed that the *Indiana Law Review* publish a tribute to honor Professor Wright's long-time service and tremendous contributions to the legal community, IU McKinney, and the *Indiana Law Review*. Proposals ranged from a *Festschrift* to a traditional tribute. However, each met the same roadblock—Professor Wright himself. He initially "forbade" the *Indiana Law Review* from publishing a tribute until his full retirement. Even when he gave in, he declined a *Festschrift* because "[I]'m not affiliated with any school of thought. Purely Individualist."

The tribute plans remained frozen until Professor Frank Sullivan, Jr. suggested a unique idea: a collection of short tributes written by Professor Wright's former and current students, sharing their personal stories and memories of their most cherished professor. This concept resonated and fittingly set the stage for a tribute as individualistic and impactful as the professor it celebrates.

Thank you, Professor Wright.

SETH ENGDAHL[1]

"Trust your Uncle George. . ."

When I walked into Constitutional Law for the first time in the Fall of 2023, I did not know what to expect from Professor Wright. My only impression of the man came from the stream of accolades listed on IU McKinney's website next to a photo of him looking suspiciously at the camera. "This guy," I thought, "Looks like a nerd. I like nerds."

Professor Wright walked into class without any notes or computer and began writing the cases we would be discussing on the whiteboard. And then he began to lecture. "The goal of every Professor is for the semester to be your

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[*] The *Indiana Law Review* would like to sincerely thank Professor Sullivan for his support and ideas for this tribute. Further, thank you to the former and current students for writing tributes for this piece. This tribute would not have been possible without all of you.

1. J.D. Candidate 2026, Indiana University Robert H. McKinney School of Law; B.A. 2011, Purdue University–West Lafayette, Indiana.

masterpiece. . .” Thus began a semester of learning Constitutional Law with the aid of analogies to Lord of the Rings and Star Trek, effortless quotations of Western philosophers, the occasional reference to jazz music, and the constant reminder of Professor Wright’s love of chocolate and Coke Zero. To this day, whenever I read or hear references to the U.S. Supreme Court’s levels of scrutiny, I still think of Professor Wright’s hatred of bees and the numerous methods he would use to irradicate them. Using a cannon to kill a bee (and anything else in the vicinity)? Well, that would be permitted under rational basis review. Using a precise poison that only targets bees with no collateral damage? Well, that would be okay under strict scrutiny.

Sadly, midway through the semester, Professor Wright informed his students and McKinney’s faculty that his wife, Mary Theresa, was near death. Accompanying this information was a lengthy, deep, introspective reflection on life and love—full of references to philosophers, religions, and, yes, Lord of the Rings. I remember reading it and being incredibly moved, thinking of my own wife and family. Nevertheless, Professor Wright continued teaching, explaining that—and I am paraphrasing—teaching is what he loved to do, and it kept him away from self-pity. Indeed, had I not been told that Professor Wright was facing such personal tragedy, I would not have suspected anything was wrong—he came to class each day, espoused his dry wit, and never canceled or cut class short.

At the end of the semester, I vividly recall flipping through Erwin Chemerinsky’s treatise on Constitutional Law in preparation for the final exam and remembering the details of cases based on Professor Wright’s descriptions. Does government involvement in a topic “give you the willies?” Well, then, there is probably a privacy-based substantive due process issue.

As he transitions from teaching future lawyers to retirement, Professor Wright can rest assured that his students will easily remember Constitutional principles due to his witty, colorful analogies and sense of humor. May his retirement be filled with evenings watching Star Trek, drinking Coke Zero, and eating chocolate.

RACHEL SCHERER JELLEN[2]

It is hard to summarize the impact that Professor Wright has had in my life, most pivotally during my law school career, and when starting out as a lawyer. But for Professor Wright, I am truly at a loss as to what kind of lawyer, if any, that I might be right now. I am forty-three years old, and I have been, by and large, happily practicing law in California (my home state) for roughly seventeen years now. I kid you not; during that entire time, Professor Wright

2. Rachel Scherer Jellen, also known as Rachel Anne Scherer, graduated *cum laude* from IU McKinney School of Law in 2007. She served as the Executive Managing Editor of the Indiana Health Law Review during the 2006–2007 school year, and her most proud and meaningful accomplishment at IU McKinney School of Law was being a research assistant to Professor Wright from 2005–2007. She is a member of the California State Bar and went on to practice in the areas of mental health law, disability civil rights, estate planning, probate, trust, and tax law.

has been glued to the back of my brain nearly every day since graduating from IU McKinney School of Law. It is hard to explain precisely how, why, or when this happened. All I can offer is that Professor Wright is quite simply a legendary teacher who transcends the boundaries of his own classroom in all the most meaningful ways.

Professor Wright's analysis of the law is not just from within any case book—his thinking and thought-provoking questions go beyond the book, beyond the classroom, and touch all subject matters, philosophies, and perspectives, both current and historical. You might literally find yourself digesting the words of Plato, John Stuart Mill, or Martin Luther King Jr. while talking with Professor Wright. Then, somehow, without skipping a beat, you find yourself in the presence of a totally normal everyday human being who happens to enjoy the Yankees, good jazz, and even Star Trek.

Having been a law student in all of his classes: Constitutional Law, Jurisprudence, Administrative Law, and the First Amendment, and when reflecting on these cherished law school days as his student, I almost want to say that being in any of his classes is akin to sitting down for a beloved dinner conversation with your dearest family and friends on important and meaningful topics that somehow do backward flips and summersaults over themes such as morality, goodness, justice, and truth. There is a unique creativity and love of learning and life that shines through in the way that Professor Wright teaches. He is a great storyteller, and so being in his classroom is truly like being on the edge of your seat at a great performance.

And his contributions to the legal community at large, with his countless scholarly articles and professional speeches all over the world, are equally legendary. Professor Wright is truly brilliant and creative but uniquely humble and easy to relate to and understand. Having worked as a student assistant to Professor Wright during my second and third years of law school, I poured through many of his law review articles, always in deep admiration for the way he shined a light on the truth while pushing the movement of the law in the direction of what is right and good with his scholarship.

It is truly one of my greatest joys to call Professor Wright a Mentor in this journey of life and law. You are with me forever, RGW, and I know your influence has similarly permeated so many others like me and the world at large to make it a better place. Like all the greats, you will never really retire, RGW. Your presence goes beyond time and space and is truly infinite. Slainte RGW!

–Your friend and student,
Rachel Scherer Jellen.

ASHLEY PAYNTER[3]

"Kombucha and baby aspirin." That was what was in Professor Wright's coffee mug that afternoon, or that is what he told us before launching into a

3. E. Ashley Paynter is a trial lawyer at Riley Safer Holmes & Cancila LLP. She graduated from the IU McKinney School of Law in 2010. All opinions expressed in this piece are her own. In all likelihood, she's currently drinking Diet Coke and grenadine.

lecture on *Wickard v. Filburn* and the breadth and scope of the Commerce Clause. As a political science and religious studies major, Constitutional Law was what I had looked most forward to in my first year of law school. And after a grueling first semester, it was finally happening. But we were not talking about the hot political issues of the day—free speech or abortion or the Establishment Clause. No, those things were not part of the first-year curriculum. Instead, this larger-than-life professor—a real-life Doc Brown—was standing in front of our class talking about how Congress could properly invoke its power to regulate interstate commerce by aggregating individual, arguably trivial, actions when they have a "substantial" impact on commerce. I sighed and pulled out my laptop, scrambling to catch Professor Wright's insights on the cases at issue that day so I could dump them into my outline later.

What I did not understand at the time was that this decidedly unusual but charming man would shape the way that I think about being a lawyer. The juxtaposition of his daily pronouncements that his mug was full of some absurd combination of beverages and near-weekly references to "our greatest and most profoundly evil Justice,"[4] with hours of lectures on the driest but most fundamental parts of our Constitution, demonstrated a truth that I would later come to fully embrace—if I do not find myself laughing most days while engaged in the practice of law, I am not doing it right.

It is no secret that lawyers, as a group, are prone to mental health issues, including anxiety, depression, and substance abuse.[5] The pressure to obtain results for our clients, our colleagues, and ourselves is immense. It is all too easy to allow it to force the fun out of the work. But, Professor Wright's approach to teaching the law set me on a path to understanding that just because something is serious does not mean that it must be dour. And, for that, I am not sure that I will ever be able to thank him enough.

DANIEL PULLIAM[6]

Professor Wright's wisdom and guidance served the *Indiana Law Review's* leadership well through his years of wisdom in addressing ethical challenges. As the academic advisor, he saw such quandaries as opportunities to teach and instill values for future challenges.

Professor Wright also brought his academic prowess to the pages of the Law Review. In handwritten script, Professor Wright's written contributions rose above the practical challenges of harmonizing caselaw or structuring statutes. His review of the moral and philosophical applications of the law on society

4. Oliver Wendell Holmes, for the uninitiated.

5. PATRICK R. KRILL ET AL., STRESSED, LONELY, AND OVERCOMMITTED: PREDICTORS OF LAWYER SUICIDE RISK, Healthcare (Basel) (Feb. 2023).

6. Daniel Pulliam is a partner in the business litigation group at Faegre Drinker Biddle & Reath LLP. B.A. 2004, *cum laude*, Butler University, Indianapolis; J.D. 2010, *magna cum laude*, Indiana University Robert H. McKinney School of Law. He is also a former Editor-in-Chief of the *Indiana Law Review* and *The Butler Collegian* and a former law clerk for Judge John Daniel Tinder on the U.S. Court of Appeals for the Seventh Circuit.

went beyond the typical law review essay by asking and answering the questions of why society cares about human rights and morality.

TRIBUTE TO UNCLE GEORGE

BREA L. MCDOUGAL[7]

Professor Wright, better known to me as "Uncle George," was the highlight of my experience as a law student. To state the obvious, Professor Wright is exceptionally brilliant and a wonderful professor. I know that goes without saying. I have learned so much in his classroom. From his professorship, I have gained a wealth of knowledge and a priceless one at that. Sitting in the front row of his classes is one of my favorite places to be, particularly in my 3L year, as I am seated and surrounded by the unofficial "Uncle George Fan Club," who have followed him around, course by course, since our 1L Constitutional Law class. 1L is hard, or at least it was for me, particularly as a first-generation law student with a weight of imposter syndrome and a lot of anxiety. I was frequently overwhelmed and genuinely afraid, and I was questioned several times if I was in the right place or if I was just too young, too unprepared, or too "different" to be a law student. I often wondered if I was smart enough to be in our law school's classrooms, if I was worthy of being there at all, and certainly worried if I would "make it." I did not feel that way, ever, in Professor Wright's classroom. I knew I was in the right seat.

Professor Wright exudes a lesson on character, a bright-line rule per se, that has lived in the halls of our law school, wherever he wanders (drinking soda and eating Oreos), thanks to him—that it matters very little how smart you are if you are not just as kind, that your heart matters as much as your brain does, and that you should always, without a doubt, use it. Professor Wright is kind—not just to the Editor-in-Chief of Law Review but also to said editor's fun little sidekick and to all the "kids" in our row. He has valued my personality and friendship with my peers as much as he has any grade I have ever received. In fact, I would bet he values it a lot more. He is warm, friendly, and open. He is funny, unique, and fantastic at what he does. He is one of, if not the, bright light of our school. He views his students as people. He talks to us, and we know he cares, not just about our intellect, but about our growth, if we are okay. Professor Wright is an expert at many things, and I could list them all. However, this tribute would then become very long, so of all the things I think Professor Wright deserves to be remembered for, it is how he made people feel like they deserved to be here, to be a law student, to have a seat and a laugh, too. And that has made, for me, all the difference.

Thank you, Professor "Uncle George" Wright, for not just all the fantastic, challenging things you've taught me about Constitutional Law, the First Amendment, and Administrative Law, but for giving me the confidence to know I belong, for making unique and fun people just as cool as editors (who are also

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7. J.D. Candidate 2025, Indiana University Robert H. McKinney School of Law; B.A. 2022, Indiana University–Bloomington, Indiana.

great), for showing that kindness is brilliance and that lawyers can laugh. I consider myself lucky to be in one of the last groups he will teach. I am saddened for all the incoming students who will genuinely miss out on a once-in-a-lifetime academic and personal experience in getting to know and be taught by our own Professor Wright.

Professor Wright, you are a difference-maker in the world, and I owe a lot to you in my journey. I am really quite thankful for you. And without any official endorsement, I know I speak for many of the "Uncle George" fan club members. Thanks for letting us into all your classes and making us smarter with a smile.

–With the utmost gratitude,
Brea L. McDougal

"Drive Safely, and Goodnight"

SHELBY MOHR[8]

When I moved into my apartment, I had bold aspirations to decorate the walls of my apartment. But, as work and law review duties picked up, the hanging of the whiteboard and posters fell to the wayside. However, I did manage to hang one thing—the recommendation letter Professor Wright ("Uncle George") wrote for me this summer. Although I am sure Uncle George wrote this letter in less than ten minutes and thought nothing else of it, this letter immediately impacted me. The letter represents the three most important things I learned in law school, the life lessons Uncle George taught me.

The first lesson is to always find the joy and humor in life. In the letter, when talking about my transferrable skills and assets, Uncle George included a quip about my enjoyment of crossword puzzles. At first read, the comment made me laugh. Upon reflection, I realized it embodied one of Uncle George's best attributes—never to forget to have fun and laugh. He brings humor into everything he does—especially into classes with his outlandish jokes about cases or teaching lessons with two puppets, aptly named "Duck and Panda." The joy he brings to others is palpable. And by doing so, he encourages others to act the same way. He reminds us that although the law is important and can be stressful, joy and humor are how you make it through life.

The next important life lesson he taught me is to always believe in yourself. The first time I read the letter, I cried. I have never felt so supported, and his writing took me aback. It was not only special because they came from a mentor I admire deeply, but it reminded me to view myself and my abilities the way he does. Imposter syndrome is, unfortunately, a very real thing. It has always been something I have struggled with, undoubtedly increasing during law school. I always think I should be doing more, and often joke that I wound up where I am as a "practical joke gone too far." However, Professor Wright has a way of noticing these feelings and telling you precisely what you need to hear to make those thoughts go away. He believes that all his students will do great things and

8. J.D. Candidate 2025, Indiana University Robert H. McKinney School of Law; B.A. 2022, Butler University. Shelby is the current Editor-in-Chief of the Indiana Law Review.

that we must believe that we can. I will forever be thankful to Uncle George for his support. The letter was genuinely transformational in helping me realize that I *can* do whatever I put my mind to.

The last and most admirable lesson Uncle George taught me is to be generous. When I asked him if he would write the letter, he told me it would be "his honor" and returned it within twenty-four hours. He was doing me a huge favor; however, he viewed it as an honor for him. His generosity is endless, and I cannot even recall all the things Professor Wright has given or done for me over the past three years. If I needed a book for a project or law review, he would give me the book, tell me to keep it, and highlight pages he thought I would enjoy. He gave me a Minnesota Twins hat after I expressed disdain for his gifting of Yankees hats to other students (sorry, Professor Wright, I will never like the Yankees). Other gifts include stress balls, seven Tide To-Go pens, a detailed flow chart outlining my future steps to reach my goals, and the most special, a vintage mirror belonging to his late wife. Professor Wright is the most generous person I know. He gives and gives, often knowing what people need before they do. This will be forever the most important lesson he taught me, and one of my goals in life is to be as generous, if even possible, as Professor George.

Uncle George taught me a lot in my three years. However, the lessons I will likely remember are not those about the Commerce Clause, the First Amendment, or *Chevron* deference; they will be life lessons. He has never said these things out loud; rather, he displays them daily. His recommendation letter for me will always serve as a reminder of these lessons. I plan to hang it on my office wall one day, as a reminder to always approach life like Uncle George: with humor, confidence, and generosity. Uncle George, your impact on IU McKinney and its students has been tremendous, and your retirement is beyond deserved. I will forever be thankful for the time spent with you, Duck, and Panda. Thank you for everything, and enjoy all of the Coke Zero-flavored Oreos your heart desires. I will end this tribute akin to how you abruptly end each class, "Drive safely, and have a good retirement."

KONSTANTINA NOËL[9]

I went to a Phish show recently, and the band said, "What an incredible thing, that we are all here together. We are here, right now. Think of the odds. That's special."

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9. Konstantina (Tina) Noël graduated from McKinney in 2022, *magna cum laude*. Konstantina was a note development editor on the Indiana Law Review Volume 55 Editorial Board, and she has fond memories of learning jurisprudence with Professor Wright. After law school, Konstantina joined Faegre Drinker Biddle & Reath as an associate attorney in the Products Liability and Mass Tort group where she worked as a defense litigator. Konstantina recently left the firm to spend time with her beautiful nine-month-old daughter, Stella. In her free time, Konstantina works part-time as an academic tutor and enjoys hiking and exploring nature with Stella, her turbo-nerd husband, Mike, and their oh-so-extraverted Labrador retriever, Annie.

We go through our lives alone, our paths intermingling, but nobody's path the same. You are one of one, entirely unique. Your eyes and ears are yours, and nobody else's.

Paradoxically, we are also sharing in this moment. Our uniqueness is intermingled, and we share one string in common right here, right now—the celebration of a great human.

Aurelius says to stop talking about what the good man is like and just be one.

That's R. George Wright.

He is an empath who sees straight through life's ugly and beautiful nuances. He is a modern-day philosopher. He knows what his students need and cares enough to make them think and question, in a time when so few continue to question.

He is a selfless person, a gift-giver. Every time I see him, he never shows up empty-handed. Funny story—he once gave me a car key battery; you know, the weird flat battery thing that goes in car keys that the dealership charges like $150 for that you can actually get at Ace Hardware? Yeah. That thing. He pulled it out of his pocket and said, "You might be able to use this." Well, strangely enough, my key died the next day! It was hilarious and, ironically, perfect timing. (I am still convinced he is some kind of wizard in disguise from an alternate universe).

Maybe he gave us that serotonin boost we needed so desperately in the middle of the day with his witty or hilarious emails. Maybe he challenged us when we needed it. Maybe he gave us good advice or a great lecture. Maybe he did not tell us what we wanted to hear, but we are better for it now.

We are all lucky to have crossed paths with Professor Wright. We are here, right now, putting our love for this great person into words, so take a pause to celebrate—George (as he always reminds me, as we share a middle name). From one George to another, I am so happy we were here on earth at the same time. Think of the odds. That's special.

–K

EVANGELYN RICHTER[10]

I have taken two classes with Professor Wright and am so glad I have. His method of using silly hypotheticals to explain complex legal concepts has helped me to understand the material without feeling daunted by it. I also appreciate that his teaching style is to generally lecture and tell us what he feels we need to know while allowing for questions should they arise. His generally unconventional style has helped me, and others find the fun in the course material during law school.

Teaching methodology aside, Professor Wright is very interesting to talk to. From classical music to his childhood radio station to his lovely lecture puppets

10. Evangelyn Richter, J.D. Candidate 2026, Indiana University Robert H. McKinney School of Law.

Duck & Panda, Professor Wright always shares an interesting perspective, story, or sentiment. He exemplifies that while the law itself may be dry at times, its practitioners are often just the opposite: interesting, intelligent, and illustrious.

EMILY SLATEN[11]

No one who meets Professor Wright forgets him, and I certainly never will. His unusual combination of unarrogant brilliance and ability to connect with others makes him one of the most memorable figures in my time at IU McKinney and my legal career.

Albert Einstein once said, "The true sign of intelligence is not knowledge but imagination,"[12] and that is perhaps no better portrayed than in an interaction with Professor Wright. His quirky sense of humor and wit leave most ordinary people stumped and then deeply enlightened. Whether in the halls or in class, his obscure references and analogies shed light on topics in a way that simple studying never could. For years, he has shared his authentic, creative self with his students and colleagues and, in doing so, provoked thoughts and conversations that would not have otherwise happened. We can only thank Professor Wright for that gift.

But it is not just his brilliance that sets him apart. In fact, where other brilliant people might falter, he excels. He makes himself available and builds up others in a way few people are willing to do, certainly not lawyers. He makes a daunting environment feel less scary just by being present. And his varied interests beyond the law assure others that there are many paths to a fulfilling life. Beyond anything learned in class are these great examples of how to treat other people.

For the future students who never have the chance to meet and know Professor Wright, I can only hope that his absence will be filled by someone half as brilliant, engaging, and thoughtful. Best wishes for a wonderful retirement, Professor Wright.

ALEXIS STEINRAUF[13]

It is difficult to summarize in a few paragraphs all of the ways in which Professor Wright is so wonderful, but I will try. I started as a first-year at IU McKinney shortly before Professor Wright joined the staff. I remember being daunted by the workload, the subject matter, and, mostly, the uncertainty about

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11. Emily Slaten graduated from IU McKinney School of Law in 2010. Upon graduation, she clerked for the Honorable Frank Sullivan, Jr. on the Indiana Supreme Court. She currently resides in St. Louis, Missouri with her husband and three young sons.

12. *The Socratic Method*, https://www.socratic-method.com/quote-meanings-interpretations/albert-einstein-the-true-sign-of-intelligence-is-not-knowledge-but-imagination (last visited Oct. 29, 2024) [https://perma.cc/P45S-2KTP].

13. Alexis Steinrauf, J.D. Indiana University Robert H. McKinney School of Law 2002; Bates College 1996; Park-Tudor 1992. Alexis currently practices family law as a solo practitioner and is semi-retired.

the future. Professor Wright was a highlight of law school for me and my fellow classmates for sure. He is an amazing professor and an equally amazing human being. He was immediately popular and well-liked. He can talk or write about anything or nothing, and it is somehow always interesting and entertaining. His sense of humor is unlike anyone else's, and there is not a single person who does not find him funny. He always has a humorous quip to make you see the lighter side of life. It is a gift that he shares generously with everyone, not just in the classroom.

He is also incredibly generous with his time. In my second year of law school, my father died suddenly. Professor Wright provided unwavering emotional support through my time in law school as well as after graduation. At the time, I did not even realize how much I needed that support. I spent countless hours in his office when I was sure he had a million other things he needed to do. He always had time for me.

When I opened my own office as an attorney, Professor Wright gave me a small statue for my desk, that I now keep at home, as I stopped renting office space years ago. He was there when I was married thirteen years ago. I have an email file titled "RGW," containing hundreds of emails dating back to as early as 2005. This correspondence represents a cumulative, constant, and confirming presence in my life that I am so grateful. I feel so fortunate that he joined the faculty of IU McKinney, and I know that his impact on my education, legal career, and life has been immense.

SAINT GEORGE AND THE DRAGON

MIA TAPELLA[14]

Law school is a battle against legendary beasts. Students need a champion, a sage warrior, to provide not only guidance but also support and encouragement. I feel fortunate to have found this in Professor R. George Wright. The first time I spoke up in Wright's class was when he asked the group of primarily 24-year-olds, "Does anyone know why people were protesting Dow Chemical during the Vietnam War?" After a few beats of quiet, I offered: "Napalm." Wright smiled, "You must be a nontraditional student." And so began one of my favorite and most treasured friendships from my time in law school. No one else in the world could make me excited to go to an Administrative Law lecture.

Whenever I felt tried by the challenges of my legal education, which was a lot, I went to Professor Wright's office hours. With minimal effort, you could coax him into a truly impressive and entirely improvised lecture about almost anything. The man's wit is sharper than that of a class clown a fourth of his age, and he is as "hip" with the current discourse as the same. His intellect is towering and brings eloquence to all he does, but in an inviting rather than intimidating way. His lectures, both formal and impromptu, are lyrical and those of a

14. Mia Tapella, J.D. McKinney School of Law 2024. Mia joined the Indiana Bar in 2024 and is an associate attorney with Plews Shadley Racher & Braun.

storyteller; sometimes, his First Amendment class reminded me of the art and film seminars I took in undergrad.

Inspiration can be hard to come by when you have had four hours of sleep and a 50-page brief due, but I always walked away from my conversations with Professor Wright feeling a renewed sense of connection to where I was and the work I was doing. He shone a beautiful ray of perspective on even his darkest times. Like a masterful artist, and perhaps a knight in shining armor, Professor Wright offered a place of peace and support for battle-worn students. His wisdom will be dearly missed by McKinney's future warriors.

 [15]

KATHLEEN THOMAS

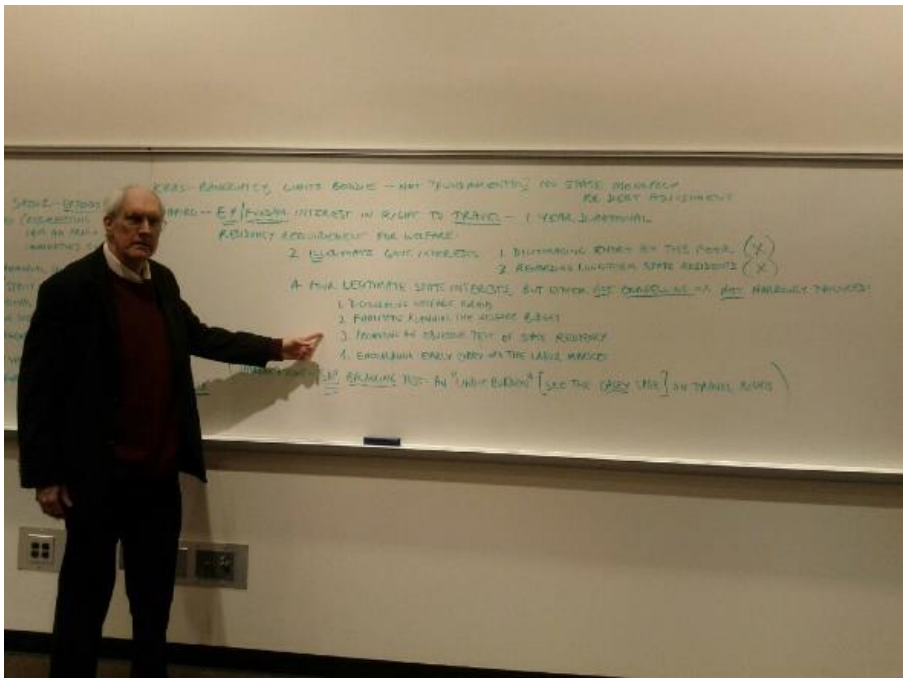
I first met Professor Wright, a.k.a. Uncle George, during the spring semester of 2014, when he taught Constitutional Law. Since it was hard for me to type or take notes, I would take pictures of the whiteboard. Sometimes, Uncle George would pose like Vanna White. He knew I shared the pictures with other classmates and wanted to show off as only Uncle George could.

Uncle George is, above all, a good person. After I completed two semesters at McKinney School of Law, my Multiple Sclerosis (MS) was getting really bad, making it hard to walk and drive. I did not continue school, but Uncle George kept emailing and staying in contact, so I had something to do or look

15. Wright gave me a postcard with "his portrait" on it. Raphael, *St. George and the Dragon*, c. 1506, oil on panel, 28.5 x 21.5cm, National Gallery of Art, https://www.nga.gov/collection/art-object-page.28.html.

forward to. We became email buddies, even sharing a little funny meme or comic strip that he could share, and I could comment on.

The bottom line is that what Professor Wright lacks in fashion sense, he makes up for in brains, wit, and heart.



Professor R. George Wright

NATALIE WICHERN[16]

Professor Wright, with his firsthand experience as both a law review student and former Editor-in-Chief of the *Indiana Law Review*, was a great Faculty Advisor. He was helpful and provided guidance, yet ensured that we would solve our own problems and grow as leaders. He was the first to celebrate our successes, offering praise that was often scarce in the world of law school. Most importantly, his door was always open for a friendly chat, creating an atmosphere of approachability and encouragement. Put simply, Professor Wright has left an indelible mark on ILR. As the Faculty Advisor, he helped shape the journal into a respected platform for legal scholarship and helped the student managers of ILR to develop as leaders. As one of those student managers, I owe him great gratitude.

As he steps into retirement, the legacy he leaves behind will undoubtedly endure. Under his guidance, ILR not only upheld rigorous academic standards

16. Natalie Wichern, J.D. McKinney School of Law 2023, Indiana Law Review Editor-in-Chief, Vol. 57.

but also emerged as a vital resource for practitioners and scholars alike, particularly through its "survey issue," which showcases insightful articles from respected practitioners on recent Indiana legal developments.[17] And, of course, it would be remiss not to acknowledge the numerous scholarly contributions he made, bolstering the academic reputation of both ILR and McKinney as a whole.[18] So, while his retirement is a loss, it is certainly well-earned, and congratulations are in order. I have no doubt, however, that this is not the conclusion of his influence. Rather, it heralds a new chapter where he will continue to mentor and provoke meaningful discourse within the legal community and beyond. Thank you, Professor Wright, for your contributions, mentorship, and friendship—cheers to the journey ahead!

MONICA WRIGHT[19]

There is no joy like walking into Professor Wright's office and hearing, "Hey, Champ! Have a seat."

Professor Wright lifts up everyone around him. I am consistently impressed by the compassion he shows for his students and how he goes above and beyond for them. His classes are interesting, his use of duck and panda is inspiring, and he brings in attorneys to help his students understand the real-world implications of his teaching. It is so clear that he wants his students to understand and grow in his classroom.

Since I started at McKinney, he has encouraged me to think about my long-term career goals and encourages me every day to deepen my relationships with the students here. His emails always put a smile on my face, and I am incredibly blessed to be known as his granddaughter in the law school. He remembers the smallest details about my life, and always asks about me. He is a shining example of a compassionate, wonderful man.

Professor Wright has truly made working at IU McKinney, unlike any other job I have had. Although I have had formal mentors before, my relationship with Professor Wright surpasses that of a mentor and a mentee. He is a great mentor, of course, but also a fantastic friend.

Professor Wright is unlike any professor I have ever encountered. He is the kindest, most thoughtful, and all-around best guy. I feel especially lucky to know him.

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17. *See, e.g.*, *Indiana Law Review, Recent Issues, Volume 57, No. 4*, IU ROBERT H. MCKINNEY SCH. OF LAW, https://mckinneylaw.iu.edu/practice/law-reviews/ilr/contents.html?Vol=57%2C4 (last visited Oct. 24, 2024) **[**https://perma.cc/PB7L-TT4R**]**.

18. *See Faculty & Staff Profile, R. George Wright*, IU ROBERT H. MCKINNEY SCH. OF LAW, https://mckinneylaw.iu.edu/faculty-staff/profile.html?id=54 (last visited Oct. 24, 2024) [https://perma.cc/KRU5-NQ9F]; *R. George Wright Profile*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=444289 (last visited Oct. 24, 2024) [https://perma.cc/5RU6-QGDP].

19. Monica Wright, J.D.; Director of Academic Advising, Robert H. McKinney School of Law; George Wright's (adopted) Granddaughter.

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ARTICLES

DEEPFAKES AND DOG TOYS: FIRST AMENDMENT DEFENSES UNDER THE *ROGERS* TEST AFTER *JACK DANIEL'S V. VIP PRODUCTS*

MICHAEL D. MURRAY*

I. INTRODUCTION AND BACKGROUND

On June 8, 2023, the United States Supreme Court issued its unanimous opinion in *Jack Daniel's Properties, Inc. v. VIP Products LLC*,[1] which ruled in favor of whiskey manufacturer Jack Daniel's in its bid to end a humorous knock-off of its Jack Daniel's Old No. 7 brand of Tennessee whiskey in the form of a dog chew toy that co-opted the brand names, marks, trade dress, and logos of the iconic alcohol producer.[2]

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* Michael D. Murray is the Spears Gilbert Associate Professor of Law and the Principal Investigator of the Artificial Intelligence and the Law Project at the University of Kentucky, J. David Rosenberg College of Law. He is the author of RIGHT OF PUBLICITY IN A NUTSHELL (2d ed. 2022) and A SHORT AND HAPPY GUIDE TO COPYRIGHT (2d ed. 2022) and the coauthor of ART LAW IN A NUTSHELL (6th ed. 2021) and ART LAW: CASES AND MATERIALS (3d ed. 2023). Professor Murray thanks Dean Mary Davis, Associate Dean for Faculty Research, Michael Healy, and the Rosenberg College of Law faculty research fund for their ongoing support of his research.

1. Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140 (2023).

2. *Id.* at 145.

3. Jessica Gresko, *Photograph of Jack Daniel's Old No. 7 whisky bottle alongside Bad Spaniels Old No. 2 dog chew toy*, *in* Beth Treffeisen, *Supreme Court case could be the end of parody products, Northeastern expert says*, NORTHEASTERN GLOBAL NEWS (Apr. 11, 2023),

In the course of disposing of the case, the *Jack Daniel's* Court reinterpreted, or at least clarified, the proper scope and application of the *Rogers v. Grimaldi*[4] test which, since 1989, has been used as a test of First Amendment-based fair uses in federal trademark law infringement, false endorsement, false designation of origin, and trademark dilution claims, and occasionally in state law name-image-likeness exploitation claims under right of publicity or right of privacy theories. The Court's attention to the *Rogers* test potentially affects the First Amendment fair use analyses in each of these areas of law.

"Deepfake"—a combination of the words "deep learning" and "fake"[5]—is a twenty-first-century term for images, video, and audio recreations of the image and likeness, and sometimes the voice or performance attributes of celebrities, politicians, and other persons.[6] The following images all were created by the author with the assistance of Stable Diffusion, a visual generative Artificial Intelligence (AI) tool.

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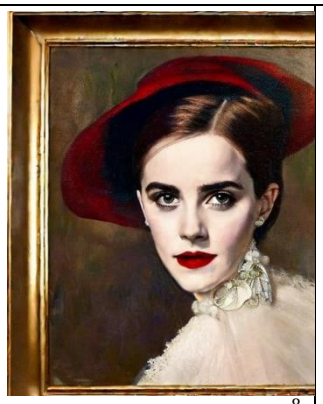
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https://news.northeastern.edu/2023/04/11/jack-daniels-dog-toy-dispute-supreme-court/ [https://perma.cc/DCV3-XC79].

4. Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

5. New York Inst. of Tech., *Deepfakes: How do they work and what are the risk*s?, THE CYBER CORNER (Oct. 26, 2023), https://blogs.nyit.edu/the_cyber_corner/deepfakes_how_do_they_work_and_what_are_the_risks [https://perma.cc/EBR4-LBRJ].

6. Sara H. Jodka, *Manipulating reality: the intersection of deepfakes and the law*, REUTERS (Feb. 1, 2024, 12:01 PM), https://www.reuters.com/legal/legalindustry/manipulating-reality-intersection-deepfakes-law-2024-02-01/ [https://perma.cc/Z54Z-BFB2].

7. Michael D. Murray, *Image of a Taylor Swift lookalike drinking beer* (Feb. 2024) (image created with the assistance of Stable Diffusion).

8. Michael D. Murray, *Image of an Emma Watson lookalike portrayed in the style of John Singer Sargent* (Feb. 2023) (image created with the assistance of Stable Diffusion).

9. Michael D. Murray, *Image of a President Joe Biden lookalike* (Apr. 2024) (image created with the assistance of Stable Diffusion).

Contemporary generative AI tools for image creation (*e.g.*, DALL-E 3,[10] Midjourney,[11] Stable Diffusion[12]), AI-generated video (*e.g.*, Open AI's Sora,[13] VideoGen,[14]; RunwayML[15]), and AI-generated audio, voice, and musical performance (*e.g.*, Suno,[16] RVC WebUI,[17] Udio,[18] Altered,[19] ElevenLabs[20]), have increased the speed and ease with which people can "fake" the appearances, voices, performances, and actions of real people. Whether one views these generative AI tools as a massive step toward the democratization of creation,[21] or a ridiculously fast and easy way to steal good will from companies, exploit celebrities, interfere with the reporting of facts, or commit a myriad of crimes,[22] the technology is present and only going to improve from where it is today.

Given that deepfakes are almost always associated with expression of some kind, any attempt to litigate or regulate deepfakes will require the consideration of the First Amendment. Deepfakes implicate so many areas of law and society that a discussion of the interface of First Amendment free speech rights and deepfakes writ large would require a treatise volume with several chapters. This article is more modest: It will examine the past, present, and future use of the *Rogers* test in an evaluation of the application of First Amendment protections in trademark infringement cases and in legal actions traditionally associated

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10. *DALL-E 3*, OPENAI, https://openai.com/dall-e-3 (last visited Apr. 8, 2024).

11. The current model of Midjourney visual generative AI system is version 6 as of Dec. 20, 2023. *See Midjourney Model Versions*, MIDJOURNEY, https://docs.midjourney.com/docs/model-versions [https://perma.cc/85JP-FXCK] (last visited Apr. 8, 2024); Barry Collins, *Midjourney 6 Arrives at Last*, TECHFINITIVE (Dec. 22, 2023), https://www.techfinitive.com/features/midjourney-6-pricing-features-release-date/ [https://perma.cc/6QDZ-8NW9].

12. The next model of Stable Diffusion, not yet openly released as of Apr. 8, 2024, is version 3, which was announced on Feb. 22, 2024. *Stable Diffusion 3*, STABILITY AI, https://stability.ai/news/stable-diffusion-3 [https://perma.cc/5GR3-Z8XA] (last visited Apr. 8, 2024).

13. *Creating Video from Text*, OPENAI, https://openai.com/sora [https://perma.cc/9LYL-PBND] (last visited Apr. 9, 2024).

14. *Create Videos in seconds*, VIDEOGEN, https://videogen.io/ [https://perma.cc/2CLF-TLMK] (last visited Sept. 14, 2024).

15. *Advancing creativity with artificial intelligence*, RUNWAY, https://runwayml.com/ [https://perma.cc/GAE5-8XYK] (last visited Apr. 9, 2024).

16. *Make a song about anything*, SUNO, https://suno.com/ [https://perma.cc/VTN3-Q7WR] (last visited Sept. 7, 2024).

17. *Retrieval-based-Voice-Conversion-WebUI*, RVC-PROJECT, https://github.com/RVC-Project/Retrieval-based-Voice-Conversion-WebUI [https://perma.cc/MG5N-5SJQ] (last visited Apr. 9, 2024).

18. UDIO, https://udio.com [https://perma.cc/WFH7-NP33] (last visited Sept. 7, 2024).

19. Altered, *Local Voice Cloning*, https://www.altered.ai/voice-cloning/ [https://perma.cc/FQ3Z-9NFL] (last visited Apr. 9, 2024).

20. *AI Voice Cloning: Clone Your Voice in Minutes*, ELEVENLABS, https://elevenlabs.io/voice-cloning [https://perma.cc/HBE4-8KMJ] (last visited Apr. 9, 2024).

21. *Democratized Generative AI: Empowering Creativity*, DATACENTERS.COM (Dec. 14, 2023), https://www.datacenters.com/news/democratized-generative-ai-empowering-creativity# [https://perma.cc/C4JD-G4GY].

22. Jodka, *supra* note 6.

with the exploitation of celebrities, sports figures, other persons under federal trademark theories of false endorsement, false designation of origin, and trademark dilution, and state law theories of right of publicity and right or privacy. In each of these areas of law, the *Rogers* fair use test has been used to evaluate the use or misuse of both trademarks and publicity and privacy rights in a claimant's name, image, or likeness, distinguishing those with true expressive content from those whose exploitation or harm overwhelms the expression in the use.

Part II of this article will examine the *Rogers v. Grimaldi* case and the *Rogers* fair use test. Part III will discuss the *Jack Daniel's* case and its clarification of *Rogers*, particularly with regard to parody defenses. Part IV will explore the past and predict the future of the *Rogers* fair use test in federal trademark infringement, false endorsement, false designation of origin, and trademark dilution claims, as well as claims asserting state law theories of right of publicity and right of privacy.

II. THE *ROGERS V. GRIMALDI* CASE AND THE *ROGERS* FAIR USE TEST

A. The Facts and Outcome of Rogers v. Grimaldi

Rogers v. Grimaldi was a case involving a lawsuit by the actress Ginger Rogers against the director, Federico Fellini, and producer, Alberto Grimaldi, of a motion picture entitled "Ginger e Fred" in Italian ("Ginger and Fred" in English), which was about two Italian cabaret performers who reunited to stage once again their imitation of the famous American dancing duo of Ginger Rogers and Fred Astaire.[23] The movie title referred to the plot of the film where the Italian dancers, called Amelia Bonetti and Pippo Botticella in the movie, had received the nicknames "Ginger and Fred" based on their portrayal of the American dancing stars.[24]

23. 875 F.2d 994, 996-97 (2nd Cir. 1989).
24. *Id.*

Ginger Rogers on the left and Fred Astaire on the right in a still from the motion picture, *Swing Time*[25]

Movie poster for *Ginger e Fred*[26]

Ginger Rogers claimed that the movie title "*Ginger e Fred*" violated her trademark rights under 15 U.S.C. § 1125(a)(1)(A), which prevents false endorsements and false designations of origin in association with the commercial sale of products and services, and violated her common law right of publicity under Oregon law,[27] because the movie title created a false impression that she endorsed or was involved in the movie, and the producers and director were commercially exploiting her famous name and star power to attract attention, advertising, and viewers for the movie. The United States District Court for the Southern District of New York dismissed her claims, and the United States Court of Appeals for the Second Circuit affirmed.[28]

B. The Rogers *Test*

In holding that the movie title was protected by the First Amendment as an artistic expression, the court adopted a two-part test now known as the *Rogers* test to determine whether a First Amendment artistic and expressive work's use of a trademark or celebrity name, image, or likeness is actionable under the Lanham Act. The test states that an artistic expressive work's use of a trademark is not actionable (1) unless the use has no artistic relevance to the underlying

25. Photograph of Ginger Rogers and Fred Astaire, *in* SWING TIME (RKO Radio Pictures 1936).

26. *Ginger e Fred* (1986) Italian movie poster, CINEMATERIAL, https://www.cinematerial.com/movies/ginger-e-fred-i91113/p/rzptdoxf [https://perma.cc/H7NX-RQS5] (last visited Jul. 3, 2023).

27. *Rogers*, 875 F.2d at 1002 (citing Anderson v. Fisher Broadcasting Cos., 712 P.2d 803, 812 (Ore. 1986)).

28. *Id.* at 997, 1005.

work whatsoever, or (2) if it has some artistic relevance, unless the use explicitly misleads as to the source or the content of the work.[29]

Appellant Rogers had framed her claim as pertaining to the title of the Fellini film, and so the court of appeals framed its discussion around whether the title of an expressive artistic work has no artistic relevance to the underlying work or misleads as to the source or content of the work.[30] The court recognized that First Amendment expressive and artistic works are meant to be sold for profit, and the titles of such works are of a "hybrid nature, combining artistic expression and commercial promotion."[31] "The title of a movie may be both an integral element of the filmmaker's expression and a significant means of marketing the film to the public."[32] The court found that neither prong of its test was satisfied in this case because the movie title had some artistic relevance to the movie's plot and theme, and it did not explicitly mislead consumers into thinking that Ms. Rogers endorsed or appeared in the movie.[33]

The *Rogers* court also applied its two-part test to the Oregon common law right of publicity claims brought by Ms. Rogers.[34] Right of publicity claims overlap federal trademark claims in the areas of false endorsement and false designation of origin because the rights protected by both areas of law and the contexts in which the claims arise are very similar.[35] The common law right of publicity, which multiple states have recognized,[36] customarily grants celebrities an exclusive right to control the commercial value of their names and to prevent others from exploiting them without permission, thus matching the "exploitation in a commercial setting" claims of trademark law, false endorsement, and false designation of origin.[37] One notable difference between right of publicity claims and trademark claims is that the right of publicity has no likelihood of confusion requirement, so it is potentially more expansive than the Lanham Act.[38]

The first prong of the *Rogers* test is very similar to the test in Section 47 of the right of publicity provisions of the Restatement of Unfair Competition.[39] Section 47 of the Restatement provides that the First Amendment protects the use of a person's identity in an expressive work unless the "name or likeness is used solely to attract attention to a work that is not related to the identified

29. *Id.* at 999.
30. *See generally id.* at 996-1000.
31. *Id.* at 998.
32. *Id.*
33. *Id.*
34. *Id.* at 1004-05.
35. *See generally* MICHAEL D. MURRAY, RIGHT OF PUBLICITY IN A NUTSHELL ch. 8 (2d ed. 2022).
36. *See id.*, app. A.
37. *Rogers*, 875 F.2d at 1003-04 (citing Bi–Rite Enterprises v. Button Master, 555 F. Supp. 1188, 1198-99 (S.D.N.Y. 1983)).
38. *Id.* at 1004.
39. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (AM. L. INST. 1995).

person."[40] In the *Rogers* case, the court interpreted the first and second prongs of its fair use test to mean that, in right of publicity claims, the use of a celebrity's name in the title of an expressive artistic work will not be barred unless the title was "wholly unrelated" to the content and meaning of the work or was "simply a disguised commercial advertisement for the sale of goods or services" including the expressive work itself.[41]

C. Rogers*'s Application to Deepfakes*

The expressive nature of deepfakes, whether in trademark law or right of publicity or right of privacy situations implicates the protections of the First Amendment. As discussed in Section IV below, for almost thirty-five years, *Rogers* has been used to evaluate the applicability and enforcement of the Lanham Act in cases involving the use of a mark in expressive works and as a test of fair use in trademark false endorsement and false designation of origin claims and in state common law and statutory right of publicity and right of privacy claims, primarily those being litigated in a federal court either under diversity or supplemental jurisdiction.[42] Although *Rogers* is controlling authority only in the Second Circuit when applied in trademark claims arising under federal law, the role of the *Rogers* test in trademark litigation is more broadly endorsed in the legislative history of the Lanham Act's latest amendment, the Trademark Modernization Act of 2020, which states that the *Rogers* test appropriately recognizes the primacy of constitutional protections for free expression.[43] The Judiciary Committee report went on to state, "In enacting this legislation, the Committee intends and expects that courts will continue to apply the *Rogers* standard to cabin the reach of the Lanham Act in cases involving expressive works."[44]

Rogers has been cited—although not always followed—by all eleven circuits and the federal circuit.[45] In addition to the Second Circuit where the case was issued, *Rogers* has been officially adopted and applied by the Third

40. *Id.*

41. *Rogers*, 875 F.2d at 1004-05.

42. *E.g.*, Parks v. Laface Recs., 329 F.3d 437, 461 (6th Cir. 2003); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936 (6th Cir. 2003); Seale v. Gramercy Pictures, 964 F. Supp. 918, 930 (E.D. Pa. 1997).

43. H.R. REP. NO. 116-645, at 20 (2020). *See* MGFB Properties, Inc. v. Viacom Inc., 54 F.4th 670, 679 (11th Cir. 2022).

44. *Id.*

45. This count is based on the Westlaw citing references for *Rogers.* Several of these citations are for a choice of law holding in *Rogers*, 875 F.2d at 1002: "In cases based on diversity of citizenship or on pendent jurisdiction, the federal district court must apply the forum state's choice-of-law rules." *E.g.*, Spain v. Haseotes, 116 F.3d 464 (1st Cir. 1997).

Circuit,[46] Fourth Circuit,[47] Fifth Circuit,[48] Sixth Circuit,[49] Ninth Circuit,[50] and Eleventh Circuit.[51] Courts have held that the *Rogers* test is not limited to the use of a trademark or a person's name in the title of a work, but applies more generally as a test of fair use for any use of marks or names, images, or likenesses in the content of the work.[52] Although it would be inaccurate to say that *Rogers* has become the dominant test for fair use in right of publicity or right of privacy claims in any one jurisdiction,[53] it has been used regularly by six federal appellate circuits in addition to the Second Circuit from which the case arose.[54]

III. THE *JACK DANIEL'S* CASE AND ITS CLARIFICATION OF *ROGERS*

The events that led up to *Jack Daniel's* were that Respondent VIP Products produced, advertised, and sold a squeaky, chewable dog toy designed to look like a bottle of Jack Daniel's whiskey.[55] The Respondent's dog toy version of a Jack Daniel's whiskey bottle had a very similar label to the iconic brand's label, but on the dog toy, the words "Jack Daniel's" became "Bad Spaniels," and "Old No. 7 Brand Tennessee Sour Mash Whiskey" was turned into "The Old No. 2 On Your Tennessee Carpet."[56] It is important to note that the dog toy featured these altered Jack Daniel's marks on its own product labels and tags as trade dress and marks *of its own product*.[57] In other words, VIP had used variations

46. Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996), *aff'd without opinion*, 156 F.3d 1225 (3d Cir. 1998). *But see* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3d Cir. 2013) (declining to apply *Rogers* in favor of the transformative test); Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1018 (3d Cir. 2008) (declining to apply *Rogers* because expression in case was deemed to be commercial speech).

47. Radiance Found., Inc. v. N.A.A.C.P., 786 F.3d 316, 322, 329 (4th Cir. 2015).

48. Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 664-65 (5th Cir. 2000).

49. Parks v. LaFace Recs., 329 F.3d 437, 450 (6th Cir. 2003); Moore v. Weinstein Co., LLC, 545 F. App'x 405, 412 (6th Cir. 2013); *see also* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936-37 (6th Cir. 2003) (applying both *Rogers* and the transformative test).

50. Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 902 (9th Cir. 2002).

51. *See* Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1278 (11th Cir. 2012); MGFB Properties, Inc. v. Viacom Inc., 54 F.4th 670, 678 (11th Cir. 2022).

52. *E.g.*, E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099 (9th Cir. 2008); Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 495 (2d Cir. 1989).

53. No single fair use test has emerged as "the" dominant fair use test for right of publicity, false endorsement, or false designation of origin claims. *See* MURRAY, RIGHT OF PUBLICITY IN A NUTSHELL, *supra* note 35, at 129, 140-42; Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 130-32 (2020).

54. MURRAY, RIGHT OF PUBLICITY IN A NUTSHELL, *supra* note 35, at 150, 167-77. *See Protection of Artistic Expression from Lanham Act Claims Under Rogers v. Grimaldi*, 22 A.L.R. Fed. 3d Art. 4 (2017).

55. Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 144 (2023).

56. *Id.*

57. *Id.* at 149-51.

of the famous and valuable Jack Daniel's marks and trade dress *as* marks and trade dress in the display and advertising of its own product.[58]

VIP's verbal jokes and wordplay did not amuse petitioner Jack Daniel's Properties, who owns valuable trademarks in the distinctive shape and design trade dress of the Jack Daniel's bottle and in many of the words and the arrangement of words and graphics on its label.[59] Jack Daniel's sued and had success at the trial level,[60] but the Ninth Circuit discounted the iconic brand owner's arguments on both the application of the *Rogers* test and the merits of VIP's alleged parody of Jack Daniel's and reversed and remanded the case.[61] On remand, the trial court awarded judgment to VIP,[62] and the Ninth Circuit summarily affirmed the judgment.[63]

At the United States Supreme Court, the Court considered both the application of *Rogers* and the merits of VIP's alleged parody defense. Apropos to this discussion, the Court made a definitive statement early in the case that sought to put *Rogers* in its place, meaning that the Court declared that *Rogers* had absolutely no application to the facts and circumstances of VIP's use of Jack Daniel's marks:

> Today, we choose a narrower path. Without deciding whether *Rogers* has merit in other contexts, we hold that it does not when an alleged infringer uses a trademark in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods. *See* [15 U.S.C.] § 1127; *supra*, [143 S. Ct.] at 1582-1583. VIP used the marks derived from Jack Daniel's in that way, so the infringement claim here rises or falls on likelihood of confusion.[64]

The Court proceeded to analyze the case strictly as a trademark infringement "likelihood of confusion" analysis and a trademark dilution analysis.[65] In what may become the more important holding of the case, the Court declared that the parody defense in trademark dilution claims does not apply or does not exculpate a diluter from liability if the diluter has used the plaintiff's mark in the diluter's own mark; in other words, when the diluter used the plaintiff's mark as an identifier of the source or origin of the diluter's own goods, parody will not excuse this use.[66] Given the overlap in federal trademark and state and

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58. *Id.*

59. *Id.* at 145, 148.

60. VIP Prods., LLC v. Jack Daniel's Props., Inc., No. CV-14-2057-PHX-SMM, 2016 WL 5408313, at *1 (D. Ariz. Sept. 27, 2016).

61. VIP Prods. LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170 (9th Cir. 2020).

62. VIP Prods. LLC v. Jack Daniel's Props. Inc., No. CV-14-02057-PHX-SMM, 2021 WL 5710730, at *2 (D. Ariz. Oct. 8, 2021).

63. VIP Prods. LLC v. Jack Daniel's Props. Inc., No. 21-16969, 2022 WL 1654040, at *1 (9th Cir. Mar. 18, 2022).

64. *Jack Daniel's*, 599 U.S. at 153.

65. *Id.*

66. *Id.*

common law right of publicity and right of privacy claims,[67] the thrust of this holding in *Jack Daniel's* may be extended to chip away at the right of publicity's and right of privacy's own parody defense.

A. Jack Daniel's *Clarification of the* Rogers *Test*

The *Jack Daniel's* case did not so much reinterpret or limit the scope of the *Rogers* test as declare that the *Rogers* case never applied to uses of a plaintiff's mark as part of the alleged infringer's marks or identifiers of its own goods.[68] The Court said quite plainly that *Rogers* already was "cabined" off from trademark situations involving a defendant's trademark use of a plaintiff's mark, even if the defendant's use arose in the context of artistic or literary expression.[69] *Rogers*, the Court said, only applied—and presumably continues to apply—to "non-trademark uses" in which "the defendant has used the mark at issue in a non-source-identifying way."[70] And the Court reiterated that a disqualified "source-identifying" use might well arise in the midst of First Amendment expression because many of those uses will involve the expression of some idea such as humor or ironic commentary—and still, *Rogers* will not apply.[71]

It is important to note at this juncture that this holding of the Court is not a novel interpretation of *Rogers*. Courts have previously drawn the distinction in the coverage of the trademark laws and the protections of the First Amendment and limited the applicability of *Rogers* to expressive, non-source-identifying uses: "[W]hen unauthorized use of another's mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right."[72] "Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment,"[73] but "[t]he First Amendment may offer little protection for a competitor who labels its commercial good with a confusingly similar mark."[74] "[T]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view."[75] "Simply put, the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function."[76]

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67. MURRAY, RIGHT OF PUBLICITY IN A NUTSHELL, *supra* note 35, ch. 8.

68. *Jack Daniel's*, 599 U.S. at 153-57.

69. *See id.* at 155, 158.

70. *Id.* at 155-56.

71. *Id.* at 159.

72. Yankee Publ'g, Inc. v. News Am. Publ'g, Inc., 809 F. Supp. 267, 276 (S.D.N.Y. 1992).

73. Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 900 (9th Cir. 2002) (quoting *Yankee Publ'g*, 809 F. Supp. at 276).

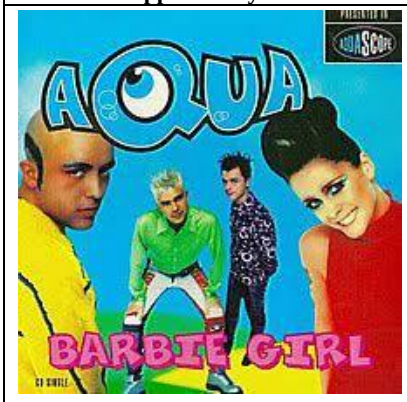
74. *Id.* (quoting L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st Cir. 1987)).

75. *Id.*

76. *Id.* at 900-01 (quoting Anti–Monopoly, Inc. v. Gen. Mills Fun Grp., 611 F.2d 296, 301 (9th Cir.1979) ("It is the source-denoting function which trademark laws protect, and nothing more.")).

The observation that *Rogers* will not be applied to source-identifying uses but will be applied to non-source identifying expressive uses is noteworthy for deepfakes because, in many instances, deepfakes are not used as marks or source indications of the deepfake creator, the deepfake image or recording itself, or any other separate product or service. At least for this analysis, deepfakes often are pure speech, revealing an expressive message or at least expressive content, and not linked in a source-identifying manner to the creator or to a separate service or product. The effect or harm caused by a deepfake might be confusion, but not necessarily *consumer* confusion caused by a misleading or deceptive source-identifying use.

The *Jack Daniel's* Court cited and discussed several federal appellate and trial court cases in support of its proclamation that *Rogers* never applied to "source-identifying" uses in expressive contexts:

The Supreme Court's list of cases on the applicability of *Rogers* in non-source-identifying uses and inapplicability in source-identifying uses	
 77	***Mattel, Inc. v. MCA Records, Inc.,*** (9th Cir. 2002)[78]: The Supreme Court in *Jack Daniel's* explained that *Rogers* protected the band Aqua's hit song, "Barbie Girl," with a title and lyrics that made explicit mention of Mattel's "Barbie"-trademarked doll franchise, because Aqua had not used the mark "Barbie" in a source-identifying manner.[79] This was found despite the words "Barbie Girl" being used on the actual cover of a release of the song, *i.e.*, in a manner suggesting a trade dress use (*see* image at left). The finding of a non-source-identifying use allowed *Rogers* to apply and led to the outcome that Aqua's use of "Barbie" was artistically relevant to its musical expression, and not explicitly misleading as to the source or content of the work. *Mattel v. MCA* was a true parody case, as MCA asserted that both the title and the lyrics were intended to spoof the iconic status of Barbie that Mattel had worked so hard to construct and preserve.

77. *Barbie Girl* (photograph), *in Barbie Girl*, WIKIPEDIA, https://en.wikipedia.org/wiki/Barbie_Girl [https://perma.cc/3UKP-V4T3] (last visited Sept. 8, 2023).

78. Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894 (9th Cir. 2002).

79. *Id.* at 902.

 80	Although not the subject of a lawsuit, the Supreme Court declared that **Janis Joplin's song, "Mercedes Benz,"** with its repeated line, "Oh Lord, won't you buy me a Mercedes Benz," was a perfect situation of a non-source-identifying use wherein no one would think that the German car maker had formed a joint venture or direct sponsorship of Ms. Joplin and her music just from the title and lyrics of this song.[81] Neither the title nor the lyrics appeared critical of the car maker in a parody sense, but they simply were not used by Joplin in a "source-identifying" manner to promote her own music or other recordings.
 82	***University of Alabama Board of Trustees v. New Life Art, Inc***. (11th Cir. 2012)[83] : Artist Daniel Moore's paintings depicting great moments in Alabama football history were protected by *Rogers* because Moore did not use the Crimson Tide's uniforms, logos, or marks in a source-identifying manner, and the marks were directly related to the historical message and artistic expression he was communicating in the paintings. There was no parody aspect to this case, as Moore's homage to the team was entirely honorific.

80. *Mercedes Benz* (photograph), *in Janis Joplin's "Mercedes Benz,"* SPOTIFY, https://open.spotify.com/track/3VI2E53Cl31jvkbQ3P2f3S [https://perma.cc/RF84-XHFT] (last visited Sept. 8, 2023).

81. Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 143 (2023).

82. Daniel A. Moore, *The Blowout* (painting), *in* Eric Kelderman, *Appeals Court Stiff-Arms U. of Alabama's Lawsuit Against Football Artist*, CHRON. HIGHER ED. (Jun. 12, 2012), https://www.chronicle.com/article/appeals-court-stiff-arms-u-of-alabamas-lawsuit-against-football-artist/ [https://perma.cc/N2XJ-SBBZ].

83. Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1279 (11th Cir. 2012).

 84	***Louis Vuitton Malletier S. A. v. Warner Bros. Entertainment Inc.*** (S.D.N.Y. 2012)[85]: A character's line in *The Hangover: Part II* movie referencing "Louis Vuitton" luggage (pronounced "Lewis"), and a character apparently carrying a Diophy knock-off Louis Vuitton bag in a scene in the movie, all were protected by *Rogers* as being non-source-identifying uses of the Louis Vuitton marks. These uses were found to be artistically relevant to the expression of the movie and not explicitly misleading as to the source or content of the work. Louis Vuitton argued that the uses were a misleading promotion of the Diophy knock-off bag that appeared in the movie because it was referred to as being a genuine Louis Vuitton bag, but the court rejected this argument. Arguably, the use of the brand's name, mispronounced in a foolish and uninformed manner, made the brand the target of the film's irreverent commentary on arrogant brands and the people who covet them, but the court did not characterize the use as a parody in applying the *Rogers* test to exempt the use from the manufacturer's infringement claim.
 86	***United We Stand Am., Inc. v. United We Stand, Am. New York, Inc***. (2d Cir. 1997)[87] : *Rogers* afforded no protection to the defendant, a New York based Ross Perot-supporting split-off group, because defendant used the mark "United We Stand America" in a source-identifying manner for its own services.

84. *Scene from* THE HANGOVER: PART II, in Ben Child, *Louis Vuitton hits The Hangover Part II with a handbag lawsuit*, THE GUARDIAN (Dec. 23, 2011), https://www.theguardian.com/film/2011/dec/23/louis-vuitton-hangover-part-2 [https://perma.cc/FK2N-VPHB].

85. Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc., 868 F. Supp. 2d 172, 180 (S.D.N.Y. 2012).

86. Photograph of book cover, *in United We Stand America: President of the United States, Ross Perot, U.S. Presidential Election 1992, Texas, Populism*, AMAZON.FR (June 2010), https://www.amazon.fr/United-Stand-America-President-Presidential/dp/6130484216 [https://perma.cc/4TX9-JD5L].

87. United We Stand Am., Inc. v. United We Stand, Am. New York, Inc., 128 F.3d 86, 93 (2d Cir. 1997).

 88	***Harley-Davidson, Inc. v. Grottanelli*** (2d Cir. 1999)[89]: The Hog Farm motorcycle shop's adaptation and use of Harley-Davidson's bar and shield logo in its own business logo was held to be a trademark source-identifying use of the venerable motorcycle company's mark and did not receive protection from *Rogers.* The Second Circuit stated that it "accorded considerable leeway to parodists whose expressive works aim their parodic commentary at a trademark or a trademarked product,"[90] but not in the context of a manufacturer's "using an alleged parody of a competitor's mark to sell a competing product."[91]
 92	***Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*** (S.D.N.Y. 2002)[93]: The court did not apply *Rogers* to the situation where Nature Labs sold pet cologne under the name "Timmy Holedigger" and thereby used the Tommy Hilfiger mark and a modified split two-color trade dress in a source-identifying manner in its own mark and trade dress. But the court ultimately found that Timmy Holedigger was a parodic send-up of the famous cologne brand, and that Tommy Hilfiger had not brought forward sufficient evidence of consumer confusion and granted Nature Lab's motion for summary judgment.

The Supreme Court drew its conclusions from the above and other cases[94] and found that the expressive nature of the products at issue in these cases, and what they might have had to say *about* the brands whose marks they were adapting for their own marks, did not tip the scales in favor of the defendants—

88. Photograph of The Hog Farm motorcycle shop logo, *in* The Hog Farm, Custom Motorcycle Shop, Since 1969, *WELCOME to THE HOG FARM*, FACEBOOK (Nov. 10, 2014), https://www.facebook.com/TheHogFarmCustomMotorcycleShop1969/photos/a.263884140426662/423931444421930/ [https://perma.cc/V4ZR-W23X].

89. Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 812-13 (2d Cir. 1999).

90. *Id.* at 812 (citing Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 493-95 (2d Cir.1989)).

91. *Id.* (citing Deere & Co. v. MTD Prods., Inc., 41 F.3d 39 (2d Cir.1994)).

92. Photograph of Timmy Holedigger Dog Spray, *in Timmy Holedigger Dog Spray*, GOTDOG.COM, https://gotdog.com/products/timmy-holedigger [https://perma.cc/LV78-AC95] (last visited Sept. 8, 2023).

93. Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC, 221 F. Supp. 2d 410, 412-14 (S.D.N.Y. 2002).

94. The Supreme Court also cited: Matal v. Tam, 582 U.S. 218, 245, 252 (2017); Friedman v. Rogers, 440 U.S. 1, 15 (1979); Yankee Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 276 (S.D.N.Y. 1992).

at least as an initial inquiry before the evaluation of the elements of trademark or trade dress infringement or dilution. Thus, even allowing that VIP's Bad Spaniels was a send-up and spoof of Jack Daniel's very serious whiskey drinking brand, in the same manner that Timmy Holedigger was a send-up and spoof of the concept of Tommy Hilfiger's fine cologne when you turn it around and spray it on a dog, the Supreme Court said the context alone of a source-identifying use was enough to disqualify the application of the *Rogers* test as a threshold issue (*i.e.*, at the motion to dismiss or summary judgment stage) before the evaluation of the infringement factors in both *Jack Daniel's* and *Tommy Hilfiger*. As noted in the table above, Timmy Holedigger ultimately was accepted as a parody fair use absolving the user for infringement, but, as noted in the section below, Bad Spaniels missed out on that absolution.

A. Jack Daniel's *Limitation of the Parody Defense in Trademark Claims*

The Supreme Court took a harsh approach regarding the argument that Bad Spaniels was a parody of Jack Daniel's whiskey. Even allowing that the VIP brand quite obviously took a serious adult beverage company and put its trade dress into the mouths of dogs, the Court would not embrace the parody defense argued by VIP and practically ordered on remand that the lower court find against VIP.[95] Beyond *Tommy Hilfiger* discussed above, the Supreme Court cited only one additional trademark parody case, *Louis Vuitton Malletier S.A. v. Haute Diggity Dog*,[96] when evaluating the Ninth Circuit's opinion in *VIP v. Jack Daniel's*.[97] The Ninth Circuit had held that the parody and artistic expression present in VIP's use called for a threshold analysis of the First Amendment as applied through the *Rogers* test.[98] The Supreme Court reversed the Ninth Circuit, stating, "[P]arody (and criticism and commentary, humorous or otherwise) is exempt from liability only if *not* used to designate source."[99] The irony (or perhaps the criticism) here is that Haute Diggity Dog, LLC used its parody versions of the Louis Vuitton marks and trade dress—Chewy Vuiton—on its own product in much the same way that VIP used the modified Old No. 7 label and trade dress, as a label and identifier of its commercially sold products.

95. Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 163 (2023).

96. Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 265 (4th Cir. 2007).

97. VIP Prods. LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170, 1175-76 (9th Cir. 2020).

98. *See generally id.*

99. *Jack Daniel's*, 599 U.S. at 162.

Chewy Vuiton dog product and Louis Vuitton bag	Jack Daniel's and Bad Spaniels' products
 100  101	 102

The *Jack Daniel's* case did not preclude the consideration of the substantive effect of an attempted parody in evaluating the *Rogers* test in a trademark or trade dress infringement or a trademark dilution case but limited the consideration to the context of the infringement analysis itself wherein the parodic nature of a work that spoofs or ridicules the plaintiff's marks or products could mitigate or eliminate any likelihood of confusion over the two uses. The application of the *Rogers* test at the infringement stage is similar to how *Rogers* and other First Amendment balancing tests are used in right of publicity and right of privacy cases when a parody defense is asserted[103]—the parody is weighed for its relevant and valuable comment and criticism of the person that might overcome the publicity or privacy right of the person unless the use is overly exploitative or commercialized (*i.e.*, the use becomes less about the

100. Photograph of Chewy Vuiton dog bed, *in Chewy Vuiton Dog Bed*, DOG PET BOUTIQUE, https://dogpetboutique.com/chewy-vuiton-dog-bed/ [https://perma.cc/96Y9-97TP] (last visited Sep. 13, 2023).

101. Photograph of Louis Vuitton handbag, *in OnTheGo MM*, LOUIS VUITTON, https://us.louisvuitton.com/images/is/image/lv/1/PP_VP_L/louis-vuitton-onthego-mm-monogram-handbags--M45321_PM2_Front%20view.png?wid=1090&hei=1090 [https://perma.cc/6UCW-M8F5] (last visited Sept. 15, 2024).

102. Gresko, *supra* note 3.

103. *See, e.g.*, *In re* Tam, 808 F.3d 1321, 1373 (Fed. Cir. 2015) (Dyk, J., concurring), *as corrected* (Feb. 11, 2016), *aff'd sub nom.* Matal v. Tam, 582 U.S. 218 (2017); Moore v. Weinstein Co., 545 F. App'x 405, 409, 412 (6th Cir. 2013) (citing *Rogers* and RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c); Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1277 (11th Cir. 2012); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 810-12 (9th Cir. 2003).

commentary or criticism and much more about attracting attention for commercial purposes).[104]

The Second Circuit in the *Vans v. MSCHF* case (discussed below) summarized *Jack Daniel's* holding on evaluating a parody defense under the *Rogers* test only at the infringement stage as follows:

> Far from disregarding the parodic nature of the Bad Spaniel's toy, however, the Supreme Court noted that "a trademark's expressive message—particularly a parodic one ... — may properly figure in assessing the likelihood of confusion." *Id.* at 161, 143 S.Ct. 1578; *see also id.* at 159, 143 S.Ct. 1578 (noting that "the likelihood-of-confusion inquiry does enough work to account for the interest in free expression"). This is because, where a message of "ridicule or pointed humor" is clear, "a parody is not often likely to create confusion" for "consumers are not so likely to think that the maker of a mocked product is itself doing the mocking." *Id.* at 161, 153, 143 S.Ct. 1578; *see id.* at 161, 143 S.Ct. 1578 ("[A]lthough VIP's effort to ridicule Jack Daniel's does not justify use of the *Rogers* test, it may make a difference in the standard trademark analysis.").[105]

Cases prior to *Jack Daniel's*, particularly in the Ninth Circuit, had inserted the *Rogers* analysis as a threshold test of First Amendment expressive uses of marks and trade dress in which a defendant might avoid the full infringement or dilution analysis altogether and be dismissed or granted summary judgment on the plaintiff's infringement or dilution claims.[106] This, of course, would be favored by defendants who want to avoid the cost of litigating the fact-intensive trademark infringement factors, which, in many cases, preclude dismissal or summary judgment in the case.[107]

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104. *See, e.g.*, *Moore*, 545 F. App'x at 409 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c); *New Life Art, Inc.*, 683 F.3d at 1277; *Mattel*, 353 F.3d at 810-12; ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 937-38 (6th Cir. 2003); Cardtoons, L.C. v. Major League Baseball Players Assoc., 95 F.3d 959, 969, 972-74 (10th Cir. 1996); Hoffman v. Cap. Cities/ABC, Inc., 255 F.3d 1180, 1183-85 (9th Cir. 2001).

105. Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F.4th 125, 137-38 (2d Cir. 2023) (inner citations presented as in original).

106. *E.g.*, Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 461-62 (9th Cir. 2020) (citing Twentieth Century Fox Television v. Empire Distrib., Inc., 875 F.3d 1192, 1198 (9th Cir. 2017)); E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099-1100 (9th Cir. 2008); Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1245 (9th Cir. 2013)); Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1015 (3d Cir. 2008). *Cf.* Parks v. LaFace Recs., 329 F.3d 437, 447-48 (6th Cir. 2003) (engaging in First Amendment analysis and application of *Rogers* in the context of cross-motions for summary judgment).

107. *E.g.*, Dorpan, S.L. v. Hotel Melia, Inc., 728 F.3d 55, 66 (1st Cir. 2013); Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062, 1075 (9th Cir. 2006); AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 616 (7th Cir. 1993); Country Floors, Inc. v. P'ship. Composed of Gepner & Ford, 930 F.2d 1056, 1063 (3d Cir. 1991).

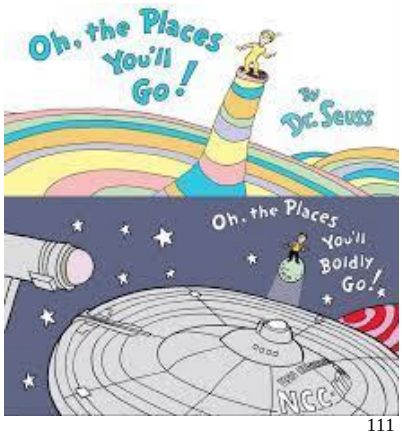
It is true that trademark parody has had a topsy-turvy reception in courts, particularly since the enactment of federal trademark dilution law, 15 U.S.C. §1125(c), in 1996. Before the enactment of the federal dilution law, courts adjudicating trademark parody cases would entertain a bona fide attempt to ridicule or criticize a brand and what it stands for as a First Amendment defense to an infringement or false designation of origin claim,[108] although many such defenses still failed.[109] After the enactment of the dilution law, the success of parody as a First Amendment defense or avoidance of a dilution claim depends on the defendant's ability to overcome the argument that every parody, no matter how clever or humorous, runs the risk of blurring or tarnishing the famous brand that is the target of the parody.[110]

The Ninth Circuit established the track record for trademark and artistic expression cases that applied the *Rogers* test as a threshold test for applicability of the Lanham Act to the allegedly infringement trademark use: if the test applied and the two prongs were evaluated in the junior user's favor, the case ended on dismissal or summary judgment.

108. *See, e.g.*, Anheuser-Busch, Inc. v. L. & L. Wings, Inc., 962 F.2d 316, 321-22 (4th Cir. 1992); Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc., 886 F.2d 490, 495 (2d Cir. 1989); Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1486-87 (10th Cir. 1987).

109. *E.g.*, S. F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 541 (1987), Anheuser–Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 776 (8th Cir.1994); Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir.1987); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979).

110. *E.g.*, Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., 764 F. App'x 39, 41 (2d Cir. 2019); Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 112-13 (2d Cir. 2009); Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 266-67 (4th Cir. 2007); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 812 (9th Cir. 2003); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28-30 (1st Cir. 1987) (state dilution claim).

Ninth Circuit trademark cases affected by *Jack Daniel's*	
 111	***Dr. Seuss Enters., L.P. v. ComicMix LLC*** (9th Cir. 2020)[112]: Although the copyright claims predominated in this case, the court did apply *Rogers* in a preliminary determination of whether the Lanham Act trademark claims raised by Dr. Seuss Enterprises even applied to ComicMix's artistic work. The court found that they did not, and affirmed the dismissal of these claims. Given the fact that ComicMix used the Dr. Seuss title ("Oh, the Places You'll Go") and font in its own title, in what can arguably be called a "trademark use," the case is called into question by *Jack Daniel's*, and it has been labeled as "abrogated" by the *Punchbowl, Inc. v. AJ Press*[113] case (discussed below).
 114	***Twentieth Century Fox Television v. Empire Distrib., Inc.*** (9th Cir. 2017)[115]: The Ninth Circuit applied *Rogers* to quash the trademark infringement and trademark dilution claims that a real-life record distributor asserted against Fox's fictional recording industry television show, "Empire." The use of the plaintiff's mark "Empire" in the title and content of the show was held to be artistically relevant and not explicitly misleading. But given the fact that Fox used the Empire Distribution's trademark in the title of the television series in what can arguably be called a "trademark use," the case is called into question by *Jack Daniel's*, and it has been labeled as "abrogated" by *Punchbowl, Inc. v. AJ Press.*[116]

111. Photograph comparing the Dr. Seuss work and the ComixMix work, *in* Ethan Schow, *Oh the Places Fair Use Can Boldly Go*, BYU COPYRIGHT LICENSING OFF. (May 11, 2020, 6:32 PM), https://copyright.byu.edu/star-trek-ii-the-wrath-of-dr-seuss [https://perma.cc/TM4M-JHLM].

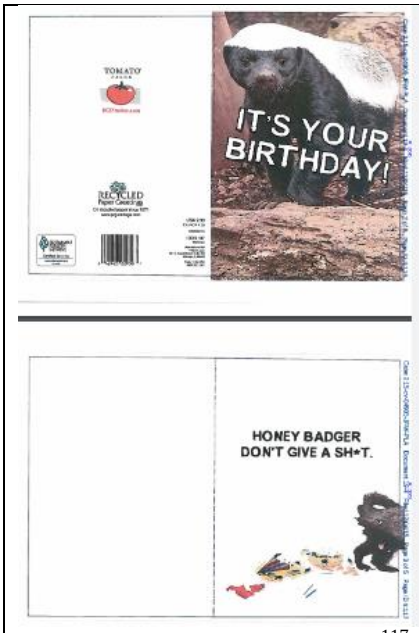
112. Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 461-62 (9th Cir. 2020).

113. Punchbowl, Inc. v. AJ Press, LLC (*Punchbowl II*), 90 F.4th 1022 (9th Cir. 2024).

114. Promotional image for the television show "Empire", *in* Empire *season 1*, WIKIPEDIA, https://en.wikipedia.org/wiki/Empire_%28season_1%29 [https://perma.cc/A27R-AU4P] (last visited Aug. 23, 2024).

115. Twentieth Century Fox Television v. Empire Distrib., Inc., 875 F.3d 1192 (9th Cir. 2017).

116. *Punchbowl II*, 90 F.4th at 1022.



117

Gordon v. Drape Creative, Inc. (9th Cir. 2018)[118]: This case concerns the dispute over the "Honey Badger Don't Give a Sh*t" greeting card between Steven Gordon, creator of the viral "Honey Badger" video series, and Drape Creative, a greeting card company that allegedly exploited Gordon's tag line (mark?), "Honey Badger don't give a sh*t." The Ninth Circuit made a threshold application of the *Rogers* test and found that the card company's use was potentially explicitly misleading, and reversed and remanded the lower court's grant of summary judgment to the card company. Because the court followed the Ninth Circuit practice of applying *Rogers* as a threshold test of applicability of the Lanham Act, and not as a factor in evaluating the elements of infringement, the case has been called into question by *Jack Daniel's* and it has been labeled as "abrogated" by *Punchbowl, Inc. v. AJ Press.*[119]

120

E.S.S. Ent. 2000, Inc. v. Rock Star Videos (9th Cir. 2008)[121]: This case tested the claims of ESS Entertainment, the owner of the real life "Play Pen Gentlemen's Club" in Los Angeles, against Rock Star Videos, the maker of Grand Theft Auto San Andreas. The suit challenged Rock Star's creation of a video game strip club called "Pig Pen" in the fictional world of Los Santos which shares many similarities with real life Los Angeles. The court applied the *Rogers* test, finding that (a) Rock Star's use was artistic expression, (b) the use of the similar name "Pig Pen" was artistically relevant to the content of the game, and (c) the use was not explicitly misleading. But, because the court followed the Ninth Circuit practice of applying *Rogers* as a threshold test of applicability of the Lanham Act and not as a factor in evaluating the elements of infringement, the

117. Photograph of "Honey Badger" greeting card, *in* Dennis Crouch, *Honey Badger Don't Care: Protecting Creativity with Trademarks*, PATENTLY-O (Aug. 24, 2018), https://patentlyo.com/patent/2018/08/protecting-creativity-trademarks.html [https://perma.cc/Y6RZ-XJNC].

118. Gordon v. Drape Creative, Inc., 909 F.3d 257, 267-69 (9th Cir. 2018).

119. *Punchbowl II*, 90 F.4th at 1022.

120. Still photograph from "Grand Theft Auto San Andreas", *in* Robert Grf, *The Pig Pen Totally Nude Strip club in LS GTA San Andreas*, YOUTUBE (Mar. 14, 2021), https://www.youtube.com/watch?v=aATdAZ3-uFg [https://perma.cc/5ZZH-8LSN].

121. E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099-100 (9th Cir. 2008).

	case has been called into question by *Jack Daniel's* and it has been labeled as "abrogated" by *Punchbowl, Inc. v. AJ Press.*[122]
 123	***Brown v. Electronic Arts, Inc.*** (9th Cir. 2013)[124]: In a case that implicates the overlap of federal false endorsement and false designation of origin claims with state law right of publicity theories, legendary football player Jim Brown alleged that Electronic Arts (EA) violated § 43(a) of the Lanham Act by using his likeness in its NFL football simulation games. The lower court granted EA's motion to dismiss. The Ninth Circuit applied the *Rogers* test and affirmed, emphasizing that the level of artistic relevance under *Rogers*' first prong need only exceed zero and concluding that it was "obvious that Brown's likeness ha[d] at least some artistic relevance to EA's work."[125] Nevertheless, because the court followed the Ninth Circuit practice of applying *Rogers* as a threshold test of applicability of the Lanham Act, and not as a factor in evaluating the elements of infringement, the case has been called into question by *Jack Daniel's* and it has been labeled as "abrogated" by *Punchbowl, Inc. v. AJ Press.*[126]
 127	***Mattel Inc. v. Walking Mountain Prods.*** (9th Cir. 2003)[128]: Tom Forsythe's photographic series of unclothed Barbie dolls imperiled by vintage kitchen appliances produced one of the classic, art law casebook-worthy cases of parody as a defense to trademark and trade dress infringement and trademark dilution claims. (The case also raised copyright infringement claims not discussed here). Mattel sought to protect Barbie, one of its most valuable properties, from this artist's humiliating treatment and exploitation, but the court followed the approach of *Mattel v. MCA Records*, 296 F.3d at 901 (discussed above) and exonerated Forsythe and Walking Mountain on the trademark infringement and trademark

122. *Punchbowl II*, 90 F.4th at 1022.

123. Photograph of Jim Brown, *in* CBS Sports HQ (@CBSSportsHQ), *Happy 85th Birthday to Jim Brown!*, X (Feb. 17, 2021, 9:38 AM), https://twitter.com/CBSSportsHQ/status/1362048905966481413 [https://perma.cc/M9SB-464T].

124. Brown v. Elec. Arts, Inc., 724 F.3d 1235 (9th Cir. 2013).

125. *Id*. at 1243.

126. *Punchbowl II*, 90 F.4th at 1022.

127. Tom Forsythe, *Food Chain Barbie* (1999), BLOGSPOT, https://lehrmach2.blogspot.com/2017/06/mattel-v-walking-mountain-20003.html [https://perma.cc/5CX4-UZ8E] (last accessed Feb. 4, 2024).

128. Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

	dilution claims by applying the *Rogers* test. The court found the artistic content and message of Forsythe's photographs were clearly and essentially tied to Barbie because the works comment on and criticize, and in many ways invert, what Mattel has communicated to be the image of what the dolls stand for—fashion, good taste, and a role-model for young women. The Ninth Circuit agreed with the district court's finding that no one "would be misled into believing that Mattel endorsed Forsythe's photographs despite Forsythe's use of the Barbie figure."[129] But because the court followed the Ninth Circuit practice of applying *Rogers* as a threshold test of applicability of the Lanham Act and not as a factor in evaluating the elements of infringement, the case has been called into question by *Jack Daniel's* and it has been labeled as "abrogated" by *Punchbowl, Inc. v. AJ Press.*[130]
Other Circuits: Third Circuit and Sixth Circuit	
 131	***Facenda v. N.F.L. Films, Inc.*** (3d Cir. 2008)[132]: The trademark issue in this dispute over the use of John Facenda's "Voice of God" narration in a new documentary about the making of EA Sports Madden NFL '06 was one of false endorsement. Facenda claimed the license he gave to NFL Films did not extend to commercial product promotion, as was alleged with NFL Film's treatment of the Madden video game development story. Because the court construed the NFL's First Amendment defense as a "threshold issue that would affect how [the court] would apply the trademark law in th[e] case,"[133] the court took up the First Amendment defense before considering the likelihood of confusion factors. The court declined to apply *Rogers* to the analysis, believing that (a) *Rogers* only applied to alleged use of marks in the title of expressive works and (b) the NFL's documentary was not pure speech but

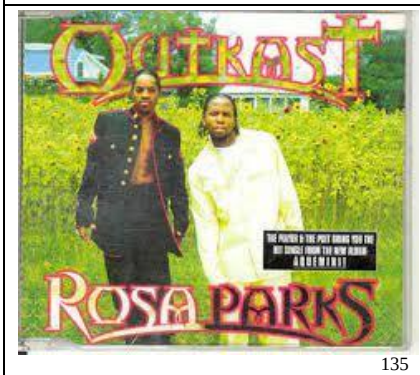
129. *Walking Mountain Prods.*, 353 F.3d at 808-13. The court did not apply *Rogers* to the trade dress infringement claim because it deemed it more appropriate to avoid the First Amendment issue and determined that Forsythe's use enjoyed a "classic" and nominative fair use because Forsythe had purchased and used actual Barbie dolls by Mattel to convey the target of his expression as opposed to converting or reappropriating aspects of the design of the dolls for his own products or services.

130. *Punchbowl II*, 90 F.4th at 1022.

131. Still image from film, in Dave Volsky's Back Door, *1968 NFL Championship Film – John Facenda – 'Perfect Championship' – Reconstruction*, YOUTUBE (Nov. 5, 2021), https://www.youtube.com/watch?app=desktop&v=O31NgjTwPog [https://perma.cc/9Q86-E8SF].

132. Facenda v. N.F.L. Films, Inc., 542 F.3d 1007 (3d Cir. 2008).

133. *Id.* at 1015.

	commercial speech.[134] It would be difficult to find that NFL Films used the thirteen seconds (in three separate voiceover clips) of Facenda's voice in the documentary in a source-identifying manner. Because the case ultimately rejected the application of *Rogers*, it appears that *Jack Daniel's* did not affect the precedential value of this case. Indeed, the subsequent history of *Facenda* on Westlaw does not indicate that *Jack Daniel's* abrogated the opinion.
 135	***Parks v. LaFace Recs.*** (6th Cir. 2003)[136]: In another case where right of privacy or right of publicity claims were asserted under the Lanham Act, the civil rights pioneer Rosa Parks sued the rap and hip-hop group, OutKast, who had used Parks' name as the title of a recording. OutKast further featured the "Rosa Parks" name on the cover and trade dress for the single release of the song (see image at left here). The Sixth Circuit considered several methods of evaluating Parks' false endorsement and false designation of origin claims in light of the First Amendment issues raised in the dispute, including the Lanham Act's likelihood of confusion analysis itself, the "alternative avenues" test, and the *Rogers* test. The court ultimately settled on the *Rogers* test. The court followed the reasoning and application of the *Rogers* test in *Mattel v. MCA Records*,[137] and ultimately found that OutKast did not meet the first prong, "artistic relevance," of the *Rogers* test "as a matter of law" (contrary to what the lower court had found). The *Parks* court reversed and remanded the case on the "artistic relevance" issue and declared that if the first prong was not met on remand, then OutKast would necessarily fail the second, "explicitly misleading," prong. It is not as obvious whether OutKast's use would have or should have been evaluated as "source identifying"; neither these terms nor the concepts they have come to represent were discussed in the *Parks* opinion, but the disputed name, Rosa Parks, was used in the title of the work and on trade dress marking the single release of the song on store shelves. Given that the Supreme Court in *Jack Daniel's* also cited *Mattel v. MCA* with approval, and *Parks* found *Rogers* did not absolve

134. *Id.* at 1017-18.

135. Photograph of the cover art for the OutKast single "Rosa Parks", in *Rosa Parks (song)*, WIKIPEDIA https://en.wikipedia.org/wiki/Rosa_Parks_%28song%29 [https://perma.cc/GAH9-NBKV] (last visited Aug. 22, 2024).

136. Parks v. LaFace Recs., 329 F.3d 437 (6th Cir. 2003).

137. *Mattel*, 296 F.3d at 902.

	OutKast's use of Rosa Park's name, it is possible that *Parks* would survive review under the Supreme Court's clarification of *Rogers*. The *Parks* case is not marked as "abrogated" by *Jack Daniel's* on Westlaw.

Outside the Ninth Circuit and the two cases from the Third and Sixth Circuits discussed above, other courts have dealt with parody and other First Amendment defenses or avoidances to trademark infringement and dilution claims not as a threshold test, but at other stages of the analysis, such as a part of the "likelihood of confusion" trademark infringement analysis.

 138	***In re Elster*** (Fed. Cir. 2022)[139]: The "Trump Too Small" case was an appeal from the denial of registration of a mark that incorporated a human being's last name ("Trump") without his consent. Thus, the case has right of privacy and right of publicity implications even though these issues arose in the context of an appeal from the denial of a trademark registration for the mark, "Trump Too Small." The Federal Circuit overturned the decision of the Trademark Board on First Amendment grounds and recognized that Elster's use had parodic elements in addition to political commentary. This decision was not specifically based on *Rogers* but rather is a continuation of the *Tam*[140]and *Iancu*[141] line of cases on First Amendment limitations on trademark registration criteria.
 142	***People for Ethical Treatment of Animals v. Doughney*** (4th Cir. 2001)[143]: The Fourth Circuit did not apply *Rogers* at a threshold stage or at any point in the analysis to analyze the alleged parody by Michael Doughney of the People for the Ethical Treatment of Animals (PETA) mark in the form of the organization and registered domain name, People Eating Tasty Animals (PETA.org). The court decided that using PETA.org as a domain name took the case out of the realm of parody because a parody is supposed to be seen side-by-side with its target, and no one

138. Photograph of tee shirt featuring the phrase "Trump Too Small", *in Trump Too Small T-Shirt*, TEE SHIRT PALACE, https://www.teeshirtpalace.com/products/tts3024623-trump-too-small-t-shirt [https://perma.cc/42B9-FRU9] (last visited Aug. 23, 2024).

139. *In re* Elster, 26 F.4th 1328, 1330 (Fed. Cir. 2022), *cert. granted sub nom*. Vidal v. Elster, 143 S. Ct. 2579 (2023).

140. Matal v. Tam, 582 U.S. 218 (2017).

141. Iancu v. Brunetti, 588 U.S. 388 (2019).

142. Illustration from home page, *in* TASTY ANIMALS, http://www.tastyanimals.us/ [https://perma.cc/7CKA-Z9ST] (last visited Aug. 23, 2024).

143. People for Ethical Treatment of Animals v. Doughney, 263 F.3d 359 (4th Cir. 2001).

	could know of the parodic value of PETA.org until they already clicked on it and were sent to the PETA.org website. Doughney anticipated user confusion on the PETA.org site by stating: "Feeling lost? Offended? Perhaps you should, like, exit immediately" and the phrase "exit immediately" contained a hyperlink to People for the Ethical Treatment of Animal's official website.[144] The case also had cybersquatting issues, which were a hot and bothersome legal issue in 2001 when the opinion was issued, and the court found Doughney's efforts showed bad faith. It is likely that if this case came up on review in the post-*Jack Daniel's* era, the use of the same mark, PETA, as a domain name and resource locater directing internet traffic to defendant's site would be regarded as a commercial, source-identifying use precluding the consideration of the parody defense altogether. In any event, this outcome would match the outcome of the Fourth Circuit's opinion.
 145	***L.L. Bean, Inc. v. Drake Publishers, Inc.*** (1st Cir. 1987)[146]: The L.L. Bean vs. High Society Magazine's "L.L. Beam's Back to School Sex Catalog" case predates *Rogers.* The First Circuit affirmed the District Court's decision to let the federal trademark infringement claims go to trial but examined the appropriate balance of the Maine trademark dilution law and First Amendment free speech protections over parody. The court analyzed the erotic magazine's use of Bean's mark as being a noncommercial, non-source-identifying use[147] in the form of pure speech editorial or artistic parody that protected the use from Bean's state law dilution claims.[148] Thus, had the *Rogers* test existed, even in light of *Jack Daniel's*, the defendant's use could have been protected as non-source-identifying artistic expression that did not explicitly mislead.

144. *Id.* at 363.

145. Image of cover art for the October 1984 edition of "High Society" magazine, *in Lot 24: October 1984 High Society Magazine-Men's Adult Only Magazine!*, INVALUABLE (Jun. 25, 2023), https://www.invaluable.com/auction-lot/october-1984-high-society-magazine-mens-adult-onl-24-c-92d4c94981 [https://perma.cc/C7LP-HGPH].

146. L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987).

147. The parody sex catalog was a two-page article in the middle of the magazine, not a stand-alone booklet or cover feature. *Id.* at 27.

148. *Id.* at 32.

149

Anheuser-Busch, Inc. v. Balducci Publ'ns [150]**:** *Anheuser-Busch v. Balducci* applied a First Amendment analysis after the court had made a determination that there was a likelihood of confusion; thus, it did not apply the First Amendment test in a threshold determination to preclude a likelihood of confusion analysis altogether (it did not apply or discuss the *Rogers* test, either). Although the words "source-identifying" were not used in the case, the court noted that Balducci's ad parody appeared on the rear cover of the magazine in a spot frequently used for actual commercial advertisements.[151] Thus, the court's resolution of the First Amendment parody defense followed the path described by *Jack Daniel's*, and the case should not be considered to be abrogated by the decision.

As indicated by *Anheuser Busch v. Balducci*[152]and other parody cases,[153] parody already had a difficult time in trademark, trade dress, and dilution actions. *Jack Daniel's* increases the difficulties by drawing attention to the concept of a "source-identifying" use, which arguably was at play in *Balducci* because the parody ad for Michelob Oily was featured on the back cover of Balducci's humor magazine where advertisements often are placed. This theory of source identification arguably was at play in *Mutual of Omaha Ins. v. Novak* because Novak's "Mutant of Omaha" t-shirt wore its modified logo and trade dress on the face of the product where it would be seen to attract purchasers.[154]

Cases of the past have shown that trademark law has been stingy with the parody defense because confusion among consumers can be generated by even the most obvious parodies.[155] When this expression is coupled with a source-

149. Illustration of Michelob Oily advertisement, *in* Anheuser-Busch, Inc. v. Balducci Publ'ns., 28 F.3d 769 app. A (8th Cir. 1994).

150. *Anheuser-Busch, Inc.*, 28 F.3d at 769.

151. *Id.* at 774.

152. *Id.*

153. Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1987); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979).

154. *See Novak*, 836 F.2d at 402.

155. *E.g.*, *Balducci*, 28 F.3d at 774-76 (noting survey evidence indicating consumer confusion over whether "Michelob Oily" was in fact an actual Anheuser-Busch product); *Novak*, 836 F.2d at 402 (discussing possible confusion over whether Mutual of Omaha really was offering nuclear fallout insurance under the name "Mutant of Omaha"); *Dallas Cowboys Cheerleaders*, 604 F.2d at 206 (concluding that pornographic send-up of Dallas Cowboys cheerleaders still met infringement analysis because mocked-up cheerleader uniforms were too close to the actual Dallas Cowboy cheerleader uniform design).

identifying use and evaluated at the infringement stage,[156] the plaintiff's claim will have a very strong chance of success.

IV. THE FUTURE OF THE *ROGERS* FAIR USE TEST IN FEDERAL TRADEMARK LAW AND STATE RIGHT OF PUBLICITY AND RIGHT OF PRIVACY CLAIMS

Cases applying and adapting *Jack Daniel's* give us some clear indications of where the use of the *Rogers* test is going in trademark-related claims, and the lessons from these early rulings shed some light on the use of *Rogers* as persuasive authority in evaluating First Amendment protections in state law right of privacy and right of publicity claims.

*A. Post-*Jack Daniel's *First Amendment Analysis in Federal Trademark Claims*

In the roughly ten months after the Supreme Court issued *Jack Daniel's*, several courts had the occasion to revise or reconsider their rulings on whether, in light of *Jack Daniel's*, the *Rogers* test had been or should be applied by the court to escape the infringement analysis of an expressive use of a trademark in the context of trademark infringement or trademark dilution claims. Some found their initial analysis was consistent with *Jack Daniel's*, while others reversed course or withdrew opinions that previously had applied the *Rogers* test.

 157	***Punchbowl, Inc. v. AJ Press, LLC* (*Punchbowl II*)** (9th Cir. 2024)[158]: The Ninth Circuit reversed course on the evaluation of the trademark "Punchbowl" used by both plaintiff's greeting cards company and defendant's political news publication. In the prior opinion in the case, the Ninth Circuit applied *Rogers* in a threshold determination as to whether the Lanham Act even applied to defendant's arguably expressive use of the term "Punchbowl" to allude to insider Washington political news. The court found that the Lanham Act did not apply and dismissed the action.[159] After *Jack Daniel's*, the Ninth Circuit withdrew

156. Jack Daniel's Props., Inc. v. VIP Prod. LLC, 599 U.S. 140, 162 (2023).

157. Logos for Punchbowl and Punchbowl News, *in* Kimberly M. Maynard, *United States: Is the Party Punch Gone? Citing Jack Daniel's, Ninth Circuit Reverses Dismissal of Punchbowl Trademark Decision*, MONDAQ (Jan. 18, 2024), https://www.mondaq.com/unitedstates/trademark/1413888/is-the-party-punch-gone-citing-jack-daniels-ninth-circuit-reverses-dismissal-of-punchbowl-trademark-decision [https://perma.cc/E3QV-TA4N].

158. Punchbowl, Inc. v. AJ Press, LLC (*Punchbowl II*), 90 F.4th 1022 (9th Cir. 2024).

159. Punchbowl, Inc. v. AJ Press, LLC (*Punchbowl I*), 52 F.4th 1091, 1094 (9th Cir. 2022).

	its prior opinion,[160] ultimately ruling (a) that *Rogers* did not apply, (b) that there would be no threshold determination on whether the Lanham Act applied, and (c) that, on remand, the court would have to adjudicate the infringement factors.[161]

As noted in the table in the prior section, *Punchbowl II* marked the abrogation of six prior Ninth Circuit cases that all had followed the formula used in the initial *Punchbowl I* case of applying *Rogers* as a threshold determination of the applicability of the Lanham Act to expressive and artistic uses of marks that, in many cases, precluded an analysis of the likelihood of confusion factors.[162]

 163	***HomeVestors of Am., Inc. v. Warner Bros. Discovery*** (D. Del. Dec. 21, 2023)[164]: The District of Delaware trial court adopted a Magistrate Judge's report and recommendation (R&R) to deny defendant Warner Bros.' motion to dismiss the suit. The Magistrate Judge's R&R was drafted before the *Jack Daniel's* opinion but had in effect followed the reasoning that was later applied in the *Jack Daniel's* case. The District Court found that *Rogers* did not apply to this dispute, in which HomeVestors sued Warner Bros. over its HGTV "Ugliest House in America" television show for allegedly infringing plaintiff's "Ugly Houses" marks (such as the mark shown at left here). Although Warner Bros. had argued that *Rogers* should preclude the suit when the allegation concerned the use of a mark in the title of an expressive work, the court disagreed, stating *Rogers* is not so broad that any use of a mark in the title of an expressive work is necessarily entitled to a threshold application of the *Rogers* analysis nor is it necessarily non-infringing. Although the

160. Punchbowl, Inc. v. AJ Press, LLC, 78 F.4th 1158 (9th Cir. 2023) (withdrawing *Punchbowl I* opinion).

161. *Punchbowl II*, 90 F.4th at 1032.

162. Dr. Seuss Enters, L.P. v. ComicMix LLC, 983 F.3d 443, 461-62 (9th Cir. 2020); Twentieth Century Fox Television v. Empire Distrib., Inc., 875 F.3d 1192 (9th Cir. 2017); Gordon v. Drape Creative, Inc., 909 F.3d 257, 267-69 (9th Cir. 2018); E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099-100 (9th Cir. 2008); Brown v. Elec. Arts, Inc., 724 F.3d 1235 (9th Cir. 2013); Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 806-07 (9th Cir. 2003).

163. HomeVestors caveman advertisement, *in We Buy Ugly Houses® Company Files Lawsuit Over Trademark Rights*, MADAN LAW PLLC (Dec. 19, 2022), https://madan-law.com/4404-2/ [https://perma.cc/863L-B2P8].

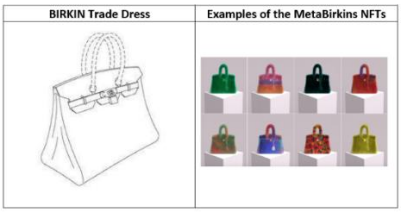
164. HomeVestors of Am., Inc. v. Warner Bros. Discovery, No. CV 22-1583-RGA, 2023 WL 6880341, at *3 (D. Del. Oct. 18, 2023), report and recommendation adopted, No. CV 22-1583-RGA, 2023 WL 8826729, at *1 (D. Del. Dec. 21, 2023).

	court wrestled with whether Warner Bros.' use was "source identifying" (*i.e.*, a trademark use of another's trademark) in spite of the mark not only being in the title but in every aspect of the promotion of the work in question, because *Rogers* was the sole ground on which Warner Bros. moved to dismiss the federal trademark infringement claims and the federal and state trademark dilution claims, and the court accepted the recommendation that *Rogers* should not be applied to the case, the motion to dismiss was denied.
 165	***JTH Tax LLC v. AMC Networks Inc.*** (S.D.N.Y. Sept. 25, 2023)[166]: JTH, purveyor of tax preparation services under "Liberty Tax Service" marks, raised trademark and trade dress infringement and state dilution claims against AMC Networks' and Sony Television's inclusion of an imaginary tax service company called "Sweet Liberty Tax Services" in an episode of defendants' *Better Call Saul* television series. The court analyzed and applied *Jack Daniel's* (and the *Louis Vuitton* case discussed above) and found that *Rogers* did apply because AMC and Sony did not use "Sweet Liberty Tax Services" as a source identifier or mark for *Better Call Saul* or any other program or product defendants produced. The imaginary "Sweet Liberty Tax Service" company run by fictional characters from the first season of *Better Call Saul* was at most used to advance the plot of one episode in Season 6 of the television series, and as such, the use was artistically relevant to the artistic expression of that fictional television episode under the first factor of *Rogers*. The court further analyzed each of the Second Circuit's *Polaroid* factors and concluded that the use of "Sweet Liberty Tax Services" as a fictional name of a fictional tax service in a fictional television episode did not present an impermissible risk of consumer confusion under the second factor of the *Rogers* test.[167] Thus, the case stands for the proposition that when a senior mark is not used in a source-identifying, "trademark" use, then *Rogers* can be applied to the dispute.

165. Photograph of Betsy and Craig Kettleman, *in Sweet Liberty Tax Services*, BREAKING BAD WIKI, https://breakingbad.fandom.com/wiki/Sweet_Liberty_Tax_Services?file=Betsy_and_Craig_Kettleman.jpeg [https://perma.cc/8ZFF-W4DY] (last visited Aug. 22, 2024).

166. JTH Tax LLC v. AMC Networks Inc., 694 F. Supp. 3d 315, 328-30 (S.D.N.Y. 2023).

167. *Id.* at 335-41.

 168	***Hermès Int'l v. Rothschild*** (S.D.N.Y. June 23, 2023)[169]: The trademark lawsuit over Hermès's Birkin bags and Mason Rothschild's MetaBirkins non-fungible tokens (NFTs) culminated in a jury trial in which the jury unanimously found Rothschild (né Sonny Estival) guilty of Lanham Act trade dress infringement. In the ruling cited above, the trial court denied several post-trial motions under Fed. R. Civ. P. 50(b) and 59(a, c) and noted that the jury instructions were entirely correct in asking the jury to find first if Hermès had carried its burden to prove the elements of infringement before asking the jury to evaluate whether Hermès had proved that the First Amendment *did not* absolve Rothschild of responsibility. The court explained that the instructions were correct and consistent with *Jack Daniel's* because a threshold inquiry based on the First Amendment and the *Rogers* analysis "is not appropriate when the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark."[170] The court opined, based on the unanimous jury verdict, that Rothschild had made a source-identifying use of the Birkin mark with his "MetaBirkins" NFTs and "MetaBirkins" website.

168. Images of a Birkin Handbag and MetaBirkin NFTs, *in* RiKaleigh Johnson, *IP Law Watch-The MetaBirkins Battle*, LEXOLOGY (Feb. 1, 2023), https://www.lexology.com/library/detail.aspx?g=bb83602b-69f7-4355-ac25-adfce623dc56 [https://perma.cc/SN8E-5CLE].

169. Hermès Int'l v. Rothschild, 678 F. Supp. 3d 475 (S.D.N.Y. 2023).

170. *Hermes*, 678 F. Supp. 3d at 484 (quoting Jack Daniel's Props., Inc. v. VIP Prod. LLC, 599 U.S. 140, 165 (2023)).

 171	***Vans, Inc. v. MSCHF Product Studio*** (2d Cir. 2023)[172]: MSCHF Product Studio's "Wavy Baby" shoes used multiple examples of Vans' trademarks and trade dress both on MSCHF's shoes themselves and on the tags, labeling, and packaging (*i.e.*, the trade dress) of the shoes (*see* images at left). Although the Wavy Baby shoes were alleged by MSCHF to be a parody and artistic expression, the Second Circuit followed *Jack Daniel's* and found MSCHF had used Van's "Old Skool" and "Off the Wall" marks and trade dress in a source-identifying manner. The court noted that, although "parodies are inherently expressive, . . . [*Rogers*] does not [apply] when an alleged infringer uses a trademark in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods."[173] The Second Circuit, also following *Jack Daniel's*, did not rule out that the parodic expression of the Wavy Baby shoe would be relevant as a mitigating factor in the infringement analysis, but it did not present a threshold question wherein the *Rogers* test might preclude the issue of infringement altogether.[174]

None of the above federal trademark cases involved a *deepfake* use of a mark, whether in a comment and criticism or parody context or as a source-identifying use. But the MetaBirkins suit (*Hermès Int'l v. Rothschild*) and the Wavy Baby suit (*Vans, Inc. v. MSCHF Product Studio*) are indicative scenarios to consider when predicting how such uses might come out in the deepfake generative AI context. A deepfake that is itself a product or is advertising or promoting a separate product or service of the deepfake creator, such as the NFTs Rothschild was selling and promoting in *Hermès* and the shoes MSCHF was selling and promoting in *Vans*, raises the issue that this advertising and promotional activity will in many, if not all, cases be deemed a source-identifying use. And even if the deepfake also expresses a parodic message that seeks to comment on or criticize the brand that the deepfake incorporates, and copies a portion of the trade dress or logo of the brand in order to conjure up the original as the target of the parody, as MetaBirkins and MSCHF did in their products, trade dress, and advertising, this will in many, if not all, instances bring the use squarely within the sights of *Jack Daniel's*. These "source identifying" activities will preclude the application of *Rogers* and eliminate the

171. Photographs of Vans shoes and designs compared to Wavy Baby designs, *in* Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F.4th 125, 131-33 (2d Cir. 2023).

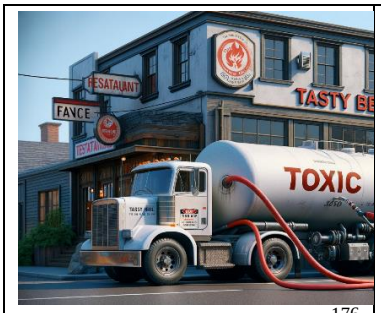
172. *Vans, Inc.*, 88 F.4th at 136-37.

173. *Id.* at 137 (quoting *Jack Daniel's*, 599 U.S. at 153).

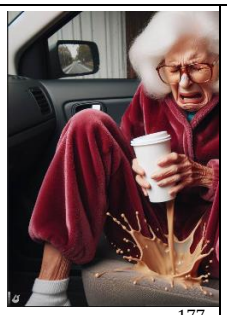
174. *Id.* at 137-38.

ability to raise a parody defense. At this point, it would be safer simply to identify the target's product or brand for what it is with no alteration or manipulation and make your comment or criticism about the brand directly, taking advantage of the nominative fair use.[175]

But *Jack Daniel's* does not preclude a deepfake that does not incorporate any part of a company's name, logos, or trade dress as a trademark or source-identifier of the deepfake creator, as in any deepfake that simply comments on or criticizes something without itself being a product or service or promoting a product or service. The author's deepfakes below attempt to illustrate this type of expressive use:



176



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*A. Post-*Jack Daniel's *First Amendment Analysis Under* Rogers *in State Law Publicity and Privacy Claims*

The evaluation of deepfakes under state law right of publicity, name-image-likeness (NIL), or right of privacy laws requires a careful analysis of the content, message, and audience of the AI-assisted expression (*e.g.*, is it directed to consumers in a commercial context, or to voters, or consumers of news media, or the arts, or entertainment) within the elements of the substantive law and the requirements of the First Amendment.

State and federal courts have policed the intersection of right of publicity laws and the First Amendment for a considerable time because the courts recognize that right of publicity laws can potentially infringe upon the First

175. *E.g.*, Am. Soc'y for Testing & Materials, et al. v. Public.Resource.Org, Inc., 896 F.3d 437, 456 (D.C. Cir. 2018); New Kids on the Block v. News America Publ'g., Inc., 971 F.2d 302, 306-07 (9th Cir. 1992).

176. Michael D. Murray, *Deepfake illustration criticizing a beer company that is connected to a toxic fuel oil company* (Feb. 15, 2024) (image created with the assistance of DALL-E 3).

177. Michael D. Murray, *Deepfake illustration criticizing a fast-food company's coffee cup design* (Jan. 3, 2024) (image created with the assistance of DALL-E 3).

178. Michael D. Murray, *Deepfake illustration criticizing a tainted money source for paying off politicians* (Feb. 15, 2024) (image created with the assistance of DALL-E 3).

Amendment.[179] The overlap of subject matter in state and common law right of publicity, NIL, and privacy claims has led to the analysis of a parody and comment and criticism defense in each of these legal regimes.[180] Meeting the *Rogers* test is not essential to making a First Amendment defense on the basis of parody or comment and criticism in a right of privacy or right of publicity claim based on state statutory law or state common law. At the risk of stating the obvious, *Rogers* is controlling authority only in the Second Circuit when applied in claims arising under federal law, such as Lanham Act false endorsement and false designation or origin claims, and when the expressive use is not a trademark source-identifying use under *Jack Daniel's* (as discussed above). *Rogers* has been cited—but not always followed—by all eleven circuits and the federal circuit.[181] It has been officially adopted and applied by the Third

179. *See* Daniels v. FanDuel, Inc., 109 N.E.3d 390, 395-96 (Ind. 2018) ("The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." (quoting Time, Inc. v. Sand Creek Partners, L.P., 825 F. Supp. 210, 212 (S.D. Ind. 1993))); Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 2001) (holding that the First Amendment will protect recitations of athletes' accomplishments); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) ("[T]he First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him . . .."); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001) (outlining and applying a First Amendment defense to the California right of publicity statute creating a tort claim for commercial misappropriation of name and likeness); Cardtoons, L.C. v. MLB Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996) (describing and applying two exceptions to the Oklahoma right of publicity statute designed to accommodate the First Amendment); Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989) (citing *In re* Estate of Havemeyer, 217 N.E.2d 26 (N.Y. 1966)) ("[C]ourts delineating the right of publicity . . . have recognized the need to limit the right to accommodate First Amendment concerns."). *See also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (AM. L. INST. 1995) ("The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression.").

180. *See, e.g.*, *In re* Tam, 808 F.3d 1321, 1373 (Fed. Cir. 2015) (Dyk, J., concurring), *as corrected* (Feb. 11, 2016), *aff'd sub nom*. Matal v. Tam, 582 U.S. 218 (2017); Moore v. Weinstein Co., LLC, 545 F. App'x 405, 409, 412 (6th Cir. 2013) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (AM. L. INST. 1995) and *Rogers*, 875 F.2d at 999); Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1277 (11th Cir. 2012); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 810-12 (9th Cir. 2003); Lohan v. Perez, 924 F. Supp. 2d 447, 454 (E.D.N.Y. 2013); Geary v. Goldstein, No. 91 CIV. 6222 (KMW), 1996 WL 447776, at *3-4 (S.D.N.Y. Aug. 8, 1996).

181. This count is based on the Westlaw citing references for *Rogers.* Several of these citations are for a choice of law holding in *Rogers*, 875 F.2d at 1002: "A federal court sitting in diversity or adjudicating state law claims that are pendent to a federal claim must apply the choice of law rules of the forum state." *E.g.,* Spain v. Haseotes, 116 F.3d 464 (1st Cir. 1997) (unpublished table decision).

Circuit,[182] Fourth Circuit,[183] Fifth Circuit,[184] Sixth Circuit,[185] Ninth Circuit,[186] and Eleventh Circuit.[187] But it has only been cited by five states— California,[188] Kentucky,[189] Missouri,[190] New York,[191] and North Carolina[192]—and not officially adopted as the sole test of free expression rights in any of these states.

In state law right of privacy and right of publicity contexts, the *Rogers* test falls within a family of related fair use tests—the *Rogers "*Relatedness" test,[193] the *Cardtoons* "Balancing" test,[194] the *CBC* and *Doe* "Predominant Purpose" test,[195] and the *Simeonov* "Artistic Expression" test[196]—that balance the value or strength of the expression using a person's name, image, likeness, or aspects of their persona against the injury or nature or level of exploitation of the name, image, likeness, or persona. These tests are summarized in RIGHT OF PUBLICITY IN A NUTSHELL as evaluating:

> the purpose behind the use of the celebrity name/image/likeness and its context and connection to the activity (*i.e.*, high value expression or high commercial activity) to see if the use looks expressive and communicative or exploitative. Works that have high expressive value and are not commercial speech and not overtly commercialized will be

182. Seale v. Gramercy Pictures, 949 F. Supp. 331, 339-41 (E.D. Pa. 1996), *aff'd without opinion*, 156 F.3d 1225 (3d Cir. 1998) (unpublished table decision). *But see* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3d Cir. 2013) (declining to apply *Rogers* in favor of the transformative test); Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1018 (3d Cir. 2008) (declining to apply *Rogers* because expression in case was deemed to be commercial speech).

183. Radiance Found., Inc. v. NAACP., 786 F.3d 316, 322, 329 (4th Cir. 2015).

184. Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 664-65 (5th Cir. 2000).

185. Parks v. LaFace Recs., 329 F.3d 437, 450 (6th Cir. 2003); Moore v. Weinstein Co., LLC, 545 F. App'x 405, 412 (6th Cir. 2013). *See also* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936-37 (6th Cir.2003) (applying both *Rogers* and the transformative test).

186. Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 902 (9th Cir. 2002).

187. *See* Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1278 (11th Cir. 2012); MGFB Props., Inc. v. Viacom Inc, 54 F.4th 670, 678 (11th Cir. 2022).

188. *E.g.*, Serova v. Sony Music Ent., 515 P.3d 1, 13 (Cal. 2022).

189. Montgomery v. Montgomery, 60 S.W.3d 524, 533 n.8 (Ky. 2001) (Keller, J., dissenting).

190. Doe v. TCI Cablevision, 110 S.W.3d 363, 373 (Mo. 2003) (en banc).

191. *E.g.*, Lacoff v. Buena Vista Pub., Inc., 705 N.Y.S.2d 183, 190 (N.Y. Sup. Ct. 2000).

192. Wachovia Bank, Nat. Ass'n v. Harbinger Cap. Partners Master Fund I, Ltd., No. CIV.A. 07 CVS 5097, 2008 WL 684926, at *12 (N.C. Super. Mar. 13, 2008) (citing *Rogers* for the proposition that a federal court adjudicating a supplemental state law claim must apply the choice of law rules of the forum state), *aff'd*, 687 S.E.2d 487 (N.C. Ct. App. 2009).

193. Rogers v. Grimaldi, 875 F.2d 994, 998-99 (2d Cir. 1989).

194. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996). The Supreme Court's opinion in *Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562, 574-75 (1977), is considered to be in line with the balancing approach that was later refined and applied in *Cardtoons. See, e.g.*, Doe v. TCI Cablevision, 110 S.W.3d 363, 373 (Mo. 2003) (en banc).

195. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 820 (8th Cir. 2007); Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

196. Simeonov v. Tiegs, 602 N.Y.S.2d 1014, 1018 (Civ. Ct. N.Y. Cty. 1993).

> considered fair even when they feature the name, image, or likeness of a celebrity. Works that are highly commercialized in nature or in context and seek to exploit the celebrity's persona for gain in a fairly obvious manner will be considered unfair.[197]

The competing First Amendment fair use test that falls outside the family of balancing tests is the "transformative" test borrowed from copyright fair use law[198] by the California Supreme Court in *Comedy III Productions v. Gary Saderup, Inc*.[199] The transformative test does not specifically weigh the value of the expression using the name, image, likeness, or persona of a person against the level of commercial exploitation of these attributes. Rather, it attempts to determine if the creator of the new work adds First Amendment expressive value to the depiction beyond the value of the name, image, or likeness used in the work either through artistic, expressive additions or because the status of the creator of the work (*e.g.*, a famous artist such as Andy Warhol) supplies value.[200] In cases involving visual depictions of valuable images or likenesses (*e.g.*, of celebrities and sports figures), the court is to ask "whether the [plaintiff's] likeness is one of the 'raw materials' from which the [defendant's] work is synthesized, or whether the depiction or imitation of the [plaintiff] is the very sum and substance of the work in question."[201] A rough shorthand of the inquiry that is offered by the California Supreme Court asks if consumers of the work will value the work (*e.g.*, buy it) because of the person who created it or because of the image or likeness depicted in the work.[202]

The transformative test is qualitatively and substantively different from *Rogers* and the other balancing tests cited above because it weighs the value of the defendant's *additions* of content or context (*e.g.*, how valuable is the celebrity defendant's participation in the expression) against the value of the depiction of the celebrity or non-celebrity plaintiff's image itself.[203] *Rogers* first evaluates if the speech presents a reason for using the plaintiff's name or identifying attributes (the relatedness question) and then weighs the level and nature of the exploitation or commercialization of the plaintiff's image (the exploitation question).[204] *Rogers* and the other balancing tests do not try to directly measure how clever and valuable the content of the expression of the

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197. MURRAY, *supra* note 35, at 166-67.

198. Within copyright law, the transformative fair use test has recently been clarified in *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 530-32 (2023). *See* Michael D. Murray, *Copyright Transformative Fair Use after* Andy Warhol Foundation v. Goldsmith, 24 WAKE FOREST J. BUS. & INTELL. PROP. L. 21 (2023).

199. 21 P.3d 797, 811 (Cal. 2001).

200. *Id.* at 804-08.

201. *Id.* at 809.

202. *See id.* at 810.

203. *E.g., id.* at 810 (holding that Gary Saderup, the defendant artist, did not contribute enough star power or valuable artistic skill to outweigh the publicity value of the images of the Three Stooges' images depicted in Saderup's work).

204. Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

use is, or how famous the defendant making that expression is, so that this value can be compared to the value of the fame or celebrity of the person whose name or identifying information is used.[205]

The diminished importance of *Rogers* in state law actions means that the Supreme Court's clarifications of when *Rogers* applies and to what extent the context of a trademark source-identifying use defeats the application of *Rogers* and limits the application of parody and other free expression defenses[206] will have less impact in state law actions for right of publicity and right of privacy claims. A "trademark" type source-identifying use of a person's name, image, likeness, or other identifying information is, by definition, highly commercialized and directly targets the person's privacy rights or publicity rights for exploitation. The balancing tests, of which the *Rogers* relatedness test is one, would be likely to balance this level of exploitation against a finding of fair use even if the use was embedded in a related expressive activity.[207] By the same token, when the Supreme Court stated that *Rogers* continues to apply to "non-trademark uses" of a rival's trademark in an expressive context, this may be held to be persuasive authority in a state lawsuit where a defendant has used the name, image, likeness, or other identifying material of a person in a "non-source-identifying way."[208] The *Rogers* relatedness test or another balancing test can be applied to evaluate the expression against the commercial exploitation present in the use.[209]

V. CONCLUSIONS

The post-*Jack Daniel's* cases discussed above show us that in federal litigation asserting trademark law theories, if the defendant made use of the plaintiff's marks and trade dress in the defendant's own marks, trade dress, or promotional materials in a "source-identifying" manner, there will be no threshold application of *Rogers* at the motion to dismiss stage to determine if

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205. *Compare* Winter v. DC Comics, 69 P.3d 473, 477 (Cal. 2003) ("'When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.' Thus, depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment.") (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001)), *with* Parks v. LaFace Recs., 329 F.3d 437, 450-51(6th Cir. 2003), *and* Seale v. Gramercy Pictures, 949 F. Supp. 331, 336 (E.D. Pa. 1996), *aff'd without opinion*, 156 F.3d 1225 (3d Cir. 1998) (unpublished table decision).

206. Jack Daniel's Props., Inc. v. VIP Prods., LLC, 599 U.S. 140, 162 (2023).

207. *See, e.g.*, Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (plaintiff Doe's—Tony Twist's—name arguably was used in a source-identifying manner when used in materials promoting the Spawn comic and its creator, Todd McFarlane, and the use was held not to be protected by the First Amendment).

208. *Jack Daniel's*, 599 U.S. at 155-56.

209. *E.g.*, *Parks*, 329 F.3d at 450; *Seale*, 949 F. Supp. at 336.

the use is even actionable under the trademark laws so as to save the defendants the cost of developing the infringement case. And then, at the infringement stage of these cases presenting "source-identifying" uses of plaintiff's marks and trade dress, the role of parody and other comment and criticism First Amendment defenses is diminished. In this way, the *Hermès Int'l v. Rothschild* (*MetaBirkins*) case and *Van's v. MSCHF* (*Wavy Baby*) cases may be the most indicative predictors of how cases with this type of expressive but potentially confusing or exploitative use will fare under trademark law and the First Amendment. Cases of the past have shown that trademark law has been stingy with the parody defense because confusion among consumers can be generated by even the most obvious parodies.[210] When this expression is coupled with a source-identifying use and evaluated at the infringement stage, [211] the plaintiff's claim will have a very strong chance of success.

The Supreme Court's clarifications of when *Rogers* applies and to what extent the context of a trademark source-identifying use defeats the application of *Rogers* and limits the application of parody and other free expression defenses[212] are not controlling and have less importance in state law actions asserting right of publicity and right of privacy claims. But the parallel nature of trademark false endorsement and false designation of origin claims and state law publicity and privacy actions should mean that a "trademark" type source-identifying use of a person's name, image, likeness, or other identifying information that is by definition highly commercialized and directly targets the person's privacy rights or publicity rights for exploitation should fail the balancing tests used in state law claims, of which the *Rogers* relatedness test is one. These tests would be likely to balance this level of exploitation against a finding of fair use, even if the use was embedded in a related expressive activity.[213]

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210. *E.g.*, Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 774-76 (survey evidence indicated consumer confusion over whether "Michelob Oily" was in fact an actual Anheuser-Busch product); Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 400-02 (8th Cir. 1987) (discussing possible confusion over whether Mutual of Omaha really was offering nuclear fallout insurance under the name "Mutant of Omaha"); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204-05 (2d Cir. 1979) (pornographic send-up of Dallas Cowboys cheerleaders still met infringement analysis because mocked up cheerleader uniforms were too close to the actual Dallas Cowboy cheerleader uniform design).

211. *Jack Daniel's*, 599 U.S. at 162.

212. *Id.*

213. *See, e.g.*, Doe v. TCI Cablevision, 110 S.W.3d 363, 373 (Mo. 2003).

CARBON EMISSIONS AND ENERGY BENCHMARKING

RICHARD J. SOBELSOHN*

INTRODUCTION

In 2015, the Paris Agreement was adopted by one-hundred and ninety-six (196) Parties at the United Nations Climate Change Conference establishing the goal to limit global warming temperatures to below 2°C and to pursue steps to limit temperature increase to 1.5°C above pre-industrial levels.[1] The Paris Agreement acted as catalyst for countries to amplify their efforts at achieving net zero carbon emissions, and significant energy reductions by 2050.[2] Countries, states, cities, and municipalities (collectively, "Region" or "Regions") have acted to reduce carbon emissions and energy consumption by implementing policies, statutes, and regulations to combat the climate crisis.[3] However, tangible progress across the globe has varied significantly, from some Regions that merely have broad-sweeping policy statements, to those that enact concrete regulations and penalties for non-compliance of climate change regulations and laws, such as progressive cities like New York City, Boston, and London. As discussed below, these cities have created a web of regulations covering both energy and carbon emission reduction. Their regulations contain mandatory energy consumption and carbon emission benchmarks for building owners, and impose weighty fines for non-compliance.[4] Further, New York City and Boston offer Property Assessed Clean Energy (PACE) financing programs to help owners comply with these regulations.[5] Contrastingly, Regions like New Jersey and Canada have failed to regulate past the infancy stages, having merely announced broad policy goals concerning energy and carbon emission reduction.[6] Unfortunately, most Regions have simply focused legislation on

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1. 3156 U.N.T.S. 54113.

2. *See id.*

3. Lamia Kamal-Chaoui & Alexis Robert (eds.), *Competitive Cities and Climate Change* (Org. for Econ. Coop. & Dev., Regional Development Working Papers N° 2, 2009).

4. *Id.*; *City of Boston Finalizes Regulations to Ensure Large Buildings Achieve Carbon Neutrality by 2050*, CITY OF BOSTON (Dec. 22, 2023), https://www.boston.gov/news/city-boston-finalizes-regulations-ensure-large-buildings-achieve-carbon-neutrality-2050 [https://perma.cc/2Z4B-KU3T].

5. Kamal-Chaoui & Robert, *supra* note 3.

6. Canada, Climate Action Tracker, https://climateactiontracker.org/countries/canada/#:~:text=The%20%E2%80%9CInsufficient%E2%80%9D%20rating%20indicates%20that,to%20modelled%20domestic%20emissions%20pathways [https://perma.cc/6JDH-35R7] (last visited Oct. 7, 2024); N.J. Dep't Env't Prot., New Jersey's Global Warming Response Act 80 x 50 Report (2020).

energy reduction but have failed to implement similar concrete measures relating to carbon emissions.[7]

While many of these Regions across the globe legislate with respect to the Paris Agreement, this Article examines and compares the policies, laws, and regulations each Region has implemented to comply with their obligations under the Paris Agreement. In conclusion, this Article proposes that the strict approach by progressive cities like New York City is better to effectively reduce energy consumption and meet the stringent carbon emission deadlines of the Paris Agreement. Ultimately, it will be clear that Regions across the globe must actively work on their respective efforts to halt increasing global temperatures by aggressively limiting energy consumption and carbon emissions.

I. POLICIES AFFECTING ENERGY CONSUMPTION AND BENCHMARKING

A critical component to addressing the climate crisis is to reduce and ultimately eliminate the production and insatiable use of fossil fuels (i.e., coal, oil, and natural gas) across the globe.[8] Fortunately, many Regions have acknowledged the harmful effects of poor energy production and have taken initial steps to track and reduce such consumption.[9] Their efforts are seen through policy-making and legislative measures which implement energy benchmarking programs and converting to cleaner energy sources.[10] Energy Benchmarking is the process of measuring and comparing a building's energy performance against the building's past performance, similar buildings, or modeled simulations of a reference building at a certain standard.[11] Legislation throughout Regions typically requires property owners to benchmark and report their energy and water use for the purpose of improving overall efficiency and in reducing Green House Gas (GHG) emissions.[12] For example, New York City has implemented a series of local laws that not only use benchmarking to track energy use but also require green roofing and limiting energy utilized for heating to electricity.[13]

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7. Caroline George et al., *How US cities are finding creative ways to fund climate progress*, BROOKINGS INST. (Feb. 22, 2023), https://www.brookings.edu/articles/how-us-cities-are-finding-creative-ways-to-fund-climate-progress/ [https://perma.cc/8P2W-GM9F].

8. Kamal-Chaoui & Robert, *supra* note 3, at 152.

9. Antonious Mickael, *Energy Benchmarking: A Comprehensive Guide to Benefits, Process and Tools*, CIM (Mar. 5, 2024), https://www.cim.io/blog/a-comprehensive-guide-to-energy-benchmarking-benefits-process-and-tools [https://perma.cc/29A7-ARLJ].

10. *Id.*

11. *Id.*

12. George et al., *supra* note 7.

13. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 84 § 1 (2009); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. No. 92 (2019); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 94 (2019); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 154 (2021).

A. United States

1. New York.—New York City has taken an early and aggressive approach in grappling with the climate crisis by implementing a variety of energy-based local laws since 2009. Notably, Local Law 84 of 2009, as amended by Local Law 133 of 2016, requires owners of "covered buildings" to annually measure their energy and potable water consumption.[14] Furthermore, Local Law 33 of 2018, in conjunction with Local Law 95 of 2019, requires covered buildings to not only benchmark their energy and water usage, but also obtain and display energy efficiency scores for public view.[15] Each of these three Local Laws pertaining to energy and water efficiency are explained individually below.

a. Local Laws 84 and 133.—Beginning in 2009, Local Law 84, and Local Law 133 later in 2016, required building owners to generate and submit annual reports of their energy and water consumption annually via the Energy Star Portfolio Manager.[16] Failure to submit these reports would result in a fine against the building owner of $500 per quarter for noncompliance.[17] Local Laws 84 and 133 apply to buildings that: (i) exceed 25,000 gross square feet; (ii) are comprised of two or more buildings on the same tax lot that together exceed 100,000 gross square feet; and (iii) include two or more buildings held as a condominium that together exceed 100,000 gross square feet.[18] Some buildings are excluded from needing to comply with Local Laws 84 and 133 (e.g., one-, two-, and three-story residential dwellings, as well as certain real property under four stories where each owner or occupant controls and is responsible for the maintenance of the heating, ventilation, and air conditioning (HVAC) systems and hot water systems).[19]

b. Local Laws 23 and 95.—In 2018 and 2019, respectively, Local Laws 33 and 95 required covered buildings to display an energy efficiency score in the entrance of the building.[20] Energy efficiency scores are based on annual energy reports that are required to be reported by May 1 of each year. Energy Efficiency scores are given grades based on their energy usage:

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14. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 84 § 1 (2009); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 133 (2016) (covered buildings include buildings between 25,000 and 50,000 square feet).

15. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 33 (2018); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 95 § 1 (2019).

16. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 84 (2009); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 133 § 2 (2016) (amending Administrative Code of City of N.Y. § 28-309.4.1).

17. *Benchmarking and Energy Efficiency Rating*, N.Y.C. DEP'T OF BUILDINGS, https://www.nyc.gov/site/buildings/codes/benchmarking.page [https://perma.cc/ZH33-THA7] (last visited Oct. 26, 2024).

18. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 133 § 1 (2016).

19. *Id.*

20. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 33 § 1 (2018).

1) Energy score ≥ 85 à A
2) Energy score ≥ 70 but < 85 à B
3) Energy score ≥ 55 but < 70 à C
4) Energy score < 55 à D
5) Non-compliance w/opportunity to be heard à F
6) Not feasible to obtain score or subject to 28-309.8 à N[21]

Buildings required to display energy efficiency scores are the same as those applicable under Local Laws 84 and 133.[22] Buildings excluded from this display requirement are: (i) city owned buildings that participated in the tenant interim lease apartment purchase program; (ii) real property classified as class one pursuant to subdivision one of § 1802 of the Real Property Tax Law; and (iii) certain real property under four stories where ownership and responsibility for maintenance of the HVAC systems and hot water systems is controlled by each individual dwelling unit owner or occupant.[23] If a required building does not follow the display requirement, it will be subject to a penalty of at least $500.[24] The exception to this requirement is when a building owner requests, from the department or another agency pursuant to section 28-309.11, benchmarking assistance, and (i) makes such request at least 60 days before the due date of the benchmarking report for which such a violation was issued, and (ii) corrects such violations within 60 days after the date of the violation notice.[25]

2. Massachusetts.—In August 2022, the State of Massachusetts passed the "2022 Climate and Clean Energy Bill," which is a comprehensive plan to grapple with global climate change.[26] The bill enables and establishes: (i) a statewide building energy benchmarking requirement;[27] (ii) offshore wind investments;[28] (iii) transportation decarbonization;[29] and (iv) authority to ban natural gas hookups.[30] Regarding energy benchmarking, all large buildings over 20,000 square feet must report their energy consumption by June 30th of each year.[31] This is a critical data gathering step that may better inform the State in formulating future building decarbonization regulations. The 2022 Climate and Clean Energy Bill became effective July 1, 2024, however, the Massachusetts Department of Energy has until July 1, 2025, to draft implementation

21. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 95 § 1 (2019).
22. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 33 § 3 (2018).
23. *See id.*
24. N.Y.C., N.Y., ADMIN. CODE OF THE CITY OF N.Y. § 28-202 (2024).
25. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 33 (2018); N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 95 (2019).
26. 2022 Mass. Acts ch. 179.
27. *Id.* § 32.
28. *Id.* § 4.
29. *Id.* § 1.
30. *Id.* § 67.
31. *Id.*

regulations and parameters of the program.[32] Although this statewide program is still in its preliminary stages, cities like Boston have established their own energy benchmarking regulations that have since been amended to incorporate building emission standards.[33] Due to its evolution via amendments focused on carbon emissions, Boston's benchmarking regulation Building Emissions Reduction and Disclosure Ordinance (BERDO), is explored further under Carbon Emissions Limits.

3. New Jersey.—In New Jersey, the "Clean Energy Act" has brought the State into the energy reduction regulation space.[34] The Clean Energy Act applies to commercial buildings of more than 25,000 square feet and generally requires benchmarking the building's energy and water use for the prior calendar year.[35] Enforcement of this program began October 1, 2023. However, the Clean Energy Act fails to clearly delineate any penalties for non-compliant building owners.[36] New Jersey commercial building owners pushed to track the progress of this legislation to keep up to date with future amendments that may include further requirements or penalties for non-compliance.[37]

4. Texas.—Texas leads the nation in energy consumption, accounting for more than one-tenth of total U.S. energy use.[38] The state has enacted building code standards which require reporting energy and water use by both residential and non-residential buildings.[39] The "Texas Building Energy Performance Standard" laid the groundwork for minimizing energy consumption by generally adopting the 2009 International Residential Code.[40] Texas cities have expanded upon these efforts by implementing their own ordinances and plans. For example, Dallas has enacted various ordinances and a Green Building Program to increase efficiency standards by requiring new buildings to comply with green building rating systems such as Leadership in Energy and Environmental Design (LEED).[41] It also has adopted the Dallas Comprehensive Environmental and Climate Action Plan detailing broad policy goals.[42] Similarly, Houston has also adopted the Houston Climate Action Plan establishing general goals and

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32. *See Massachusetts Clean Energy and Climate Plan for 2025 and 2030*, COMMONWEALTH OF MASS., https://www.mass.gov/info-details/massachusetts-clean-energy-and-climate-plan-for-2025-and-2030 [https://perma.cc/X49B-XJDB] (last visited Nov. 20, 2023).

33. Ben Silverman, *Massachusetts Adopts Statewide Building and Transparency Law*, INST. FOR MKT. TRANSFORMATION, (Aug. 11, 2022), https://www.imt.org/news/massachusetts-adopts-statewide-building-benchmarking-and-transparency-law/ [https://perma.cc/8DVJ-8V67].

34. N.J. STAT. §§ 48:3-87.8-48:3-87.12 (2019).

35. *Id.* § 48:3-87.10(4).

36. *See id.* § 48:3-87.8.

37. *Id.*

38. *Texas State Profile and Energy Estimates*, U.S ENERGY INFO. ADMIN. (last updated Jul. 18, 2024), https://www.eia.gov/state/analysis.php?sid=TX [https://perma.cc/F3BU-VA6U].

39. *Id.*

40. TEX. HEALTH & SAFETY CODE ANN. § 388 (2021).

41. DALL., TEX., CODE OF ORD. CH. 61 (2012).

42. DALL., TEX., RES. 20-0827 (2020).

strategies to comply with the Paris Agreement.[43] Lastly, the State of Texas has implemented a PACE financing program to enable property owners to pay for eligible water conservation and energy efficiency projects, which would result in lowering their operating costs.[44] Commercial property, industrial property, and residential real property with five or more dwelling units are eligible for PACE financing.[45] Each regulation is explored more fully below.

a. City of Dallas Green Building Program.—The Dallas Green Building Program comprises four ordinances that each have strategically placed energy requirements for new construction. The purpose of the Green Building Program is to reduce the use of natural resources, create healthier and more sustainable living environments, and minimize the negative environmental impact of developments in Dallas.[46] The program was implemented in two major phases and applies to all new construction work in the city for both residential and commercial projects.[47]

Phase One became effective on October 1, 2009.[48] It included requirements for energy efficiency, water conservation, and cool roofs for proposed projects affecting less than 50,000 square feet of floor area for projects lasting greater than a year.[49] Proposed projects, lasting greater than a year, affecting 50,000 or more square feet of floor area must meet the requirements of Section 4304.4 of the Dallas Building Code.[50]

Phase Two became effective on October 11, 2011, and applies to all proposed projects, requiring them to be LEED certifiable, Green Built North Texas certifiable, or certifiable under an equivalent green building standard.[51] Phase Two requires that: (a) building owners must agree that utility companies may release their annual energy consumption data to the city; (b) owners must submit a checklist from a green building standard, though a minimum number of points is not required; (c) proposed projects must use 15% less energy than the minimum provisions of the Dallas Energy Conservation Code; (d) proposed projects must use 20% less water than the water use baseline calculated for the buildings total interior water fixture as required by the Dallas Plumbing Code; and (e) all roof surfaces with a slope of 2:12 inches or less (as defined in ASTM E 1918-97) must meet the specifications of the United States Environmental Protection Agency's (EPA) Energy Star qualified low-slope roof product

43. *City Launches Houston's First-Ever Climate Action Plan on 50th Anniversary of Earth Day*, GREENHOUSTONTX.GOV (Apr. 22, 2020), http://greenhoustontx.gov/pressrelease20200422.html [https://perma.cc/4HCJ-RDSL].

44. TEX. LOC. GOV'T CODE ANN. §§ 399.001-399.019 (2013).

45. *PACE for Property Owners*, TEX. PACE AUTH., https://www.texaspaceauthority.org/for-property-owners/ [https://perma.cc/4A8U-CYQV] (last visited Oct. 7, 2024).

46. DALL., TEX., RES. 12-2428 (2012).

47. *Id.* at 1.

48. *Id.*

49.DALL., TEX., ORD. 28813 (2012).

50. *Id.* § 1.

51. *Id.* § 4.

requirements.[52] Dallas has not implemented any penalties or fines for violations, such as failure to report or for falsely reporting information.

b. Dallas Comprehensive Environmental and Climate Action Plan.—This is a sweeping policy enactment that aims to increase energy efficiency and reduce GHG emissions set by the Paris Agreement, with a target of carbon neutrality by 2050, and an interim goal of a 43% reduction below 2015 levels by 2030.[53] This policy is a guideline for the city to implement different methods to reach certain goals; however, it lacks the necessary compliance penalties to enforce the deadlines it aims to achieve. The strategies the plan aims to implement are: (i) expanding participation in PACE financing and identifying other funding sources and incentives for building energy retrofits; (ii) developing a building electrification program for replacing gas-powered equipment in existing buildings; (iii) developing ordinances addressing commercial building energy performance, including energy benchmarking and disclosure, audits, retrofits, and emissions targets; (iv) adopting a net zero energy building code by 2030 for new construction and substantial renovations; (v) adopting building codes that include solar-ready and electric vehicle-ready requirements; (vi) establishing urban greening requirements for new construction.[54]

c. Houston Climate Action Plan.—Similar to Dallas' Climate Action Plan, Houston has developed a comprehensive guide to achieving carbon neutrality by 2050 by reducing GHG emissions, with interim targets of: (i) 40% below 2014 emissions by 2030; and (ii) 75% below 2014 emissions by 2040.[55] It has a primary focus on energy transition and reduction; however, it is only a guide on how the city plans to achieve its goals and fails to establish proper enforcement to verify that goals are met. The primary focus of this plan is to: (i) reduce building energy use by adopting the 2021 International Code Council (ICC) model building code by 2025 and update every five years; (ii) establish a plan to achieve 85% energy code compliance by 2030; (iii) expand investments in energy efficiency by doubling the number of PACE projects by 2025; and (iv) require 70% of commercial buildings to be operated by building operators trained in relevant building systems by 2030.[56]

5. California.—California is taking significant steps to combat climate change in line with the commitments made in the Paris Agreement. Two crucial codes have been implemented: the "California Green Buildings Standards Code" and the "2022 Energy Code," which focus on reducing energy and water usage.[57] The state's cities are also doing their part by creating local regulations to address climate change. For instance, Los Angeles implemented its "Green

52. *Id.*
53. DALL., TEX., COMPREHENSIVE ENVIRONMENTAL AND CLIMATE ACTION PLAN, xvi (2020).
54. *Id.* § 2.
55. HOUS., TEX., CLIMATE ACTION PLAN, 20 (2020).
56. *Id.* at 20.
57. CAL. CODE REGS. tit. 24, pt. 11 (2022); CAL. CODE REGS. tit. 24, pt. 6 (2022).

New Deal Program," which aims to create more sustainable buildings, reduce greenhouse gas emissions, and mitigate the impacts of climate change.[58]

a. California Green Buildings Standards Code.—The "California Green Building Standards Code", also known as "CALGreen," is a set of mandatory regulations designed to reduce the environmental impact of buildings.[59] CALGreen aims to reduce the environmental impact of buildings throughout a building's lifecycle, from construction to occupancy, and all the way to eventual demolition[60]. CALGreen applies to all new construction and renovation projects that require a building permit.[61] This includes both residential and non-residential buildings, as well as state-owned buildings, and applies to existing buildings undergoing alterations or additions that meet certain criteria.[62]

CALGreen sets requirements for buildings in the areas of energy efficiency, water conservation, waste reduction, indoor air quality, commissioning, and green materials.[63] As for energy efficiency, the code requires buildings to meet specific energy efficiency standards for lighting, HVAC systems, insulation, and other components which helps to reduce energy consumption and lower greenhouse gas emissions.[64] The water conservation requirements include buildings obtaining water-efficient landscaping, low-flow plumbing fixtures, and other measures to reduce water usage in buildings.[65] As for waste reduction, CALGreen mandates that a minimum percentage of construction waste must be diverted from landfills through recycling or reuse.[66] Indoor air quality requirements are set to provide ventilation, filtration, and other measures to ensure healthy indoor air quality for occupants.[67] CALGreen also requires that buildings undergo a commissioning process to verify that systems are installed and operating as designed, which helps to ensure optimal performance and energy efficiency.[68] Finally, CALGreen encourages the use of sustainable and environmentally preferable materials in construction and renovation projects.[69]

b. 2022 Energy Code.—The California "2022 Energy Code" is a set of mandatory regulations that establish energy efficiency standards for new and existing residential and non-residential buildings.[70] The code was developed by the California Energy Commission and took effect on January 1, 2023.[71] The 2022 Energy Code encourages efficient electric heat pumps, establishes electric-

58. L.A., CAL., GREEN NEW DEAL (2019).
59. CAL. CODE REGS. tit. 24, pt. 11, § 101.1 (2022).
60. *Id.* § 101.5.1.
61. *Id.* § 101.3.1.
62. *Id.*
63. *Id.* §§ 4.101-5.508.
64. *Id.* §§ 4.201, 5.201.
65. *Id.* §§ 4.301-4.304, 5.301-5.304.
66. *Id.* § 5.401.1
67. *Id.* §§ 4.506, 5.506.
68. *Id.* § 703.1.
69. *Id.* §§ A4.4, A5.4.
70. CAL. CODE REGS. tit. 24, pt. 6 (2022).
71. *Id.*

ready requirements for new homes, expands solar photovoltaic and battery storage standards, strengthens ventilation standards, and more.[72] Buildings whose permit applications are applied for on or after January 1, 2023, must comply with the 2022 Energy Code.[73] The code is extremely intricate and specific, even when it comes to what appliances and lighting can be used.[74] The code demands higher efficiency standards for building envelopes, with increased insulation and airtightness to reduce energy losses, lighting, HVAC systems, and other components to reduce energy consumption.[75] It also encourages the use of electric appliances and equipment, as well as the installation of electric vehicle charging infrastructure.[76] The code also requires the installation of solar photovoltaic systems on new residential and non-residential buildings, but there are exemptions for certain building types and situations.[77] Finally, the code requires the use of demand response technologies to manage energy consumption during peak periods and reduce strain on the electrical grid.[78]

The specific fines and penalties for violating the California Energy Code can vary depending on the severity and nature of the violation, as well as the jurisdiction and agency responsible for enforcement. For example, in Los Angeles, violations of the energy code may result in a citation and fines ranging from $100 to $500 for each violation.[79] Repeat offenders may face higher fines, and in some cases, may be required to stop work on the project until the violation is corrected.[80]

c. Los Angeles's Existing Building Energy and Water Efficiency Program.—The purpose of the "Existing Building Energy and Water Efficiency Program" (Program) is to reduce energy and water consumption in existing buildings in Los Angeles.[81] The efficiency improvements addressed in the Program are deigned to lower the use of energy, water, and greenhouse gas emissions citywide. The Program applies to: (i) all Los Angeles-owned buildings that are 7,500 square feet or more; (ii) all privately owned buildings that are 20,000 square feet or more; and (iii) all buildings owned by a local agency of the state that are required to comply with the city's building ordinances pursuant to Government Code Section 53090, et seq., or successor legislation, and are 20,000 square feet or more.[82] Exceptions to the Program

72. *Id.* §§ 110.0-110.12.
73. *Id.* § 100.0(a).
74. *See id.* § 141.0.
75. *Id.* §§ 110.0-110.12.
76. *Id.* § 110.1.
77. *Id.* § 140.10.
78. *Id.* §110.12.
79. L.A., CAL., ORDINANCE 930 § 10 (2023); L.A., CAL., ORDINANCE 903 § 11 (2020); L.A., CAL., ORDINANCE 865 § 27 (2015); L.A., CAL., ORDINANCE 838 § 12 (2011).
80. *Id.*
81. L.A., CAL., MUN. CODE, div. 97, art. 1, ch. IX, § 91.9702.
82. *Id.* § 91.9703.

include one and two-family dwellings, hotels, broadcast antennas, vehicle charging stations, utility pumping stations, treatment facilities, sound stages, structures primarily used for the production and post-production of motion pictures and television, and other similar uses as well as other buildings that do not meet the purpose of this division as determined by the Department of Building and Safety.[83]

The benchmarking requirements and scheduling varies depending on the type of building. For buildings owned by the city with gross floor area of 7,500 square feet or more, the city must complete and submit the initial benchmarking report on or before December 1, 2017, and annually no later than June 1 thereafter.[84] For a privately owned building or a building owned by a local agency of the state with gross floor area of 100,000 square feet or more, the state agency must complete and submit the initial benchmarking report on or before December 1, 2017, and annually no later than June 1 thereafter.[85] For a privately owned building or a building owned by a local agency of the state with gross floor area of 50,000 square feet or more but less than 100,000 square feet, the state agency must complete and submit the initial benchmarking report on or before June 1, 2018, and annually no later than June 1 thereafter.[86] For a privately-owned building or a building owned by a local agency of the state with gross floor area greater of 20,000 square feet or more, but less than 50,000 square feet, the owner shall complete and submit the initial benchmarking report on or before June 1, 2019, and annually no later than June 1 thereafter.[87]

In addition to the benchmarking requirements, there are other requirements set by the Program. Owners of buildings over 20,000 square feet must conduct energy and water audits every five years, which began in June 2019.[88] The audits must be conducted by a certified energy auditor, and must identify opportunities for energy and water savings.[89] Building owners must disclose the results of their audits to the city and then make certain energy and water efficiency improvements to their buildings based on their building's energy use intensity (EUI).[90] Buildings with a high EUI must implement more extensive efficiency measures, such as lighting upgrades, HVAC system improvements, or building envelope improvements while buildings with a lower EUI may only need to make minor improvements or upgrades. The Program provides resources to help building owners comply with the regulations and make the necessary improvements.[91]

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83. *Id.*
84. *Id.* § 91.9708.1(1).
85. *Id.* § 91.9708.1(2).
86. *Id.* § 91.9708.1(3).
87. *Id.* § 91.9708.1(4).
88. *Id.* § 91.9706.
89. *Id.* § 91.9706.1.2
90. *Id.*
91. The program provides various guides, benchmarking services, and resource centers to assist in compliance. *Id.*

If a building owner does not comply with the Program, they may be required to pay a $202 fee for each building not in compliance.[92] Additionally, if the fee invoice is not paid within thirty days after receipt, a late fee of "two (2) times the Code Violation Inspection Fee plus a 50 percent (50%) collection fee for a maximum total of $1,176.00"will be imposed.[93] Building owners should also be aware that payment of the non-compliance fee does not result in compliance and exemption; rather, the building will continue to be considered non-complying, and the status of each building ("Complied" or "Not Complied") is posted publicly.[94] Thus, in addition to the fines, non-compliance with the Program can also result in negative publicity and damage to a building owner's reputation.

6. Illinois.—Illinois has taken action to address the climate emergency by enacting the "Illinois Energy Efficient Building Act" (EEBA).[95] The EEBA generally has adopted the International Energy Conservation Code and applied it to the state. However, the city of Chicago has taken further action and applied a structured energy benchmarking system for building owners to follow under the "Building Energy Use Benchmarking Ordinance."[96] Beneficial to property owners, Illinois offers PACE financing for owners who want to make energy efficiency or renewable energy improvements to their buildings.[97] This is a critical component in ensuring that building owners can comply with the sustainability requirements of the state and local municipalities. The key points of each regulation are detailed further below.

a. Illinois Energy Efficient Building Act.—The EEBA was created to promote and encourage the construction and renovation of energy-efficient buildings, reduce energy consumption, lower energy costs, and improve the quality of the indoor environment in the building.[98] The EEBA requires that the building envelope—which includes walls, roofs, windows, doors, and foundations—must meet specific insulations and air leakage requirements to limit heat loss or gain.[99] The EEBA imposes lighting protocols to reduce consumption by requiring buildings to use energy-efficient lighting fixtures and controls, such as occupancy and sensors or timers.[100] HVAC systems must meet specific efficiency requirements, including minimum equipment efficiency ratings and controls that optimize energy use.[101] Buildings must also use energy-efficient water heaters that meet certain efficiency requirements and incorporate

92. *Id*. § 91.9709.
93. *Id.*
94. *Id.*
95. 20 ILL. COMP. STAT. 3125 (2004).
96.CHI., ILL., BUILDING ENERGY USE ORDINANCE (2013).
97. *Overview*, ILL. ENERGY CONSERVATION AUTH. NFP, https://www.iecapace.org/ [https://perma.cc/97HW-PDUS] (last visited Sept. 9, 2024).
98. 20 ILL. COMP. STAT. 3125 (2004).
99. *Id.*
100. *Id.*
101. *Id.*

temperature controls to optimize energy use.[102] Finally, the EEBA encourages the use of renewable energy sources, such as solar or wind power, to help reduce energy consumption and greenhouse gas emissions.[103]

The EEBA applies to any new building, existing building, or structure in the state that requires a building permit application, and for any addition, alteration, renovation, or repair.[104] Some buildings are exempt from the act, including those that that do not use electricity or fossil fuel for comfort conditioning, historic buildings listed on the National Register of Historic Places or the Illinois Register of Historic Places, and other buildings that are specified as exempt under the "International Energy Conservation Code."[105]

Penalties and violations for failure to comply to the code differ depending on the building type. For state-funded buildings, the "Illinois Capital Development Board" (CDB) is responsible for enforcing the energy efficiency standard.[106] If the CDB determines that a building is not in compliance with the EEBA, it may withhold payment for the construction or renovation of the building until the building is brought into compliance.[107] For commercial and residential buildings, the Illinois Department of Commerce and Economic Opportunity (DCEO) is responsible for enforcing the energy efficiency standards. If the DCEO determines that a building is not in compliance with the EEBA, it may issue a notice of violation and impose a penalty of up to $10,000 per violation.[108]

b. Building Energy Use Benchmarking Ordinance.—The "Building Energy Use Benchmarking Ordinance" requires public buildings and privately owned commercial and high-rise multifamily buildings to track their annual energy consumption and water use in the Energy Star portfolio manager.[109] The reports must be submitted annually by June 1 each year, and data verification is required once every three years.[110] Further, their ratings must be publicly available on the Chicago Energy Benchmarking webpage and by posting the rating within the building.[111] Any violation of the reporting requirements may subject a building owner to a fine of up to $100 for the first violation, and an additional fine of up to $25 for each day that the violation continues.[112]

The ordinance applies to all buildings within the city of Chicago larger than 50,000 square feet.[113] The benchmarking ordinance does not apply to buildings with more than 10% or more of gross square footage classified as Class D open

102. *Id.*
103. *Id.*
104. *Id.* § 20(a).
105. *Id.* § 20(b)(3).
106. *Id.* § 30.
107. *Id.*
108. ILL. DEP'T OF FIN. & PRO. REGUL., ILLINOIS CODE ENFORCEMENT MANUAL (2004).
109. CHI., ILL., BUILDING ENERGY USE ORDINANCE (2013).
110. *Id.* § 18-14-102.1.
111. *Id.* § 18-14-102.3.
112. *Id.* § 18-14-101.5(b).
113. *Id.* § 18-14-101.3.

air assembly units, Class G industrial units, Class H storage units, Class I hazardous use units, or Class J miscellaneous buildings and structures.[114]

c. Chicago's Energy Transformation Code.—Chicago implemented the "Energy Efficient Building Act" with the goal of improving energy efficiency in all new commercial and residential buildings by 40% above 2001 levels.[115] The city plans to achieve this goal through its "Energy Transformation Code" by requiring: (i) the window placement in new buildings to minimize energy demands due to solar heat gain in the summer; (ii) that new low-rise commercial buildings be designed with roofs that can support the future installation of solar panels; (iii) the installation of improved insulation to reduce heat loss through the exterior walls of those buildings with projecting balconies or parapets; (iv) that new residences with gas-fired appliances be built with the appropriate electrical capacity and wiring necessary to switch to electric appliances in the future, without the necessity of opening walls; and (v) that where indoor plant growing facilities exist, for them to use energy efficient lighting.[116]

7. Pennsylvania.—Pennsylvania has implemented their state-wide policy named the "Pennsylvania Climate Action Plan of 2021," which encompasses strategies aimed at reducing energy consumption and GHG emissions.[117] Although this state act has lofty goals, cities within the state have acted in a more stringent manner with legislation to tackle the climate crisis. For example, the city of Philadelphia has enacted the Building Energy Performance Policy that requires non-residential building owners to perform "tune-ups" to their building's energy and water systems, as well as submitting energy performance certificates.[118] Moreover, the city of Pittsburgh has enacted the "Pittsburgh Climate Action Plan 3.0," which identifies strategies to achieve goals set by the Paris Agreement, and the "Building Benchmarking Ordinance" requiring owners to report their annual water and energy consumption.[119] Although a very promising start, most climate crisis action taken within the state of Pennsylvania is limited to energy and water benchmarking, and there lacks any standards for limiting carbon emissions. Pennsylvania's PACE program allows building owners to borrow up to 100% financing to reduce energy and potable water consumption, which is repaid as a property tax to business property owners interested in pursuing clean energy and water projects.[120] Eligible participants for PACE are owners of existing or new properties zoned for commercial,

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114. *Id.*

115. *Chicago Energy Transformation Code*, CHICAGO.GOV, https://www.chicago.gov/city/en/depts/bldgs/supp_info/chicago-energy-conservation-code.html [https://perma.cc/98W6-6RU9] (last visited Oct. 27, 2024).

116. *Id.*

117. *Pennsylvania Climate Action Plan*, PA. DEP'T OF ENV'T PROT., https://www.dep.pa.gov/citizens/climate/Pages/PA-Climate-Action-Plan.aspx [https://perma.cc/C87B-95W7] (last visited Oct. 27, 2024).

118. PHILA., PA., CODE § 9-3404 (2019).

119. PITTSBURG, PA., CLIMATE ACTION PLAN 3.0 (2018).

120. 12 PA. CONST. STAT. §§ 4301-4310 (2018).

industrial, and/or agricultural use.[121] However, residential properties, including multi-family residential, are not eligible for this type of financing.[122] Details of each piece of legislation or policy are set forth more fully below.

a. City of Philadelphia: Benchmarking Energy and Water Use.—In Philadelphia, benchmarking energy and water use is required with the purpose of tracking and assessing a building's energy and water use with the goal of ultimately reducing energy and water consumption, and GHG emissions.[123] Covered buildings are required to submit complete building energy use, water use, and building characteristics as required by the EPA's Energy Star Portfolio Manager.[124] No later than June 30 of each year, owners must upload the building's energy and water use of the previous year to the "portfolio manager" created by the EPA.[125] Failure to timely comply with the regulation will result in a $300 fine for the first 30 days of non-compliance, and $100 a day for every day thereafter.[126]

This benchmarking requirement applies to any building with indoor floor space of 50,000 square feet or more and any building participating in the Commercial Property Assessed Clean Energy (C-PACE) program.[127] Buildings not required to report are those that are exempt by the Office of Sustainability's regulations, which include (i) less than 50,000 square feet; (ii) residential buildings including residence halls, dormitories, and other non-transient large lodging places; and (iii) parking lots and parking garages, or the portions of otherwise-Covered Buildings that are used for parking.[128]

b. City of Philadelphia: Building Energy Performance Policy.—The "Building Energy Performance Policy" ("Policy") was created in Philadelphia with the purpose of making "tune-ups" and repairs to existing buildings' energy and water systems resulting in reduced energy usage and GHG emissions.[129] The Policy applies to any non-residential building with indoor floor space of at least 50,000 square feet and requires inspection of systems or subsystems that use energy or impact energy consumption.[130]

Exceptions to the Policy include: (i) systems/subsystems owned by tenants, (ii) condo/co-ops, and (iii) industrial processes that occur within a covered building.[131] Additionally, buildings that have received LEED Gold certification

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121. *Id.* § 4301.
122. *Id.* § 4302.
123. PHILA., PA., CODE § 9-3402 (2019).
124. *Id.* § 9-3402(1).
125. *Id.* § 9-3402(2).
126. *Id.* § 9-3402(6).
127. *Id.* § 9-3402(1).
128. *Building Energy Performance FAQs*, PHILA., PA. OFF. OF SUSTAINABILITY, https://www.phila.gov/media/20210405123946/Building-Energy-Performance-Program-FAQs_Final.pdf [https://perma.cc/2F2C-82LT] (last visited Oct. 27, 2024).
129. PHILA., Pa., CODE § 9-3404(2) (2019).
130. *Id.* § 9-3404(1)(c).
131. *Id.* § 9-3404(3).

are exempt from the Policy.[132] Reporting deadlines for building owners differ depending on the size of the buildings:

1) For buildings of at least 200,000 square feet: September 30, 2021.
2) For buildings of at least 100,000 square feet and less than 200,000 square feet: September 30, 2022.
3) For buildings of at least 70,000 square feet and less than 100,000 square feet: September 30, 2023.
4) For buildings of at least 50,000 and less than 70,000 square feet: September 30, 2024.[133]

Building owners who fail to timely file a report will be subject to a $2,000 fine.[134] After thirty days of non-compliance, the building owner will then be subject to an additional $500 fine per day.[135]

c. City of Pittsburgh: Building Benchmarking Ordinance.—In Pittsburgh, the "Building Benchmarking Ordinance" was implemented to assess building energy and water use to ultimately guide legislation towards reducing energy use and GHG emissions.[136] The Ordinance applies to any non-residential building with indoor floor space of 50,000 square feet and all non-residential portions of any mixed-use building where a total of at least 50,000 square feet of indoor floor space is devoted to any non-residential use.[137] Covered buildings are required to submit complete building energy use, water use, and building characteristics as required by the EPA's Energy Star Portfolio Manager.[138] Owners must submit the report by June 1 of each year beginning in 2018.[139] If owners believe they are exempt from the Ordinance, they must apply for an exemption no later than April 1 annually.[140]

A covered building owner or city facility operator who successfully complies with the ordinance benchmarking requirements will be publicly posted as "participating" on the online platform described in Section 629.07.[141] Those who are exempt from benchmarking requirements, pursuant to Section 629.03, will be publicly posted as "exempted" on the online platform described in Section 629.07.[142] Any building owner or city facility operator who fails to comply with the ordinance benchmarking requirements will be publicly posted as "eligible and non-participating" on the online platform described in Section

132. *Id.*
133. *Id.* at § 9-3404(4).
134. *Id.* at § 9-3404(6).
135. *Id.*
136. PITTSBURGH, PA., CODE OF ORDINANCES ch. 629 (2016).
137. *Id.* § 629.01(b).
138. *Id.* § 629.02.
139. *Id.* § 629.08.
140. *Id.* § 629.03.
141. *Id.* § 629.07.
142. *Id.*

629.07.[143] Pursuant to Section 629.04, a property owner, or city facility operator, of a building that is not a covered building, yet successfully complies with the benchmarking requirements of the ordinance anyway, will be publicly posted as "voluntarily participating" on the online platform described in Section 629.07.[144]

8. Maryland.—Maryland's "Climate Solutions Now Act" was created with the goal of reducing carbon emissions in covered buildings by requiring them to reduce net direct greenhouse gas emissions by 20% by 2030.[145] A covered building under the Act includes any commercial, multifamily residential, or state-owned building that is 35,000 square feet or larger, excluding the building's parking garage.[146] Covered buildings are subject to reporting requirements each year after 2025.[147] The building owner is required to collect and enter all benchmarking data into the EPA's Energy Star Portfolio Manager, where the owner will have to report the building's (i) gross floor area, (ii) occupancy, (iii) year of construction, (iv) operating hours, and (v) energy use based on meter readings from electric and gas companies.[148] Buildings in Maryland that are not subject to the Climate Solutions Now Act are some historic properties, public and non-public elementary and secondary schools, manufacturing buildings, and agricultural buildings.[149]

9. Colorado.—In Denver, Colorado, the City Council passed the "Energize Denver Ordinance" with the goal of ensuring that the City reduces GHG emissions by 2030 by implementing energy performance standards for both commercial and multifamily buildings.[150] The ordinance creates mandatory energy usage targets for buildings 25,000 square feet or greater.[151] Smaller buildings between 5,000 and 24,999 square feet will be required to reduce energy use through compliance with new lighting standards.[152] Ordinance requirements will be implemented by the Office of Climate Action, Sustainability, and Resiliency (CASR).[153]

Buildings 25,000 square feet or larger must report the building energy use annually while meeting energy targets periodically in 2024, 2027, and 2030.[154] These energy performance targets will be measured by CASR using the EUI index, which compiles the building's different types of energy usage data into

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143. *Id.*
144. *Id.*
145. 2022 Md. Laws 38.
146. *Id.*
147. *Id.*
148. *See generally Benchmark Your Building With Portfolio Manager*, ENERGY STAR, https://www.energystar.gov/buildings/benchmark [https://perma.cc/V4GS-7LTP] (last visited Oct. 27, 2024).
149. 2022 Md. Laws 38.
150. DENVER, COLO., CODE OF ORDINANCES §§ 10-400-10-407 (2016).
151. *Id.* § 10-404.
152. *Id.* § 10-405.
153. *Id.* at § 10-404.
154. *Id.*

one single metric.[155] The building's energy efficiency is measured by a building's EUI; the lower the EUI, the more efficient the building is.[156] Using benchmarking data starting in 2019, CASR will establish energy targets for each building type and set goals for each reporting year.[157] If 2019 benchmarking data does not exist for a building, then CASR will use benchmarking data from previous years to set baseline target numbers.[158] Building owners are responsible for reducing their building's energy usage in order to reach target goals and must use the EPA's Energy Star Portfolio Manager to report the building's energy usage for each year no later than June 1.[159] The report must show the building details, including (i) gross floor area and (ii) monthly and annual energy usage. If the owner does not have this information, they must request it from tenants.[160] With approval from CASR, building owners can report compliance with these energy requirements through methods other than the EPA's Energy Star Portfolio Manager, including Electrification Bonuses; Renewable Credits; Compliance Timeline Adjustments; Performance Target Adjustments; and options for buildings designated as Manufacturing, Agricultural, or Industrial.[161] Buildings between 5,000 and 24,999 square feet must demonstrate that all lights in the building use LED bulbs, or that the building has achieved an alternate, but equivalent, lighting power density.[162]

If a building owner fails to report accurately, CASR may issue Notices or Orders for data errors and non-compliance with the regulations.[163] The Denver municipal code allows CASR to fine the building owners seventy cents ($0.70) per year for each required kBtu reduction that the owner's building fails to achieve.[164] Further, the city may implement a $2,000 fine for non-compliance with reporting requirements.[165] If the building owner fails to pay the fine, the City may then place a lien on the property until the fine, plus any interest, is paid in its entirety.[166]

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155. *Id.* § 10-400.
156. *Id*.
157. *Id*. § 10-404.
158. *Id.* § 10-400.
159. *Id.* § 10-404
160. *Id*. § 10-403.
161. Diana C. Jenkins & Danielle DeSantis, *Energize Denver Benchmarking and Energy Performance Requirements*, OTTEN JOHNSON, https://www.ottenjohnson.com/news/energize-denver-benchmarking-and-energy-performance-requirements/ [https://perma.cc/V6A3-BMBK] (last visited Oct. 27, 2024).
162. DENVER, COLO., CODE OF ORDINANCES § 10-405 (2016).
163. *Id*. § 10-407.
164. *Id*.
165. *Id.*
166. *Id.*

B. International

1. England and Wales.—The United Kingdom has taken a significant step in addressing energy efficiency in buildings through its enactment of the "Minimum Energy Efficiency Standard" legislation (MEES).[167] MEES applies to England and Wales, and it sets a minimum energy efficiency standard that must be met by privately rented buildings, with the aim of reducing energy consumption and carbon emissions.[168] With the growing global concern over climate change, the MEES is a crucial piece of legislation that seeks to ensure that buildings are more energy-efficient, cost-effective, and sustainable. Although financing was available to homeowners and businesses for energy efficiency upgrades under the "Green Deal," that regulation was closed to new applications in 2015.[169] Detailed information on MEES regulation is listed below.

a. Minimum Energy Efficiency Standard.—MEES was implemented to reduce carbon emissions by 78% by 2035 compared to 1990 levels.[170] UK regulations made it unlawful for landlords to renew or grant new leases if their commercial properties held a substandard MEES energy rating scale (A–G).[171] The "Energy Rating Scale" (ERS) is determined by an Energy Performance Certificate (EPC) which is an analysis/report that provides a theoretical rating to a building based on its method of construction, insulation, the services for heating or cooling it, and some standardized assumptions about how it will be used.[172]

The ERS applies to non-domestic property (a term which covers "most, but not all, commercial property"), requiring the property to have an EPC rating of "E" or above to be in compliance with regulations.[173] Non-domestic property covers all property situated in England and Wales rented under a qualifying type of non-residential tenancy.[174] Domestic property (a term which covers "some, but not all, residential property") must have an EPC rating of "E" or above to

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167. The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015, SI 2015/962.

168. *MEES: minimum energy efficiency standards toolkit*, WESTLAW PRAC. L. PROP., https://www.westlaw.com/8-578-9565?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (last visited Oct. 27, 2024).

169. *The GB Green Deal*, WESTLAW PRAC. L. ENV'T, https://www.westlaw.com/1-509-4823?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (last visited Oct. 27, 2024).

170. HOUSE OF COMMONS LIBRARY, THE UK'S PLANS TO PROGRESS TO REACH NET ZERO BY 2050, 2024, at 4 (UK).

171. *MEES: minimum energy efficiency standards toolkit*, *supra* note 168.

172. *Energy performance certificates (EPCs)*, WESTLAW PRAC. L. PROP., https://www.westlaw.com/3-259-4960?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (last visited Oct. 27, 2024).

173. *Id.*

174. *Id.*

be in compliance with regulations.[175] A domestic property falls under the scope of the regulation if the property is rented under a qualifying type of tenancy that is not an excluded type of property and is not rented by an excluded landlord.[176]

There are many exceptions to MEES, some of which include industrial sites, workshops, non-residential agricultural buildings with a low energy demand, certain listed buildings, and temporary properties.[177] Furthermore, buildings where the EPC is more than ten years old, or where there is no EPC, have no obligation to follow the standard.[178] Finally, tenancies of less than six months (with no right of renewal) and tenancies of over ninety-nine years are not required to comply with the standard.[179]

In addition to the property-specific exceptions, there are some exemptions to the standard.[180] For example, if an independent assessor determines that all relevant energy efficiency improvements (that either have already been or could be made to the property) would not pay for themselves through energy savings within seven years, they will not be required under MEES.[181] Similarly, where an assessor determines that the relevant energy efficiency improvements that could be made to the property are likely to reduce the market value of the property by more than 5%, these are also not required.[182] Finally, relevant energy efficiency improvements are not required where consent from persons such as a tenant, a superior landlord, or planning authorities has been refused or has been given with conditions with which the landlord cannot reasonably comply.[183]

Beginning April 1, 2018, landlords are not permitted to renew existing tenancies, or grant new tenancies in their building, if the building has less than the minimum EPC rating of "E."[184] Beginning April 1, 2020, the renewal of existing leases of a sub-standard building that has less than the minimum EPC rating of "E" is prohibited.[185]

A building owner who rents property for less than a three-month term will be subject to a fine of 10% of the property's ratable value (a minimum of £5,000

175. *Id.*

176. *Id.*

177. *MEES: minimum energy efficiency standards for commercial property*, WESTLAW PRAC. L. PROP., https://us.practicallaw.thomsonreuters.com/w-013-0480 (last visited Oct. 27, 2024).

178. *Id.*

179. *Id.*

180. Exceptions to the requirement are the standards that would normally apply but are excluded for various reasons, while exemptions are where the rule does not apply at all.

181. *MEES: minimum energy efficiency standards for commercial property*, *supra* note 177.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

and a maximum of £50,000).[186] If the property is leased for a term greater than three months, the fine will be 20% of the property's ratable value (a minimum of £10,000 and a maximum of £150,000).[187]

2. Canada.—Canadian provinces have also embraced energy efficiency and consumption regulations. For example, Ontario passed regulation 506/18, known as the "Reporting of Energy Consumption and Water Use" regulation.[188] It requires large buildings in Ontario to report their energy and water consumption data on an annual basis.[189] The regulation was introduced as part of the government's efforts to reduce greenhouse gas emissions and combat climate change. By requiring large buildings to report their energy and water use, the government aims to increase awareness of energy consumption and encourage building owners to invest in energy-efficient technologies and practices. This regulation applies to a range of building types, including commercial, industrial, multi-unit residential, and institutional buildings, and it sets specific reporting requirements and deadlines for building owners.[190] Currently, there is no PACE financing equivalent in Canada; however, the Canadian federal government offers the "Canada Greener Homes Grant Program," which provides up to $5,000 in grants to all eligible homeowners for energy-efficient retrofits.[191]

a. Ontario Regulation 506/18: Reporting of Energy Consumption and Water Use.—The Ontario Regulation 506/18 ("506/18") was created to measure energy use and water consumption in various large buildings that would result in the reduction in energy and water consumption, and to efficiently address the climate emergency. 506/18 became effective January 1, 2019, and before July 1 of each year, building owners must report the gross floor area of their property and certain information regarding the property, including performance metrics and information about energy consumption and water use.[192]

Beginning on July 1, 2023, property owners were required to report their water and energy consumption if the following criteria applies:

> 1. Any part of the building or structure is situated on a property classified by the Municipal Property Assessment Corporation by way of a code listed in the Guide.
> 2. Electricity or gas is consumed at the building or structure.

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186. *MEES: minimum energy efficiency standards for commercial property*, *supra* note 177. Ratable value means the estimated annual rental value of a commercial property, which is calculated by a valuation officer.

187. *Id.*

188. Electricity Act, S.O. 1998, c 15, sched A. (Can.).

189. *Id.* § 2.

190. *Id.* § 3.

191. *Canada Greener Homes Grant*, GOV'T OF CAN., https://natural-resources.canada.ca/energy-efficiency/homes/canada-greener-homes-initiative/canada-greener-homes-grant/24833 [https://perma.cc/4ZJX-QT9Q] (last modified July 5, 2024).

192. Reporting of Energy Consumption and Water Use, O. Reg. 506/18 § 9 (Can.).

> 3. Electricity or gas consumption information for the building or structure is available from a distributor.
> 4. The building or structure at which electricity or gas is consumed has a gross floor area of at least 50,000 square feet.
> 5. In the case of a multi-unit residential building, it contains more than 10 units.[193]

Buildings that are owned by a public agency are exempt from the reporting requirements.[194] Furthermore, if 10% of the property's gross floor area (i) functions as a data center, television studio, or trading floor, or (ii) is used for manufacturing processing, commercial processing, agricultural processing, or industrial processing, there is no obligation to report.[195] Currently, the regulations do not specifically designate any penalties or fines for violations, such as failure to report or falsely reporting information.

3. Germany.—Germany has been at the forefront of promoting energy efficiency and sustainability in the built environment. With the aim of reducing energy consumption and greenhouse gas emissions, the country has implemented various regulations and initiatives. One such initiative is the "New Buildings Energy Act," which was introduced in November 2020, and sets energy efficiency standards for new buildings.[196] In addition, Germany has also been promoting energy benchmarking as a means of improving energy efficiency in existing buildings. Through the implementation of energy benchmarking regulations, the country has been able to track and report energy consumption, identify areas for improvement, and incentivize building owners to invest in energy efficiency measures. Fortunately, for property owners, Germany has several financing programs for energy efficiency upgrades. One of the most well-known programs is the Kreditanstalt für Wiederaufbau (KfW) program, which offers low-interest loans to homeowners, businesses, and public institutions for a variety of energy efficiency upgrades, including insulation, heating systems, and renewable energy installations.[197] Another financing program is the "Federal Ministry of Economics and Energy's Energy-Efficient Refurbishment Grant Program," which provides grants to homeowners and landlords who carry out energy efficiency improvements on their buildings.[198] The New Buildings Energy Act is explored more fully below.

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193. *Id.* § 3.

194. *Id.* § 2(1).

195. *Id.* § 5.

196. *Finally: The new German Buildings Energy Act (Gebäudeenergiegesetz, GEG) has been adopted*, DELOITTE, https://www2.deloitte.com/dl/en/pages/legal/articles/gebaeudeenergiegesetz.html [https://perma.cc/H48W-GY2B] (last visited Oct. 27, 2024).

197. *Responsible banking*, KFW, https://www.kfw.de/About-KfW/ [https://perma.cc/8FPP-V8UT] (last visited Aug. 17, 2024).

198. *Federal Ministry for Economic Affairs and Climate Action sets new incentives for refurbishments and introduces a bonus for serial investments*, FED. MINISTRY FOR ECON. AFF.

a. New Buildings Energy Act.—The "New Buildings Energy Act" replaces old legislation named EnEG and EnEV and establishes a new, uniform, coordinated set of rules for the energy requirements of new buildings and the use of renewable energy for heating and cooling them.[199] Specifically, it will aid in the application and enforcement of the provisions now brought together in the New Buildings Energy Act.[200] The ultimate goal of the Act is to achieve climate-neutral building stock by 2050, which will entail reducing primary energy demand in buildings by 80% from 2008 levels.[201]

The "New Buildings Energy Act" applies to all new buildings for which the building application is submitted after November 1, 2020.[202] For existing buildings, the energy requirements of the "German Buildings Energy Act" (GEG) apply when a major renovation is planned or carried out, or when a change of use of the building occurs.[203] It is the responsibility of the building owner to comply with the energy efficiency requirements set forth in the GEG at the time of construction or renovation.[204] Fines and penalties for noncompliance depend on the nature and severity of the violation.[205]

4. Netherlands.—In 2015, the Netherlands committed to the Paris Agreement.[206] In addition, the Dutch government has set the target to achieve a 49% reduction in carbon emissions from 1990 levels by 2030 and a 95% reduction by 2050.[207] To achieve this, the Netherlands has implemented various measures, including the enactment of the "Dutch Buildings Decree" (Buildings Decree).[208] The Buildings Decree sets out minimum requirements for a building's energy performance and aims to reduce their energy consumption and

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AND CLIMATE ACTION (Sept. 12, 2022), https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/12/20221209-federal-ministry-for-economic-affairs-and-climate-action-sets-new-incentives-for-refurbishments.html. [https://perma.cc/UBM2-ENZA].

199. Gebäudeenergiegesetz [Buildings Energy Act], Aug. 8, 2020, BGBl. I S. at 1728, revised Oct. 16, 2023, BGBl. at 97 (Ger.).

200. *Id.*

201. *5 Global Building Emissions Regulations Affected Property Owners*, BRAINBOX AI, https://brainboxai.com/en/articles/5-global-building-emissions-regulations-affecting-property-owners#:~:text=To%20address%20this%2C%20the%20German,(Geb%C3%A4udeenergiegesetz%2C%20or%20GEG) [https://perma.cc/S3VP-T4JV] (last visited Oct. 10, 2024).

202. *Finally: The new German Buildings Energy Act (Gebäudeenergiegesetz, GEG) has been adopted*, *supra* note 196.

203. Gebäudeenergiegesetz [Buildings Energy Act], Aug. 8, 2020, BGBl. I S. at 1728, revised Oct. 16, 2023, BGBl. at 97 (Ger.).

204. *Id.*

205. For example, in some instances, if a building emits more CO2 than covered by emission allowances, the owner may face a fine of 100 euros per excess ton. *See id.*

206. *Climate policy*, GOV'T OF THE NETH., https://www.government.nl/topics/climate-change/climate-policy#:~:text=To%20combat%20climate%20change%2C%20the,a%2095%25%20reduction%20by%202050 [https://perma.cc/2B42-FW6Y] (last visited Oct. 10, 2024).

207. *Id.*

208. *Rules for Construction*, NETH. ENTER. AGENCY, RVO, https://business.gov.nl/regulation/building-regulations/#art:building-decree-2012 [https://perma.cc/PS5E-BESP] (last visited Aug. 17, 2024).

CO2 emissions.[209] The Buildings Decree applies to: (i) both new and existing buildings; (ii) includes requirements for building insulation, ventilation, and heating systems; and (iii) aims to promote sustainable construction practices and improve a building's energy efficiency.[210] All of these are designed to achieve the Netherlands' commitment under the Paris Agreement.[211]

a. Dutch Buildings Decree.—The Buildings Decree sets out technical regulations for new buildings and renovations in the Netherlands.[212] It aims to promote the safety, health, accessibility, and energy efficiency of buildings, and to ensure that they meet minimum standards for sustainability and the environment.[213] The Buildings Decree applies to all new buildings and renovations in the Netherlands, including residential and non-residential buildings, as well as public buildings and facilities.[214] It covers a wide range of technical requirements, including those related to structural safety, fire safety, ventilation, and indoor climate.[215]

The Buildings Decree is updated periodically to reflect changes in building codes and standards. The most recent version of the Decree went into effect on July 1, 2020, and includes new provisions for energy performance and sustainability.[216] The Buildings Decree requires that all new buildings meet minimum energy performance standards and that renovations of existing buildings achieve a minimum level of energy efficiency.[217] The Dutch government enforces compliance with the Buildings Decree through inspections and audits, and can impose fines and penalties for noncompliance.[218] The exact fines and penalties depend on the severity of the violation, but can range from warnings and required corrective actions, to fines of several thousand euros.[219] Repeat offenders may face higher fines or legal action.[220]

5. Australia.—Australia is a signatory to the Paris Agreement and has set its own ambitious goals for improving energy efficiency in the built environment.[221] Australia's efforts include energy benchmarking via the "Building Energy Efficiency Disclosure Act 2010," (BEED Act) which requires

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209. *Id.*

210. *Netherlands Planning and Environmental Issues*, BAKER MCKENZIE, https://resourcehub.bakermckenzie.com/en/resources/global-corporate-real-estate-guide/europe-middle-east-and-africa/netherlands/topics/planning-and-environmental-issues [https://perma.cc/H62J-ZYTH] (last visited Oct. 10, 2024).

211. *Rules for Construction*, *supra* note 208.

212. *Id.*

213. *Id.*

214. Bouwbesluit van 29 augustus 2011, Stb. 2011, 416 (Neth.).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Status of Paris Agreement*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en [https://perma.cc/ZQW5-49AC] (last visited Oct. 28, 2024).

building owners to obtain and disclose the energy efficiency rating of their buildings to potential buyers or lessees.[222] Furthermore, Australia has implemented a mandatory energy rating system called the "National Australian Built Environment Rating System" (NABERS).[223] NABERS measures the energy efficiency, water usage, and indoor environment quality of buildings on a scale of zero to six stars, with six being the highest rating.[224] Building owners are required to obtain a NABERS rating for their building, and to disclose it when selling, leasing, or subleasing.[225] The act applies to commercial buildings over 1,000 square meters, and the rating must be obtained by a qualified assessor using a prescribed methodology.[226] The BEED Act aims to improve transparency relating to energy performance, encouraging building owners to invest in energy efficiency upgrades, thereby leading to a more sustainable built environment.[227] Further details on the BEED Act are listed below.

a. Building Energy Efficiency Disclosure Act 2010.—The BEED Act is designed to improve the energy efficiency of Australia's commercial office buildings by requiring building owners, or lessors, to obtain and disclose energy efficiency information through a Building Energy Efficiency Certificate (BEEC).[228] This aims to enable prospective tenants and buyers to make informed decisions about the energy efficiency of a building before purchasing or leasing.[229] The BEED Act applies to commercial office buildings with a net rentable area of 1,000 square meters or more that are offered for sale, lease or sublease.[230] It also applies to any part of a building with a net rentable area of 1,000 square meters or more that is leased or subleased separately.[231]

Since November 1, 2010, the Beed Act requires building owners or lessors to disclose energy efficiency information through a BEEC when offering their building for sale, lease or sublease.[232] They must also provide an up-to-date BEEC to any prospective tenant or buyer upon request.[233] The BEEC is valid for up to twelve months from issuance, and must be renewed thereafter if the building is still being offered for sale, lease or sublease.[234] There are varying levels of offenses that may be levied against building owners for noncompliance

222. *Building Energy Efficiency Disclosure Act 2010* (Cth) (Austl.).

223. *What is NABERS?*, NAT'L AUSTRALIAN BUILT ENV'T RATING SYS., https://www.nabers.gov.au/about/what-nabers [https://perma.cc/56B4-2RVB] (last visited Aug. 17, 2024).

224. *Id.*

225. *Id.*

226. Scott Beauman, *Everything you ever wanted to know about NABERS rating*, CIM (Mar. 6, 2024), https://www.cim.io/blog/nabers-rating-everything-you-need-to-know [https://perma.cc/UM5Z-5T3H].

227. *Building Energy Efficiency Disclosure Act 2010* (Cth) s 2A (Austl.).

228. *Id.* at ss 10-11.

229. *Id.* at ss 12.

230. *Id.* at pt 2.

231. *Id.*

232. *Id.* at s 12.

233. *Id.*

234. *Id.*

with the Act. Australian law assigns Civil Penalty Units for such offenses which may lead to varying fines dependent upon the violation and its severity.[235] A penalty unit (PU) is a standard amount of money used to compute penalties for many breaches of law in Australia at both the federal, state, and territory level.[236] Fines are calculated by multiplying the value of a PU by the number of units prescribed for the offense.[237]

II. POLICIES AND REGULATIONS AFFECTING CARBON EMISSION LIMITS

Although many Regions have benchmarking for energy reduction, very few have concrete carbon emission limits pertaining to buildings and construction. The most thorough regulations concerning carbon emissions are seen in New York City and Boston, both of which have each enacted strict requirements that are clearly defined with Carbon emission limits. Furthermore, noncompliance with these limits results in a scheduled penalty system that levies large fines as a method to deter violators. On the other hand, many international cities seem to just be starting the process of regulating building carbon emissions. For example, although Montreal is establishing a benchmarking system for building carbon emissions, the regulation is still in its infancy stages and will only be used to track data rather than placing true restrictions on emissions. Ultimately, most countries and cities have focused their efforts primarily on energy benchmarking and are still grappling with regulating building carbon emissions.

A. United States

1. New York City, New York.—New York City has taken extensive measures to combat the climate crisis with a complex integration of multiple regulations concerning GHG emissions. A package of regulations was implemented under Local Law 97, 96, 92, and 94. Collectively, these laws created clear standards, deadlines, and penalties for noncompliance regarding GHG emissions from both commercial and residential buildings. Lastly, New York City's Local Law 96 established a building PACE financing program to pay for sustainability efforts. Each Local Law is explained more fully below.

a. Local Law 97.—Local Law 97 applies to any building in New York City: (i) that exceeds 25,000 square feet; (ii) where two or more buildings on the same tax lot that together exceed 50,000 square feet; or (iii) where two or more buildings held in condominium ownership that are governed by the same board of managers that together exceed 50,000 square feet.[238] Exceptions to Local Law 97 include:

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235. *Id.* at s 11.

236. *Penalty Units*, GOTOCOURT.COM.AU, https://www.gotocourt.com.au/criminal-law/penalty-units/ [https://perma.cc/HAX9-JYYW] (last visited Oct. 10, 2024).

237. *Id.*

238. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 97, § 28.320.1 (2019).

(i) Power generating facilities;
(ii) City-owned property;
(iii) NYC Housing Authority property;
(iv) Rent Regulated accommodation (Although, this classification must implement prescriptive measures by 12/31/24);
(v) Property owned by a Housing Development Fund Corporation;
(vi) Dedicated places of worship; and
(vii) Certain types of condominiums of no more than three stories.[239]

Carbon emission limits under Local Law 97 are as follows:

2024–2029 Limits[240]

Row	Building Occupancy Group(s)	Multiply the building emissions intensity limit below by the corresponding gross floor area (sf)
1	A	0.01074 tCO_2e/sf[241]
2	B, other than as described in row #6	0.00846 tCO_2e/sf
3	E and I-4	0.00758 tCO_2e/sf
4	I-1	0.01138 tCO_2e/sf
5	F	0.00574 tCO_2e/sf
6	B civic administrative facility for emergency response services; B non-production laboratory; B ambulatory health care facility; H; I-2; I-3	0.02381 tCO_2e/sf
7	M	0.01181 tCO_2e/sf
8	R-1	0.00987 tCO_2e/sf
9	R-2	0.00675 tCO_2e/sf
10	S and U	0.426 tCO_2e/sf

239. *Id.*
240. *Id.* § 28-320.3.1.
241. Total carbon dioxide emissions per square foot.

2030–2034 Limits[242]

Row	Building Occupancy Group(s)	Multiply the building emissions intensity limit below by the corresponding gross floor area (sf)
1	A	0.00420 tCO_2e/sf
2	B, other than as described in row #6	0.00453 tCO_2e/sf
3	E and I-4	0.00344 tCO_2e/sf
4	I-1	0.00598 tCO_2e/sf
5	F	0.00167 tCO_2e/sf
6	B civic administrative facility for emergency response services; B non-production laboratory; B ambulatory health care facility; H; I-2; I-3	0.001330 tCO_2e/sf
7	M	0.00403 tCO_2e/sf
8	R-1	0.00526 tCO_2e/sf
9	R-2	0.00407 tCO_2e/sf
10	S and U	0.00110 tCO_2e/sf

Beginning May 1, 2025, covered buildings are required to annually report emissions each May 1 for the previous calendar year. The report must represent that their buildings are either: (i) in compliance with the emissions limits; or (ii) not in compliance, and provide the amount by which the building exceeds the prescribed limit.[243] Building owners will be assessed a civil penalty of not more than an amount equal to the difference between the building emissions' limit for a given year, and the actual building emissions for that year, multiplied by $268.[244] Building owners who fail to file a report will be liable for a penalty of not more than an amount equal to the gross floor area of such covered building, multiplied by $0.50 for each month that the violation is not corrected within the 12 months following the reporting deadline.[245] However, a covered building owner will not be liable for a penalty for a report demonstrating compliance with the requirements if the report is filed within 60 days of the date on which the report is due.[246] A violation will also be imposed if a building owner knowingly makes a false statement in a report or submission, and makes them subject to (i) a misdemeanor, and (ii) for a fine of not more than $500,000.[247]

b. Local Law 96.—Local Law 96, provides for loans to the owners of real property located within the city to finance (i) the installation of renewable energy systems and energy efficiency improvements; (ii) related energy audits

242. *Id.* § 28-320.3.2.
243. *Id.* § 28-321.3.
244. *Id.* § 28-320.6.
245. *Id.* § 28-320.6.2
246. *Id.* § 28-320.6.2.
247. *Id.* § 28-320.6.3.

and renewable energy system feasibility studies; and (iii) the verification of the installation of such systems and improvements.[248] It applies to any commercial or multifamily (3 units and larger) building, including tax-exempt non-profit and religious facilities, health care facilities, and industrial properties.[249]

2. Massachusetts.—

a. Massachusetts PACE.—Massachusetts has implemented a PACE financing system that is available for renovations or retrofits of existing buildings that are either commercial, industrial, or multifamily (5 or more units).[250]

b. Boston, Massachusetts.—The City of Boston has also addressed the climate crisis, specifically with carbon emissions reductions by implementing the "Building Emission Reduction and Disclosure Ordinance" (BERDO).[251] BERDO's goal is to reduce GHG emissions from all large buildings to achieve net zero emissions by 2050.[252] Additionally, this regulation simultaneously addresses energy reduction by requiring the submission of energy use as a benchmarking tool.[253] To meet its goal, the City has enacted strict emission standards, compliance deadlines, and penalties for noncompliance. An interesting caveat to the application of BERDO is that there are various alternative ways a building owner could comply with the regulation's requirements.[254] For example, a building owner can request an Individual Compliance Schedule, Hardship Compliance plan, Renewable Energy Certificates as well as others.[255] Whether these alternative methods of compliance are an effective way to achieve the goal of net zero emissions remains to be seen; however, they pose an interesting path that could be replicated in other cities where ordinary compliance can be initially difficult.

BERDO applies to: (i) nonresidential buildings that are 20,000 square feet or larger; (ii) residential buildings that are 20,000 square feet or larger or have 15 or more units; (iii) parcels with multiple buildings that are at least 20,000 square feet or 15 units; and (iv) buildings between 20,000 and 35,000 square feet or residential buildings between 15 and 35 units, all of which needed to begin reporting their energy use in 2022.[256] Building owners may apply for hardship exemptions relating to an individual compliance schedule or hardship compliance plan if confronted with issues such as: (i) historic building

248. N.Y.C., N.Y., LOCAL L. OF THE CITY OF N.Y. NO. 96 (2013).

249. *Id.*

250. MASS. DEV. FIN. AGENCY & MASS. DEP'T OF ENERGY RES., MASSACHUSETTS COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY PROGRAM GUIDELINES (2023).

251. BOS., MASS., MUNICIPAL CODE §§ 7-2.1-7-2.2 (2021).

252. *Id.* § 7-2.2(a).

253. *Id.* § 7-2.2(e).

254. *Id.* §§ 7-2.2(k)-(m).

255. *Id.*

256. *Id.* §§ 7-2.2(d)-(e).

designations; (ii) affordable housing refinancing timelines; (iii) long-term energy contracts; and (iv) financial hardship.[257]

Carbon Emission Standards/Limits[258]

Building use	Emissions standard ($kgCO_2e/SF/yr.$[259])					
	2025–2029	2030–2034	2035–2039	2040–2044	2045–2049	2050–
Assembly	7.8	4.6	3.3	2.1	1.1	0
College/ University	10.2	5.3	3.8	2.5	1.2	0
Education	3.9	2.4	1.8	1.2	0.6	0
Food Sales & Service	17.4	10.9	8.0	5.4	2.7	0
Healthcare	15.4	10.0	7.4	4.9	2.4	0
Lodging	5.8	3.7	2.7	1.8	0.9	0
Manufacturing/ Industrial	23.9	15.3	10.9	6.7	3.2	0
Multifamily housing	4.1	2.4	1.8	1.1	0.6	0
Office	5.3	3.2	2.4	1.6	0.8	0
Retail	7.1	3.4	2.4	1.5	0.7	0
Services	7.5	4.5	3.3	2.2	1.1	0
Storage	5.4	2.8	1.8	1.0	0.4	0
Technology/ Science	19.2	11.1	7.8	5.1	2.5	0

For all covered city and non-city buildings, owners must report the previous year's emissions, energy, and water use no later than May 15 each year.[260] They must also report owner contact information, building uses, renewable energy certificates, energy purchased via a power purchase agreement, and any CO2e Emissions Factors for Energy (Emissions Factors) used by the building if different from the Emissions Factors in BEDRO.[261] The penalties for failure to comply with reporting requirements versus failure to comply with emissions standards, although similar, are different. Failure to timely comply with the reporting requirements will result in a $300 a day fine for (a) non-residential properties that are (i) equal to or greater than 35,000 square feet or (ii) 2 or more buildings on the same parcel that are equal to or greater than 100,000 square feet; and (b) for residential properties equal to or greater than 35 units or 35,000

257. *Id.* § 7-2.2(l).
258. *Id.* § 7-2.2(i).
259. Kilograms of carbon dioxide per square foot per year.
260. *Id.* § 7-2.2(e).
261. *Id.*

square feet.[262] There is a $150 a day non-compliance fine for non-residential properties that are equal to or greater than 20,000 square feet, but less than 35,000 square feet; and for residential properties that are equal to or greater than 15 units or 20,000 square feet, but less than 35 units or 35,000 square feet.[263] If a building owner submits an inaccurate report, the owner may be met with a fine ranging from $1,000-$5,000.[264] Additionally, failure to comply with emission standards will result in a $1,000 per day fine for (x) non-residential properties that are (1) equal to or greater than 35,000 square feet or (2) two or more buildings on the same parcel that are equal or greater than 100,000 square feet; and (y) for residential properties equal to or greater than thirty-five units or 35,000 square feet.[265] Furthermore, there is a $300 non-compliance fee for non-residential properties that are equal to or greater than 20,000 square feet, but less than 35,000 square feet; and for residential properties that are equal to or greater than 15 units or 20,000 square feet, but less than thirty-five units or 35,000 square feet.[266]

3. New Jersey.—Although just next door to the heavily regulated state of New York, New Jersey has taken a "wait-and-see" approach concerning limiting carbon emissions by only implementing policies and surface-level regulations. New Jersey has enacted two major policies: "The Global Warming Response Act"[267] and "The 2019 Energy Master Plan."[268] Broadly, each policy conveys goals affecting new and existing commercial and residential buildings of varying sizes to ultimately reduce GHGs. However, the legislation remains in its infancy as data is still being collected before the state proposes more stringent standards and deadlines. Further, PACE financing remains to be implemented by the New Jersey Economic Development Authority.[269] Each policy's goal is further explained below.

a. The Global Warming Response Act.—"The Global Warming Response Act" requires the reduction of GHG emissions to 80% of 2006 levels by 2050. A New Jersey report indicated that in order to achieve these levels, the commercial and residential building sectors must: (i) reduce GHG emissions by 89%; (ii) convert 90% of buildings to 100% clean energy systems; and (iii) use net zero emissions standards for new construction.[270]

The 2019 Energy Master Plan set the goal to achieve 100% clean energy and reduce GHG emissions to 80% of 2006 levels by 2050. Strategies to reach

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262. *Id.* § 7-2.2(r)(i).

263. *Id.*

264. *Id.* § 7-2.2(r)(iii).

265. *Id.* § 7-2.2(r)(ii).

266. *Id.*

267. N.J. REV. STAT. §§ 26:2C-37-26:2C-68 (2023).

268. *Energy Master Plan*, N.J. DEP'T ENV'T PROT., https://www.nj.gov/emp/index.shtml [https://perma.cc/LEV4-S4DK] (last visited Sept. 9, 2024).

269. N.J. REV. STAT. §§ 34:1b-374-34:1b-382 (2023).

270. N.J. Dep't Env't Prot., New Jersey's Global Warming Response Act 80 x 50 Report (2020).

these results include improving building codes, increasing energy efficiency in existing buildings, developing regulations for net zero carbon new construction, providing incentives for the transition to electric heat pumps, water heaters, and appliances, and transitioning to a fully electrified building sector.[271]

4. Miami, Florida.—Miami, Florida, has taken only preliminary steps in tackling the climate crisis as it pertains to limiting carbon emissions and reducing energy consumption. Miami's sole initiative to accomplish this is called "Miami Forever Carbon Neutral, City of Miami Greenhouse Gas Reduction Plan and Pathway to Carbon Neutrality by 2050" (Plan).[272] The Plan identifies strategies for Miami to meet Paris Agreement targets and an interim goal of a 60% reduction from 2018 levels of GHG emissions by 2035.[273] Beginning in 2024, the plan requires all new and existing buildings to be solar-ready and storage-ready when substantially retrofitted.[274] Further, LEED Silver certification will be required for new construction that is more than 50,000 square feet.[275] The Plan provides for expedited permitting and other incentives for green buildings and rooftop solar installations.[276] Finally, for buildings more than 20,000 square feet, a program requiring energy benchmarking and disclosure and adoption of performance standards will be implemented.[277] The Plan's objectives are broad and aspirational as they pertain to new and existing commercial and residential buildings yet lack any mechanisms that impose any penalties to implement and enforce the regulations upon building owners.

5. Texas.—Although Texas has begun to regulate energy consumption and its reduction, there is a material lack of concrete state legislation directly concerning reducing building carbon emissions. However, along with this statewide dearth of laws, some cities have enacted their own laws.[278]

a. Austin, Texas.—Austin has implemented the "Austin Climate Equity Plan" (Plan).[279] The Plan focuses on sustainability in buildings with basic goals such as achieving net-zero carbon for all new buildings by 2030 while reducing carbon emissions by 25% for existing buildings.[280] The Plan provides guidance on how to achieve these results such as offering financial incentives to owners,

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271. *Id.* at 73.

272. CITY OF MIA., MIAMI FOREVER CARBON NEUTRAL: CITY OF MIAMI GREENHOUSE GAS REDUCTION PLAN AND PATHWAY TO CARBON NEUTRALITY BY 2050 (2021).

273. *Id.* at 3.

274. *Id.* at 15.

275. *Id.* at 36.

276. *Id.*

277. *Id.* at 36-37.

278. According to the U.S. Energy Information Administration, Texas produced 624 million metric tons of carbon dioxide in 2020, which was more than double the amount emitted in California, the second largest carbon producer. *See Climate in the Northwest-central United States*, EARTH@HOME, https://earthathome.org/hoe/nwc/climate/ [https://perma.cc/946E-2JRG] (last visited Oct. 30, 2024).

279. AUSTIN CLIMATE EQUITY PLAN STEERING COMM., AUSTIN CLIMATE EQUITY PLAN (2020–21).

280. *Id.* at 8.

and by amending building codes.[281] However, the Plan lacks enforcement provisions and fails to call on legislators to enact tangible regulations.

6. California.—California has taken broad measures to address the climate issue presented in the Paris Agreement. As discussed *supra*, the state has enacted the "California Green Buildings Standards Code" and the "2022 Energy Code," which concern energy and water efficiency. However, regulations directly relating to tracking and placing strict limits on building carbon emissions are less common. Statewide, California has just scratched the surface of regulating buildings carbon emissions with the passage of: (i) Senate Bill 1477, Low emissions buildings and sources of heat energy (adopted September 13, 2018);[282] (ii) Assembly Bill 2446, Embodied carbon emissions: construction materials (approved and filed September 16, 2022);[283] (iii) Building Initiative for Low-Emissions Development (BUILD);[284] and (iv) Senate Bill No. 253, "The Climate Corporate Data Accountability Act" (CCDAA).[285] Generally, these legislative efforts lay the groundwork for further regulation that may place strict limits on carbon emissions going forward, but nothing more. Many cities in California have also enacted their own legislation, such as San Francisco's Ordinance 237-20 regulating the use of natural gas in new buildings.[286] And although significant progress has been made, individual city regulations that place caps on buildings' carbon emissions remain to be seen. However, the State of California does offer PACE financing for building owners to finance energy efficiency, water reductions, and other environmentally beneficial improvements paid through their property taxes.[287] Key elements of each piece of legislation referenced herein are detailed below.

a. Senate Bill 1477: Low-emissions buildings and sources of heat energy.—Senate Bill 1477 focuses on building decarbonization and allocates $50 million annually through June 2023 for development and funding of different programs and initiatives.[288] The Building Initiative for Low-emissions Development (BUILD) program requires gas corporations to provide incentives to eligible applicants for the deployment of near-zero-emission building technologies to significantly reduce the buildings' emissions of greenhouse gases.[289] Senate Bill 1477 also introduces the "Technology and Equipment for Clean Heating Initiative" (TECH), which is a statewide market development initiative aimed to drive market-wide adoption of low-emission space and water heating

281. *Id.* at 40-78.

282. S.B. 1477, 2017–2018 Reg. Sess. (Cal. 2018).

283. Assemb. B. 2446, 2021–2022 Reg. Sess. (Cal. 2022).

284. S.B. 1477, 2017–2018 Reg. Sess. (Cal. 2018).

285. S.B. 253, 2022–2023 Reg. Sess. (Cal. 2023).

286. S.F., CAL., ALL ELECTRIC NEW CONSTRUCTION ORDINANCE, No. 237-20 (2020).

287. *PACE (Property Assessed Clean Energy): What Homeowners Need to Know*, CAL. DEP'T OF FIN. PROT. & INNOVATION, https://dfpi.ca.gov/pace-program-administrators/pace/#faq [https://perma.cc/75HS-ZHDL] (last visited Oct. 10, 2024).

288. S.B. 1477, 2017–2018 Reg. Sess. (Cal. 2018).

289. *Id.* § 921.1.

equipment for new and existing residential buildings.[290] At least 30% of these funds are reserved for new low-income residential housing.[291]

b. Assembly Bill 2466: Embodied carbon emissions: construction materials.—Assembly Bill 2446 (Bill) is designed to reduce the embodied carbon emissions associated with the production and transportation of building construction materials used in California by requiring the state to set embodied carbon reduction targets, and to develop a methodology for measuring and reporting embodied carbon emissions.[292] The ultimate goal of the Bill is to achieve a 40% reduction in GHG emissions of building materials by 2035, with an interim target of 20% reduction by 2030, and using 2026 GHG levels as a baseline.[293] To achieve this result, the State Air Resources Board established carbon reduction targets for January 1, 2023, and a mandate to develop a methodology for measuring and reporting carbon emissions by January 1, 2024.[294] On December 15, 2022, the State Air Resources Board approved the carbon reduction target that aims to cut GHG emissions by 85% and achieve carbon neutrality by 2045.[295] Beginning January 1, 2025, the bill requires that the state set carbon emissions performance standards for building construction materials. The bill applies to the new construction of non-residential buildings of 10,000 square feet or greater, and residential buildings of five or more units.[296] The bill does not specify any penalties or fines for noncompliance but does require the state to use existing resources to enforce the requirements and to take steps to encourage compliance.[297]

c. San Francisco Ordinance 237-20.—San Francisco Ordinance 237-20 (Ordinance) was presented to reduce energy consumption and greenhouse gas emissions from large buildings in San Francisco by identifying and implementing cost-effective energy efficiency measures and applies to all new buildings constructed after June 1, 2021.[298] The Ordinance requires applications for permits submitted after June 1, 2021, for new building construction to be designed and built with only electric space conditioning, water heating, cooking,

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290. *Id.* at art. 13.

291. *Id.* § 921.1(c)(1).

292. Assemb. B. 2446, 2021–2022 Reg. Sess. (2022).

293. *Id.* § 38561.3(a)(2).

294. *Prepare to Disclose: California Legislature Declines to Extend AB 1305 Voluntary Carbon Market Disclosure Deadline, Leaves Existing SB 253 and SB 261 Climate Disclosure Timelines in Place*, MORRISON FOERSTER (Sept. 9, 2024), https://www.mofo.com/resources/insights/240909-prepare-to-disclose-california-legislature-declines [https://perma.cc/92ZU-ZCRV].

295. *CARB approves unprecedented climate action plan to shift world's 4th largest economy from fossil fuels to clean and renewable energy*, CAL. AIR RES. BD. (Dec. 15, 2022), https://ww2.arb.ca.gov/news/carb-approves-unprecedented-climate-action-plan-shift-worlds-4th-largest-economy-fossil-fuels#:~:text=The%20California%20Air%20Resources%20Board,achieves%20carbon%20neutrality%20in%202045 [https://perma.cc/6LA7-NRYV].

296. Assemb. B. 2446, 2021–2022 Reg. Sess. (2022).

297. *Id.*

298. S.F., CAL., ALL ELECTRIC NEW CONSTRUCTION ORDINANCE, No. 237-20 (2020).

and clothes drying systems, and prohibits installation of infrastructure, piping systems, or piping for distribution of natural gas or propane to such uses.[299] Buildings are not subject to the ordinance if: (i) an all-electric project is demonstrated to be physically or technically infeasible; (ii) applications for permits for new construction proposing the installation of gas piping systems, fixtures, and infrastructure exclusively for cooking equipment within the area designated for commercial food service; or (iii) where application of San Francisco Building Code Section 106A.1.17 would violate the terms of an existing development agreement or other contract with the City.[300]

d. Senate Bill 253: the Climate Corporate Data Accountability Act.—The "Climate Corporate Data Disclosure Act" (CCDDA) requires public and private companies doing business in California to disclose Scope 1, 2, and 3 emissions beginning in 2026, on a date not yet determined.[301] Reporting on Scope 3 will not be required until 2027, when companies must report on 2026 data.[302] The California State Air Resources Board (CARB) will house a digital registry containing company reports that will be available to the public.[303]

The CCDAA impacts all large public and private companies in California with an annual excess of at least $1 billion in revenue.[304] If a company fails to comply with the regulations set out in the CCDAA, CARB will be able to bring civil actions against the company in an attempt to seek civil penalties for violations of the act.[305] The maximum fine CARB can collect in a reporting year is $500,000.[306]

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299. *Id.* § 106A.1.17.

300. *Id.*

301. S.B. 253, 2022–2023 Reg. Sess. (Cal. 2023). Scope 1 emissions are those that result directly from a company's activities. Scope 2 emissions are those that are released indirectly, like electricity purchased by the company. Scope 3 emissions are those that are indirectly produced from a company's entire supply chain. *See* Cynthia Faur, *California's New Climate Disclosure and GHG-Related Claims Laws*, QUARLES (Mar. 13, 2024), https://www.quarles.com/newsroom/publications/californias-new-climate-disclosure-and-ghg-related-claims-laws#:~:text=SB%20253%20requires%20U.S.%20based,2027%20for%20Scope%203%20emissions [https://perma.cc/9SYM-WDLB] ("Additionally, the compliance date for the law, which became effective on January 1, 2024, is not express. One of the bill's sponsors obtained unanimous consent of the California Assembly to have a letter published in the California Assembly Daily Journal clarifying that the intended "applicability date" for AB 1305 is January 1, 2025. This letter, however, does not amend the law.").

302. S.B. 253, 2022–2023 Reg. Sess. § 2(c)(1)(A)(i)(II (Cal. 2023).

303. *Id.*

304. *Id.* § 2(b)(2).

305. *Id.* § 2(f).

306. *Id.*

B. International

1. United Kingdom.—The United Kingdom (UK) drafted the "Climate Change Act" (CCA) in 2008, which helped them achieve their goals and obligations set forth in the later signed Paris Agreement.[307] CCA established the Committee on Climate Change (CCC), an independent statutory body.[308] The CCA is a comprehensive piece of legislation that establishes a legally binding framework to reduce the UK's greenhouse gas emissions and address the risks of climate change.[309] One of the key elements of the CCA is the establishment of carbon budgets, which are legally binding targets for reducing greenhouse gas emissions in the UK.[310] Carbon budgets are set for five-year periods, and cover all sectors of the economy, including buildings, transportation, and industry.[311] Ultimately, the goal is to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.[312]

Similar to NYC's Local Law 97 on carbon emission caps, the CCA's carbon budget is a cap on the amount of greenhouse gases emitted in the UK over a five-year period.[313] The budgets are set twelve years in advance to allow proper preparations by all parties involved and affected.[314] Below is a chart of the allowable levels.[315]

Budget	**Carbon budget level**	**Reduction below 1990 levels**	**Met?**
1st carbon budget (2008 to 2012)	3,018 MtCO2e[316]	25%	Yes
2nd carbon budget (2013 to 2017)	2,782 MtCO2e	31%	Yes
3rd carbon budget (2018 to 2022)	2,544 MtCO2e	37% by 2020	On track
4th carbon budget (2023 to 2027)	1,950 MtCO2e	51% by 2025	Off track
5th carbon budget (2028 to 2032)	1,725 MtCO2e	57% by 2030	Off track
6th carbon budget (2033 to 2037)	965 MtCO2e	78% by 2035	Off track
Net Zero Target	At least 100% by 2050		

307. Climate Change Act 2008, c. 27 (UK).

308. *A Legal Duty to Act*, CLIMATE CHANGE COMM., https://www.theccc.org.uk/what-is-climate-change/a-legal-duty-to-act/ [https://perma.cc/8SQ5-37R3] (last visited Aug. 21, 2024).

309. *Id.*

310. Climate Change Act 2008, c. 27, § 4 (UK).

311. *Id.* § 10.

312. *Id.* § 1.

313. *Id.* § 4(1)(a).

314. *Id.* § 4(2)(b).

315. HOUSE OF COMMONS LIBRARY, *supra* note 170, at 8-9.

316. Million tons of carbon dioxide equivalent.

The CCA imposes a duty on the CCC to provide an annual statement to Parliament for each year, starting in 2009.[317] The statement must report the amount of GHG emissions in the UK, UK Removals,[318] and identify the methods used to measure or calculate those amounts.[319] Additionally, the statement must show whether any of those amounts represent an increase or decrease, compared to the equivalent amount for the previous year.[320]

However, since this regulation applies to a multitude of sectors that generate carbon emissions for the entire UK, it is not exactly targeted towards carbon emissions of buildings specifically.[321] Further, this regulation does not impose any penalties or fines if the carbon budgets are exceeded.[322] Therefore, it truly acts as a guide on the trajectory of carbon emissions as a whole in the UK.

2. Canada.—Canada is taking significant steps to reduce its greenhouse gas emissions and meet the targets set under the Paris Agreement. Specifically, there is a focus on reducing carbon emissions from buildings, which are responsible for a significant portion of Canada's emissions.[323] To achieve this result, Canada implemented various policies and initiatives aimed at promoting energy-efficient buildings and reducing emissions from existing structures.[324] One such initiative is the "Pan-Canadian Framework on Clean Growth and Climate Change," which includes a commitment to develop and implement a national model building code to improve the energy efficiency of new buildings.[325] In addition, several provinces and cities have implemented their own regulations and by-laws to reduce building carbon emissions.[326] An example of this is the "Montreal Building Emissions By-Law," (By-Law), which aims to reduce the carbon footprint of buildings in Montreal by requiring owners to measure and report their building's energy consumption and greenhouse gas emissions.[327] Although the regulation is still in its infancy stages, some of the details are listed below.

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317. Climate Change Act 2008, c. 27, § 12 (UK).

318. DEP'T FOR ENERGY SEC. & NET ZERO, ANNUAL STATEMENT OF EMISSIONS FOR 2022, 2024 (UK).

319. *Id.*

320. *Id.*

321. Climate Change Act 2008, c. 27, § 12 (UK).

322. *Id.* § 17.

323. *Building Climate Solutions*, CAN. GREEN BLDG. COUNCIL, https://www.cagbc.org/why-green-building/building-climate-solutions/#:~:text=A%20proven%20path%20to%20lower%20carbon%20emissions&text=Today%2C%20residential%2C%20commercial%2C%20and,Canada's%20third%2Dhighest%20carbon%20emitter [https://perma.cc/XEW2-WSUS] (last visited Oct. 29, 2024).

324. *Canada Green Buildings Strategy Released*, INT'L INST. OF BLDG. ENCLOSURE CONSULTANTS (July 29, 2024), https://iibec.org/canada-green-buildings-strategy-released/#:~:text=The%20CGBS%20aims%20to%3A,carbon%20building%20materials%20and%20technologies [https://perma.cc/YB5G-GDPX].

325. GOV'T OF CAN., PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE: CANADA'S PLAN TO ADDRESS CLIMATE CHANGE AND GROW THE ECONOMY (2016).

326. *Id.* at 1.

327. MONTREAL, CAN., BUILDING EMISSIONS BY-LAW (2021).

a. Montreal Building Emissions By-Law.—The purpose of the Montreal Building Emissions By-Law is to reduce greenhouse gas emissions and energy consumption from buildings in Montreal.[328] The By-Law aims to improve the energy efficiency of existing buildings and reduce emissions from new buildings by benchmarking & gathering GHG emissions to construct rating systems and implementing mandatory displays of GHG emission performance on each building.[329]

To be implemented periodically, beginning in 2022, buildings greater than 160,000 square feet are to be assessed for fossil fuel consumption.[330] In 2023, the regulation will expand to include buildings greater than 50,000 square feet, including residential buildings of fifty dwellings or more.[331] Finally, in 2024, the regulation will include buildings greater than 20,000 square feet and residential buildings of twenty-five dwellings or more.[332] Currently, the regulation is unclear on the violations and penalties that may be assessed for noncompliance.

3. European Union (EU).—The EU's 2030 Climate Target Plan is ambitious in its goal to reduce GHG emissions by at least 55% of 1990 levels by 2030, and to reach a net-zero emission balance by 2050.[333] The European Commission has since adopted a series of legislative proposals, called the "Fit for 55" package to reach this goal.[334]

a. Carbon Border Adjustment Mechanism.—The "Carbon Border Adjustment Mechanism" (CBAM) will place a tax on the importation of carbon intensive goods.[335] Thus, CBAM will impact any importer of goods containing cement, electricity, fertilizers, iron, steel, aluminum, and hydrogen.[336] Importers of covered products will be required to purchase CBAM certificates, which will correspond to what an EU producer of the same product would have to pay in carbon allowance under the EU Emissions Trading System (ETS).[337] If the importer of the affected goods can demonstrate that a carbon price has already been paid, the price of the CBAM certificate will be deducted to reflect what

328. *Id.* at art. I.

329. *Id.*

330. *Id.* at art. III.

331. *Id.*

332. *Id.*

333. *2030 climate targets*, EUR. COMM., https://climate.ec.europa.eu/eu-action/climate-strategies-targets/2030-climate-energy-framework_en#:~:text=In%20July%202021%2C%20the%20European,climate%2Dneutral%20continent%20by%202050 [https://perma.cc/3CMM-NPA5] (last visited Sept. 9, 2024).

334. *Commission Welcomes Completion of Key "Fit for 55" Legislation, Putting EU on Track to Exceed 2030 Targets*, EUR. COMM. (Oct. 9, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4754 [https://perma.cc/G4VE-CURL].

335. Commission Regulation 2023/956 of May 10, 2023, Establishing a Carbon Border Adjustment Mechanism, 2023, (L 130/52).

336. David J. Ross et. al., *EU adopts the Carbon Border Adjustment Mechanism Regulation*, WILMERHALE (June 6, 2023), https://www.wilmerhale.com/insights/client-alerts/20230606-eu-adopts-the-carbon-border-adjustment-mechanism-regulation [https://perma.cc/XFN2-2KJL].

337. *Id.*

has already been paid.[338] The price of the CBAM certificates will be calculated weekly, based on the average auction price of EU ETS allowances.[339]

The charge on affected imported goods will be gradually phased in from 2026 through 2034. [340] The implementation of CBAM will begin with a transitional period from October 1, 2023, through December 31, 2025.[341] During this transitional period, importers will only be subject to reporting obligations without being required to purchase CBAM certificates.[342] Furthermore, importers will be required to submit a quarterly CBAM report that includes: (i) the total quantity of each covered good that was imported during the quarter; (ii) the specific total emissions and indirect emissions imbedded in the goods; and (iii) the carbon price due, if any, in the country of origin for the embedded emissions, taking into account discounts or other forms of compensation.[343]

Starting January 1, 2023, only those importers with CBAM certificates will be able to import CBAM goods into the EU.[344] CBAM importers will be required to submit an annual CBAM declaration beginning in 2027 and no later than May 31.[345] These declarations must include: (a) the total quantity of each type of covered good imported in the previous year; (b) the total emissions embedded in the good; (c) the number of CBAM certificates to be surrendered, after adjusting for EU ETS; and (d) a copy of the verification report of embedded emissions by an accredited verifier.[346] Importers must use an accredited verifier to confirm the total emissions declared in the CBAM declaration.[347] Importers must then purchase their CBAM certificates from their EU Member State of establishment, with certificates priced at the weekly average of EU ETS allowances.[348] Importers must also ensure that their account reflects certificates corresponding to 80% of emissions embedded in all of their goods that fall under CBAM since the beginning of the year.[349] Finally, importers will be required to surrender CBAM certificates no later than May 31 each year.[350] This will need to reflect the emissions previously verified in the importer's annual declaration or the previous year.[351]

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338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*

CONCLUSION

The Paris Agreement has provided a global framework for combating climate change, but the actual progress towards reducing energy consumption and carbon emissions has varied widely among different Regions. Although some progressive cities have adopted concrete policies and regulations that impose mandatory benchmarks and heavy fines for non-compliance, many Regions have only announced broad policy goals, without implementing specific measures or penalties. As the deadline for meeting the Paris Agreement's stringent carbon emission targets approaches, Regions must increase their efforts to reduce energy consumption and carbon emissions by adopting stricter policies and regulations.

Furthermore, it is clear that Regions must not only focus on reducing energy consumption, but must also pay close attention to buildings carbon emissions. The approach taken by cities such as New York City, which has implemented a comprehensive set of regulations covering both energy and carbon emission reduction, is better suited to achieve the Paris Agreement's goals of limiting global warming temperatures to 1.5°C above pre-industrial levels. Moreover, Regions should explore financing options such as PACE programs to assist building owners in complying with these regulations.

In sum, there will always be the argument as to whether carrots or sticks are more effective in modifying behavior and, in this case, reducing energy consumption and meeting the stringent carbon emission deadlines of the Paris Agreement. Although the numbers are not finalized as to how many property owners will be penalized for failing to satisfy the imposed carbon limits, the statistics of those property owners that have performed retrofits provide some insight into the effectiveness of the legislation.

In New York City alone, "[n]ine in ten buildings already comply with their 2024 LL97 limits."[352] Furthermore, the New York City Department of Buildings estimated that "88% of NYC buildings meet 2024 limits, 89% of multifamily buildings meet 2024 limits, and 92% of office buildings meet 2024 limits."[353] However, there are those who believe that, although "evidence suggests carbon taxes do reduce emissions," the tax "rate and the scope" affects the impact.[354] In his article "Carbon Taxes in Theory and Practice," Alex Muresianu argues that the various factors determining the effectiveness of a carbon tax include: (a) whether the "electric sector was already heavily decarbonized,"[355] (b) whether

352. *See Local Law 97 Progress*, URBAN GREEN, https://www.urbangreencouncil.org/what-we-do/explore-nyc-building-data-hub/local-law-97-progress/ [https://perma.cc/Q897-YZYS] (last visited May 28, 2024).

353. *Id.*

354. *See* Alex Muresianu, *Carbon Taxes in Theory and Practice*, TAX FOUND. (May 2, 2023), *available at* https://taxfoundation.org/research/all/global/carbon-taxes-in-practice/#:~:text=Carbon%20taxes%20will%20reduce%20emissions,to%20avoid%20bearing%20the%20tax [https://perma.cc/633D-MHVZ].

355. *Id.* (looking at Sweden's tax).

the tax is "a high tax applied to a narrow base" or "a low-to-moderate tax to a broad base,"[356] (c) if the tax was effective against "the power generation section, which is much more responsive to taxation."[357] Muresianu postures that if the "power sector" was non-fossil fuel reliant prior to the implementation of the carbon tax, as it was in Sweden and British Columbia, the "carbon taxes led to modest reductions in carbon emissions," but in the United Kingdom, where it was still fossil-fuel reliant, there was "a significant decline in emissions."[358] However, this research shows that, in many cases, "the most powerful response to the carbon tax occurs in the power sector."[359]

There are other studies that see carbon taxes as a very effective method to reduce energy consumption,[360] and "the commercial buildings sector appears to respond quickly to a carbon tax."[361] The Georgia Institute of Technology team concludes that, "carbon taxes would have significant impacts on the [carbon dioxide] emissions attributable to commercial buildings sector."[362] The ultimate question though, and the point made clear in the above-reference research, is that the carbon taxes may not be enough to meet the desired goals.[363]

As a result, it is essential that Regions continue to prioritize and implement concrete measures aimed at reducing energy consumption and carbon emissions. By doing so, they can effectively combat the global climate crisis and meet the strict carbon emission targets set forth by the Paris Agreement.

356. *Id.* (looking at British Columbia's tax).

357. *Id.* (looking at the United Kingdom tax).

358. *Id.*

359. *Id.*

360. *See* MARILYN BROWN ET AL., MODELING THE IMPACT OF A CARBON TAX ON THE COMMERCIAL BUILDINGS SECTOR, GEORGIA INST. OF TECH (2012).

361. *Id.*

362. *Id.*

363. *Id.*

AUTHORSHIP BY OMISSION: HOW EDITORIAL CHOICES IN CASEBOOKS SHAPE THE APPREHENSION AND MEANING OF LAW

SAM WILLIAMS*

ABSTRACT

The unique internal workings of the legal mind are a point of pride for the profession. But do those internal machinations reflect, and possibly reinforce, biases that ought to be examined, if not challenged? Expanding on recent work on the subject, this article makes the case that the casebook, the primary means of legal instruction, offers insights into the biases of the legal mind. Using some concepts adapted from other disciplines, the article analyzes coverage of the same case in seven textbooks to demonstrate how even the smallest changes can dramatically change the reader's understanding of what the law is.

Implications for practice include the following:

1. The bias inherent in the law,
2. The value of identifying subjective meaning in "objective" places,
3. Challenging built-in presumptions of how the law works,
4. The importance of organization in creating meaning, and
5. Self-improvement by identifying and challenging one's own biases.

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I. INTRODUCTION

Law school casebooks have a (not entirely unearned) bad reputation. Langdell's casebook method of teaching, now the dominant form of formal legal education in the United States, has been controversial since its inception.[1] It has been criticized for its narrow view of the law in order to replicate scientific methodology,[2] the fact that it is too theoretical,[3] and inefficient use of student time and attention.[4] The casebooks themselves have been criticized as collections of cases with no connecting trend of legal doctrines.[5] Casebooks have always been expensive, and that price has increased dramatically in the past twenty years.[6]

1. Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 160 (1965).

2. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 227 (1949).

3. A. V. Dicey, *The Teaching of English Law at Harvard*, 13 HARV. L. REV. 422, 429 (1900).

4. Austin, *supra* note 1, at 164-65.

5. Austin, *supra* note 1, at 165. I can also confirm anecdotally that I have seen a large enough number of struggling students read the entire casebook ahead of class, to the detriment of their understanding of the material, that I now explicitly discourage it when introducing new students to law school.

6. Steven Chung, *Do Law School Casebooks Have a Future?*, ABOVE THE LAW (Sept. 6, 2023, 12:16 PM), https://abovethelaw.com/2023/09/do-law-school-casebooks-have-a-future/#:~:text=Today%2C%20law%20school%20casebooks%20cost,per%20year%20on%20books%20alone [https://perma.cc/SXR9-8LH7].

For all their faults, casebooks are a singular medium that reflect, reshape, and reinforce the legal community that creates and learns from them.[7] "Because casebooks still maintain the center of gravity in legal education, they serve as the vehicle through which each succeeding generation of lawyers is socialized into patterns of thinking about law and legal practice."[8] One might assume, given Langdell's scientific aspirations, that these casebooks reflect a somewhat sterile and "unbiased" view of the law. This presumed objectivity could not be further from the truth. "Casebooks provide their authors with an opportunity to construct a thoroughly realized, if often inadequately articulated, instantiation of their own particular jurisprudential and normative belief systems."[9] This reflection of author bias is no bug, but rather a feature of this unique art form. In her review of Randy E. Barnett's Contracts casebook,[10] Kellye Testy calls attention to an ideological commitment to consent as the basis of contract law that permeates the casebook.[11] Rather than use this to criticize the casebook, she instead calls attention to it as a way to help students identify the assumptions that the law takes as a given, giving students an opportunity to identify and combat the biases of the community they are entering.[12]

This longstanding potential within casebooks to identify the unique perspective and biases of the law and legal community finds fresh cause given the United States' increasingly divided political landscape. With increasing frequency, law professors find themselves in a situation where right-leaning students accuse them of stifling viewpoint diversity while left-leaning students criticize them for doing too little to protect marginalized groups.[13] This framing positions professors as a third, neutral party hoping to find some middle ground between two poles, but it denies the unique perspective that a member of the legal community brings to the table—a perspective that can be identified and reinforced through analysis of the casebooks introducing the student to that unique perspective.

In this article, I make the case that a form of literary analysis can offer insight into casebooks that can help reveal the biases within the legal community, either as individual authors or as a community at large. I begin by

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7. For a layperson-friendly example of this, see VERONICA ALVAREZ & THERESA SOTTO, L.A. CNTY. MUSEUM OF ART, ART OF MANY CULTURES: A RESOURCE GUIDE FOR VISITING LACMA 1 (Sarah Jesse ed., 2014) https://www.lacma.org/sites/default/files/module-uploads/ArtofManyCulturesResourceGuide.pdf [https://perma.cc/8R6K-37XU] ("Artists are a product of the culture and society in which they grew; and as such, they are influenced by the customs and norms of their society. Often, their artwork reflects upon and upholds the objects, ideas, and customs that that society values.").

8. Janet Ainsworth, *Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews*, 20 SEATTLE U. L. REV. 271, 275 (1997).

9. *Id.* at 274.

10. RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE (1st ed. 1995).

11. Kellye Testy, *Intention in Tension*, 20 SEATTLE U. L. REV. 319 (1997).

12. *Id.* at 322-23.

13. *See, e.g.*, Meera E. Deo, *The Paradox of Faculty-Student Interactions*, 69 J. LEGAL EDUC. 36 (2019).

addressing Kathleen Fletcher's recent work on the subject, which offers a compelling argument for bias within casebooks and a strong dataset to begin this textual analysis.[14] While Fletcher's work is essential to this article, my analysis differs considerably from hers for reasons I identify in this section. The most important difference, interpreting the message conveyed rather than identifying that a message was conveyed, leads me to my next section, which spells out some concepts borrowed from artistic disciplines that aid the interpretive process. I then use these tools to analyze the casebooks that Fletcher identified in her earlier article and spell out some initial conclusions derived from this small, but instructive, sample. By doing this, I demonstrate how literary analysis of casebooks is a vital tool both for recognizing and combatting bias and for embracing the unique art form of our legal culture.

II. BUILDING FROM FLETCHER'S ARTICLE

Kathleen Fletcher's article, *Casebooks, Bias, and Information Literacy—Do Law Librarians Have a Duty?*[15] makes a compelling case for the existence of bias in the casebooks used to teach law by demonstrating the difference in editorial decisions among several different textbooks.[16] In order to make that point, she looks at how a number of casebooks addressing the same topics (four Constitutional Law casebooks, three Property casebooks, and three Civil Procedure casebooks) cited different portions of a particular case's facts as the "key facts" of that case.[17]

While Fletcher's article makes an exciting case for the existence of bias in legal casebooks, she leaves several rich veins of inquiry untapped. This section explains these promising additional topics, which the article explores later.

A. Cross-Doctrinal Analysis

One thing that stands out about Fletcher's article is her decision on which case to cover. Her sample case for Constitutional Law was *Kelo v. City of New London*.[18] In *Kelo*, a city attempted to purchase multiple residents' homes through eminent domain as part of an urban development project.[19] Several homeowners refused, noting the private (as opposed to public) use of the condemned land.[20] The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."[21] In a 5-4 decision, the

14. Kathleen D. Fletcher, *Casebooks, Bias, and Information Literacy—Do Law Librarians Have a Duty?*, 40 LEGAL REFERENCE SERVS. Q. 184 (2021).
15. *Id.*
16. *Id.* at 189-99.
17. *Id.*
18. Fletcher, *supra* note 14, at 189.
19. 545 U.S. 469, 475 (2005)
20. *Id.*
21. U.S. CONST. amend. V, cl. 4.

United States Supreme Court ruled that the public purpose for which the land was being used was sufficient to meet the Constitution's requirements for eminent domain.[22] The case was controversial even before its resolution, with major organizations like the American Association of Retired Persons (AARP) and the National Association for the Advancement of Colored People (NAACP) filing an amicus curiae brief supporting the plaintiffs.[23] The Court's decision prompted massive backlash.[24] Following *Kelo*, forty-five states amended their laws to limit or prevent the use of eminent domain for purposes of economic development.[25] The decision remains unpopular almost twenty years after its resolution, with a recent survey of self-identified libertarian and conservative legal scholars listing it as the seventeenth worst Supreme Court decision in the history of the United States.[26]

Without looking at the content of the case, it is clear why Fletcher chose *Kelo* as her sample case. The four textbooks she cites[27] all have their own clear differences from one another in the facts cited. The three that do cite[28] *Kelo* cite entirely different parts of the opinion from one another. One of the four[29] does not cite the case at all.

The decision to use *Kelo* is noteworthy because *Kelo* is arguably as much a Property Law case as it is a Constitutional Law case. While only three of the four Constitutional Law casebooks that Fletcher examines cite *Kelo*,[30] all three of the Property casebooks do.[31] While there is inevitably overlap between the two topics, Property and Constitutional Law are entirely different areas of the law. An editor might limit their explanation of the cases' key facts to those that

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22. *Kelo*, 545 U.S. at 478-79.

23. Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057.

24. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009).

25. Ilya Somin, *Will Connecticut Finally Enact Meaningful Eminent Domain Reform?*, VOLOKH CONSPIRACY (Apr. 23, 2019, 11:34 PM), https://reason.com/volokh/2019/04/23/will-connecticut-finally-enact-meaningful-eminent-domain-reform/ [https://perma.cc/V6P9-5PBS].

26. Matthew J. Frank & Mark David Hall, *Supreme Failures from the Court*, L. & LIBERTY (Jan. 26, 2023), https://lawliberty.org/supreme-failures-from-the-court/ [https://perma.cc/XYJ9-ECW8].

27. Fletcher, *supra* note 14, at 189. The four Constitutional Law casebooks she uses are: ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (4th ed. 2013); CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (4th ed. 2012) [hereinafter MASSEY CONSTITUTIONAL]; RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (9th ed. 2010); JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS (Concise 13th ed. 2009) [hereinafter VARAT CONCISE].

28. CHEMERINSKY, *supra* note 27; MASSEY CONSTITUTIONAL, *supra* note 27, at 782; ROTUNDA, *supra* note 27.

29. VARAT CONCISE, *supra* note 27.

30. *Supra* note 28.

31. Fletcher, *supra* note 14, at 192. The three Property casebooks she uses are: JESSE DUKEMINIER ET AL., PROPERTY (8th ed. 2013); CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES (1st ed. 2012) [hereinafter MASSEY PROPERTY]; JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (5th ed. 2010).

were most relevant to the Court's analysis of the doctrinal area covered by the casebook. For example, in *National Federation of Independent Business v. Sebelius*,[32] the Supreme Court ruled that the Individual Mandate of the Patient Protection and Affordable Care Act[33] was unconstitutional under the Commerce Clause,[34] but was constitutional under the Taxing and Spending Clause.[35] While *Sebelius* might warrant citation in either a Constitutional Law casebook or a Tax Law casebook, one might expect the Constitutional Law casebook to contain more significant coverage of the Court's Commerce Clause analysis than one would expect from the Tax Law casebook.[36] Even if the search proves fruitless, it is at least worth investigating whether there is a difference in the ways that a case is edited across multiple disciplines.

While both Property and Constitutional Law have the general goal of teaching students the law of a subject, they have entirely different goals in terms of content for students and methodologies for accomplishing those goals. The Multistate Bar Examination (MBE) Content Scope Outlines may offer a helpful framework that provides some (imperfect) empirical support for this intuition, since both classes teach material that is tested heavily on the widely adopted MBE.[37] The different ways that the Multistate Bar Exam organizes its topics for Constitutional Law and Property offer some insight into the different goals each class has for teaching its students.

The MBE subject outline breaks Constitutional Law into four distinct topics.[38] Three of those include judicial review, separation of powers, and the relationship between nation and states in a federal system.[39] The fourth topic (which constitutes 50 percent of Constitutional Law questions on the MBE) addresses individual rights. Here is the content outline for individual rights:

IV. Individual rights
- A. State action
- B. Due process
  - 1. Substantive due process
    - a. Fundamental rights
    - b. Other rights and interests
  - 2. Procedural due process
- C. Equal protection

32. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

33. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10106(b)-(d), 124 Stat. 119, 909-10 (2010) (codified as amended at 26 U.S.C. § 5000A).

34. *Sebelius*, 567 U.S. at 588 (finding the individual mandate unconstitutional under U.S. CONST. art. I, § 8, cl. 3.).

35. *Id.* (finding the individual mandate constitutional under U.S. CONST. art. I, § 8, cl. 1.)

36. I acknowledge this is a hypothetical example rather than one demonstrated by analysis of Constitutional Law and Tax Law casebooks, and that this characterization of possible editorial decisions may be incorrect.

37. NAT'L CONF. BAR EXAM'RS, MBE SUBJECT MATTER OUTLINE (2020).

38. *Id.* at 1-2.

39. *Id.*

1. Fundamental rights
2. Classifications subject to heightened scrutiny
3. Rational basis review

D. Takings

E. Other protections, including the privileges and immunities clauses, the contracts clause, unconstitutional conditions, bills of attainder, and ex post facto laws

F. First Amendment freedoms

1. Freedom of religion and separation of church and state
    a. Free exercise
    b. Establishment
2. Freedom of expression
    a. Content-based regulation of protected expression
    b. Content-neutral regulation of protected expression
    c. Regulation of unprotected expression
    d. Regulation of commercial speech
    e. Regulation of, or impositions upon, public school students, public employment, licenses, or benefits based upon exercise of expressive or associational rights
    f. Regulation of expressive conduct
    g. Prior restraint, vagueness, and overbreadth
3. Freedom of the press
4. Freedom of association [40]

Takings, which would include cases like *Kelo*, is a viable topic for testing. However, that topic is given nowhere near as much nuance or explanation as due process, equal protection, or First Amendment freedoms. This likely reflects the more extensive jurisprudence of the non-takings topics, but as evidenced below, there are multiple different aspects of takings claims that can dramatically affect the cases considered and the legal concepts demonstrated. Regardless of the reason, takings feels comparable to state action or the general "Other Protections" clause—relevant, but as seen below, some of the first things to get cut in Constitutional Law coverage. Takings feels like it is included as an afterthought.

Real Property[41] does not cover *Kelo*, but in a way that makes its exclusion feel peculiar. Topic II of the Property content scope outline, "Rights in real property," has a section, "D. Zoning (fundamentals other than regulatory taking),"[42] that feels like such a natural fit for the topic that it must specifically

40. *Id.* at 2.
41. *Id.* at 6-7.
42. *Id.* at 6.

state that it is not included. The entire Real Property outline reads as more of a transactional document than the Constitutional Law outline. Its five major topic areas each receive approximately equal coverage and include questions of types of ownership, real estate contracts, mortgages, and titles.[43] Even its section dedicated to property rights emphasizes how things like a restrictive covenant are made rather than what the purpose of a restrictive covenant is.[44] The emphasis is on the realities of its doctrine and practice rather than more theoretical topics like those covered in Constitutional Law.

Even if the difference between doctrines fails to produce any easily identifiable or obviously relevant distinction between the two, the different organization of the information can have pronounced effects on the apprehension and interpretation of law. If nothing else, it is worth investigating whether editors make different editorial decisions when editing a case for a Property casebook instead of a Constitutional Law casebook. Although the case that Fletcher used[45] demonstrated her point by showing visible differences in the "key" facts reported by the various casebooks, using a different case leaves the notion that different doctrines reflect the case differently from one another unexplored.

B. Defining "Bias"

Fletcher's point in evaluating these casebooks for bias is heavily informed by the pedagogical responsibilities of law librarians. Principle III of the American Association of Law Librarians' *Principles and Standards for Legal Research Competencies* states, "A successful legal researcher critically evaluates information."[46] The version of these standards published in 2013 listed evaluating information and material under the criteria of "authority, credibility, currency, and authenticity" as a competency under this principle.[47] The current version of these competencies, updated in April of 2020, added two additional criteria, "relevance and bias."[48]

There is nothing wrong with the word bias. It seems to be the most concise and accurate term for the phenomenon that she is describing. It also provides a valuable reason to examine how casebooks are written for both professional reasons and to shed light on important modern political questions. For example,

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43. *Id.* at 6-7.

44. *Id.* at 6.

45. Shelley v. Kraemer, 334 U.S. 1 (1948) (finding that the judicial enforcement of racially restrictive covenants qualifies as discriminatory state action prohibited by the Fourteenth Amendment).

46. AM. ASS'N OF L. LIBR., PRINCIPLES AND STANDARDS FOR LEGAL RESEARCH COMPETENCIES 3 (2013), https://www.aallnet.org/wp-content/uploads/2017/12/AALL2013 PrinciplesStandardsLegalResearchCompetencyPrint.pdf [https://perma.cc/SB6L-P5UX].

47. *Id.* at 8.

48. AM. ASS'N OF L. LIBR., PRINCIPLES AND STANDARDS FOR LEGAL RESEARCH COMPETENCIES 4 (2020).

the Association added relevance and bias in 2020, a month after the World Health Organization began referring to the COVID-19 pandemic as a pandemic.[49] The COVID-19 pandemic stood apart from other health scares due to the early, constant, and persistent misinformation regarding the virus.[50] This misinformation was often presented on social media (and occasionally by public officials)[51] alongside correct or more reliable information, making it more efficient to evaluate claims by content rather than source.[52] The reference to "relevance and bias" as a part of information literacy includes content analysis where the prior definition did not.

The issue here is that Fletcher leaves the term "bias" undefined in a way that opens the door for miscommunication. Merriam-Webster defines bias as "an inclination of temperament or outlook."[53] This definition has no inherently political dimension to it. However, there is a real danger that when one uses the word "bias," they implicitly mean "political bias."[54] Fletcher, who couches her conversation of bias in contemporary politics, does this herself. For example, her first paragraph directly addresses former President Donald Trump and presents a political dichotomy by noting that "[t]he popular literature is unsure if the media is biased toward liberalism or conservatism, and scholarly authors seem unable to reach definite conclusions in the matter."[55] While she may refer to multiple types of bias in the article, the distinction between political and other forms of bias should be made explicit.

I will add a word noting the type of bias present where appropriate. For example, two of the Constitutional Law casebooks arguably demonstrate political bias in their editorial decisions. However, there are other forms of bias that may be less charged than political bias. These types of bias may be read as

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49. Tedros A. Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/5EN9-P3LR].

50. *See* Taylor Nelson et al., *The Danger of Misinformation in the Covid-19 Crisis*, 117 MO. MED. 6, 510 (2020); Tiffany Hsu, *As Covid-19 Continues to Spread, So Does Misinformation About It*, N.Y. TIMES (Dec. 28, 2022), https://www.nytimes.com/2022/12/28/technology/covid-misinformation-online.html [https://perma.cc/5R8Y-HVMN].

51. For example, Congresswoman Marjorie Taylor Greene was banned from Twitter for spreading COVID-19 misinformation. *See* Davey Alba, *Twitter Permanently Suspends Marjorie Taylor Greene's Account*, N.Y. TIMES (Jan. 2, 2022), https://www.nytimes.com/2022/01/02/technology/marjorie-taylor-greene-twitter.html [https://perma.cc/F5F4-V4LJ].

52. Hsu, *supra* note 50 ("'Pre-Covid, people who believed in medical misinformation were generally just talking to each other, contained within their own little bubble, and you had to go and do a bit of work to find that bubble[.] . . . But now, you don't have to do any work to find that information—it is presented in your feed with any other types of information.'").

53. *Bias*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/bias [https://perma.cc/3LHS-KUT6] (last visited Oct. 7, 2023).

54. I received numerous comments while writing this paper challenging the use of the loaded term. An earlier draft of this article emphasized political realities that, while indirectly relevant, ultimately diluted the article's focus and message.

55. Fletcher, *supra* note 14, at 1.

the editor's point of view. For a less charged example of bias, recency bias is a cognitive bias to place more weight on recent experiences than older ones when estimating future events.[56] Its antonym, primacy bias, emphasizes the first pieces of information that people received over those that they encountered later.[57] One might argue that American legal thought (and perhaps the law more generally) demonstrates either of these biases.[58] While either claim may have political implications, neither is inherently political bias.[59] These political implications might be worth investigating further, but they are not essential at this early stage in the interpretive process.

C. Acknowledging the Message's Existence Without Acknowledging Its Content

My most significant departure from Fletcher's approach is to focus on the content of the bias conveyed by editorial choices rather than the mere existence of that bias. While Fletcher makes a compelling case that textbook authors have various biases that significantly affect the content and message their textbook conveys, she does not examine what that message is. As she explains,

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56. Robert B. B. Durand et al., *Behavioral Biases in the NFL Gambling Market: Overreaction to News and the Recency Bias*, 31 J. BEHAV. & EXPERIMENTAL FIN. 100522 (2021) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861231 [https://perma.cc/H7QR-NKQG].

57. Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCH. Q. 285, 286 (1983).

58. For examples of articles accusing the legal world of recency bias, see Chance Meyer, *Law Schools Need Improvement Science, Now More Than Ever*, 51 SYLLABUS 9, 10 (2022) (criticizing the customary approach to a new law school challenge by stating, among other things, that "recency bias is common."); Eric Segall, *Recency Bias and the Supreme Court as a Broken Institution*, DORF ON LAW (Apr. 11, 2022), https://www.dorfonlaw.org/2022/04/recency-bias-and-supreme-court-as.html [https://perma.cc/225B-VMN4] ("Recency bias has played a large role in the thinking of Court watchers that we are in more difficult times than ever when it comes to the Justices' decisions."). For an example accusing the legal world of primacy bias, see Matthew I. Fraidin, *Heuristics, Cognitive Biases, and Accountability: Decision-Making in Dependency Court*, 90 CLEV. ST. L. REV. 913, 944 (2013) ("Judges in family court likely are susceptible to a cognitive bias described as the 'primacy effect.'").

59. For an example of recency bias having some effect on politics, see Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 545 (2010) ("Political scientists have found that voters pay closer attention as the election draws near and posit a 'recency bias' (the 'what have you done for me lately' phenomenon), where voters weigh more heavily their representatives' recent actions, in response to which politicians seeking re-election attempt to accomplish more for their constituents toward the end of their terms."). For an example of primacy bias having some effect on politics, see Meryl Chertoff & Dustin F. Robinson, *Check One and the Accountability is Done: The Harmful Impact of Straight-Ticket Voting on Judicial Elections*, 75 ALB. L. REV. 1773 (2012) (arguing that, although partisan judicial elections are flawed because prior knowledge of party affiliation can overwhelm consideration of judicial ability, such elections are superior to straight-ticket voting because the voter is given opportunity to challenge prior biases).

> It is not necessary for law librarians to determine and teach students whether the biases of casebook authors skew "liberal" or "conservative." The point is that the standards for information literacy call for students themselves to be able "to evaluate . . . point of view or bias."[60]

It is not a librarian's job to provide a list of "conservative" and "liberal" textbooks, but failing to engage with the message conveyed by a text at all will leave students unable to identify subtle biases among reliable sources in any meaningful way. Most of the factors listed within the standards point to comparatively discreet information—"reliability, validity, accuracy, authority, relevance"—that can be easily and quickly identified.[61] These five factors can be understood as information literacy, which is a concept closely associated with librarianship. The ability to evaluate a point of view or bias, while a component of information literacy, requires deeper and more subjective analysis that taps into a distinct, but closely related, concept—media literacy.

1. Defining Information Literacy and Media Literacy.—Information literacy is an aspect of librarianship that has become a major part of modern discourse, and this is reflected in its inclusion within the American Bar Association's Standards and Rules of Procedure as a required topic of legal instruction.[62] While a precise definition of information literacy is elusive, the following is a useful working definition:

> Information literacy is the set of integrated abilities encompassing the reflective discovery of information, the understanding of how information is produced and valued, and the use of information in creating new knowledge and participating ethically in communities of learning.[63]

The American Association of Law Libraries' *Principles and Standards for Legal Research Competencies* includes an information literacy-like obligation for evaluating legal informational material under criteria of "authority, credibility, currency, authenticity, relevance, and bias."[64]

Media literacy is a more nebulous concept than information literacy that has evolved in both definition and public interest over recent years. One commonly cited definition comes from the 1992 Aspen Media Literacy Leadership Institute, which defined media literacy as "the ability to access, analyze,

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60. Fletcher, *supra* note 14, at 201.

61. AM. ASS'N OF L. LIBR., *supra* note 48, at 4.

62. AM. BAR. ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–2023 43 (2022).

63. ASS'N OF COLL. & RSCH. LIBRS., FRAMEWORK FOR INFORMATION LITERACY FOR HIGHER EDUCATION 3 (2015).

64. AM. ASS'N OF L. LIBR., *supra* note 48, at 4.

evaluate, and create media in a variety of forms."[65] "It is a broadened definition of literacy that includes media beyond text and promotes curiosity about the media we consume and create."[66] The Center for Media Literacy, an educational organization "[d]edicated to promoting and supporting media literacy education as a framework for accessing, analyzing, evaluating, creating and participating with media content,"[67] has expanded its definition:

> [Media literacy] provides a framework to access, analyze, evaluate, create and participate with messages in a variety of forms – from print to video to the Internet. Media literacy builds an understanding of the role of media in society as well as essential skills of inquiry and self-expression necessary for citizens of a democracy.[68]

Media Literacy Now, another educational organization dedicated to increasing media literacy education in public schools, offers its own definition of the concept:

> Media literacy is the ability to:
> - Decode media messages (including the systems in which they exist);
> - Assess the influence of those messages on thoughts, feelings, and behaviors; and
> - Create media thoughtfully and conscientiously.[69]

In short, media literacy involves the skills necessary to take information and derive conclusions and meaning from it, rather than the ability to know discrete pieces of information. It is worth knowing that a textbook conveys a message, but it is the equivalent of knowing that a conversation occurred with no knowledge of what the participants talked about. My inquiry is an attempt to figure out what the conversation entailed and demonstrate how others might pursue a similar analysis.

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65. *Media Literacy: A Definition and More*, CTR. FOR MEDIA LITERACY, https://www.medialit.org/media-literacy-definition-and-more [https://perma.cc/2D4E-ZPVH] (last visited Feb. 6, 2023).

66. Mary Kate Lonergan, *What Is Media Literacy and How Can Simple Shifts Center It*, PBS TCHR. LOUNGE (Oct. 28, 2022), https://www.pbs.org/education/blog/what-is-media-literacy-and-how-can-simple-shifts-center-it [https://perma.cc/F38E-RQK7].

67. *About CML*, CTR. FOR MEDIA LITERACY, https://www.medialit.org/about-cml [https://perma.cc/TZM5-5E4P] (last visited Oct. 6, 2023).

68. *Media Literacy: A Definition and More*, *supra* note 65.

69. *What is Media Literacy?*, MEDIA LITERACY NOW, https://medialiteracynow.org/what-is-media-literacy/ [https://perma.cc/5TRF-B5BB] (last visited Feb. 6, 2023).

III. TREATING CASEBOOKS AS ART

The shift from information literacy to media literacy has an underlying current in changing how those assessing legal materials consider those cases. "Information" suggests objectivity. Many definitions of information emphasize things like "facts" or "data."[70] There is such a thing as good information—information that is correct—and bad information—information that is wrong. Legal documents like casebooks aspire to this objectivity to present the law as it was decided and leave it to the reader to respond to those facts.

While media[71] can be related to information (since people use media to communicate information broadly), it can also communicate less clearly defined concepts, such as emotions, perceptions, or general concepts. This makes the analysis of media an inherently more subjective exercise. If "good" media and "bad" media exist at all (a subject of considerable and long-standing debate),[72] the analysis will emphasize the content of the message conveyed and the effectiveness in conveying that message.[73] These sorts of questions are typically the purview of art critics rather than attorneys.

In essence, I encourage the reader to engage with legal casebooks (and perhaps legal documents and the law more generally) as art. While this approach may be novel, it is not unprecedented. Pierre Schlag articulated a "description of those recurrent forms that shape the creation, apprehension, and identity of the law," which he identified as "aesthetics."[74] Schlag's definition of aesthetics explicitly rejected the ethical and moral issues with "the disturbing possibility that law paints its order of pain and death on human beings with no more ethical warrant or rational grounding than an artist who applies paint to canvas." [75]

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70. For example, one definition of the word given by Merriam-Webster is simply "Facts, Data." *Information*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/information [https://perma.cc/NE72-A24M] (last visited Oct. 8, 2023). Another from the Oxford English Dictionary defines information as "Knowledge communicated concerning some particular fact, subject, or event." *Information*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/information_n?tab=meaning_and_use#416073 [https://perma.cc/8MA8-3VRC] (last visited Oct. 8, 2023).

71. Here meaning "[t]he main means of mass communication, *esp.* newspapers, radio, and television, and (from the later 20th century) content accessed via the internet, regarded collectively." *Media*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/media_n2?tab=meaning_and_use#37520622 [https://perma.cc/XSW4-BAUL] (last visited Oct. 8, 2023).

72. *See, e.g.*, A.H. Hannay, *Is Art Subjective?*, 48 PROC. ARISTOTELIAN SOC'Y 29, 29 (1947–48) ("Popular discussions about art almost invariably centre on the question of the relativity of taste, and there is usually a tendency to admit that there is no objective rightness or wrongness in art.").

73. It is worth pointing out that information can be considered better or worse based on how clearly it is communicated. Even then, incorrect information clearly communicated would still be bad information while correct information communicated poorly could conceivably become good information if properly presented or interpreted.

74. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1049, 1051 (2002).

75. *Id.* at 1050.

However, he acknowledged the clear connection between the study of aesthetics and the study of art.[76] As evidenced below, this concern with an overly abstract and amoral approach to the law is not entirely unwarranted. Ronald Dworkin offered a more explicitly artistic example when he compared a judge deciding a case informed by past precedent to an author writing a chapter as part of a chain novel in which several authors take turns writing chapters informed by each previously written chapter in the hope of creating a single cohesive document.[77] As the tools of law move online and presentation beyond traditional hierarchically arranged text becomes more common, a more aesthetic understanding of the law is essential to its research, instruction, and application.[78]

While one might reject the notion that law, as it presents itself in the real world and art, are the same,[79] that line blurs when faced with a creative work describing the law. Dworkin's example fits that act of writing a casebook perfectly, so long as the reader replaces the judge with the casebook editor who is more interested in accurately reflecting reality than shaping a better one. The way that casebooks are written, which are typically "opaque"[80] and deliver information in "small drips"[81] so that students are forced to learn doctrine by analyzing a text, actively encourage students to engage in interpretation to understand what the proposed reality even is. As Matthew Butterick argued in *Typography for Lawyers*, "The substance-presentation distinction has always been a false dichotomy, because the two overlap."[82] If a choice as simple as the type of font used can change the message conveyed by a casebook, a choice as complex as how to edit and present a case and whether to include a case at all can certainly change a casebook's message.

While it is far beyond the scope of this article to explore all aspects of art criticism, here are a few artistic concepts that will clarify the casebook analysis moving forward.

A. The Audience

The first concept is one that will likely be familiar to most readers—that what information a work conveys, and how it organizes and conveys that

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76. *Id.* at 1049-50.

77. RONALD DWORKIN, LAW'S EMPIRE 228-38 (Hart 1986).

78. Sam Williams, *The Aesthetics of Legal Research*, 41 LEGAL REFERENCES SERV. Q. 1, 3 (2022).

79. For one example, see J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663 (2010).

80. KENT C. OLSON, LEGAL INFORMATION: HOW TO FIND IT, HOW TO USE IT 58 (1999).

81. *Id.*

82. MATTHEW BUTTERICK, *Why Does Typography Matter?*, in TYPOGRAPHY FOR LAWYERS (2d ed. 2015); *see also* Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ASS'N LEGAL WRITING DIRS. 87 (2010) (arguing that the narrative of an argument in a case can be strengthened or weakened by use of fonts that align with the narrative conveyed).

information, will differ wildly based on the writer's intended audience. Numerous legal writing books emphasize this point.[83] Part of law is the art of persuasion,[84] and it is essential to know whom one is trying to persuade to effectively persuade them. Most readers likely already understand this point, at least as applied to writing intended to persuade (such as a brief or an academic article).[85] They also likely understand how content is written to inform also changes based on the perceived knowledge and abilities of those it is meant to inform.

However, this observation carries several implications that may be less intuitive to most readers. The first is that a reader does not passively receive information, but instead apprehends that information by engaging with the text. When a reader engages with a text, it is a conversation between the writer, who communicates with the reader through the text, and the reader, who interprets the text. That act of interpretation is not a passive one. A reader injects their own experiences and biases into their understanding of a text. One must understand both participants in that conversation to understand the message conveyed.

If media literacy requires both an interpreter and a text to interpret, what interpreter should be given priority when assessing a work's meaning? One approach would be to consider multiple possible perspectives and characterize how they might respond to a text. For example, in her feminist analysis of a Contracts casebook, Mary Joe Frug "describe[d] a variety of possible casebook readers in order to create a shared sense of readers and their attitudes towards gender."[86] Frug then included explanations of how these different readers—including such characters as "The Feminist," "The Reader with a Chip on the Shoulder," and "The Innocent Gentleman"—would respond to the material covered by the text.[87]

While Frug's rightly celebrated work is an exhaustive and insightful example of what a detailed analysis of a single casebook can reveal, her approach is different from that of this article.[88] For my purposes, it is neither necessary nor desirable to create a caricature of students or colleagues to derive

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83. *See, e.g.*, WAYNE SCHIESS, WRITING FOR THE LEGAL AUDIENCE (2d ed. 2014); CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS (3d ed. 2020) (chapter 19, entitled "The Transition from Objective to Persuasive Writing," specifically calls attention to the importance of a new audience); KAMELA BRIDGES & WAYNE SCHIESS, WRITING FOR LITIGATION (2011) (which addresses the distinct audiences for numerous types of legal documents, including complaints, demand letters, jury instructions, and motions).

84. *See, e.g.*, JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES (2d. ed. 2022).

85. COUGHLIN, ET AL., *supra* note 83. That chapter 19 is entitled "The Transition from Objective to Persuasive Writing" indicates that the first eighteen chapters deal largely for objective writing.

86. Mary Jo Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. UNIV. L. REV. 1065, 1066 (1985).

87. *E.g.*, *id.* at 1070-74; *id*. at 1081.

88. For example, she focuses a casebook's structural details and content inclusions more than the case-by-case editorial decisions considered here. She also approaches the text from a different viewpoint than I do (although not necessarily one that I disagree with).

meaning from the editorial decisions made in these casebooks. However, it should not merely be implied that the readings below are heavily informed by my own experiences and biases.[89] Living within the legal profession for ten years can change my biases from those of a first-year law student who is more likely to read a casebook. It is also entirely possible that another reader would draw very different conclusions from these texts. One of those conclusions may be that they convey no message, that the search for meaning within these decisions is "reading too much into it." This conclusion is an act of interpretation itself, one that makes a tremendous amount of effort to remove messages that the text conveys. Not having a take on the text is a take itself, one that presumes neutrality and objectivity while emphatically reinforcing numerous deeply ingrained messages and biases.[90]

The importance of the individual reader in deriving meaning from a text also means that a work's meaning may change based on the audience that it is intended for and the audience that reads it. I examine casebooks instead of their accompanying teacher's manuals because those are different texts written for a different audience. I am most interested in the messages that casebooks convey to their students. While teacher manuals might affect that meaning by informing how the material is discussed in class or assigned, it offers another level of interpretation—the instructor reading it—that dramatically complicates the narrative. With that said, a reader more interested in a "deep dive" into their casebook would likely benefit from applying the same analysis to the teacher's manual.

B. Death of the Author

The importance of the reader in the process of discovering meaning implies another observation from the art world—that the author does not have the final word on what their work means. In his 1967 essay *The Death of the Author*, French literary critic Roland Barthes argued that the author's intentions and biography were less important in discerning a text's meaning than each reader's interpretation of the text.[91] First, there is a serious question about who an author even is. Barthes challenged the notion of a human author (specifically the primacy of that author's vision and desires in interpretation), a distinctly modern creation that owed its existence to the social movements and individualism of empiricism, rationalism, and reformation.[92] He instead characterized a text as a

89. For one factor differentiating this analysis from Frug's, I am male instead of female, making me more like the characters described by Frug than the author performing the analysis.

90. For an example of a scholar arguing a similar point, see Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368 (2015) ("These decisions about what or how we teach are not neutral, objective, or apolitical. They are decidedly political, and they have consequences for the shape of the profession and law.").

91. Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., Fontana 1977).

92. *Id*. at 142-43.

nebulous collection of influences simply transcribed by a scriptor.[93] Even allowing for a discernible human creator whose intent could be divined, most (if not all) projects involve some level of collaboration that makes the identification of a single creator impossible. For a modern example, while there is a tendency to credit a film's creation to its director,[94] film is a creative medium that is the product of input from dozens, if not hundreds, of people.[95] At a smaller (and perhaps more relatable) scale, if a book has an editor and an author, to read the editor out of the text denies a key creative force behind it.[96] Second, even if an author or set of authors can be clearly identified, it is impossible to detect what exactly that author intended.[97] While it risks overstating the case to say that the author is dead (especially in light of some author-centric analysis below), the value of the author's intent and interpretation of their own work should be given limited weight in textual analysis.

The Death of the Author is a deeply influential work that I have only superficially characterized here.[98] Even this superficial characterization offers some insights into the casebook analysis below. First, in order to kill the author, the reader must notice an author who has either deliberately or accidentally obfuscated their role in creating the text. While casebooks are credited to their editors, within the text of the book itself individual opinions cite the judge who is credited with writing the opinion.[99] A reader must understand that they are reading and interpreting a text that has already been read, translated, and

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93. *Id.* at 145.

94. For instance, the "auteur" theory (which was adapted from French film criticism and literally translates to "author" theory) is a tool of film criticism that identifies how unique filmmakers leave a unique stamp on their work, despite filmmaking's collaborative nature. *See* Peter Wollen, *The Listmaker*, SIGHT & SOUND, Nov. 1998, at 30 (book review).

95. One need only look to the credits of a motion picture to see how many people were involved with a single production. According to one blog post, an average of 500 people are involved in the creation of a film. *See* Pete Briley, *How Long Does It Take to Make a Movies? The Ultimate Guide*, MUSIC GATEWAY (June 7, 2023), https://www.musicgateway.com/blog/filmmaking/how-long-does-it-take-to-make-a-movie# [https://perma.cc/9ED4-JQVS].

96. *The Death of the Author* is a translation of the French title *La mort de l'auteur*, which is a play on LE MORTE D'ARTHUR, the Anglo-Norman French translation of "The Death of Arthur." *See* SIR THOMAS MALORY, LE MORTE D'ARTHUR (A.W. Pollard 1903). LE MORTE D'ARTHUR is a collection of the numerous tales told about King Arthur, Camelot, and other figures of Arthurian legend. The collection was compiled, edited, and curated by Sir Thomas Malory. Due to the diffuse sources that contributed to the work, biographical analysis of the text is impossible and pointless. As one helpful colleague noted, the editor's touch might be *very* light, but as evidenced below, even a light touch can meaningfully affect the interpretation of a text.

97. For an introduction of this concept that predates but is somewhat complimentary to Barthes, *see* William K. Wimsatt & Monroe Beardsley, *The Intentional Fallacy*, 54(3) SEWANEE REV. 468 (1946) ("[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art.").

98. For a detailed explanation of the term's history and place in philosophical discourse, see Elton Fukumoto, *The Author Effect after the Death of the Author: Copyright in a Postmodern Age*, 72 WASH. L. REV. 903 (1997).

99. For examples, see the aforementioned casebooks, *supra* notes 27, 31.

interpreted by an editor in order to produce their own informed interpretation of the text.

A second takeaway from *The Death of the Author* for these casebooks is that the reader is not bound by the intent of editor. There is significant evidence that even the most intelligent people are oblivious to their own biases.[100] Those biases might not be apparent until one encounters someone who does not have those biases or has their own conflicting ones. While the author's intent might help the reader to interpret the work, it is one tool of many that can inform analysis. This means that while the author's intent may not be an essential aspect of interpretation, the identity of the author may be relevant in discerning (or providing additional evidence of) an interpretation of the text. The author's intent is relevant, but it is far from dispositive.

Disentangling an author's intent from the message conveyed by the book also allows the reader to analyze a message without engaging in armchair psychology. While an attentive reader might make inferences about the character of the casebook editor by the message that they convey, those inferences could easily be incorrect. The emphasis on the author's message, rather than the author themselves, keeps the analysis on the reader's relationship to the work. It is one thing to say that an author makes editorial decisions informed by their biographical details that change the message that they convey. It is another for a reader to recognize biases in another work that allow them to identify and examine their own biases, and perhaps change those biases and their impact on the world. The second of these options seems like the far more helpful one.

For a contemporary example of why breaking meaning free of the author's intent can be beneficial and even necessary, consider generative "artificial intelligence" such as Chat GPT. These programs work by creating a wide variety of typically creative work—including images and text—by learning the patterns and structure of input training data and then using that data to generate new materials that exhibit similar characteristics.[101] The application of the term "artificial intelligence" to these technologies is arguably something of a misnomer. Skeptics argue that they mimic text without any core understanding

100. HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES 16 (updated ed. 2020) ("[O]ne of the many remarkable contradictions we see in [bias] research is that intelligent people with high self-esteem may be the most likely to develop blind spots about their biases."). The book also cites Philip G. Dodgson & Joanne V. Wood, *Self-Esteem and the Cognitive Accessibility of Strengths and Weaknesses After Failure*, 75(1) J. OF PERS. & SOC. PSYCH. 178 (1998), for the principle that people with high self-esteem may be less likely to internalize negative thoughts or ideas about themselves.

101. *See, e.g.*, Adam Pasick, *Artificial Intelligence Glossary: Neural Networks and Other Terms Explained*, N.Y. TIMES (Mar. 27, 2023), https://www.nytimes.com/article/ai-artificial-intelligence-glossary.html [https://perma.cc/C9TE-UT3L]; Andrej Karpathy et al., *Generative Models*, OPEN AI (June 16, 2016), https://openai.com/research/generative-models [https://perma.cc/5JPC-HVK5].

of what it is doing or talking about.[102] Evangelists contend that any intelligence that it possesses is entirely alien to human consciousness and cannot be easily understood.[103] The issue of "artificial intelligence" as a creative actor has already raised questions over things like copyright, which traditionally demands a human author of creative work.[104] Whatever one makes of this debate, the concept of bias in these generative artificial intelligence models is a widely recognized separate issue with the technology.[105] Bias exists and can have real consequences regardless of who the author is or if a text even has an author. To understand what those biases are and why they matter, readers must be able to interpret the text critically.

A third point is that interpretation is not always a conscious act. If the writer has an unconscious bias, the reader almost certainly does as well—it may just be a different bias. One might hope that a reader becomes more aware of their biases by recognizing them in another work. However, this process may take time, if it happens at all. That does not mean that an instinctive reaction to a work has no value for either its editor or an instructor. In the words of game designer Mark Rosewater, "Your audience is good at recognizing problems and bad at solving them."[106] Many teachers' first response to a persistent disconnect with their students amounts to the popular quote from *The Simpsons*: "Am I so out of touch? No, it's the children who are wrong."[107] There is an understandable tendency to focus on what baggage students are bringing into the conversation, which presumes a sort of neutrality and "correctness" to the professor's role in that conversation. When a person visits a doctor, the first thing the doctor does is ask how the patient is feeling. The patient is the expert on that specific topic (i.e., how they feel). The doctor's value comes from having the tools and knowledge necessary to interpret that feeling and find a solution.[108] When

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102. *See*, *e.g.*, Max G. Levy, *Chatbots Don't Know What Stuff Isn't*, QUANTA MAG. (May 12, 2023), https://www.quantamagazine.org/ai-like-chatgpt-are-no-good-at-not-20230512/ [https://perma.cc/56AY-TZ54].

103. For example, A.I. engineers have taken to comparing generative A.I. to "Shoggoths," horrors of undefinable alien intelligence created by author H.P. Lovecraft. *See* Kevin Roose, *Why an Octopus-like Creature Has Come to Symbolize the State of A.I.*, N.Y. TIMES (May 30, 2023), https://www.nytimes.com/2023/05/30/technology/shoggoth-meme-ai.html [https://perma.cc/AT23-54C8].

104. *See*, *e.g.*, Michael D. Murray, *Generative and AI Authored Artworks and Copyright Law*, 45 HASTINGS COMM. & ENT. L.J. 27 (2023).

105. *See*, *e.g.*, Drew Roselli et al., *Managing Bias in AI*, *in* WWW '19: COMPANION PROCEEDINGS OF THE 2019 WORLD WIDE WEB CONFERENCE 539-44 (Ass'n for Computing Mach. ed., 2019).

106. GDC, *'Magic: the Gathering': 20 Years, 20 Lessons Learned*, YOUTUBE (May 2, 2016), https://www.youtube.com/watch?v=QHHg99hwQGY&t=3472s [https://perma.cc/Z4NQ-A7G7] (beginning at 56:50). Rosewater also wrote and published a version of this presentation on the *Magic: The Gathering* website. *See* Mark Rosewater, *Twenty Years, Twenty Lessons-Part 3*, MAGIC: THE GATHERING (Jun. 13, 2016), https://magic.wizards.com/en/news/making-magic/twenty-years-twenty-lessons-part-3-2016-06-13 [https://perma.cc/8AFB-JF6J].

107. *The Simpsons: The Boy Who Knew Too Much* (Fox television broadcast May 5, 1994).

108. GDC, *supra* note 106.

multiple readers consistently have the same reaction to a text, there is likely something about the text facilitating that reaction that the reader intuits but cannot fully articulate. When this situation occurs, it may be more helpful for the author (or, in this case, the teacher) to think of themselves as doctors helping a patient identify a problem rather than a teacher correcting a wayward pupil.

C. The Kuleshov Effect

A third artistic concept that might help clarify the casebook analysis is one borrowed from film criticism: the Kuleshov Effect. The effect is named for Lev Kuleshov, a film editor and theorist who perceived the ability of film to convey meaning through multiple images as the key to film's identity as a distinct art form.[109] Kuleshov's contention was that viewers drew more meaning from the interaction of two different images than they drew from either image in isolation.[110] To demonstrate this principle, Kuleshov edited a film in which footage of an actor alternated with footage of other material. The footage of the actor was the same each time, but when paired with footage of food, audiences read the actor's blank expression as hunger, while they read the actor's blank expression as sadness when paired with footage of a girl in a coffin.[111]

While this effect is an imperfect explanation of one aspect of evaluating these casebooks, it evokes an important organizational principle that informs these readings. When analyzing several different cases that have been organized into a single document with a cohesive narrative, the way that the topics are organized will inform how those individual cases are understood, even if the content remains the same. The Thirteenth Amendment of the United States Constitution, which ended slavery in the United States,[112] is cause for celebration and a national holiday.[113] The Thirteenth Amendment, which mostly prohibited slavery but allowed slavery or involuntary servitude ". . . as a punishment for crime whereof the party shall have been duly convicted," has been widely criticized as enabling and even encouraging criminal conviction.[114] No matter how accurately a source portrays the Amendment, that source will

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109. *Kuleshov Effect: Everything You Need to Know*, NASHVILLE FILM INST., https://www.nfi.edu/kuleshov-effect/ [https://perma.cc/9DL4-E8VF] (last visited Oct. 14, 2023).

110. GERALD MAST & BRUCE F. KAWIN, THE MOVIES: A SHORT HISTORY 176 (Allyn & Bacon 1996).

111. *Id.*

112. U.S. CONST. amend. XIII

113. Juneteenth National Independence Day Act, Pub. L. No. 117-17, 135 Stat. 287 (2021). For an example of the history behind the holiday, see Derrick Bryson Taylor, *Juneteenth: The History of a Holiday*, N.Y. TIMES (June 19, 2023), https://www.nytimes.com/article/juneteenth-day-celebration.html [https://perma.cc/TQ5F-BZKJ].

114. Ava DuVernay's award-winning documentary 13TH is a popular example. 13TH (Netflix 2016). For academic work dealing with this topic, see for example MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509 (2014).

read differently in the context of Constitutional Law, which would emphasize the primary purpose of the law, than it would in Criminal Law, which would emphasize its modern implications for punishment and enforcement.

The notion that *Kelo* makes more sense as a Property case than a Constitutional Law case is arguably an example of this—that *Kelo* will mean something different if it is introduced in the context of government power and individual liberties than it will in the context of ownership. As demonstrated below, placing *Kelo* in different sections of the book that address different aspects of constitutional law can significantly change the meaning that the reader draws from the case. The key takeaway is that the structure of the book and the case's location within the book can convey a message at least as clearly as the edits made within the case itself.

IV. ANALYZING THE INDIVIDUAL TEXTBOOKS

Now that the reader knows what I am doing and some of the rudimentary tools that I am using to do it, it is time to interpret the casebooks and determine what (if any) message can be divined from the editorial decisions that the casebook editors made.

Before analyzing the casebooks, readers should note that while I am using approximately the same data set (collection of sections of textbooks) as Fletcher, I am using a slightly different collection of material than she does. As noted above, I consider the case's location within the textbook while she does not. I also consider an additional Constitutional Law textbook that clarifies the editorial decisions identified by Fletcher. Finally, I use an entirely different case than she does for the Property textbooks.

Those small changes help illustrate the important point that the examples below are not intended as any sort of definitive "bias analysis" for these or any other casebooks. The list is far too small to be exhaustive. The emphasis is also on a portion of a single case within textbooks containing hundreds. I deliberately minimize attempts to acknowledge how someone else might interpret the work. They are intended as seven examples of how a reader might derive meaning from an author's editorial decisions. Even if the sample size is too small to derive any universal understanding, it offers several insights into patterns of author bias worth noting and keeping in mind moving forward.

The following sections expand on Fletcher's observation by exploring her data set. I begin by discussing how the four Constitutional Law casebooks in question[115] present (or decline to present) *Kelo*—the case mentioned above in which the Court found that it was constitutionally permissible to take private property using eminent domain for the public purpose of economic development through private use. I then look at how the three Property textbooks that Fletcher

115. CHEMERINSKY, *supra* note 27; MASSEY CONSTITUTIONAL, *supra* note 27; ROTUNDA, *supra* note 27; VARAT CONCISE, *supra* note 27.

identified[116] treat *Kelo*. For each textbook, I describe how *Kelo* fits within the book's organization and describe the edits that the author makes in order to present *Kelo* in the way that best fits their understanding of their topic.[117] These observations are not intended as a definitive analysis of what these casebooks are and how they work, but rather as a demonstration of how one might interpret the story that each textbook tells about its topic and how that might shape student understanding of the topic overall.

A. Kelo *in Constitutional Law Casebooks*

In her article, Fletcher looks at the contents of four different Constitutional Law casebooks. These books are *Constitutional Law*, 4th edition, by Erwin Chemerinsky; *American Constitutional Law: Powers and Liberties*, 4th edition, by Calvin Massey; *Modern Constitutional Law: Cases and Notes*, 9th edition, by Ronald D. Rotunda; and *Constitutional Law: Cases and Materials*, concise 13th edition, by Jonathan D. Varat, William Cohen, and Vikram D. Amar.[118] The case that she picked to examine, which I reuse here, is *Kelo v. City of New London*.[119] I also include a fifth casebook, *Constitutional Law: Cases and Materials*, 13th edition, by Jonathan D. Varat, William Cohen, and Vikram D. Amar,[120] which is the complete edition of the concise edition Fletcher considers. This full edition *does* include *Kelo*, but in a way that helps to understand why the editors chose to omit the case in the concise edition.

1. Chemerinsky: Liberal Political Bias.—Erwin Chemerinsky addresses *Kelo* in his chapter discussing economic liberties.[121] That chapter also covers the Contracts Clause and, critically, a historical review of Economic Substantive Due Process that goes through the *Lochner*-era decisions and the post-1937 decisions that have largely rejected that earlier doctrine.[122] The *Lochner* era was a period in the early twentieth century during which the United States Supreme Court regularly struck down laws that infringed on economic liberty or private contract rights.[123] *Lochner* in particular has been widely criticized as "the

116. *See* Fletcher, *supra* note 14, at 190-91; DUKEMINIER ET AL., *supra* note 31; MASSEY PROPERTY, *supra* note 31; SINGER, *supra* note 31.

117. While I have attempted to describe the contents of each book clearly and concisely, I include a version of *Kelo* highlighting the text cited in each casebook in the Appendix.

118. Fletcher, *supra* note 14, at 189.

119. 545 U.S. 469 (2005).

120. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS (13th ed. 2009) [hereinafter VARAT FULL].

121. CHEMERINSKY, *supra* note 27, at 698.

122. *Id.* at xviii-xix.

123. Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning from the 20th Century*, *in* PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL 31 (Harvey Martin Jacobs ed., 2003). The era is named for *Lochner v. New York*, 198 U.S. 45 (1905), an infamous decision overruling a New York law setting maximum working hours for bakers as violative of the workers' freedom to contract under the Constitution's Fourteenth Amendment.

symbol, indeed the quintessence, of judicial usurpation of power."[124] Section D of Chemerinsky's chapter on economic liberties has four sub-sections: an introduction; a section asking what a "taking" is; a section asking if it is for "public use"; and a section discussing "just compensation."[125] Chemerinsky includes *Kelo* in sub-section 3, as the second of two cases discussing what a "public use" is.[126] The other, earlier case is *Hawaii Housing Authority v. Midkiff*, in which the Court ruled that using eminent domain to break up highly concentrated Hawaiian land ownership was a public service.[127]

Chemerinsky's edits emphasize the procedure and intention of the proposed development plan. It includes the first paragraph in its entirety, the first paragraph of Section I, and the majority of the second paragraph of Section I.[128] These quotations from Section I emphasize the dire economic state of the area and how the plan was designed to resolve that issue in its entirety. The facts that Chemerinsky omits went into detail about how the land being taken would be used as a part of that plan.[129] Chemerinsky's brief quotation of Section II describes the plaintiffs in short, sympathetic terms as proud homeowners who are being forced out exclusively because of their proximity to the project.[130]

The story that Chemerinsky tells through his editorial decisions is a cohesive one, but one that forces the reader to make several assumptions without realizing it. The chapter begins by describing how generalized economic rights as a limiting factor on government action is effectively a dead doctrine.[131] Rather than address these economic rights as a part of substantive due process, which he discusses in another chapter, he connects these discarded rights to other economic protections that are explicitly ensured by the Constitution. In doing so, he weakens those explicitly protected rights by association with a dead (and unpopular) doctrine.

Chemerinsky then describes what economic rights the Constitution does protect, spelling out the three components that a regulatory taking requires: (1) there is a taking, (2) it is for a public use, and (3) there is just compensation.[132] This analysis more closely resembles the Property outline, emphasizing the elements of a regulatory taking rather than saying broadly what the point of a regulatory taking is.[133] The facts of *Kelo* provided emphasize utilitarian

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124. ROBERT H. BORK, THE TEMPTING OF AMERICA 44 (1990). For examples, see BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 744 (6th ed. 2009) *(describing the case as "one of the most condemned cases in United States history.").*

125. CHEMERINSKY, *supra* note 27, at xix-xx.

126. *Id.* at xix.

127. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984).

128. CHEMERINSKY, *supra* note 27, at 698.

129. *See generally* Kelo v. City of New London, 545 U.S. 469, 473-75 (2005); *see also* the Chemerinsky-highlighted version of *Kelo* in the appendix.

130. CHEMERINSKY, *supra* note 27, at 699.

131. *Id.* at 623.

132. *Id.* at 658-710.

133. NAT'L CONF. BAR EXAM'RS, *supra* note 37, at 6.

considerations and treat the city's actions as several small components that function together as part of a cohesive whole.[134] The United States has a proud tradition of accomplishing policy objectives through private action, and this seems of a piece with other economy-stimulating efforts that are clearly constitutional.[135] With no free-standing property interests and a clearly stated public objective, this rationale appears logical, if not inevitable. It even relies on an instance where eminent domain was used to transfer privately held property to an economically disadvantaged racial minority, giving a more benign example of the same underlying doctrine in action.[136] While this specific instance might produce an unwanted outcome, it makes sense as a part of the cohesive whole with a unique ability to serve the public good.

I begin with Chemerinsky's book because it appears to offer an in-depth, favorable impression of *Kelo*. This is entirely consistent with Chemerinsky's public persona as a left-of-center legal scholar.[137] While there are less political biases considered below, it makes sense to begin with a clear political divide between casebook authors. Chemerinsky's book also makes relatively limited edits to the contents of the case, seemingly only leaving out facts about the specific uses of the land taken. The book is the least heavily edited of the Constitutional Law textbooks, but that limited editing makes its significant editorial decisions more subtle and harder to notice.

2. Massey: Conservative Political Bias.—Massey's book is broken into three broad parts: "The Role of the Courts in Constitutional Interpretation," "Enforcing the Constitutional Allocation of Government Power," and "Limits on the Use of Governmental Power."[138] One noteworthy feature differentiating Massey's book from others is that its primary emphasis is on the judiciary and its role in constitutional interpretation. While the book inevitably discusses the other branches of government (and all Constitutional Law casebooks do give the courts a key role), the key actor in all instances is the judiciary.

Massey addresses *Kelo* in the chapter titled "Economic Rights: The Takings and Contracts Clauses."[139] The chapter goes into some detail on the Takings Clause, considering the public-use Requirement, regulatory takings (or when a regulation becomes a taking), and conditional regulatory takings.[140] *Kelo* is

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134. *Kelo*, 545 U.S. at 473-75.

135. For a recent example, see The American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), which was designed to counter the economy-depressing effects of the COVID-19 pandemic by providing funds to private individuals and corporations.

136. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

137. For examples of his other work supporting center-left legal causes, see ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010); ERWIN CHEMERINSKY WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY (2018); ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022); ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021).

138. MASSEY CONSTITUTIONAL, *supra* note 27, at ix-xvii.

139. *Id.* at 606.

140. *Id.* at xix.

considered as part of the public-use requirement, again following *Hawaii Housing Authority v. Midkiff*.[141]

Massey's edited version of the case includes part of the majority opinion's introduction and a parenthetical summarization of the facts presented by the Court.[142] The edits to the introduction simplify the parties by referring to the city's development agent as "[The city]" and removing any reference to the other residents who voluntarily sold their land to the city.[143] The factual parenthetical mentions the city's economic history, but its emphasis is on the private uses to which the land in question will likely be used.[144] It quotes several individual features of the city's overall plan, including office space, new residences, parking lots, and retail space.[145]

Massey's story is one in which the Court has eroded constitutional protections into nothingness out of undue deference to state interests. He says as much in the opening paragraph of the chapter: "By judicial construction . . . these barriers to government invasion of economic interests have been much reduced."[146] His organization of the book is also instructive here. In his chapter exploring due process, Massey discusses "Economic Rights as the Substance of Due Process."[147] Massey differentiates the protection of economic due process (which he characterizes as wider-ranging) from those economic protections clearly described by the Constitution itself.[148] The section introducing the topic is titled "The Rise and Fall of Economic Rights as the Substance of Due Process," while the next section is titled "The Modern Revival: 'Privacy' Rights."[149] In essence, economic rights that were the core of due process during the *Lochner* era bear a close relationship to individual, non-economic rights of the modern era, while economic rights explicitly protected elsewhere in the Constitution are their own thing and have largely been interpreted by courts into meaninglessness. Even if the doctrinal takeaway is the same for both Massey and Chemerinsky (i.e., that there is limited meaningful protection against regulatory takings for private use rather than public use), there is a huge difference between one of many fallen economic rights and the Court's dereliction of duty on this specific protection.

The edited case fits within that narrative by allowing several dubious uses of the land by private actors with only marginal consideration of the government's goals or the processes the city took to ensure legitimacy. The discussion of the city's dire economic straits is very limited. While the edited opinion recognizes a government plan, it emphasizes individual uses of the

141. *Id.*
142. *Id.* at 606-07.
143. *Id.*
144. *Id.* at 607.
145. *Id.*
146. *Id.* at 601.
147. *Id.* at xviii.
148. *Id.* at 602.
149. *Id.* at 501, 514.

taken land rather than its role as a part of that plan or the processes taken to ensure its legitimacy.[150] The edited opinion's examples are also facially private, arguably ridiculous without context, and vaguely reflect upper-class interests rather than those of the working class.[151] The casebook concludes its discussion of the case by noting subsequent legislative and judicial rejection of the decision, presenting a story of the case in which the Court's abdication of its constitutional duty was so complete that other parties needed to take action to avoid disaster.[152]

Massey and Chemerinsky are worth addressing early since they clearly demonstrate the bias Fletcher observes. She asks the reader to "note that, if all the facts selected were significant, Chemerinsky and Massey chose almost a completely opposite set."[153] These opposing factual considerations lead to conflicting interpretations of the case. Where Chemerinsky's editorial decisions portray a more favorable impression of *Kelo*, Massey's decisions portray a more negative one. I characterize this as a conservative political position, as it was the liberals on the Court and swing Justice Anthony Kennedy who voted for the majority decision while the four conservatives on the Court voted against it. However, this is an un-nuanced characterization, primarily assuming that the left favors government action over property interests while the right favors property interests over government action.

It is also worth noting that by editing the case more aggressively than Chemerinsky did, Massey also makes his edits more visible than Chemerinsky's.[154] While this might be off-putting to those who perceive the law as more objective or neutral, the more explicit editorial decisions can also help readers appreciate law professors as third parties to a conversation rather than moderating forces.

3. Rotunda: Topic Bias.—Rotunda's book is organized in a similar manner to the other casebooks, with its most significant departure from other casebooks being a chapter on the state action doctrine.[155] He addresses *Kelo* in his chapter focusing on due process.[156] This places the case closer to where it was in Chemerinsky's book, among topics such as substantive due process, the incorporation of the Bill of Rights, the new procedural due process, and the Second Amendment.[157]

The casebook only includes one fully edited case in its consideration of taking by possession, *United States v. Causby*,[158] but includes descriptions of

150. *Id.* at 607.

151. For example, Massey emphasizes that many of the uses are for leisure activities. *Id.*

152. *Id.* at 612.

153. Fletcher, *supra* note 14, at 189.

154. See the appendix for a highlighted comparison using the original Supreme Court decision.

155. ROTUNDA, *supra* note 27, at xvii.

156. *Id.*, at xvi.

157. *Id.*

158. United States v. Causby, 328 U.S. 256 (1946).

Kelo and several other cases in its notes following that case.[159] *Causby* is a classic case relating to one of the questions posed by the other textbooks: did a taking occur when the government regularly flew aircraft at low altitudes over their land?[160] The notes summarize several cases in which unique facts did or did not constitute a taking.[161] Rotunda discusses *Kelo* in his final note, Note 7, specifying that it is a public-use question.[162]

Rotunda's explanation of the facts begins with its conclusion that "the city of New London's proposed taking of non-blighted homes in order to promote development that the City believed would increase the City's tax base qualifies as a 'public use' within the meaning of the Takings Clause."[163] The facts include the order of events—Pfizer's facility, the City's delegation of power to the New London Development Corporation (NLDC), the NLDC's purchases, and the petitioner's rejection.[164] Rotunda also gives one of his only full quotations to the majority opinion's acknowledgment that the properties were only being condemned because of their proximity to the project.[165] However, there are several quotations to parts of the opinion that consider the "[c]arefully considered" development plan as a part of "a whole greater than the sum of its parts."[166]

Rotunda's story is one that has room for *Kelo*, but only to the extent that it supplements his book's consistent interest in state action.[167] Rotunda considers these sorts of economic rights as an extension of the economic due process doctrine that died at the beginning of the century. He also treats the newer due process cases as something of a revival of the doctrine in a new form rather than as a new doctrine. The key is that neither of these editorial decisions connects to *Kelo*. Instead, *Kelo* is a note at the end of an extended analysis of whether government action constituted a taking.[168] This conceptually lines up well with his unique chapter on state action.[169] While takings and state actions are different doctrines, the core analysis is similar—does this government action fit within the definition of a vague constitutional term? This also helps to explain Rotunda using his few paragraphs on *Kelo* to describe the city's delegation of its power to a non-profit corporation.[170] A regulatory taking by a non-state actor might be

159. ROTUNDA, *supra* note 27, at 556-66.
160. *Causby*, 328 U.S. at 256.
161. ROTUNDA, *supra* note 27, at 559-66.
162. *Id.* at 565-66.
163. *Id.* at 565.
164. *Id.*
165. *Id.*
166. *Id.*
167. In the words of Mr. Peanutbutter, "Is my problem with women any movie directed by Christopher Nolan? Because, yes, women are involved, but it's never really about the women. It's about me." *See* Alejandro Margariños, *Bojack Horseman - Christopher Nolan Joke Scene*, YOUTUBE (Apr. 29, 2020), https://youtu.be/gfdRUjhz00U [https://perma.cc/65N8-SFHX].
168. ROTUNDA, *supra* note 27, at 565.
169. *Id.*
170. *Id.* at xvii.

an interesting wrinkle in the state action doctrine. Even if it is not, it is a small clarification that may stand out to an author who is particularly interested in the state action doctrine.

The bias here is less political than in other casebooks, but it may reflect a more omnipresent bias—law professors are likely to emphasize material that they write or have written scholarship about. This might be considered "topic bias," where a strong interest in a particular topic informs the analysis of other, unrelated topics. While the chapter discussing state action might serve a valid purpose within the work, it is the clearest departure from the content of other casebooks. It also emphasizes an area that Rotunda has written about at length.[171] A preoccupation with niche topics that alters (and possibly ignores) other, less niche topics (or topics of less abstract real-world consequence) is one way that a casebook editor can convey a message to a reader, whether intentional or not. That message, that the arcane machinations of the law are more important than the people that it governs, is far from value-neutral. Even if the description of that case is entirely accurate, a student might learn far more than the doctrinal holding of the case itself.

4. Varat et al.: Intellectual Novelty Bias.—The book by Varat et al. offers a unique opportunity because the casebook in question has two different versions to look through—the concise edition considered by Fletcher and the full edition.[172] While Fletcher correctly notes that the concise edition does not consider *Kelo* at all,[173] the full edition does in an interesting fashion.[174] This is the first casebook cited with more than one listed author. It is, therefore, entirely possible that this unique inclusion is a product of compromise among multiple voices. This is part of the reason that considering a casebook and its message detached from the biographical details of the authors or editors can help to clarify the message expressed by the material.

Varat et al. include *Kelo* in their chapter titled "The Due Process, Contract, and Just Compensation Clauses and the Review of the Reasonableness of Legislation."[175] This decision places just compensation in the immediate vicinity of *Lochner*-era court decisions under the label of "economic regulatory legislation," echoing Chemerinsky's topic organization.[176] While other due process topics are included in the chapter, they appear in different sections and are implicitly conceptually distinct.[177]

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171. *See, e.g.*, Ronald D. Rotunda, Runyon v. McCrary *and the Mosaic of State Action*, 67 WASH. U. L. Q. 47 (1989); Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of* Cousins v. Wigoda, 53 TEX. L. REV. 935 (1975); Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court*, 55 ARK. L. REV. 795 (2003).

172. VARAT CONCISE, *supra* note 27; VARAT FULL, *supra* note 120.

173. Fletcher, *supra* note 14, at 189.

174. VARAT FULL, *supra* note 120, at 591-96.

175. *Id.* at xvii-xix.

176. *Id.* at 591-96.

177. *Id.*

Before describing the edits that the authors made to the case, it is important to note where *Kelo* fits within the book's edits. Subsection C begins on page 589 and begins with a paragraph describing topics covered in future subsections.[178] It then goes into an additional topic, which is the meaning of "public use."[179] The book notes that judicial scrutiny of the requirement has been quite limited, describing two cases where the requirement was read broadly.[180] It then goes into a more detailed discussion of *Brown v. Legal Foundation of Washington*, calling particular attention to a footnote in Justice Scalia's dissent.[181] Finally, on page 591, the authors begin a pages-long description, with significant excerpts, of *Kelo*.[182] This section then ends before going into a subsection on restrictions of property use, with no further commentary.[183]

The *Kelo* half-inclusion begins with a paragraph-long description of the case's facts.[184] The paragraph includes the reason for the State Action, including its economic depression and decreasing population.[185] It describes the city's delegation of planning to the NLDC, the role of the property as part of a greater plan, and the city's eventual delegation of eminent domain power to the organization.[186] It also identifies many of the uses of the property, with a collection of transparently private uses (including shops and restaurants, an urban neighborhood, and office space).[187] It also specifically details how most homeowners willingly sold, how fifteen residents declined to sell, and how four of the homes would be used for office space while eleven would be for park and marina support.[188]

The story of *Kelo* here is one of a noteworthy case that simply is not all that interesting. By looking at the table of contents, one would not even know that *Kelo* or the topic of whether a use was or was not public was in the book at all.[189] It is included within a chapter dominated by the rise and fall of economic due process, and with both the section on the Contract Clause and the section on the Just Compensation Clause[190] asking, "What Does It Add to Due Process,"[191] the answer is an emphatic "not much." The concise edition supports this

178. The topics are "what kind of government regulation affecting the use of property constitutes a 'taking' of it," "what constitutes 'property,'" and the "government's obligation in the event of a taking." *Id.* at 589.

179. *Id.* at 589-96.

180. *Id*. at 589 (those two cases are Berman v. Parker, 348 U.S. 26 (1954), and Haw. Hous. Auth., 467 U.S. at 229).

181. VARAT FULL, *supra* note 120, at 590; Brown v. Legal Found. Wash., 538 U.S. 216 (2003).

182. VARAT FULL, *supra* note 120, at 591-96.

183. *Id.* at 596.

184. *Id*. at 591.

185. *Id.*

186. *Id.* at 591.

187. *Id.*

188. *Id.*

189. *Id.* at xviii.

190. U.S. CONST. amend. V, cl. 4

191. VARAT FULL, *supra* note 120.

interpretation since it simply removes the sections of chapter nine relating to the Contract Clause and the Just Compensation Clause.[192]

The reader does get an interesting wrinkle in the casebook's factual inclusions, though. Its sprinkling of both public and private individual uses of the condemned property treats the city's plan as a complicated and cohesive one.[193] The specific mention of the division of the fifteen uses—eleven with a much stronger (if less explicit)[194] case for the use being public than the other four—continues this treatment.[195] While strict application of "public use" language would likely prohibit the plan, the practical analysis considered in all other cases makes a stronger case for allowing the use of eminent domain. There was a plan responsive to a city's goals with significant community buy-in, and the majority of those who rejected it had a much weaker case than the other four. The case warrants inclusion because its facts are noteworthy, but its legal elements simply are not.

Like the previously mentioned bias towards scholarship, this bias towards intellectual novelty over emotionally resonant cases or real-world impact may be an omnipresent bias worth acknowledging further. It is hard to criticize this instinct too heavily because making editorial decisions to make the law more accessible and interesting is precisely why casebooks exist. However, by making the law overly abstract, authors and professors run the risk of alienating their students. The law governs how people interact with one another. While the specific mechanisms through which government acts are interesting and worth theoretical exploration, the cases that professors use to instruct students can have profound effects on the lives of the people involved with those cases. Part of the reason *Kelo* resonated as much as it did was just *how* sympathetic the plaintiffs were, with plaintiff Susette Kelo's story inspiring a book in 2009[196] and a feature film in 2017.[197] Law instructors' instincts may be to emphasize the abstract law and figure out how it might apply to unique facts. This is not (necessarily) a bad instinct.[198] It is a vital skill for students to learn. But when

192. VARAT CONCISE, *supra* note 27, at viii. It is worth noting, however, that this did not foretell a change to come—the full 16th edition, published in 2021, contains *Kelo* in much the same way as the full 13th edition. *See* VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 534-39 (16th ed. 2021).

193. VARAT FULL, *supra* note 120, at 591.

194. The eleven petitioners were granted relief by the trial court while the four office space petitioners were not, due to the indefinite nature of the proposed use beyond generalized support for the marina and park. *See* Kelo v. City of New London, No. 557299, 2002 WL 500238, at *112 (Conn. Super. Ct. Mar. 13, 2002).

195. VARAT FULL, *supra* note 120, at 591.

196. JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009).

197. LITTLE PINK HOUSE (Dada Films 2017).

198. This point strays dangerously close to the longstanding debate between formalism, or "[t]he theory that law is a set of rules and principles independent of other political and social institutions," *Legal Formalism*, BLACK'S LAW DICTIONARY (11th ed. 2019), and realism, or "the theory that law is based not on formal rules or principles but instead on judicial decisions deriving

making something real more abstract, it is important to be wary of making things too abstract. When a conversation on law is limited to students who have never practiced and faculty who have not practiced in years, if they have at all, the risk of becoming overly abstract becomes exponentially higher. That is even more true for topics like Constitutional Law than it is for more "grounded" disciplines like Property.

B. Property Textbooks

Fletcher considered three property textbooks in her article: *Property*, 8th edition, by Jesse Dukeminier et al.; *Property Law: Principles, Problems, and Cases*, by Calvin Massey; and *Property Law: Rules, Policies, and Practices*, 5th edition, by Joseph William Singer.[199] Her sample case that she studied for those textbooks was *Shelley v. Kraemer*, a United States Supreme Court decision that found that the Michigan state government denied members of a racial minority equal protection by enforcing restrictive covenants based on race against them.[200]

While this case offers some interesting insight that supports her broader point, I consider a different case for two reasons. First, as she notes, the different fact selections are "not as dramatically different as the facts selected in *Kelo* . . ."[201] Second, *Kelo* is as much a Property case as it is a Constitutional Law case, giving a unique opportunity to see if coverage of the case differed across disciplines. Given those two considerations, I use her collection of textbooks to consider differences in how the three textbooks cover *Kelo*. This section follows a pattern similar to the one considered above. All three casebooks cover *Kelo*, although all three are instructive in their unique use of the case. While the differences between casebooks are not as pronounced as they were in the Constitutional Law casebooks, there are still meaningful differences among the three that could dramatically affect understanding of the law. There are also meaningful differences between the three Property books and the four Constitutional Law textbooks that warrant some examination.

1. Dukeminier et al.: Status Quo Bias.—Jesse Dukeminier et al.'s casebook, *Property: Eighth Edition*, covers *Kelo* in its final chapter, "Eminent Domain and

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from social interests and public policy as conceived by individual judges, *Legal Realism*, BLACK'S LAW DICTIONARY (11th ed. 2019). I do not seek to resolve the debate here but note that to the extent the law school's mission is to teach students law that they will be tested on for the bar exam, any amount of realism that enhances student understanding of the law will be subservient to knowledge of the law itself.

199. Fletcher, *supra* note 14, at 192; *supra* note 31.

200. Shelley v. Kraemer, 334 U.S. 1 (1948).

201. Fletcher, *supra* note 14, at 192.

the Problem of Regulatory Takings."[202] *Kelo* is the only case fully reported in the section on public use.[203]

There are no visible edits in Dukeminier et al.'s treatment of the case beyond the ones one might expect for a casebook, such as cutting footnotes and counsel.[204] While other parts of the case are edited down (including a reduction of Justice Kennedy's concurring opinion to a parenthetical explanation),[205] the facts are included in their entirety and as described by the majority opinion.[206] The annotations following the case spell out that the doctrine is "in shambles," with subsequent notes pointing out that public use could mean either end or means when determining a public use, the inconsistent level of scrutiny applied in such cases, and the political aftermath of the case.[207]

There are a few different ways to read this mostly unedited facts section. The first is a desire to be as even-handed as possible—simply let the reader decide what matters most by including the facts in their entirety. The notes following the case could also be read this way: They include several different perspectives on the case, as well as subsequent developments that might be read favorably or unfavorably.

However, this seems unlikely given the role of facts in a case. The full adoption of the majority's description of the facts likely at least signals agreement that those are the facts that mattered to the Court. By emphasizing those facts emphasized by the majority, one could interpret this complete repetition of the facts as reported by the majority as support for the majority's opinion.

The story that this casebook tells is probably most in line with one suggested in the notes following the case—that the doctrine was largely unworkable and is best handed over to politically accountable actors.[208] While the commentary in these notes has points both in favor of and against *Kelo*, including the eventual fate of the land in question and how the expansive reading of the doctrine might conflict with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[209] the notes speak to a confusing doctrine with inconsistent application and an outcome that sufficiently shocked the conscience to warrant political action (which the Court had even suggested in its opinion). This section's heading refers to a status quo bias, which is a bias toward maintaining an existing situation rather than taking action that might change that

202. DUKEMINIER ET AL., *supra* note 31, at xxiv.

203. *Id.* Justice Thomas's dissenting opinion also appears in a footnote in the section discussing physical occupation and regulatory takings. *Id.* at 1161.

204. DUKEMINIER ET AL., supra note 31, at 1111-23. See also the highlighted version in the Appendix.

205. *Id.* at 1117-18.

206. *Id.* at 1111-12.

207. *Id.* at 1123, 1124-31.

208. The book attributes this opinion to Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 32, 98 (2005).

209. 42 U.S.C. §§ 2000cc-2000cc-5.

condition.[210] While this might be a fair characterization of the message conveyed here (as it reports the existing situation with no real alternative and offering no clear alternative path),[211] it is still somewhat different than reinforcing a message by accurately repeating it.

One key difference to note here is that Dukeminier et al. do not edit their cases nearly as extensively as any of the Constitutional Law textbook authors did.[212] This may have something to do with how the two disciplines treat cases. One reason could be that Constitutional Law case topics are argued with wider implications for society while Property presents the law as it is and leaves the reader/attorney to figure out what to do with it. The Property textbook structure, while clear, has less of a narrative. Property and its transfer get spelled out, and then there is a list of government actions that might affect or limit that ownership. This less narrative organization of the topic may inspire biases of its own. For example, by conceptualizing property as a creation of the government that is best characterized as a bundle of rights, the validity of property as a concept and government intrusion into it both feel more immediately defensible than government intrusion into other rights. In any case, the lighter touch when it comes to editing is worth further exploration but can also leave more room for reader inference.

2. Singer: Simplicity Bias.—Singer includes *Kelo* in his final chapter, which discusses regulatory takings law.[213] This covers a variety of topics, some conceptual (such as "Property as a Mediator Between Citizens and State")[214] but most direct and small (*Kelo* is in a section dedicated to public use, which also addresses state law).[215]

Singer's edits to the facts in the majority opinion are minimal, but he makes a few different decisions than Dukeminier et al. First, he includes multiple footnotes from the case most other editors leave out.[216] The first of these simply states the text of the Fifth Amendment and mentions its incorporation through the Fourteenth Amendment.[217] However, the second footnote discusses negotiation over more specific development plans happening at the time of litigation.[218] This offers a rare example of a footnote included within the reported facts of a case, which raises the further question of which footnotes Singer chose not to include. For example, Footnote 2 in the Court's opinion discusses research that multiple state agencies did on the development plan.[219]

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210. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7 (1988).

211. DUKEMINIER ET AL., *supra* note 31, at 1123-27.

212. Compare highlighted versions of *Kelo* in the Appendix.

213. SINGER, *supra* note 31, at xxxiii.

214. *Id.*

215. *Id.* at xxxiii-iv.

216. *Id.* at 1074, 1076-77, 1079-82.

217. SINGER, *supra* note 31 at 1114.

218. *Id.* at 1076 n.2.

219. Kelo v. City of New London, 545 U.S. 469, 473 n.2 (2005).

Footnote 3 notes that the City and the NLDC will be treated interchangeably for the remainder of the case unless necessary.[220]

Second, he cuts one paragraph from the two sections containing the facts of the case. The missing section states:

> Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, and, second, whether the takings were for "reasonably foreseeable needs." The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process.[221]

The facts are otherwise unedited.

The story this casebook tells is similar to Dukeminier et al., but that story gains a key wrinkle in the book's decision to exclude references to the indefinite use of the land and its effect on the overall holding. It is possible that these decisions keep the emphasis on the private versus public question instead of the generalized holding. This reading is consistent with the decision to exclude Footnote 3 and simply not call attention to other possible wrinkles. However, this clarity has the consequence of confusing other aspects of the case. For example, the difference between the landowners whose homes were destined to become office space and the landowners whose homes were likely to be used to support the park and marina likely did not matter to the Court. However, without the reference to the indefinite use of the property, the decision reads as the Court finding use for office space a more compelling public use than taking land to support public lands. This presents the government's claim of public use as even stronger than the initial opinion's by making the weaker claim overall seem like the one with greater constitutional support. It is a small point, but an example of how clarifying or simplifying the issue can warp a reader's understanding of that issue before they even know the outcome.

3. Massey: Consistent Bias, Different Perspectives.—Calvin Massey offers an exciting point of comparison because he wrote textbooks for both topics that covered *Kelo* in detail.[222] Massey's book is the exception among the property textbooks in that it extensively edits *Kelo*. This is seemingly true throughout Massey's book—using Fletcher's examples from *Shelley*, Massey includes fewer facts than either Dukeminier et al. or Singer there as well, although his edits more closely align with Dukeminier's as Singer again replicates the case in its entirety.[223]

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220. *Id.* at 475 n.3.
221. *Id.* at 476-77; *see* SINGER, *supra* note 31, at 1114.
222. MASSEY CONSTITUTIONAL, *supra* note 27; MASSEY PROPERTY, *supra* note 31.
223. Fletcher, *supra* note 14, at 191, 193.

Massey includes *Kelo* in his final chapter, "Eminent Domain and the Problem of Regulatory Takings."[224] It differs from the other property casebooks by dedicating its final chapter to various forms of takings, whereas the other books included takings as one of several related topics in their closing chapters.[225]

There are some small but noticeable changes in Massey's edits between the two casebooks. Here, Massey does not remove the introduction's references to the other willing sellers.[226] The parenthetical summarization of the facts is largely identical, with most of the differences coming in how the first few sentences are arranged.[227] Here is the opening of the paragraph in Massey's Constitutional Law casebook:

> New London, Connecticut, an economically depressed city of some 24,000 residents, concluded that the Fort Trumbull area, a 90-acre peninsula jutting into the Thames River consisting of some 115 privately owned properties and a 32-acre state park, was ideally suited for redevelopment. The occasion for this decision was pharmaceutical manufacturer Pfizer's decision to build a large research facility adjacent to the Fort Trumbull area.[228]

And here is the first sentence in Massey's Property Law casebook:

> After Pfizer, a major pharmaceutical manufacturer, decided to build a large research facility adjacent to New London, Connecticut's Fort Trumbull area, a 90-acre peninsula jutting into the Thames River consisting of some 115 privately owned properties and a 32-acre state park, the city concluded that the Fort Trumbull area was ideally suited for redevelopment to improve the depressed economic conditions of the city.[229]

While the facts are the same, the main reason for the regulatory taking (Pfizer's research facility) comes before the relevant property. The city's conditions shift from "economically depressed"[230] to "depressed economic conditions."[231] Massey's book also lists those conditions as one of the last facts in Property rather than one of the first as in Constitutional Law. The Property book makes it clearer that Fort Trumbull is a part of New London rather than an

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224. MASSEY PROPERTY, *supra* note 31, at xvii.
225. *Id.*
226. *Id*. at 782.
227. See the highlighted versions in the Appendix for visual comparison.
228. MASSEY CONSTITUTIONAL, *supra* note 27, at 607.
229. MASSEY PROPERTY, *supra* note 31, at 782.
230. MASSEY CONSTITUTIONAL, *supra* note 27, at 607.
231. MASSEY PROPERTY, *supra* note 31, at 782.

independent adjacent area.[232] Finally, the last parenthetical explanation of the facts is different: The Constitutional Law textbook says only, "The Connecticut Supreme Court upheld the plan, and the Supreme Court affirmed,"[233] whereas the Property book's parenthetical contains a sentence before that: "Residents and property owners contended that condemnation to implement this plan was not for a public use."[234]

While many of these changes arguably make the case clearer, they do tell a slightly different story from the one told in the Constitutional Law casebook. The private use of the property is even more strongly emphasized than it is in the Constitutional Law casebook, while the government's plan is given even less consideration here than it was in the Constitutional Law casebook by making the alleged public use even more secondary than it was in the initial facts. The Constitutional Law casebook also places greater importance on individuals and their rights rather than government action. This helps to demonstrate the different states of mind that different doctrines can have on how a case is understood. In Constitutional Law, the emphasis on government action means the reading of the case is likely more informed by opinions on government action generally. The government wants to do a thing—can it do it? In Property, which emphasizes the rights that property owners can exercise against other citizens and governments, the property owner is the central figure. The property owner wants to enjoy the use of their property—can they stop the actor trying to take it from them? Even if the answer is the same either way—yes, the government can take this action, or no, the property owner cannot stop them from taking it—the framing of the issue shapes what that doctrinal reality means to the reader.

C. Conclusions from All Seven Casebooks

To close out this analysis of all seven casebooks, this short section summarizes a few key takeaways. These reflect what are hopefully fairly straightforward and uncontentious readings of the text. There are certainly deeper layers that this analysis could allow given more time and space—time and space that these examples hopefully indicate is worth spending on this endeavor independently.

1. The Author's Identity (But Not Their Intent) Matters.—First, the identity of the author, and their work outside of the casebook, matters. This presents itself in straightforward ways through partisan bias or unique scholarly interests. An author who is liberal in other domains (like Chemerinsky) will likely present a case in the most charitable light toward liberal interests. A scholar who is unusually invested in a unique aspect of law will likely emphasize that aspect of a case when it appears. Rotunda's scholarship suggests that he is more

232. *Id.*
233. MASSEY CONSTITUTIONAL, *supra* note 27, at 607.
234. MASSEY PROPERTY, *supra* note 31, at 782-83.

interested in the state action doctrine than the Takings Clause, and his treatment of the Takings Clause reflects the parts of the clause that align with that interest in state action. Massey was interested enough in both constitutional law and property to write books on both, and his treatment of a case like *Kelo* that implicates both fields suggests greater interest in the case and greater precision in its treatment than editors whose primary interest lies in one field or the other. The identity of the author is also relevant when books have multiple authors. Trying to decipher the peculiar treatment of *Kelo* in Varat et al.'s book may be as simple a matter as realizing a work has more than one competing vision behind it, and its ultimate placement might reflect some level of editorial compromise. Whatever conclusions one derives from the above analysis, the notion of an invisible author is a difficult one to defend.

With that said, as evidenced by the *Death of the Author* conversation above, the intent of the author matters far less in the interpretation of their work than the work itself. While one might read a bias into one of the textbooks that might not otherwise be there, it is the text itself, supported by external evidence, that is the biased source, not the author's intention. Most, if not all, of these editorial decisions were likely entirely unintentional. The more minimalistic Property casebook edits stand out as particularly unlikely examples. The existence of conscious bias might make bias within a text more visible, but its absence cannot be read as a sign of its nonexistence.

2. The Organization of a Book Affects the Book's Message.—The notion that a case's placement within a casebook can change its meaning as much as the actual edits to the case finds ample support when analyzing the three Property textbooks. While the Kuleshov Effect is an imperfect metaphor for what is happening there, it offers a simple example of how important the notion of proximity is to interpretation. The four Constitutional Law textbooks that reflect *Kelo* in a positive or relatively tangential manner all connect it to due process, with a particularly visible connection to the economic rights nominally protected by the Court during the *Lochner* era. The textbook that most negatively portrays *Kelo* detaches it from the contentious due process discourse and instead treats it as an independent, explicitly protected right. More narrowly and perhaps more obviously, a book that includes a smaller excerpt from *Kelo* or only addresses it as a note to another case will present *Kelo* as a less significant case than one that dedicates a substantial number of pages to it or highlights the case itself.

There are many reasons that any of the editors might have made these editorial decisions. Takings does not fit within the broader concepts of constitutional law, so a decision to group it with another topic makes sense. If an editor does that, comparing it to economic due process makes sense, especially if the takeaway is that the Court does not seriously protect economic rights in either instance. On the other hand, treating a taking as a separate constitutional issue with a similar outcome is more precise, but also may conceal the broader point that the other three casebooks make. Takings is also a niche

topic, making it easier to cut in a course using the casebook than more similar, more topical and hotly debated substantive due process. No matter what the conscious reason for the decision, the author's intent might be relevant, but it is far from the most important factor. The point is not to examine the inner thoughts of these editors, but to acknowledge that the editorial decisions they made might change the lessons that readers take from them.

3. Constitutional Law and Property Law Editors Edit Cases Differently.—This point affirms the intuition that editors treat cases differently if they are editing a case for Property instead of Constitutional Law. In general, it seems that Property casebook editors are prone to leaving cases relatively unedited, while Constitutional Law editors make substantial changes to fit cases within the book. Even the least heavily edited Constitutional Law casebook, Chemerinsky's, still cut out a key paragraph that dramatically changed the meaning of the case. The most heavily edited of the Property casebooks, Massey's, most closely paralleled his edits to his Constitutional Law casebook. This limited editorial touch extends to those editorial decisions outside of the case itself. There was greater uniformity among the Property textbooks in how they treated *Kelo*—always in the book's last chapter, grouped with similar topics across the three books. While editorial choices are still apparent in each book's organization, there is more of an "industry standard" across Property books (at least in where they include *Kelo* relative to other material).

This standard itself almost certainly reflects biases inherent to the industry regarding the topic that have become so ingrained in thought on the doctrine that they seem natural and remain unexamined. Pushes to change law schools' approach to property as a doctrine, including shifting to a more practical focus,[235] changing the content covered,[236] and even teaching the course at all,[237] reflect a growing awareness of these biases and the importance of acknowledging them. However, this push is also against a nebulous and entrenched pattern of thought rather than an individual author simply informed by the biases inherent to their chosen topic. Translating these challenges into changes will require smaller scale, regular engagement. The broader structural

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235. HEATHER WAY ET AL., REAL PROPERTY FOR THE REAL WORLD: BUILDING SKILLS THROUGH CASE STUDY (1st ed. 2017).

236. For an example of dueling perspectives considering no longer teaching the rule against perpetuities, a famous (and famously difficult) part of traditional property courses, see Ilya Somin, *Should We Teach Law Students the Rule Against Perpetuities?*, THE VOLOKH CONSPIRACY (Aug. 11, 2007, 2:32 PM), https://volokh.com/2007/08/11/should-we-teach-law-students-the-rule-against-perpetuities/ [perma.cc/94nZ-5N5d]; and Dave Fagundes, *Why Teach the Rule Against Perpetuities?*, PRAWFSBLOG (Apr. 3, 2011, 9:54 AM), https://prawfsblawg.blogs.com/prawfsblawg/2011/04/why-teach-the-rule-against-perpetuities.html [https://perma.cc/8W5C-GHMC].

237. For example, the UC Berkeley School of Law no longer requires first-year students to take Property law. *First-Year Curriculum*, BERKELEY LAW, https://www.law.berkeley.edu/academics/jd/first-year-curriculum/ [perma.cc/X8F5-YPY7] (last visited Oct. 8, 2023). Even if it is only coincidental, it is also worth noting that this change happened during Erwin Chemerinsky's tenure as the law school's dean.

argument is part of the point in defining the death of the author, to acknowledge that an author's surroundings and culture can be an even more important factor in their text than the author's intent. But by focusing on an individual text, the problem can become more manageable.

4. There Is More to Learn from Casebooks.—As noted above, this collection of casebooks is far from exhaustive. It primarily demonstrates the point that one can, and probably should, look to the messages that textbooks convey. Any casebook, and certainly any change in the medium that makes a casebook read more as a curated collection of cases rather than a book, will also influence the message that a case conveys. There are other dimensions of casebook analysis that are entirely irrelevant to these seven casebooks. Other textbooks might have limitations either removed or placed upon them by their unique publication in ways that the article does not consider here. For example, the Property casebook a colleague assigns, *Property: A Contemporary Approach*, is written with the specific purpose of being accessible online.[238] This goal leads the authors to include several captions within both the print and text versions of the casebook that take users away from the case and toward other online resources, such as a photo of the *Kelo* house, a map of the planned development, and a copy of the economic impact report all within the narrow facts sections considered here.[239] This fractured engagement with the opinion itself may well have its own effect on reader apprehension and interpretation, especially given the known and developing differences between how readers process information on a computer rather than on a page.[240] In a world where part of the generational divide defining American culture and politics is an increasing number of "digital natives" more familiar with online resources than print resources, possibilities like these offer yet another way to explore the message legal academics convey through their editorial decisions.[241] As the audience of a text changes, as is the case with students increasingly unfamiliar with print entering the print-centric world of the law, the possible meanings of a text change as well.

5. Media Literacy Is a Skill That Can Only Be Learned Through Practice.—Finally, this section demonstrates that while it is necessary to emphasize aspects of information literacy that can be objectively determined, doing so without reference to subjective, individualized interpretation is insufficient to teach the skill. The reader—the audience—means at least as much to the meaning of the text as the author, and frankly may well mean more. While none of the casebooks inaccurately present *Kelo*, all of them make decisions that present something other than the case itself. Part of the reason that it can be difficult to introduce media literacy in an academic setting is its own subjective nature.

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238. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH (5th ed. 2021).

239. *Id.* at 860-61.

240. Lauren M. Singer & Patricia A. Alexander, *Reading on Paper and Digitally: What the Past Decades of Empirical Research Reveal*, 20 REV. EDUC. RSCH. 1 (2017).

241. Marc Prensky, *Digital Natives, Digital Immigrants*, 9 ON THE HORIZON 1, 3-6 (2001).

Creative work has no single meaning. But the potential for an individualized understanding of a text to expose truths about its topic is a reason to spend more time refining that skill, not less. And this individualized skill can only be taught by examples like those included above. By learning to identify these alterations and their impact within the work of others, readers become better able to identify these biases and unique viewpoints within themselves.

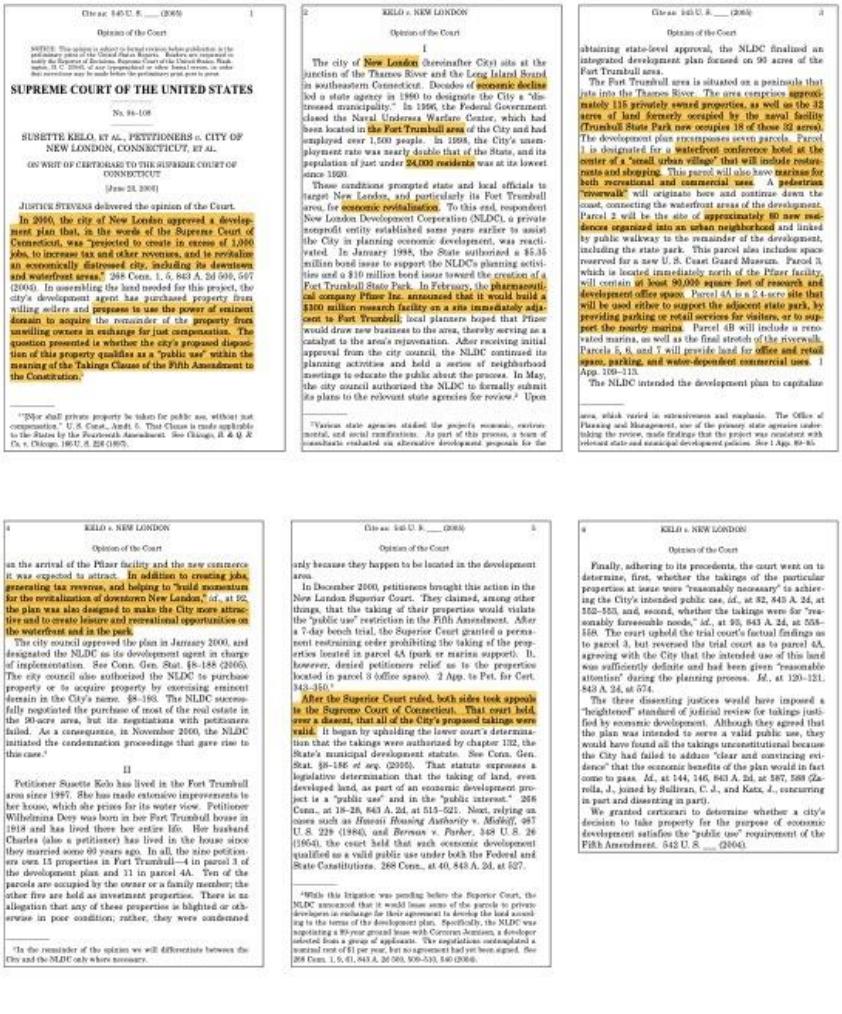
V. CONCLUSION

An author or editor injects their own bias into a work as soon as they make an editorial decision about that work. The existence of bias in a text or classroom is unavoidable, and not inherently negative. However, it is insufficient to acknowledge that bias exists and leave it unexplored. There is bias within the legal profession, and legal academia in particular, that can be detrimental to practice and education in an increasingly polarized and information-skeptical environment. Taking the time to explore and understand the reader's own biases will help keep the legal community connected to the public it nominally serves and educates.

Even if the utilitarian arguments for examining bias or my interpretations of editorial decisions here are unconvincing, exploring the bias found in our work has rewards of its own. When readers engage with a casebook as a literary work with meaning informed by its author's identity, or examine a book for bias, they engage with that book as a work of art. Art does not strictly belong to the artist, and it can be daunting to realize how vastly different what the author says is from what the author means. However, that same unknowability also means that there is always something new for authors to discover about themselves and the world. By acknowledging the smallness of their own worldview, the author gives themselves the space that they need to grow.

APPENDIX

Fig. 2: *Kelo*, facts and procedure, as appears in MASSEY CONSTITUTIONAL



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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 04–108

SUSETTE KELO, ET AL., PETITIONERS *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[June 23, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 6, 843 A. 2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[1]

[1]"[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

2 KELO *v.* NEW LONDON

Opinion of the Court

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon

[2]Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated an alternative development proposals for the

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Opinion of the Court

obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

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The NLDC intended the development plan to capitalize

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The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. §8–188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. §8–193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.[3]

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned

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Opinion of the Court

only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 343–350.[4]

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. §8–186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18–28, 843 A. 2d, at 515–521. Next, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), and *Berman* v. *Parker*, 348 U. S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

[4]While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A. 2d 500, 509–510, 540 (2004).

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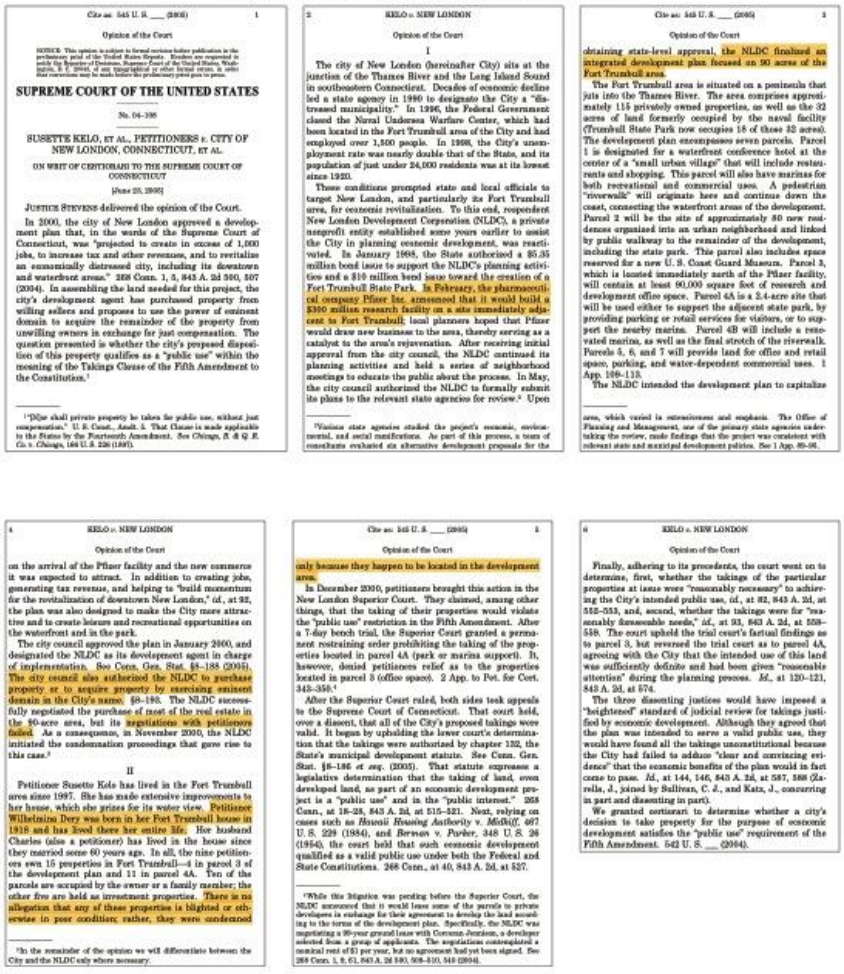
Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82, 843 A. 2d, at 552–553, and, second, whether the takings were for "reasonably foreseeable needs," *id.*, at 93, 843 A. 2d, at 558–559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120–121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U. S. ____ (2004).

APPENDIX

Fig. 3: *Kelo*, facts and procedure, as appears in ROTUNDA



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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 04–108

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[June 23, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A. 2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[1]

[1] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897).

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I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon

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II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned

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Opinion of the Court

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After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. §8–186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18–28, 843 A. 2d, at 515–521. Next, relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229 (1984), and *Berman* v. *Parker*, 348 U. S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

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APPENDIX

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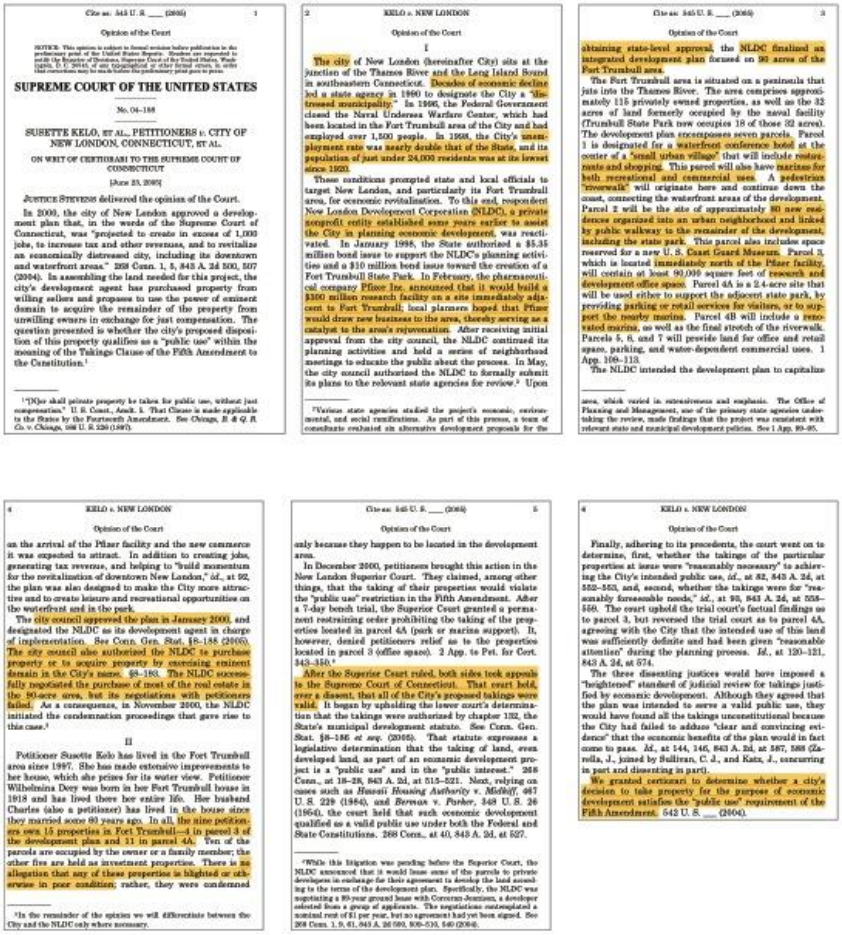

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2 KELO *v.* NEW LONDON

Opinion of the Court

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Opinion of the Court

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Opinion of the Court

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6 KELO *v.* NEW LONDON

Opinion of the Court

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APPENDIX

Fig. 5: *Kelo*, facts and procedure, as appears in DUKEMINIER ET AL.

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Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—11 in parcel 3 of the development plan and 4 in parcel 4A. Two of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned

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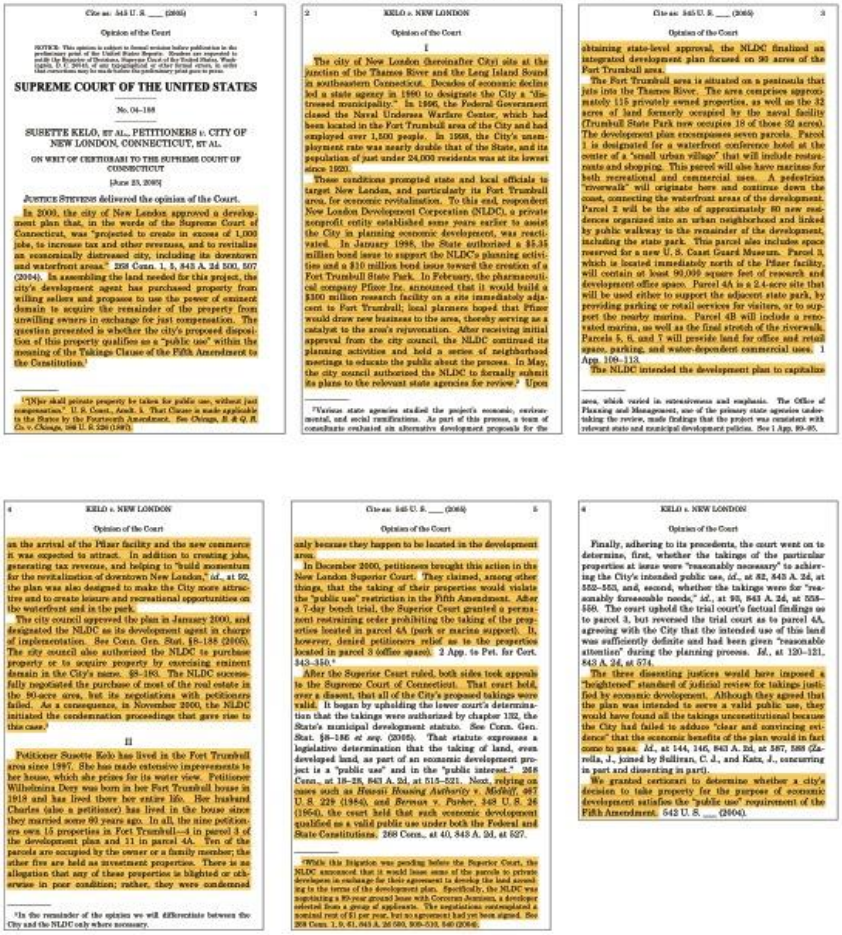
APPENDIX

Fig. 6: *Kelo*, facts and procedure, as appears in SINGER



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[1] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

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I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "dis-tressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unem-ployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reacti-vated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activi-ties and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceuti-cal company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adja-cent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.[2] Upon

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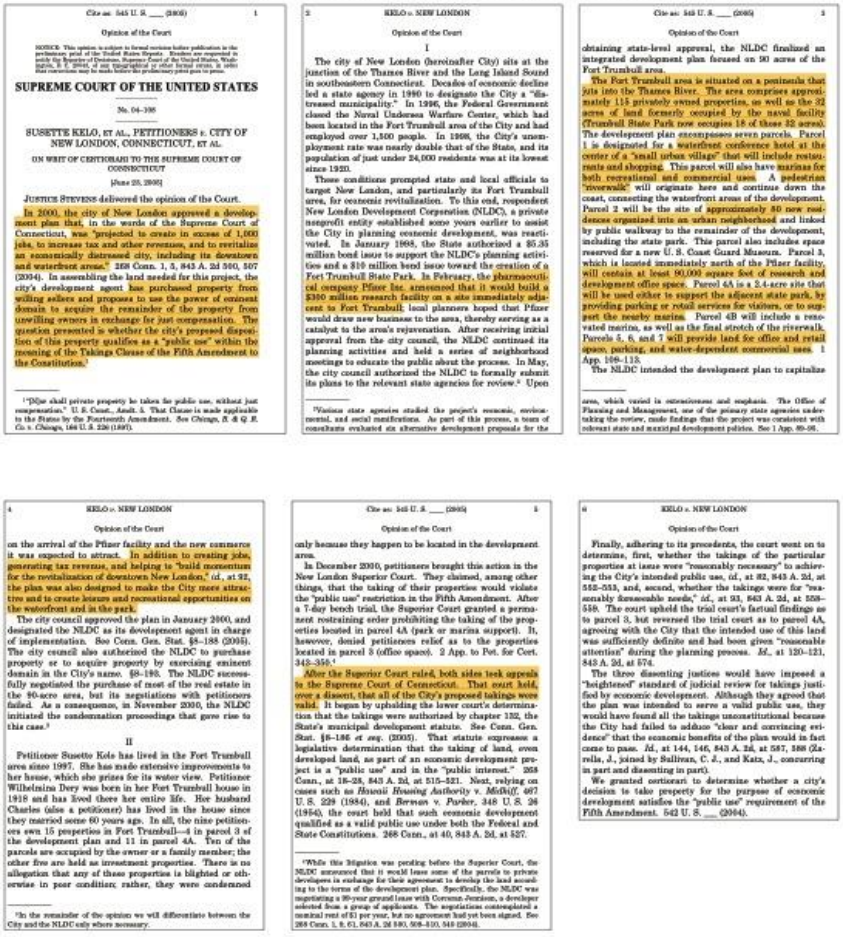

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JUDICIAL HUMILITY IN AN AGE OF CERTITUDE

R. GEORGE WRIGHT*

I. INTRODUCTION

It has not escaped notice that we live in an era of political and legal hyperpolarization.[1] One possible response to this circumstance would be to step back to reassess the grounds of our own political and legal beliefs, along with those of others.[2] This response would naturally be thought to involve a degree of intellectual humility.[3] However, whether humility is more generally worth pursuing has long been contested.[4] Often, humility is thought of in terms of something like an undignified, abject, self-effacing, deluded lack of sufficient self-respect.[5]

But humility,[6] intellectual humility,[7] and judicial intellectual humility in particular[8] need not be thought of as unworthy qualities. Below, we argue that a proper judicial humility, under our circumstances, is distinctively valuable and, more generally, in an era of legal certitude and unusual contentiousness. Crucially, judicial humility, in particular, is not skewed toward deference to either past judges or to contemporary legal decision-makers.[9] Judicial humility is an essential element of the ultimate value of broad practical wisdom in judging, but at the same time, judicial humility should be informed and steered by accumulated judicial practical wisdom.[10] A proper judicial humility and judicial practical wisdom thus reciprocally inform and guide each other.

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* Lawrence A. Jegen III Professor of Law, Indiana University Robert H. McKinny School of Law. A.B., University of Virginia; Ph.D., J.D. Indiana University.

[1] In this regard, consider the work of EZRA KLEIN, WHY WE'RE POLARIZED (2020); Joel Achenbach, *Science Is Revealing Why American Politics Are So Intensely Polarized*, THE WASH. POST (Jan. 20, 2024), www.washingtonpost.com/science/2024/01/20/polarization-science-evolution-psychology [https://perma.cc/F95Q-QRZB] (citing tribalism and mutual contempt in particular); Levi Boxtell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization*, NAT'L BUREAU OF ECON. RSCH. (Jan. 2020), https://www.nber.org/papers/w26669 [https://perma.cc/GW2H-MPGG] (explaining the United States as polarizing relatively rapidly); Richard Pildes, *The Age of Political Fragmentation*, 32 J. DEMOCRACY 146 (2021); Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011).

[2] One might refer to this as a Dylanesque approach, as inspired by the lyrics: "People disagreeing everywhere you look . . . [m]akes you wanna stop and read a book." BOB DYLAN, *Watching the River Flow* on BOB DYLAN'S GREATEST HITS VOL. II (Columbia Records 1971).

3. For an overview, see THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF HUMILITY (Mark Alfano et al. eds., 2020).

4. *See infra* Part II.

5. *See id.*

6. *See id.*

7. *See infra* Part III.

8. *See infra* Parts IV-V.

9. *See id.*

10. *See id.*

II. HUMILITY IN GENERAL: ITS NATURE AND VALUE

The nature and value of humility have long been controversial.[11] Some such uncertainty is inevitable. But humility can be defined in terms that bypass much of what disturbs those who find humility to be objectionable. As one analysis has suggested, "some varieties of humility are morally problematic,"[12] but "there are other varieties of humility that are certainly worth wanting."[13]

Thus, we shall not herein take humility to involve anything like a low opinion of oneself;[14] a low opinion of one's abilities;[15] a "slave morality;"[16] a "forgetting of the self;"[17] seeing oneself "as nothing;"[18] being insufficiently magnanimous;[19] underestimating one's good qualities;[20] a form of modesty;[21] or "putting oneself last."[22] Humility, in our approach, does not involve any of these forms of self-abnegation.

As well, humility, in our view, also excludes what some consider the opposing extreme. Thus,

> [h]umility is opposite to a number of vices, including arrogance, vanity, conceit, egotism, hyper-autonomy, grandiosity, pretentiousness, snobbishness, impertinence (presumption), haughtiness, self-righteousness, domination, selfish ambition, and self-complacency.[23]

More positively, our approach takes humility to be instead a matter of insightful, undistorted accuracy and realism in assessing one's own capacities

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11. *See, e.g.*, James Kellenberger, *Humility*, 47 AM. PHIL. Q. (2010); Thomas Nadelhoffer, et al., *Some Varieties of Humility Worth Wanting*, 14 J. MORAL PHIL. 168 (2017); Norvin Richards, *Is Humility a Virtue?*, 25 AM. PHIL. Q. 253 (1988).

12. Nadelhoffer, *supra* note 11, at 171.

13. *Id.*; *see also, e.g.*, THE UDDHAVA GITA dialogue 14, at 143 (Swami Ambikananda Saraswati trans., 2002); Arthur C. Brooks, *The Red Pill of Humility*, THE ATLANTIC (Oct. 5, 2023), www.theatlantic.com/ideas/archive/2023/10/humility-happiness-matrix-acceptance/675543[https://perma.cc/7FGR-484B] (elaborating on the rewards of humility).

14. *See* Richards, *supra* note 11, at 253.

15. *See id.* (citing HENRY SIDGWICK, METHODS OF ETHICS 334 (7th ed. 1907) (reprint ed. 1981)).

16. *Id.* at 258 (referring to Friedrich Nietzsche's formulation). Spinoza holds that humility is neither a virtue, nor something that arises from a virtue. But Spinoza's definition of humility is contrary to that which we employ herein. *See* BENEDICTUS DE SPINOZA, ETHICS — PART 4 prop. LIII, at 223 (R. H. M. Elwes trans., 1883) (1955 ed.) (1677).

17. *See* June Price Tangney, *Humility: Theoretical Perspectives, Empirical Findings and Directions for Future Research*, 19 J. SOC. & CLINICAL PSYCH. 70, 70 (2000); Cathy Mason, *Humility and Ethical Development*, 17 J. ETHICS & SOC. PHIL. 48, 48 (2020).

18. Kellenberger, *supra* note 11, at 331 (referring to the writer Iris Murdoch).

19. *See id.* at 321 (Aristotle on humility as a deficiency of the virtue of magnanimity).

20. *See id.* at 323 (citing the contemporary philosopher Julia Driver).

21. *See id.* (citing Driver).

22. *Id.* at 332 (quoting John Cottingham).

23. ROBERT C. ROBERTS & W. JAY WOOD, INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY 236 (2009).

and those of other persons.[24] Humility in this crucial sense is partly a matter of acuity, astuteness, and insight bearing upon the self, on others, and on the relevant circumstances. But it is also a matter of moral character, including the virtue of fortitude, as well.[25] Professor Norvin Richards thus concludes that humility "involves having an accurate sense of oneself, sufficiently firm to resist pressures toward incorrect revisions."[26]

This view thus revises Aristotle's basic methodology.[27] Humility, in our approach, is not the deficiency of the Aristotle virtue of magnanimity.[28] If humility is to be assessed on a loosely Aristotelian scheme, humility should occupy a virtuous mean between the vice of arrogance or the overestimation of self on the one hand and the opposed vice of self-effacement, diffidence, servility, self-subordination, or cringing inferiority on the other.[29]

Thus, Professor Linda Zagzebski, setting aside any connection between humility and fortitude, recognizes that "humility is not an Aristotelian virtue."[30] In Aristotelian terms, though, "if humility is the virtue whereby a person is disposed to make an accurate appraisal of her own competence,"[31] then humility can be seen as a sort of Aristotelian mean between a deficiency and an excess.[32] Humility in its intellectual dimension, in particular, "could reasonably be interpreted as a mean between the tendency to grandiosity and the tendency to a diminished sense of [one's] own ability."[33]

It cannot be assumed, though, that humility precisely bisects the difference between its deficiency and its excess. Humility need not mark some important geometric halfway point. Thomas Aquinas, for example, takes humility to lie closer to "lack of confidence"[34] than to "excessive self-confidence"[35] at the other

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24. *See* Kellenberger, *supra* note 11, at 332 (citing the psychologist Nancy Snow); *id.* at 332-33 (citing Bernard of Clairvaux).

25. *See* Richards, *supra* note 11, at 254.

26. *Id.*; *see also id.* at 258; Johannes Brunzel & Daniel Ebsen, *The Role of Humility in Chief Executive Officers*, 17 REV. MANAGERIAL SCI. 1487, 1487-88 (2023). In the judicial realm, consider, *e.g.*, FRANK SIKORA, THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. (2007).

27. *See* Kellenberger, *supra* note 11, at 321.

28. *See id.*

29. *See* Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 135-36 (1998). While Aristotle treats humility as a deficiency, it is possible to classify arrogance or self-effacement as constituting the deficiency or the excess of the virtuous mean of humility. A practical distinction between self-underevaluation and humility is relied upon in PHILIP E. TETLOCK & DAN GARDNER, SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION 228 (2015).

30. LINDA TRINKAUS ZAGZEBSKI, VIRTUES OF THE MIND 220 n.61 (1998).

31. *Id.*

32. *See id.*

33. *Id.*

34. ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ II-II, q. 161, art. 2, at 1265-74 (London, Burns Oates & Washbourne 1920).

35. *Id.*

extreme.[36] But it is also said that "[h]umility is not a sickly virtue, timid and feeble . . . it is *strong, magnanimous,* generous and constant, because it is founded on truth and justice."[37] For our purposes herein, we may remain agnostic on many such issues.

Humility is insight into reality when it is supported by character traits, including fortitude, and is commonly of value to individuals, groups, institutional actors, and entire societies. Living by illusions is often a risky evolutionary bet, even assuming the survival value of a sincere belief in the illusions in question. Bluster, obliviousness, and certitude carry the broader public interest only so far. Humility is, roughly, "the effort through which the self attempts to free itself of its illusions about itself"[38] more typically steers us away from risks we should not run and from challenges we should not take up.

Humility, though, admittedly imposes certain costs on the humble. Humility requires repressing the "highly agreeable"[39] feeling of "self-admiration."[40] The humble, insofar as they avoid living by illusions about their own abilities, cannot unthinkingly "credit their successes to something about themselves, such as their ability or effort, and lay blame for failure elsewhere."[41]

Importantly, though, humility is again not solely a matter of accurate self-perception and its sustaining virtues. One's view of the broader world,[42] and of "the ethical worth of others,"[43] are at stake as well.[44] Humility tends to limit our distortions of empirical as well as ethical reality.[45] Humility can thus be manifested by, for example, the social or natural scientist who is more interested in genuinely learning from rivals than in fending off all critiques and objections.

The typically valuable nature of humility can also be seen through that which humility opposes. Consider again the typical disvalue of the opposing qualities of "arrogance, vanity, conceit, egotism, hyper-autonomy, grandiosity,

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36. *See id.*

37. CAJETAN MARY DA BERGAMO, HUMILITY OF HEART 38 (Herbert Cardinal Vaughan trans., 1908) (2006 ed.) (emphasis added); *see also* Christopher M. Bellitto, *The Medieval Notion That Shows Why Even Experts Should Be Humble*, PSYCHE (Mar. 21, 2024), https://psyche.co/ideas/the-medieval-notion-that-shows-why-even-experts-should-be-humble [https://perma.cc/BF42-87PB].

38. ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES 147 (Catherine Temerson trans., 1996) (2001 ed.).

39. HENRY SIDGWICK, THE METHODS OF ETHICS 335 (7th ed. 1907) (reprint ed. 1981).

40. *Id.*

41. DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF 70 (2005). The risk, though, is that misconceived ideas of humility may impair one's own self-preservation or enhance the risk of being dominated or exploited. *See* Waclaw Bak et al., *Intellectual Humility: An Old Problem in a New Psychological Perspective*, 10 CURRENT ISSUES IN PERSONALITY PSYCH. 85, 92 (2022).

42. *See* Jen Cole Wright, *Experience Humility*, TIMES ARGUS (Sept. 14, 2023), https://www.timesargus.com/opinion/commentary/wright-experience-humility/article_95a176d6-d676-5170-bfda-ba9eaf7c1d0e.html [https://perma.cc/934J-ZNS7].

43. *Id.*

44. *See id.*

45. *See id.*

pretentiousness, snobbishness, impertinence (presumption), haughtiness, self-righteousness, domination, selfish ambition, and self-complacency."[46] Each of these qualities may indeed benefit its exhibitor, in the short run or even in the long run, particularly in a hierarchical or deeply class-divided society. However, the personal and social costs of these generally alienating and otherwise unattractive qualities should be obvious. Their manifestation ordinarily undermines broad, productive trust and cooperation among more or less free and equal persons and groups.

There arise distinctive and important problems when lack of humility manifests itself as, in particular, a lack more specifically of intellectual humility. The quality of intellectual humility is of special significance in the context of judicial, legislative, regulatory, and legal academic judgment and policy advocacy. We take up these considerations immediately below.

III. THE MORE SPECIFIC QUALITY OF INTELLECTUAL HUMILITY

Intellectual humility, in particular, is depicted in the literature in common-sensical terms. Thus, intellectual humility is thought to involve an accurate understanding of one's abilities and limitations;[47] an ability to recognize one's errors in judgment[48] and the gaps or deficiencies in one's knowledge and thinking abilities;[49] a genuine openness to new or currently disfavored ideas and information;[50] a tolerance of ambiguity and uncertainty;[51] and a resistance to premature epistemic closure.[52]

Otherwise put, intellectual humility involves appropriate, rather than excessive, recognition of one's frailties and vulnerabilities.[53] The intellectually humble person thus displays "appropriate attentiveness to the evidentiary basis of . . . beliefs,"[54] and to their own personal information processing limits.[55]

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46. ROBERT C. ROBERTS & W. JAY WOOD, INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY 236 (2007).

47. *See* Dennis Whitcomb et al., *Intellectual Humility: Owning Our Limitations*, 94 PHIL. & PHENOMENOLOGICAL RSCH. 509, 510 (2017) (citing J.P. Tangney, *Humility*, *in* OXFORD HANDBOOK OF POSITIVE PSYCH. (S.J. Lopez & C.R. Snyder eds., 2009)).

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id*. It is not surprising that intellectual humility is positively correlated with intelligence. *See* Leor Zmigrod, et al., *The Psychological Roots of Intellectual Humility: The Role of Intelligence and Cognitive Flexibility*, 141 PERSONALITY & INDIVIDUAL DIFFERENCES 200 (2019). Of course, any given person may be intellectually humble in one or more of these respects, but not intellectually humble in one or more others. As well, particular persons, and people in general, may display more, or less, intellectual humility in one context or domain than another.

53. *See* Bak, *supra* note 41, at 88.

54. *Id.*

55. *Id.*; *see also* CHRISTOPHER PETERSON & MARTIN E. P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 462-63 (2004).

Similarly, there is "appropriate attentiveness to limitations in obtaining and evaluating relevant information."[56]

Crucially, intellectual humility involves a typical "openness to revising one's own viewpoints, lack of over-confidence about one's knowledge, respect for the viewpoints of others,[57] and lack of threat in the face of intellectual disagreements."[58] Pointedly, it is said that "[i]ntellectually humble people are those who are more concerned with getting at the truth than promoting themselves or protecting their own ideas."[59] Intellectual humility thus requires more than respecting or deferring reasonably to colleagues, allies, and neutral parties. Seeking out the actual first-hand opinions of at least minimally thoughtful opponents may usefully inhibit the tendency toward self-defeating 'groupthink.'[60]

Intellectual humility can certainly have its costs under some circumstances, including various emergencies. Intellectual humility in a leader or a potential leader may be interpreted as weakness, indecisiveness, or irresolution. In a politically intensely polarized era, perceived intellectual humility may alienate potential supporters. Professional groups to which one belongs may require at least the appearance of one's epistemic certainty as to the basic group beliefs. Reflective doubt may be widely deemed to amount to irresolution, dithering, or a way station to heresy.

In contrast, intellectual humility offers important benefits, including spillover benefits for groups and the broader society. Consider, for example, that the intellectually humble "are more likely to display tolerance of opposing political and religious views, exhibit less hostility toward members of those opposing groups, and are more likely to resist derogating outgroup members as

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56. *See* Bak, *supra* note 41, at 88, quoting Mark R. Leary, *The Psychology of Intellectual Humility*, TEMPLETON FOUNDATION 4 (Sept. 2018), https://www.templeton.org/wp-content/uploads/2020/08/JTF_Intellectual_Humility_final.pdf [https://perma.cc/PCS7-YDTQ].

57. Crucially, the 'others' involved here would extend beyond one's colleagues, allies, and those with whom one sympathizes to include non-supporters, skeptics, and implacable enemies of one's relevant beliefs and values. The other side of this coin is the intellectually humble person's tendency to avoid dogmatism; *see* Michael P. Lynch, et al., INTELLECTUAL HUMILITY IN PUBLIC DISCOURSE 5, IHPD LIT. REV (2012), https://humilityandconviction.uconn.edu/wp-content/uploads/sites/1877/2016/09/IHPD-Literature-Review-revised.pdf.

58. Bak, *supra* note 41, at 88, quoting ELIZABETH J. KRUMREI-MANCUSO & STEVEN V. ROUSE, NAT'L LIBR. OF MED, THE DEVELOPMENT AND VALIDATION OF THE COMPREHENSIVE INTELLECTUAL HUMILITY SCALE 210 (Nov. 5, 2015). The Nobel Prize winner Daniel Kahneman is credited in this respect; *see* Cass R. Sunstein, *The Nobel Prize Winner Who Liked to Collaborate with His Adversaries*, THE NEW YORK TIMES (Apr. 1, 2024,) www.nytimes.com/2024/04/01/opinion/nobel-daniel-kahneman-collaboration.html [https://perma.cc/36RR-8AVN].

59. Bak, *supra* note 41, at 1 (quoting Justin L. Barrett, *Intellectual Humility*, 12 J. Pos. Psych. 1 (2017)).

60. *See* Tenelle Porter & Karina Schumann, *Intellectual Humility and Openness to the Opposing View*, 17 SELF & IDENTITY 139 (2017) (referring to the classic IRVING JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF POLICY DECISIONS AND FIASCOES (Houghton Mifflin Company, 1972).

intellectually and morally bankrupt."[61] Perhaps even more crucially, the intellectually humble "seem to be more curious and better liked as leaders, and tend to make more thorough, well informed decisions."[62]

More broadly, intellectual humility has been found to correlate with "measures of empathy, benevolence and altruism."[63] Low levels of intellectual humility are associated not only with inadequately grounded opinions,[64] but with "interpersonal conflict"[65] and "an unwillingness to negotiate or compromise."[66] No doubt many political actors—many with low intellectual humility—positively value interpersonal conflict and their own unwillingness to negotiate or compromise. This would seem to be especially characteristic of an intensely polarized age, where extremism is often rewarded.

Even those political actors would not typically approve of an unwillingness to negotiate or compromise with their opponents. Unwillingness to negotiate or compromise is commonly valued only on the assumption that, through that behavior, one's own side, and not one's opponent's, will ultimately prevail. There is no reason, though, to identify the public interest with the uncompromised viewpoint of any single group of intransigents or fanatic extremists. The long-term public interest is, overall, better served by the intellectually humble person's inclination toward reasonable "gratitude, forgiveness, altruism, and empathy."[67]

More concretely, the public interest is not typically best served by those who score low in intellectual humility and who

> badger and bulldoze in place of persuading and discussing. They don't care about your feelings but cry if you offend theirs . . . They fail to be open to the chance that they might be misinformed, mistaken, or—worst of all for their needy egos—not the center of everyone else's universe.[68]

What the contemporary physicist Carlo Rovelli says of science is true in the social and legal spheres as well: "The search for knowledge is not nourished by certainty: it is nourished by a radical absence of certainty. Thanks to the acute

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61. Tenelle Porter, et al., *Predictors and Consequences of Intellectual Humility*, 1 NAT'L REV. PSYCH. 524, 530-31 (Jun. 27, 2022). This would seem especially important in societies with decreasing effective literacy, practical numeracy, interest in reading, national and global test scores, and student study effort at all levels.

62. *Id.* at 532.

63. Bak, *supra* note 41, at 91.

64. *See* Mark R. Leary, *Cognitive and Interpersonal Features of Intellectual Humility*, 43 J. PERSONALITY & SOCIAL PSYCH. BULL.793 (2017).

65. *Id.*

66. *Id.* Which may be seen, however ultimately self-destructively, as a desirable quality.

67. Leary, supra note 56, at 13.

68. CHRISTOPHER M. BELLITTO, HUMILITY: THE SECRET HISTORY OF A LOST VIRTUE 141 (2023).

awareness of our ignorance, we are open to doubt and can continue to learn and to learn better."[69]

Intellectual humility, it should be emphasized, does not require anything like unlimited open-mindedness, undue credulity, or the active consideration of all new claims or all newly proffered evidence. Recognizing one's fallibility in a given context does not mean that all new claims should be treated as plausible or worthy of costly examination. Nor need the appropriately intellectually humble decision maker to treat every speaker on a given subject as equally credible.[70] Intellectual humility is entirely compatible with recognizing that, in a given context, one may have epistemic superiors, epistemic peers, and epistemic inferiors.[71] Other people, no less than oneself, may be vulnerable to the various adverse influences of psychological defense mechanisms,[72] cognitive biases,[73] conflicts of interest,[74] and the inculcation of false consciousness[75] or adaptive preferences.[76]

On the basis of these understandings, we can now address the proper scope and limits of humility, and of intellectual humility in particular, in specifically legal contexts.

IV. HUMILITY, AND INTELLECTUAL HUMILITY IN PARTICULAR, ACROSS THE LAW

It seems reasonable to assess the work of judges and other legal system actors as manifesting or not manifesting relevant virtues and vices.[77] But it has,

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69. CARLO ROVELLI, HELGOLAND 156 (2021).

70. *See* Kasim Khorasanee, *Being Open-Minded About Open-Mindedness*, 99 PHIL. 191 (Feb. 20, 2024).

71. *See* R. George Wright, *Epistemic Peerhood in the Law*, 91 ST. JOHN'S L. REV. 663 (2017); Heather Battaly, *Epistemic Self-Indulgence*, 41 METAPHILOSOPHY, 214 (2010); Juan Gomesana, *Conciliation and Peer-Demotion in Epistemology of Disagreement*, 49 AM. PHIL. Q. 237, 238 (2012); Bryan Frances, *Discovering Disagreeing Epistemic Peers and Superiors*, 20 INT'L J. PHIL. STUD. 1 (2012); Robert Mark Simpson, *Epistemic Peerhood and the Epistemology of Disagreement*, 164 PHIL. STUD. 561 (2013).

72. See, classically, ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENSE (1936).

73. Beyond the cognitive bias surveys themselves, *see* Nathan Ballantyne, *Debunking Biased Thinkers (Including Ourselves)*, 1 J. AM. PHIL. ASS'N 141 (2015); Emily Pronin & Lori Hazel, *Humans' Blind Spot and Its Societal Significance*, 32 CURR. DIRECTIONS IN PSYCH. SCI. 402 (2023).

74. Presumably, one's approach to many legal issues, including tax, schools, and crime, may reflect one's sense of either insulation from, or vulnerability to, adverse policy consequences.

75. See, e.g., Nancy E. Snow, *Humility*, 29 J. VALUE INQUIRY 203, 213 (1995) ("calls to humilitycan be used by oppressors to inculcate false consciousness").

76. *See, e.g.*, SERENE J. KHADER, ADAPTIVE PREFERENCES AND WOMEN'S EMPOWERMENT (2011); Martha C. Nussbaum, *Symposium on Amartya Sen's Philosophy: 5 Adaptive Preferences and Women's Options*, 17 ECON. & PHIL. 67 (2001).

77. The leading such example is Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2004); see also R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 CLEV. ST. L. REV. 195 (2012). Professor

unfortunately, been suggested that lawyers in general "have lost sight of the necessity of humility as a core element"[78] of their discipline. What, though, might be gained by greater attention to, and by the practice of, appropriate judicial humility?

The answer to that question largely flows from the values and limits of the broader practice of humility illustrated above.[79] Thus, judicial humility can be associated with generally desirable qualities, including "modesty, gentleness, awareness of one's fallibility, an openness to learning, curiosity about and engagement with the perspectives of others, [and] respect for and deference to other decision-makers and institutions."[80] A judge who is not too sure that she is right may be neither indecisive nor underinformed. She may, to the broader benefit, be instead manifesting the spirit of liberty.[81]

In discussing the jurisprudence of Justice Holmes, Professor John Inazu suggests the value of judicial discourse that prioritizes charity over dismissal,[82] or at least the value of a productive dialogue across time.[83] Judicial humility may play a role in limiting broad and severe societal conflict. Thus, "[a]t a time when we too often sacralize our views and condemn our opponents, epistemic humility could help our society avoid escalating from weaponized words to actual weapons."[84] The psychological evidence suggests that persons with high intellectual humility in the sociopolitical realm tend toward reduced levels of political polarization[85] and of "motivated thinking."[86]

Still, we might wonder whether judicial humility would lead to an unduly conservative judicial system. The courts might unduly constrain the role and judicial influence of their own hard-won insights when confronted by legislative mandates or by popular excitation. Or perhaps courts would tend unduly to defer to what they take to be the presumed insights of the constitutional framers or to the presumed wisdom embodied in some particular version of history and tradition. Or, yet again, judicially humble courts might opt for narrow,

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Solum focuses most extensively on the virtues of judicial practical wisdom, judicial impartiality or evenhandedness, and judicial integrity or respect for the law.

78. Bruce P. Frohnen, Augustine, *Lawyers & the Lost Virtue of Humility*, 60 CATH. U.L. REV. 1, 4 (2020).

79. *See supra* Parts II-III.

80. Benjamin Berger, *What Humility Isn't: Responsibility and the Judicial Role*, *in* CANADA'S CHIEF JUSTICE: BEVERLY MCLACHLIN'S LEGACY OF LAW AND LEADERSHIP (Marcus Moore & Daniel Jutras eds., 2018) (forthcoming) (manuscript at 5-6) (on file with author).

81. *See generally* LEARNED HAND, THE SPIRIT OF LIBERTY, PAPERS AND OTHER ADDRESSES (1959).

82. *See* John Inazu, *Holmes, Humility and How Not to Kill Each Other*, 94 NOTRE DAME L. REV. 1631, 1631-33 (2019).

83. *See id.*

84. *Id.* at 1632 (referring to Justice Holmes).

85. *See* Elizabeth I. Krumrei-Mancuso & Brian Newman, *Intellectual Humility in the Sociopolitical Domain*, 19 SELF & IDENTITY 989, 1011 (2020).

86. *Id.* See, for background on motivated reasoning as distinguished from truth-tropic reasoning, Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990).

unambitious judicial incrementalism rather than acknowledge a need for more substantial legal change at the moment.

All of these possible outcomes of adopting judicial humility are real. But adopting such judicial attitudes need not reflect judicial humility. Judicial humility does not require these judicial attitudes any more distinctively than would any other defensible approach to judicial decision-making. Judicial humility itself does not, in general, tell us anything distinctive about the proper role of judicial deference, the passive virtues, the narrowness of statutory construction, the judicial avoidance canons, or judicial restraint.

The dominant current understanding of judicial humility might well lead us, admittedly, to suppose otherwise. Thus, it is said that "[t]he prevailing conception of judicial humility equates it with judicial restraint, deference, or comity."[87] But in truth, judicial humility is more a matter of accurately assessing, in absolute or comparative terms, one's competence along with that of others. Humility does not deny one's absolute advantages or, even more interestingly, one's comparative advantages.[88]

More concretely, "the well-calibrated person can have real conviction, since being epistemically conscientious need not entail a loss of conviction."[89] Appreciating one's capacities, absolute and comparative, as well as one's limitations, may enhance one's grounds for conviction.[90] Believing that one's convictions have been properly shown to be well-grounded may well lead to enhanced confidence and steadfastness. As one philosopher has rightly concluded, "humility is not inconsistent with social activism."[91]

On this basis, we can think of judicial humility as sustaining the continuous threads of judicial institutional legitimacy and basic constitutional principles across time[92] while reformulating those principles[93] to avoid the "unwarranted, destabilizing reinvention of the whole legal landscape."[94] In itself, though, judicial humility does not allow others to predict how the judge in question will vote on some particular constitutional case.[95] Merely, for example, judicial

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87. Amalia Amaya, *The Virtue of Judicial Humility*, 9 JURISPRUDENCE 97, 98 (2018); *see*, for an application, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution*, 65 FORDHAM L. REV. 1269, 1290 (1997).

88. *See, e.g.*, R. George Wright, *At What Is the Supreme Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535 (2013).

89. Michael Hannon & Ian James Kidd, *Political Conviction, Intellectual Humility, and Quietism*, 18 J. POSITIVE PSYCH. 233, 234 (2023); *see also* Michael Hannon & Ian James Kidd, *Is Intellectual Humility Compatible with Political Conviction?*, 27 J. ETHICS & SOC. PHIL. 211 (2024).

90. *See* the sources cited *supra* note 89.

91. Jennifer Wargin, *"We Must Speak:" Humility and Social Activism*, 6 EIDOS 51, 59 (2022).

92. See Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835, 858 (2012).

93. *See id.*

94. *Id.*

95. *See* Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 42 (2007).

humility need not impair that judge's ability to assess some case precedent as reflecting either the judicial humility of one's predecessor judges or humility's very opposite.[96] Judicial humility is thus entirely compatible with the ability to recognize a prior instance of judicial arrogance for what it is.

V. THE NATURE, VALUE, AND LIMITS OF PROPER JUDICIAL HUMILITY

It has been said that "judges are no less fallible about moral questions than the rest of us, and it's dangerous for them to imagine otherwise."[97] More broadly, judicial humility may be indispensable to the functioning of courts,[98] and to their well-founded and sustained legitimacy.[99]

Consider the position of judges seeking, during the COVID-19 pandemic, to accommodate constitutional rights with public health concerns and other public interests. At the time, Judge David Hamilton of the Seventh Circuit Court of Appeals richly appreciated that "the Constitution cannot be put away and forgotten."[100] But Judge Hamilton recognized as well that most judges will, in science-based cases, unavoidably lack much relevant technical expertise.[101]

So, in many such cases, any judicial impulse to independently assess alleged constitutional rights violations should be tempered by a proper judicial humility. In the COVID-19 context, judicial humility would require a proper respect for the findings of others as to many emerging and complex technical and social facts.[102] In such cases, the sense of judicial fallibility should be particularly acute.

The crucial complication, though, is that a judge's professional humility must also incorporate some sense of the capacities and limitations of other policymakers. Those judgments will often incorporate evidence of the degree of intellectual humility of those other policymakers. Judicial humility may well counsel less judicial deference to technical experts with unduly low intellectual

96. *See id.*

97. Susan Haack, *Pragmatism, Law, and Morality*, 3 EUR. J. PRAGMATISM & AM. PHIL. 79, 80 (2011).

98. See the discussion of Justices Frankfurter and Owen Roberts in AARON TANG, SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT 235-36 (2023).

99. *See id*. at 236.

100. Cassell v. Snyders, 990 F.3d 539, 549 (7th Cir. 2021).

101. *See id.*

102. *See id.* More broadly, judicial humility may "in the long run save time, energy, and resources." Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

humility.[103] Judicial deference to policymakers in the evident grip of some cognitive bias can also be deeply harmful.[104]

Consider that non-judicial policy experts may, quite systematically, overestimate their specific subject matter expertise.[105] They may be distinctively subject to systematic, non-random cognitive biases.[106] Their basic interests may evidently not align with those of the public, a fact that they may themselves clearly underappreciate.[107] Their basic methodological assumptions may be seriously flawed, contestable, or indeterminate in their proper application.[108] Experts may overrate the importance of considerations that are central to their own field of expertise and underrate the importance of considerations not within the scope of their expertise.[109] They may also tend, in a systematic way, to assume that important normative policy conclusions fall naturally and

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103. As a hypothetical example, psychological studies might find less intellectual humility, and a greater degree of systematic cognitive bias, in some credentialed experts than among many judges.

104. Consider, for example, that pandemic response policies arguably impairing constitutional rights may also have adverse, unintended, long-term consequences in areas beyond the deaths and illnesses directly caused by the virus in question, and beyond the technical expertise of the key policy makers.

105. For a rigorous exposition of just such overestimation, *see* PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (Princeton University Press, 2006).

106. *See*. JANIS, *supra* note 60; Michael Hallsworth, et al., *Behavioural Government*, BEHAVIOURAL INSIGHTS TEAM (July 11, 2018), www.bi.team/wp-content/uploads/2018/08/BIT-Behavioural-Government-Report-2018.pdf [https://perma.cc/KS6Z-BFY5]; *see also* BRIAN W. HOGWOOD & B. GUY PETERS, THE PATHOLOGY OF PUBLIC POLICY (1985); Sceheryar Banuri, et al., *Biased Policy Professionals*, 33 WORLD BANK REV. 310, 310 (2019) (on "confirmation bias driven by ideological predisposition"); Casper Dahlmann & Niels Bjorn Petersen, *Politicians Reject Evidence That Conflicts With Their Beliefs: And If You Give Them More Evidence, They Double Down*, THE WASHINGTON POST (Oct. 5, 2017, 10:00 AM) https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/05/politicians-reject-evidence-that-conflicts-with-their-beliefs-and-if-you-give-them-more-evidence-they-double-down/ [https://perma.cc/GA6U-RFXS]; Timur Kuran & Cass R. Sunstein, *Availability Cascade and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Slavisa Tasic, *The Illusion of Regulatory Competence*, 21 CRITICAL REV. 423 (2009); Michael David Thomas, *Reapplying Behavioral Symmetry: Public Choice and Choice Architecture*, 180 PUB. CHOICE 11 (2018) (on administrative agency cognitive capture).

107. *See* EAMOUN BUTLER, PUBLIC CHOICE - A PRIMER (Mar. 25, 2012); GORDON TULLOCK, ET AL.,, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE (2002). For broader-based arguments, see PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER (Princeton University Press, 2014); Clifford Winston, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMIC POLICY RESEARCH AND GOVERNMENT PERFORMANCE (2006).

108. Policy makers seeking to apply some form of cost-benefit analysis, or perhaps a form of a precautionary principle, may overlook fundamental methodological problems that are evident to outsiders. For background, *see e.g.*, Eric Posner & Matthew D. Adler, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165 (1999). On the logic of the precautionary principle, pre-COVID-19, see CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005). For an endorsement of a "least harm" decisional principle, *see* AARON TANG, SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT (2023).

109. Query whether teams of epidemiologists and separate teams of child and adolescent development and educational specialists would likely adopt the same COVID-19 response policies.

uncontroversially out of their findings of fact.[110] And policy experts may tend to assume that the available evidence is clearly indicative of a much larger body of unavailable evidence.[111]

More broadly, a properly exercised judicial humility does not invariably call for judicial minimalism or judicial restraint. What a proper judicial humility really calls for in any given case requires the exercise of the further, ultimate virtue of practical judicial wisdom. A proper degree of judicial humility is indispensable to a properly functioning judicial system. But in the end, judicial humility vitally contributes to the ultimate, overarching value of practical judicial wisdom while also relying on some elements of practical wisdom to guide judicial efforts to exercise humility. Judicial humility is thus essential to judicial practical wisdom and a properly functioning rule of law while being, at the same time, crucially informed by other dimensions of practical wisdom in the judicial context.

At first blush, judicial humility would seem to generally condemn attempts by courts to probe into the motives of legislators who have enacted a particular statute.[112] But the reasonably epistemically humble judge can recognize the difference between the attempted reading of a perhaps non-existent collective legislative mind and reasonably inferring legislative intent from the obvious point of a statute.[113]

A reasonable humility counsels against any judicial pretense to extreme or Herculean fact-finding abilities.[114] Thus, when it comes to, say, a university's advanced student professionalism evaluations, the Court has recognized that such matters require "an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."[115] But when the typical outcome of an overly ambitious judicial test is widely approved of, any pretentiousness embodied in that test is

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110. The tendency to slide casually from an 'is,' or a likely 'is,' to an all-things-considered 'ought' should be resisted judicially. *See* Rachel Cohon, *Hume's Moral Philosophy*, Stanford Encyclopedia of Philosophy (Aug. 20, 2018), https://plato.stanford.edu/entries/hume-moral [https://perma.cc/M8CW-ZPJN].

111. *See* Nathan Ballantyne, *The Significance of Unpossessed Evidence*, 65 PHIL. Q. 315, 315 (2015) ("[f]or many topics, evidence we don't have comprises most of the evidence there is"). On the other hand, there is the problem of the overuse, rather than the underuse, of judicial summary judgment. See Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L. J. 627, 637 (2012) (the proper response to the overuse of summary judgment as "a large dose of judicial humility or consciousness-raising").

112. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (observing that "[i]nquiries into congressional motives or purposes are a hazardous matter").

113. For a more aggressive epistemic approach, see the hippie food stamp case of U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

114. *See, e.g.*, Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 89-90 (1978).

115. *Id.* at 90.

commonly ignored.[116] Judicial claims to mind-reading and the ability to assign probabilities to future events are widely approved of in some contexts, such as when the courts protect freedom of speech.[117] Such speech-protective decisions may actually be defended on the grounds of judicial humility, though, if federal courts are thought to be less caught up than local officials in the political passions, frenzies, biases, and epistemic excesses of the day.[118]

Probably the most familiar argument for judicial humility as something like judicial restraint or judicial minimalism, though, relies upon Justice Brandeis's concurring opinion in the classic case of *Ashwander v. Tennessee Valley Authority*.[119] Among Justice Brandeis's counsels of judicial humility in *Ashwander* is, centrally, the principle that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[120] Presumably, the idea is that common law courts, especially, are by training and disposition better suited to modest tasks of narrow, concrete, fact-based, incremental scope rather than attempting to foresee the unintended consequences of needlessly broad judicial rules.[121]

The general approval of Justice Brandeis's *Ashwander* principles is not confined to any portion of the familiar political spectrum. Thus, it is thought by progressive judges that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."[122] The related general principle of

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116. Note the Court's willingness to second-guess local administrative judgments on a range of largely empirical, or subjective, matters in the subversive advocacy free speech case of Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (per curiam).

117. *See id.*

118. *See generally* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618 (1988) (critiquing Professor Blasi's approach).

119. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

120. *Id.* at 347 (internal citation omitted).

121. *See, e.g.*, the concern for the quality of judicial decision-making expressed in State v. Rowan, 416 P.3d 566, 579 (Utah 2017) (citing Ashwander, 297 U.S. at 346-47). More broadly, see the comparison between what is called disjoint incrementalism and broader, more synoptic approaches to decision-making in DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS (1970). For discussion in one particular constitutional context, see Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995). For a skeptical critique of some aspects of judicial avoidance, *see generally* Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71 (1995).

122. Trump v. Anderson, 601 U.S. 100, 118 (2024) (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment) (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in the judgment)). The Sotomayor opinion goes on to declare this policy to be a "fundamental principle of judicial restraint." *Id.* For broader discussion, see CASS R. SUNSTEIN, ONE CASE AT A TIME - JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

stare decisis is also thought to reflect judicial humility, modesty, and restraint, as opposed to judicial arrogance or hubris.[123]

The deep problem here is not that judicial humility may be outweighed by other considerations. Certainly, *Ashwander* narrowness and respect for judicial precedent should, in some cases, be less than decisive. Professor Andrew Coan has recently observed that "[a]cross-the-board gradualism is subject to many weighty objections. It is hard to square with some of the Supreme Court's most celebrated decisions. Think of *Obergefell v. Hodges* or *Brown v. Board of Education* or *Gideon v. Wainwright*."[124] The controversy over the proper scope of judicial narrowness and stare decisis[125] is, however, not really about the role of judicial humility.

To see this, consider the position of the Court in *Brown*. Judicial humility certainly requires attention to one's own real capacities, deficiencies, biases, limitations, and overall fallibility. However, thoughtful judicial humility does not automatically credit all other legal actors, including any judicial predecessors, with themselves invariably acting with proper humility. Such matters can be reflected upon by current judges with appropriate humility. One's predecessor judges, prior and current legislators and administrators, and other legal actors were themselves fallible. They were situated persons, of and within their culture. They may not have always fully recognized their fallibilities. And their predictions as to the actual effects of their actions are typically less accurate than the observations of their successors, who have actually lived through those actual effects. All this may be humbly taken into account.

Judicial humility certainly requires a proper deference to those who contributed to the accumulated wisdom of tradition.[126] But merely being a predecessor of one's successors hardly implies that one's judgments reflect any degree of humility. Our predecessors may well have had even stronger grounds for exercising epistemic humility, given their comparatively more limited experiences.

This point is related to a conclusion classically expressed by Blaise Pascal. Pascal claimed that

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123. *See, e.g.*, Brown v. Davenport, 596 U.S. 118, 141 (2022) (stare decisis is at best "a call for judicial humility" and "a reminder to afford careful consideration to the work of our forebearers, their experience, and their wisdom."); *see also id.* (misuse of the doctrine "would turn stare decisis from a tool of judicial humility into one of judicial hubris"). For further thoughtful discussion, *see* State v. Walker, 267 P.3d 210 (Utah 2011).

124. Andrew Coan, *Too Much, Too Quickly?*, ARIZ. LEGAL STUD. at 26 (January 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714188 [https://perma.cc/WAG5-4P5T]. One might think of the dubious value of cases like Sweatt v. Painter, 339 U.S. 629 (1950) in merely limiting Plessy v. Ferguson, 163 U.S. 537 (1896) rather than broadly overruling Plessy in Brown v. Bd. of Educ., 347 U.S. 483 (1954).

125. For a recent authoritative discussion of the scope and limits of stare decisis, *see Dobbs*, 597 U.S. at 231-32; *id.* at 263-64 (Breyer, J., dissenting).

126. *See, e.g.*, Edmund Burke, Reflections on the Revolution in France, in The Portable Edmund Burke 415-451 (Isaac Kramnick eds., 1999).

> [t]hose whom we call ancient were really new in all things, and properly constituted the infancy of humankind, and as we have joined to their knowledge the experience of the centuries which have followed them, it is in ourselves that we should find this antiquity that we revere in others.[127]

The problem here, though, is that it cannot be simply assumed that nearly all of the knowledge attained by our predecessors has been preserved and absorbed by us in a largely undistorted fashion. Insights can be grossly distorted or lost, at least for some period of time.[128]

But Pascal's broader point is clearly important. Earlier courts may have lacked sufficient humility, along with much grasp of the actual effects of their decisions, let alone the accumulated experience of later decades. The proper judicial humility of contemporary judges should thus take earlier insufficiencies in judicial humility into realistic account, along with the inevitable inability to anticipate the ill consequences of one's decisions over time.

Consider, then, the question of judicial humility in deciding whether to overrule the racial separate but equal case of *Plessy v. Ferguson*.[129] An important defect in the *Plessy* majority opinion is one of a distinct lack of judicial humility in a matter of logic and judgment, rather than of ability to forecast the future. The *Plessy* majority had declared that "[l]aws permitting, or even requiring, [racial] separation, in places where [races] are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other."[130]

This is doubtless true, but only as a matter of the most arid, abstract, contextless, ahistorical, unrealistic legal formalism. Justice Harlan's dissenting opinion at the time pointed clearly enough at the problem of sightless formalism versus realism,[131] though. The *Plessy* majority lacked the epistemic humility to hold their intuitions and biases up to any meaningful scrutiny. And the *Brown* Court could, with due humility, have taken the *Plessy* Court's now evidently insufficient judicial humility into proper account.

Such a judgment by the *Brown* Court need not have been a matter of hindsight bias or even of experience accumulated after Plessy. Perhaps the most decisive claim in Plessy runs as follows:

> We consider the underlying fallacy of the plaintiff's argument to consist of the assumption that the enforced separation of the two races stamps

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127. BLAISE PASCAL, A PREFACE TO THE TREATISE ON VACUUM, IN MODERN PHILOSOPHY: ESSENTIAL SELECTIONS 6, (Oct. 18, 2016), https://en.wikisource.org/wiki/Blaise_Pascal/Preface_to_the_Treatise_on_Vacuum [https://perma.cc/7B2S-BUHE].

128. As noted in JOHN STUART MILL, ON LIBERTY 63 (Gertrude Himmelfarb ed., 1974) (1859).

129. 163 U.S. 537 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954).

130. *Id.* at 544.

131. *See id.* at 552, 556-57 (Harlan, J., dissenting).

> the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.[132]

These are measured, but objectively and plainly embarrassing, words. They amount, in all relevant times and places, to an obvious instance of the fallacy of the excluded middle,[133] as most generously constructed. On the *Plessy* majority's logic, if there is any badge of inferiority in the case, it must be sourced either in the particular regulation at issue itself, or else in the supposedly readily alterable subjective perceptions of African Americans.

Giving the *Plessy* majority every benefit of the doubt, it should have been evident even then that the Court had somehow managed to exclude the most obvious possible account. We may choose to assume that the particular racial separation regulation, in itself, at least facially,[134] was not racially invidious in its express terms.[135] But this does not leave the readily alterable perceptual subjectivities of African Americans as the sole, or even most likely, alternative. Justice Harlan recognizes this and finds the majority's excluded middle alternative to be entirely obvious. Justice Harlan, in dissent, points to the commonsense recognition ignored by the majority:

> Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons. . . . The thing to accomplish was to compel [blacks] to keep to themselves while traveling in railroad passenger cars. No one would be so wanting in candor as to assert the contrary.[136]

As Justice Harlan evidently recognizes, there was likely some sentiment, as in racial intermarriage cases,[137] that the behavior of white persons should also be constrained to some degree by law. But this sort of Orwellian even-handedness is no less racially invidious and in a racially non-symmetrical way. Fear of some sort of racial taint has historically run asymmetrically.

All of this should have been, if it was somehow not in fact, evident to all of the Justices in *Plessy*. And this is a matter of what was then widely known and

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132. *Id.* at 551.

133. *See, e.g.*, the discussion *False Dilemma* Fallacy, THOUGHTCO (Ma. 8, 2017), www.thoughtco.com/false-dilemma-fallacy-250338 [https://perma.cc/W85X-WHYG] (last visited Mar. 1, 2024).

134. Of course, it has long been understood that an invidious intent can be carried out through language that is not invidious in its express terms, as in the case of Mark Anthony's funeral oration, and as recognized jurisprudentially in Washington v. Davis, 426 U.S. 229, 241 (1976).

135. *See id.*

136. *Plessy*, 136 U.S. at 557.

137. *See, e.g.*, the underlying cultural considerations in Loving v. Virginia, 388 U.S. 1 (1967).

understood rather than of our own hindsight. At the very least, by the time of *Brown v. Board. of Education*,[138] the Court was in a position, in all epistemic humility, to appreciate the failure of the Plessy majority to recognize its own biases and fallibility. Anything like judicial deference to the *Plessy* Court's reasoning would have been entirely inappropriate.

A proper judicial humility is thus both broadly realistic and broadly comparative. In some cases, as in *Brown* relative to *Plessy*, assessing proper judicial humility may call for dramatic, if not socially revolutionary, change. This can be so even where the long-term results in Brown itself were indeed partly unpredictable.[139] Again, the idea of humility is more closely associated with truth, and the pursuit thereof, than with deference to others, or to self-effacement.[140]

Of course, most cases involving the proper scope of judicial humility will not be clustered either at the *Brown-Plessy* end of the spectrum, or at the end of the spectrum at which humility requires almost reflexive deference to other judicial, legislative, or administrative decision-makers. Among the most important kinds of cases in which the implications of a proper judicial humility are contested are those involving the question of judicial deference to various sorts of administrative agency regulatory determinations.

In some administrative agency case contexts, the Court treats the concrete application of a statutory term as less a matter of administrative expertise or of largely unbridled administrative discretion than of judicial inquiry into legislative intent.[141] In other cases, the ambivalence of the Court toward the non-adversarially-based interpretive judgments of administrative agencies is almost palpable.[142]

Often, but not always,[143] judicial humility will, in the administrative agency case context, depend upon the administrative agency's own apparent epistemic humility in seeking to upgrade its own base of knowledge and experience. The implications of a proper judicial humility in the context of one degree or another

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138. 347 U.S. 483 (1954).

139. Consider the partially disappointing results discussed in GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

140. *See supra* Parts II-IV.

141. *See, e.g.*, NLRB v. Hearst Pubs., 322 U.S. 111, 124 (1944) ("[w]hether . . . the term 'employee' includes . . . newsboys must be answered primarily from the history, terms, and purposes of the legislation").

142. *See, e.g.*, Skidmore v. Swift, 323 U.S. 134, 140 (1944) (following up a deferential review formulation with a clearly less deferential set of considerations); Chevron, U.S.A., Inc. v. NRDC Inc., 467 U.S. 837, 844-45 (1984) (pointing both to clear legislative intent and to an agency's "more than ordinary knowledge" of the matter at issue); *see also* the diverging approaches of the well-regarded opinions in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc).

143. *See, e.g.*, Kisor v. Wilkie, 588 U.S. 588, 571-72 (2019) ("[a]gencies (unlike courts) can conduct factual investigations, can consult with affected parties"); United States v. Western Pac. R.R., 352 U.S. 59, 65 (1958) (decided in the context of the doctrine of agency primary jurisdiction).

of administrative agency expertise in interpreting congressional language are currently intensely contested.[144] Thinking about what a proper judicial humility requires in this area of the law thus seems especially important, and of current and future controversy.

VI. CONCLUSION

A proper judicial humility is an indispensable element of the ultimate value of practical wisdom in adjudication. Such humility need not imply and is, in fact, incompatible with judicial timidity, judicial institutional self-effacement, and unjustified deference to either prior judicial decisions or to the judgments of other legal actors. Reciprocally, though,[145] a proper judicial humility must, in its turn, be informed and steered by independent elements of all-things-considered practical wisdom in judging.[146] There may be no shortcuts to a proper judicial humility or to persuading judges of its indispensability.[147] But this does not make a proper judicial humility and the continuing pursuit thereof any less necessary.[148]

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144. *See, e.g.*, *Skidmore*, 323 U.S. at 140 (not requiring administrative agency procedural outreach); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 682 (D.C. Cir. 1973) (agencies as "not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice") (citation omitted). For a broader discussion, see R. George Wright, *At What Is the Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535 (2013).

145. Consider, for example, the contest over the nature and scope of the 'major questions' doctrine that is central to the various opinions in West Virginia v. EPA, 597 U.S. 697 (2022); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Anita S. Krishnakumar, *What the Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

146. As in, for example, what is called Rawlsian wide or narrow reflective equilibrium. For background, see Carl Knight, *Reflective Equilibrium*, Stanford Encyclopedia of Philosophy, (Nov. 27, 2023), https://plato.stanford.edu/entries/reflective-equilibrium[https://perma.cc/2HYB-QUEL] (last visited Mar. 1, 2024).

147. While moving much past Aristotle's classic understanding of phronesis, or practical wisdom, has been difficult, see the careful empirical work of Professor Philip Tetlock, as referenced at The Decision Lab. *Phillip Telock*, THE DECISION LAB, https://thedecisionlab.com/thinkers/political-science/philip-tetlock [https://perma.cc/LUX4-JHH5], (last visited Mar. 1, 2024); GOOD JUDGMENT, https://goodjudgment.com [https://perma.cc/YU9B-77UL], (last visited March 1, 2024).

148. For those who find the idea of wisdom to be meaningless, empty, unrecognizable, or entirely unattainable to any degree, we can define wisdom as the sum of whatever conduces to decisional outcomes that such a skeptic finds overall most appealing. For discussion, see Mario DeCaro et al., *Why Practical Wisdom Cannot Be Eliminated*, 43 TOPOI 895 (Mar. 16, 2024).

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NOTES

PROHIBITING CONVERSION ~~THERAPY~~ TORTURE IN INDIANA: PROFESSIONAL MISCONDUCT AND NOT FREE SPEECH

MICHAEL CASSE*

INTRODUCTION

The distinction between freedom of speech and professional misconduct becomes abundantly clear upon comparing their definitions. The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free speech exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] Merriam-Webster defines "freedom of speech" as "the legal right to express one's opinions freely."[2] Additionally, the Collins Dictionary defines "professional misconduct" as "a violation of the rules or boundaries set by the governing body of a profession."[3] Furthermore, the College of Physiotherapists of Ontario expounds on this definition, using examples such as abusive, disgraceful, dishonorable, and unprofessional conduct as typical of professional misconduct.[4]

The U.S. Constitution does not protect all speech as free. Consider some hypotheticals. Imagine that the president of the United States reveals top-secret national security information without any prior clearance or permissible justification for his actions. He argues that he has a free speech right under the First Amendment to do so. Is he correct?

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1. U.S. CONST. amend. I.

2. *Freedom of Speech*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/freedom%20of%20speech [https://perma.cc/D3X5-4CPS] (last visited Oct. 6, 2023).

3. *Professional Misconduct*, COLLINSDICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/professional-misconduct) [https://perma.cc/P24E-MNHM] (last visited Oct. 6, 2023).

4. *What Does Professional Misconduct Mean to Me?*, COLL. OF PHYSIOTHERAPISTS OF ONT., https://www.collegept.org/registrants/PTaccountabilities/professional-misconduct-what-does-it-mean-to-me#:~:text=According%20to%20the%20dictionary%20it,Abusive%20conduct [https://perma.cc/R4H9-S84D] (last visited Oct. 6, 2023).

Similarly, imagine a second scenario in which the president, during a press conference, begins screaming obscene, offensive, racist statements attacking foreign leaders. Again, he decides to justify his actions by arguing that it is his right to free speech under the First Amendment. Is he protected?

These two hypothetical situations highlight the clear distinction between free speech and professional misconduct, in which the president's actions in both situations undoubtedly constitute professional misconduct, likely subjecting him to disciplinary action. This distinction between free speech and professional misconduct is important. An ongoing debate and split circuit decisions analyze whether conversion therapy efforts against LGBTQ+ individuals are considered free speech under the First Amendment.

Many LGBTQ+ patients risk abusive conversion therapy treatment because conflicting court decisions and lax professional rules may sanction conversion therapy on LGBTQ+ patients. The United States Court of Appeals for the Ninth and Eleventh Circuits and the United States Supreme Court have made decisions in this conversion therapy debate. Furthermore, this pressing issue has been at the forefront of discussion in Indiana.

In early 2023, Indiana passed Senate Bill 350, effectively stopping local governments from regulating any services subject to state licensure.[5] Consequently, Indiana is the only state where state law prohibits local-level bans on conversion therapy treatment.[6] Senator J.D. Ford, an openly gay member of Indiana's General Assembly, recalled his own exposures to conversion therapy treatment as the "most hurtful, damaging and humiliating experiences of my life."[7]

Part I of this note defines relevant terms along with a brief history of homosexuality in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM). Part II of this note thoroughly analyzes the jurisdictional split regarding licensed medical professionals subjecting LGBTQ+ patients to conversion therapy treatment. Through statistical analysis of various studies and recent cases, part III of this note argues against proven harmful conversion therapy treatment on members of the LGBTQ+ community. After providing Indiana statistics regarding conversion therapy, part IV of this note proposes a statutory ban in Indiana that would prohibit conversion therapy on LGBTQ+ patients by licensed medical professionals.

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5. Leslie Bonilla Muñiz, *Senate Passes Bill Inspired by Conversion Therapy Dispute*, IND. CAP. CHRON. (Mar. 1, 2023), https://indianacapitalchronicle.com/2023/03/01/senate-passes-bill-inspired-by-conversion-therapy-dispute-plus-more/ [https://perma.cc/C5SM-RSZA].

6. *Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/Q67J-TEXN] (last visited Oct. 6, 2023).

7. Muñiz, *supra* note 5.

I. OVERVIEW OF RELEVANT TERMS & DSM HISTORY OF HOMOSEXUALITY

A. Relevant Terms

First, consider the following definitions essential for thoroughly understanding this note. The Washington Legislature defines "[c]onversion therapy" as a regime seeking to change an individual's sexual orientation or gender identity.[8] Additionally, the U.S. Code defines "Licensed health professional" as "a physician, physician assistant, nurse practitioner, physical, speech, or occupational therapist, physical or occupational therapy assistant, registered professional nurse, licensed practical nurse, or licensed or certified social worker."[9] Indiana Code defines "Health care provider" as the following:

> An individual, a partnership, a limited liability company, a corporation, a professional corporation, a facility, or an institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, health facility, emergency ambulance service, dentist, registered or licensed practical nurse, physician assistant, certified nurse midwife, anesthesiologist assistant, optometrist, podiatrist, chiropractor, physical therapist, respiratory care practitioner, occupational therapist, psychologist, paramedic, advanced emergency medical technician, or emergency medical technician, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility, or institution acting in the course and scope of the person's employment.[10]

B. History of DSM and LGBTQ+ Community

Several psychoanalysts viewed homosexuality as a pathological disease that deviated from "normal" heterosexual development.[11] In response, the American Psychiatric Association (APA) published its first edition of the Diagnostic and Statistical Manual (DSM-I), in which it listed "homosexuality" as a "sociopathic personality disturbance" mental disorder.[12] In the 1968 publication of the DSM-II, the APA reclassified homosexuality as a "sexual deviation."[13] The second edition of the American Psychiatric Association's second version of its

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8. WASH. REV. CODE § 18.130.020(4)(a) (2018).

9. 42 U.S.C.A. § 1396r(5)(G) (2021).

10. IND. CODE § 34-18-2-14(1) (2016).

11. Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 565-575 (Dec. 4, 2015) (discussing historical scientific theories leading to the placement of "homosexuality" in DSM-I and DSM-II as well as conflicting theories that led to its removal from the DSM).

12. *Id.* at 569.

13. *Id.*

Diagnostic and Statistical Manual (DSM-II) removed "Homosexuality" as a diagnosis in 1973.[14]

Alfred Kinsey, in conducting reports surveying thousands of non-psychiatric patients, "found homosexuality to be more common in the general population than was generally believed."[15] His revelation contradicted various psychiatric claims that homosexuality was extremely rare.[16] In the late 1950s, psychologist Evelyn Hooker's study of thirty gay men and thirty heterosexual people disproved beliefs that "all gay men had severe psychological disturbances."[17] Results of the study concluded the group of gay men had no more signs of psychological disturbances than the heterosexual group.[18]

The American Psychiatric Association's 1973 revision served as a driving force toward the end of the social stigmatization of homosexuality by organized medicine.[19] Following the American Psychiatric Association, the World Health Organization removed homosexuality from the Internal Classification of Diseases in 1990.[20] Cultural attitudes about homosexuality also began to change.[21] To illustrate this cultural shift regarding the normalization of homosexuality, many countries began repealing laws criminalizing homosexuality, enacting protections for LGBTQ+ community members in the workplace, and facilitating gay parents' adoption rights.[22] Most importantly, the removal of homosexuality as a diagnosis from the DSM shifted the classification of homosexuality as a disease to focus on the particular health needs of the LGBTQ+ community.[23]

II. EXAMINATION OF CIRCUIT SPLIT: IS CONVERSION THERAPY PROTECTED SPEECH UNDER THE FIRST AMENDMENT?

Subsection A of this circuit split discussion of the Ninth Circuit Court of Appeals' decision in *Pickup v. Brown*.[24] Subsection B discusses a subsequent case, *National Institute of Family & Life Advocates. v. Becerra*, in which the Supreme Court abrogated part of *Pickup*.[25] Subsection C discusses *Tingley v. Ferguson*, a recent case that enhances the Ninth Circuit's stance regarding whether conversion therapy is free speech under the First Amendment.[26] Lastly,

14. *Id.* at 565.
15. *Id.* at 569.
16. *Id.*
17. *Id.* at 569-70.
18. *Id.* at 570.
19. *Id.*
20. *Id.* at 571.
21. *Id.* at 572.
22. *Id.*
23. *Id.*
24. Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).
25. Nat'l Inst. Of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).
26. Tingley v. Ferguson, 47 F.4th 1055, 1065 (9th Cir. 2022).

subsection D discusses a 2020 decision in *Otto v. City of Boca Raton, Fla.*, in which the Eleventh Circuit issued differing opinions regarding conversion therapy and free speech debate.[27]

A. Overview of The Court of Appeals for the Ninth Circuit's Pickup v. Brown *Decision*

California's Senate Bill 1172 required mental health providers who chose to engage in sexual orientation change efforts (SOCE) to either wait until patients became 18 years old or risk professional discipline.[28] In enacting Senate Bill 1172, the legislature intended to protect the well-being of minors, including the LGBTQ+ community, against serious harms resulting from exposure to SOCE.[29] Various mental health providers offering SOCE therapy, organizations advocating for SOCE therapy, and children undergoing SOCE therapy and their parents sought a declaratory judgment.[30] The providers argued that state law prohibiting the licensed mental health providers from providing such therapy violated providers' constitutional rights.[31] The district court granted plaintiffs' preliminary injunction against Senate Bill 1172 in *Welch v. Brown*.[32] The court denied a similar request in *Pickup*, leading to interlocutory appeals.[33]

When considering the First Amendment rights of professionals, the Ninth Circuit viewed the issue as a continuum.[34] The court explained, "[a]t one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest."[35] Furthermore, the court explained that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished."[36] Lastly, at the opposite end of this continuum, and where the court believes Senate Bill 1172 falls, "is the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech."[37]

The Ninth Circuit held that California's state law ban on conversion therapy on minors does not violate the First Amendment, even when that treatment is performed solely through speech.[38] Applying rational basis review, the court found that Senate Bill 1172 advances California's legitimate state interest in

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27. Otto v. City of Boca Raton, Fla., 981 F.3d 854 (11th Cir. 2020).
28. *Pickup*, 740 F.3d at 1223.
29. *Id.*
30. *Id.* at 1224.
31. *Id.* at 1221.
32. Welch v. Brown, 907 F. Supp. 2d 1102, 1122 (E.D. Cal. 2012), *abrogated by Pickup*, 740 F.3d 1208 (9th Cir. 2014).
33. *Pickup*, 740 F.3d at 1221-22.
34. *Id.* at 1227.
35. *Id.*
36. *Id.* at 1228.
37. *Id.* at 1229.
38. *Id.* at 1230.

protecting the well-being of minors.[39] The court reasoned that California's conversion therapy ban at issue is a regulation of the conduct of state-licensed professionals, and any effects Senate Bill 1172 may have on free speech interests are "merely incidental."[40] The court made this determination by explaining that Senate Bill 1172 regulates treatment only and leaves "mental health providers free to discuss and recommend, or recommend against, SOCE."[41] The Ninth Circuit's decision highlights its stance on the circuit split debate. This opinion, along with the Ninth Circuit's reasoning, is important to remember when analyzing subsequent cases such as the *National Institute of Family & Life Advocates. v. Becerra*, which abrogated part of *Pickup*.[42]

B. Overview of United States Supreme Court's decision in National Institute of Family & Life Advocates. v. Becerra

Four years after *Pickup*, the Supreme Court decided *National Institute of Family & Life Advocates v. Becerra*. In this case, an organization of crisis pregnancy centers brought suit against various California officials after the governor signed the FACT Act.[43] They argued that state law required these licensed clinics to provide notice of services, including contraception and abortions.[44] They also urged that requiring unlicensed clinics to provide notice they were unlicensed violated their free speech rights under the First Amendment.[45] After the United States District Court for the Southern District of California denied the plaintiffs' motion for preliminary injunction, the Ninth Circuit affirmed this decision.[46] Then, the Supreme Court of the United States granted certiorari.[47]

The Supreme Court held that the plaintiffs were likely to succeed in their claim that the California state law at issue, known as the FACT Act, violates the First Amendment.[48] The Court reasoned that "professional speech" does not constitute a separate category of speech.[49] Furthermore, the Court explained that states "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[50] The Court abrogated *Pickup*, explaining that "[t]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'"[51]

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39. *Id.* at 1231.
40. *Id.*
41. *Id.*
42. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 779 (2018).
43. *Id.* at 765.
44. *Id.* at 763-64.
45. *Id.* at 765.
46. *Id.*
47. *Id.*
48. *Id.* at 779.
49. *Id.* at 767.
50. *Id.* at 769 (citing NAACP v. Button, 371 U.S. 415, 439 (1963)).
51. *Id.* at 767.

The Court further explained the dangers associated with regulating professional speech, specifically highlighting how regulating professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[52] The Court clarified that making something a "profession" requires only "that it involves personalized services and requires a professional license from the State," giving states unconstrained power to reduce a certain group's First Amendment rights by imposing certain licensing requirements.[53] Consequently, the Court explained that "[s]tates cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'"[54] In sum, the Court concluded, "neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category exempt from ordinary First Amendment principles."[55] However, the Court followed up by acknowledging it "do[es] not foreclose the possibility that some such reason exists."[56]

C. Overview of Court of Appeals for the Ninth Circuit's Tingley v. Ferguson *Decision*

Another four years later, in 2022, the Ninth Circuit weighed in on the issue when handing down its opinion in *Tingly v. Ferguson*. Washington law states that "[p]erforming conversion therapy on a patient under age eighteen" is a form of unprofessional conduct, which is subject to discipline.[57] Brian Tingley, a licensed marriage and family therapist in Washington, believes "sexual relationships are beautiful and healthy" only if they occur "between one man and one woman committed to each other through marriage."[58] Tingley filed suit against state officials in May 2021, alleging Washington's conversion therapy ban on minors violates his First Amendment rights to free speech and free exercise of religion while also claiming that the state law is unconstitutionally vague under the Fourteenth Amendment.[59] After the district court rejected Tingley's constitutional claims by applying *Pickup v. Brown*, Tingley appealed.[60]

The Ninth Circuit held that Tingley's claims could not proceed under precedent from *Pickup v. Brown* and the "well-established tradition of

52. *Id.* at 771 (citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994)).
53. *Id.* at 773.
54. *Id.* (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423-24 n.19 (1993)).
55. *Id.*
56. *Id.*
57. WASH. REV. CODE § 18.130.180(26) (2023).
58. Tingley v. Ferguson, 47 F.4th 1055, 1065 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023).
59. *Id.* at 1066.
60. *Id.*

constitutional regulations on the practice of medical treatments."[61] The court explained that *National Institute of Family & Life Advocates v. Becerra* abrogated only part of *Pickup* but did not abrogate its central holding that California's ban on conversion therapy regulated professional conduct and only incidentally burdened speech.[62] Therefore, the court explained that the decision in *Pickup* remained binding and thus controlled the outcome of Tingley's case.[63]

The court described California's law as essentially identical to Washington's law regarding a ban on conversion therapy, with the same purpose of protecting the well-being of minors from harmful exposure caused by conversion therapy treatment.[64] Furthermore, the court explained that the Washington Legislature considered evidence demonstrating "scientifically credible proof of harm" from conversion therapy to minors and acted rationally when preventing licensed providers from practicing conversion therapy on them.[65] While systematically reviewing the scientific research on conversion therapy presented to Washington, the American Psychiatric Association confirmed the research "showed harm from both aversive practices and non-aversive practices, such as talk therapy."[66] The report concluded there is a "fair amount of evidence that conversion therapy is associated with negative health outcomes such as depression, self-stigma, cognitive and emotional dissonance, emotional distress, and negative self-image . . . ."[67] Moreover, the report indicated a significant percentage of surveyed people who have been a part of conversion therapy report negative health effects associated with these efforts.[68] Additionally, the court explained that Washington's law belongs to a "long . . . tradition" of categories of speech that warrant lesser scrutiny regarding the First Amendment.[69]

In December 2023, the United States Supreme Court denied the petition for a writ of certiorari in this case.[70] The Ninth Circuit's decision, along with the subsequent denial of certiorari by the Supreme Court, importantly highlights their position that subjecting LGBTQ+ individuals to conversion therapy is not protected speech under the First Amendment. Considering these significant de, the Court of Appeals for the Eleventh Circuit weighed in when issuing its opinion in *Otto v. City of Boca Raton*.

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61. *Id.* at 1091.
62. *Id.* at 1077.
63. *Id.*
64. *Id.* at 1078.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1079.
70. Tingley v. Ferguson, 144 S. Ct. 33 (2023).

D. Overview of The Court of Appeals for the Eleventh Circuit's Otto v. City of Boca Raton, Fla. *Decision*

In 2017, both Palm Beach County, Florida, and the City of Boca Raton passed ordinances prohibiting sexual orientation change efforts based on legislative findings that these practices pose serious health risks to minors.[71] Robert Otto and Julie Hamilton, licensed marriage and family therapists in Florida, provided counseling to minors with gender identity issues and same-sex attraction.[72] Otto and Hamilton filed suit regarding the ordinances, alleging they were preempted by state law and violated their First Amendment rights.[73] Regarding the First Amendment claim, the court found that the therapists "failed to demonstrate a substantial likelihood of success on the merits."[74] As to their preemption claim, the court found that even if the likelihood of success on the merits could be demonstrated, the plaintiffs could not demonstrate irreparable harm.[75] Consequently, the plaintiffs filed an interlocutory appeal.[76]

While rejecting the *Pickup* case, the Eleventh Circuit held that conduct involved in talk therapy "consists—entirely—of words," and "[t]he government cannot regulate speech by relabeling it as conduct."[77] The court reasoned that if SOCE is conduct, the same could be said of protesting, teaching, and even book clubs, which are all activities consisting entirely of speech.[78] Furthermore, the Eleventh Circuit concluded the First Amendment "protects speech itself, no matter how disagreeable that speech might be to the government."[79] Regarding SOCE specifically, the court asked, "What good would it do for a therapist whose client sought SOCE therapy to tell the client that she thought the therapy could be helpful, but could not offer it?"[80]

The court reasoned, "Speech is speech, and it must be analyzed as such for purposes of the First Amendment."[81] Further criticizing the decision in *Pickup*, the court explained that it is not enough for the government to frame speech as conduct, and "[s]aying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation."[82] The court explained that First Amendment restraints are not relaxed simply because the laws target "professional speech,"

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71. Otto v. City of Boca Raton, Fla., 981 F.3d 854, 859 (11th Cir. 2020).
72. *Id.* at 860.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 865.
78. *Id.*
79. *Id.* at 863.
80. *Id.*
81. *Id.* at 866.
82. *Id.*

and content-based restrictions may be justified "only if the government proves that they are narrowly tailored to serve compelling state interests."[83]

Although recognizing the government's strong interest in protecting minors, the court explained that this interest "does not include a free-floating power to restrict the ideas to which children may be exposed."[84] Applying a strict scrutiny standard to the First Amendment implication, the court explained that although these professional groups consist of well-educated people who presumably act in good faith, they "cannot define the boundaries of constitutional rights."[85]

These aforementioned cases shed light on the circuit split regarding whether conversion therapy is a protected free speech right under the First Amendment of the U.S. Constitution. Because conversion therapy is not a free speech right, it is essential that steps are taken to prohibit licensed medical professionals from subjecting LGBTQ+ individuals to harmful SOCE. The Eleventh Circuit exhibited faulty reasoning by ignoring the fact that examples such as protesting and speech in book clubs are inherently different than dialogue between licensed medical professionals and patients because licensed medical professionals must adhere to licensing standards.[86] Continually permitting medical personnel to conceal blatant discriminatory practices targeting LGBTQ+ individuals behind their status as a licensed professional must be put to rest.

III. POLICY ARGUMENTS FOR PROHIBITING CONVERSION THERAPY FOR LGBTQ+ PATIENTS BY LICENSED MEDICAL PROFESSIONALS

A. Arguing Against Disguising Medical Expertise as a Way to Push a Specific Agenda to Target the Rights of LGBTQ+ Patients

The National Alliance on Mental Illness, an organization advocating for the interests of those suffering from mental illness, describes conversion therapy treatment as a discredited practice that lacks evidential basis and "is opposed by all major medical organizations."[87]

Moreover, The American Psychiatric Association described the potential risks of conversion therapy as "great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient."[88] The National Alliance on Mental Illness corroborated these findings, finding

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83. *Id.* at 867-68.
84. *Id.* at 868.
85. *Id.* at 869.
86. FLA. STAT. § 456.072 (2021).
87. *Conversion Therapy*, NAT'L ALL. OF MENTAL ILLNESS, https://www.nami.org/Advocacy/Policy-Priorities/Stopping-Harmful-Practices/Conversion-Therapy [https://perma.cc/FY3B-RFLM] (last visited Oct. 9, 2023).
88. *Id.*

those subjected to conversion therapy "are at a greater risk for depression, anxiety, and self-destructive behavior such as drug misuse and suicide."[89]

According to a JAMA Pediatrics economic evaluation study and systematic literature review comprised of LGBTQ+ individuals of varying ages, there are high societal costs and a high economic burden associated with conversion therapy.[90] The study explained that individuals who experience sexual orientation and gender identity change efforts (SOGICE), also called conversion therapy, experience increased rates of depression, suicidality, substance abuse, and psychological distress.[91] Furthermore, the study explained that the downstream effects of conversion therapy "are associated with lifetime excess costs of $83366 per individual at risk, primarily associated with suicidality, anxiety, severe psychological distress, depression, and substance abuse," which translates to "total costs of $650 million for SOGICE in 2021, with harms associated with an estimated economic burden of $9.23 billion."[92] When compared to LGBTQ+ people who did not undergo SOGICE, the study showed individuals who underwent SOGICE suffered several serious consequences, including severe psychological distress (47% vs. 34%), depression (65% vs. 27%), problematic substance use (67% vs. 50%), attempted suicide (58% vs. 39%), and attempted suicide causing moderate or severe injury (67% higher odds).[93]

In addition to this study, Victor Madrigal-Borloz, the UN Independent Expert on sexual orientation and gender identity, stated conversion therapy practices are "inherently discriminatory" and they may amount to torture depending on the severity of pain and suffering inflicted on the victims.[94] In his report to the Human Rights Council, Madrigal-Borloz stated that conversion therapy often leads to pain and suffering that lasts far longer than the initial experience itself and may lead to damaged self-worth due to the combined effects of feeling powerless, humiliated, shameful, and worthless.[95] Furthermore, Madrigal-Borloz explained that the various methods of attempting conversion include "physical, psychological and sexual abuse, electrocution and forced medication, isolation and confinement, verbal abuse, and humiliation."[96]

In 2012, the Pan American Health Organization stated that conversion therapy "had no medical justification and represented a severe threat to health

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89. *Id.*

90. Anna Forsythe, et al., *Humanistic and Economic Burden of Conversion Therapy Among LGBTQ Youths in the United States*, 176(5) JAMA PEDIATRICS 493, 493-501 (2022) (discussing a systematic literature review and economic evaluation gathering evidence of the consequences of conversion therapy among LGBTQ+ members in the United States).

91. *Id.* at 497.

92. *Id.* at 498.

93. *Id.* at 497.

94. *'Conversion Therapy' Can Amount to Torture and Should Be Banned Says UN Expert*, UNITED NATIONS HUMAN RIGHTS (Jul. 13, 2020), https://www.ohchr.org/en/stories/2020/07/conversion-therapy-can-amount-torture-and-should-be-banned-says-un-expert.

95. *Id.*

96. *Id.*

and human rights of victims."[97] Additionally, in 2016, the World Psychiatric Association recognized that "there is no sound scientific evidence that innate sexual orientation can be changed,"[98] while the Independent Forensic Expert Group declared conversion therapy "a form of deception, false advertising and fraud" in 2020.[99] Furthermore, conversion therapists' claims of changing a person's sexual orientation have never been supported by any credible scientific study, and the American Psychological Association Task Force found it unlikely that same-sex attractions would be reduced through sexual orientation change efforts based on research in its 2009 report.[100]

The Trevor Project's 2020 National Survey on LGBTQ+ Youth Mental Health found that 10% of LGBTQ+ youth who underwent conversion therapy reported more than twice the rate of attempted suicide in the prior year than LGBTQ+ youth who did not experience conversion therapy.[101] Additionally, according to a 2018 study by The Family Acceptance Project, "[s]uicide attempts nearly tripled for LGBTQ+ young people who reported both home-based and out-of-home efforts to change their sexual orientation."[102] The Family Acceptance Project's 2018 study also found that "[h]igh levels of depression more than doubled (33%) LGBTQ+ young people whose parents tried to change their sexual orientation compared with those who reported no conversion experiences (16%) and more than tripled (52%) for LGBTQ+ young people who reported both home-based and out-of-home efforts to change their sexual orientation."[103]

In light of the various studies and aforementioned statistics emphasizing the mental health struggles and associated financial burden that conversion therapy places on members of the LGBTQ+ community, putting a stop to this harmful discrimination is crucial. Licensed medical professionals should not be allowed to use their medical expertise to target LGBTQ+ patients by subjecting them to conversion therapy. Consequently, unexpected conversion therapy discussions from medical professionals may make LGBTQ+ individuals less likely to seek medical care for fear of facing such damaging discrimination.

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Conversion Therapy: A Harmful Practice Targeting LGBTQ+ Youth*, EQUALITY TEX. https://www.equalitytexas.org/conversion-therapy/ [https://perma.cc/B64J-YDXG] (last visited Sept. 22, 2024).

101. *Id.*

102. *Id.*

103. *Id.*

B. LGBTQ+ Patients Deserve the Right to Seek Medical Assistance Without Fear of Offensive Conversion Therapy Discussion and Discrimination

According to a 2020 survey of 1,528 LGBTQ+ individuals conducted by the Center for American Progress, more than one in three LGBTQ+ individuals, including nearly two in three transgender individuals, reported experiencing discrimination in the last year.[104] In this study, 15% of respondents stated they postponed or purposely did not seek medical care when sick or injured because of disrespect or discrimination from providers.[105] Moreover, 16% of all LGBTQ+ respondents stated they have postponed seeking preventive screenings in the past year because of disrespect or discrimination from healthcare providers.[106] Additionally, 47% of transgender respondents said they had experienced some form of negative or discriminatory treatment from a provider in the last year, while 20% of all gay, lesbian, queer, or bisexual respondents stated they experienced some form of negative or discriminatory treatment from a provider in the last year.[107] More specifically, 15% of transgender individuals responded that, in the prior year, doctors or other medical providers refused to provide care to them because of religious beliefs.[108] Consequently, 20% of all LGBTQ+ respondents reported avoiding doctor's offices to avoid such discrimination.[109] The respondents' answers to the various questions in the survey emphasize the clear presence of discriminatory treatment that LGBTQ+ members face when seeking medical treatment in the United States, highlighting the immense need for change to ensure protections for members of the LGBTQ+ community when seeking treatment.

B. Supreme Court Decisions Acknowledging LGBTQ+ Protections

In light of this statistical information highlighting the challenging discriminatory treatment and mental health struggles LGBTQ+ people endure, consider the 2003 decision in *Lawrence v. Texas*, which acknowledges the right for homosexual people to engage in same-sex sexual activity.[110] In *Lawrence*, upon entering John Lawrence's apartment in response to a reported weapons disturbance, Houston police saw Lawrence engaging in a private, consensual sexual act with Tyron Garner.[111] The two men sued after they were arrested and

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104. Lindsay Mahowald, Mathew Brady & Caroline Medina, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results*, CTR. FOR AM. PROGRESS (Apr. 21, 2021), https://www.americanprogress.org/article/discrimination-experiences-among-lgbtq-people-us-2020-survey-results/ [https://perma.cc/UGE2-DCV6].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

111. *Id.* at 563.

convicted of deviant sexual intercourse for violating a Texas statute forbidding same-sex intimate sexual conduct.[112] The Supreme Court, in holding the Texas statute violated the Due Process Clause, explained that two adults engaging in sexual practices in their home with full and mutual consent from each other are entitled to respect for their private lives.[113]

The Court stated, "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[114] After acknowledging action taken in other nations affirming the protected right of same-sex adults to engage in intimate, consensual conduct, the Court recognized that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[115] The Court reasoned that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[116] Lastly, the Court, in recognizing the ability of future generations to identify oppressive laws that were once thought to be necessary and proper, stated, "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[117]

Now consider the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which came twelve years after *Lawrence* and further emphasizes the nation's forward-thinking trend toward LGBTQ+ acceptance.[118] In *Obergefell v. Hodges*, same-sex couples brought an action alleging that the Michigan Marriage Amendment, which prohibited same-sex marriage, violated their constitutional rights.[119] The Supreme Court of the United States held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty."[120] The Court reasoned that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[121] Furthermore, referring to the same-sex couples in this case, the Supreme Court stated, "Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions."[122] Lastly, as the Court mentions, the petitioners in this case are asking for "equal dignity in the eyes of the law," and "[t]he Constitution grants them that right."[123]

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112. *Id.*
113. *Id.* at 578.
114. *Id.*
115. *Id.* at 576-77.
116. *Id.* at 575.
117. *Id.* at 579.
118. Obergefell v. Hodges, 576 U.S. 644, 670-71 (2015).
119. *Id.* at 654-55.
120. *Id.* at 675.
121. *Id.* at 665.
122. *Id.* at 681.
123. *Id.*

The recent case of *Obergefell*, along with *Lawrence*, shows the importance of our nation's progressive trend toward acceptance of the LGBTQ+ community in general, with the Court stating these exclusionary laws "impose stigma and injury of the kind prohibited by our basic charter."[124] The Court also highlights the changing history of marriage as a "characteristic of a Nation where new dimensions of freedom become apparent to new generations."[125] *Obergefell*, although focused primarily on marriage equality, highlights the Supreme Court's important recognition of the rights of the LGBTQ+ community, who should not face discrimination for wanting to exercise those rights.

The Supreme Court continued its trend of defending LGBTQ+ rights in *Bostock v. Clayton County, Ga.*, by upholding Title VII protections against sex discrimination and extending those protections to gay and transgender employees.[126] The case is comprised of three actions.[127] In the first action, Clayton County, Georgia, fired Gerald Bostock shortly after Bostock joined a gay recreational softball league.[128] In a separate action, Donald Zarda was fired by Altitude Express just days after mentioning he was gay.[129] In a third action, Aimee Stephens, who presented as a male when hired, was fired by R.G. & G.R. Harris Funeral Homes after she informed her employer she intended to "'live and work full-time as a woman.'"[130] Each employee subsequently sued under Title VII of the Civil Rights Act of 1964, alleging sex discrimination.[131] The employers argued that "the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology," while the employees argued the term was broader in scope and "reach[ed] at least some norms concerning gender identity and sexual orientation."[132]

Holding that the employers violated Title VII of the Civil Rights Act of 1964, the Supreme Court explained, "There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking."[133] The Court further asserted that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex," which Title VII has always prohibited.[134] Addressing the objection that Congress could not possibly have meant to protect disfavored

124. *Id.* at 671.
125. *Id.* at 660.
126. Bostock v. Clayton Cty., 590 U.S. 644, 651-52 (2020).
127. *Id.* at 653.
128. *Id.*
129. *Id.*
130. *Id.* at 653-54.
131. *Id.* at 654.
132. *Id.* at 655.
133. *Id.* at 661.
134. *Id.* at 662.

groups, the Supreme Court explained that refusing enforcement solely because parties were unpopular at the time a law was passed "would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."[135]

As society evolves and antiquated ways of thinking are shifting, it is essential now, perhaps more than ever, to look inward and ask, "If I were in this position, would I be willing to accept the blatant discrimination inflicted on me?" Putting oneself in another's shoes and attempting to view a situation from a perspective different from one's own is vital in moving toward a more accepting society that recognizes discriminatory, hateful, and damaging practices targeting the LGBTQ+ community as entirely unacceptable.

As circuit courts and the United States Supreme Court have issued opinions weighing in on whether conversion therapy efforts by licensed medical professionals constitute free speech under the First Amendment, a new law in the state of Indiana has brought this debate into focus.

IV. PROPOSED SOLUTION IN INDIANA

Regarding a proposed solution in Indiana, subsection A below first discusses various Indiana-specific statistics surrounding LGBTQ+ individuals. Then, subsection A discusses legislation in Indiana, leaving Indiana's LGBTQ+ community at risk for encountering harmful, discriminatory conversion therapy practices. Lastly, subsection A proposes a statutory ban on conversion therapy in Indiana, along with an alternative option to repeal Indiana's new law blocking local governments from regulating behavioral health and human services subject to licensing or certification.[136] Subsection B provides proposed statutory language regarding a ban on conversion therapy in Indiana.

A. Arguing for Indiana Statutory Ban on Conversion Therapy by Licensed Medical Professionals on LGBTQ+ Patients

The Trevor Project, the leading suicide prevention organization for young members of the LGBTQ+ community, tracks legislation and conducts research specific to the LGBTQ+ community.[137] According to research from The Trevor Project, roughly 18% of LGBTQ+ youth in Indiana reported being either subjected to or threatened with conversion therapy.[138] Director of State Advocacy Campaigns at The Trevor Project, Troy Stevenson, explained that

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135. *Id.* at 677-78.

136. IND. CODE § 25-23.6-2-8.5 (2024).

137. Elliott Sylvester, *The Trevor Project Opposes Indiana Bill Undermining LGBTQ Youth Protections Against Conversion Therapy*, THE TREVOR PROJECT (Feb. 13, 2023), https://www.thetrevorproject.org/blog/the-trevor-project-opposes-indiana-bill-undermining-lgbtq-youth-protections-against-conversion-therapy/ [https://perma.cc/WP9C-BJJC].

138. *Id.*

protections against conversion therapy exist in twenty-six states and roughly 100 municipalities throughout the country, and Indiana's current law puts LGBTQ+ members at risk due to its harmful legislation prohibiting protection against conversion therapy.[139]

In 2022, the Trevor Project published its national survey for the first time, which is segmented by all fifty states and captures roughly 34,000 LGBTQ+ people ages 13-24 across the United States.[140] The survey data captures critical insights regarding barriers faced by LGBTQ+ community members, such as suicide risk, access to mental health care, and prevalence of anti-LGBTQ+ victimization.[141] The Trevor Project's 2022 National Survey on LGBTQ+ Youth Mental Health revealed that roughly 45% of Indiana's LGBTQ+ youth considered suicide within the past year.[142] The survey results also showed that 75% of LGBTQ+ youth in Indiana reported experiencing anxiety, while 58% reported experiencing depression.[143]

Regarding specific challenges faced by LGBTQ+ youth in Indiana, The Trevor Project's 2022 National Survey results concluded that 39% experienced threats or physical harm based on sexual orientation or gender identity, while 76% experienced some degree of discrimination.[144] Moreover, regarding access to mental health care in Indiana, 62% of LGBTQ+ youth who sought mental health care in the past year were unable to receive it.[145] Of the 62% who were unable to receive mental health care, 48% stated they were afraid to discuss their mental health concerns with someone else, while 44% reported being afraid they would not be taken seriously.[146] These statistics highlight the prevalent dangers LGBTQ+ members face in Indiana, which could become far more damaging considering the harmful legislation exhibiting homophobic and transphobic trends within the state, including newly introduced laws in Indiana regarding conversion therapy.[147]

Indiana is one of eight states with a "Don't Say LGBTQ" law explicitly censoring discussion of LGBTQ+ individuals or their issues in all school curricula.[148] These harmful and exclusionary laws explicitly prohibit teachers and staff from discussing any LGBTQ person, along with any issues faced by

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139. *Id.*

140. THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH INDIANA 1 (2021).

141. *Id.*

142. Sylvester, *supra* note 137.

143. 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH INDIANA, *supra* note 140 at 2.

144. *Id.* at 4.

145. *Id.* at 3.

146. *Id.*

147. Sylvester, *supra* note 137; *see also* IND. CODE § 25-23.6-2-8.5 (2024).

148. *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [https://perma.cc/ZF9C-8SZF] (last visited Nov. 7, 2024); *see also* IND. CODE § 20-30-10-17 (2023).

members of the LGBTQ+ community.[149] Additionally, Indiana is one of twenty-four states that have passed a law banning transgender students from participating in school sports.[150] More frequent in K-12 schools, this restrictive legislation means that, for example, transgender girls are not allowed to play sports with other girls in the state of Indiana.[151] Furthermore, Indiana is one of eight states with a law forcing the outing of transgender youth in schools.[152] Since 2020, transgender individuals, particularly transgender youth, have been the target of legislative attacks with laws such as this one, which requires school staff members to out transgender children to their families, often with blatant disregard for the potentially harmful impact on these children.[153]

Moreover, despite describing the bill as "clear as mud," Indiana Governor Eric Holcomb signed Senate Bill 480 into law on April 5, 2023.[154] This bill "not only bans gender affirming surgery for minors (something that no hospital in Indiana does)—it bans nearly any gender affirming care and treatment provided by licensed health care professionals to their transgender and non-binary minor patients."[155] Included in this ban is "the use of medications that delay puberty so that decisions about gender affirming care can be made when the patient is an adult."[156] Lastly, Senate Bill 480 disrupts evidence-based care plans designed to thoughtfully care for transgender and non-binary youth by giving minors already receiving such medications six months to taper off of them.[157] These laws represent a series of legislative attacks on the LGBTQ+ community in Indiana. Consider these laws in addition to recent legislation surrounding conversion therapy in the state, which further emphasizes the prevalent and persistent homophobic and transphobic trends putting Indiana's LGBTQ+ community at risk of discrimination and harm.

In early 2023, Indiana's Senate passed Senate Bill 350 to block local governments from implementing certain bans on counseling and behavioral health services.[158] This bill originated over a pastor's feud with the city of West

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149. *LGBTQ Curricular Laws*, *supra* note 148.

150. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [https://perma.cc/SV2H-7A7T] (last visited Nov. 7, 2024); *see also* H.B. 1041, 122nd Gen. Assemb., Second Reg. Sess. (Ind. 2022).

151. *Id.*

152. *Forced Outing of Transgender Youth in Schools*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/forced_outing [https://perma.cc/VBQ2-8QGR] (last visited Nov. 7, 2024); *see also* IND. CODE § 20-30-10-17 (2023).

153. *Forced Outing of Transgender Youth in Schools*, *supra* note 152; *see also* IND. CODE § 20-30-10-17 (2023).

154. Jane Harstock et al., *Op/Ed: Gov. Holcomb Signed a Bill He Called 'Clear as Mud.' We're Confused and Concerned.*, IndyStar (Apr. 12, 2023), https://www.indystar.com/story/opinion/2023/04/12/indiana-governor-called-sb-480-clear-as-mud-but-signed-it-anyway/70103354007/ [https://perma.cc/9ER3-EMLL]; *see also* IND. CODE § 25-1-22 (2023).

155. Harstock et al., *supra* note 154; *see also* IND. CODE § 25-1-22 (2023).

156. *Id.*

157. *Id.*

158. Muñiz, *supra* note 5; *see also* IND. CODE § 20-25-23.6-2-8.5 (2023).

Lafayette regarding a withdrawn ordinance banning unlicensed counselors from conducting conversion therapy.[159] Indiana Senator Jeff Raatz brought the bill on behalf of the church leader in West Lafayette, who opposed the city council over its proposed ban against conversion therapy efforts for minors.[160]

Steve Viars, senior pastor at Faith Church of Lafayette, threatened to sue the city of West Lafayette when a proposed ordinance threatened to ban unlicensed practitioners from conversion therapy treatments with minors.[161] The original West Lafayette ordinance would have prohibited unlicensed practitioners from practicing conversion therapy, which was defined as "any practices or treatments that seek to change an individual's sexual orientation or gender identity, including efforts to change gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender."[162] Viars argued that the term "conversion therapy" was defined too broadly, stating that "we could possibly be accused of doing some of those things."[163] After Viars argued before a committee that "there are plenty of other small churches doing good things in their community that need to have the freedom to practice," the City of West Lafayette withdrew the ordinance.[164] Senators broadened the bill, effectively stopping local governments from regulating services subject to state licensure.[165]

Consequently, this harmful law prevents state and local governments in Indiana from implementing critical safeguards against conversion therapy practices, which could lead to increased suicide risk and a decline in mental health outcomes.[166] Due to the harmful nature of Indiana's enactment of Senate Bill 350, a statutory ban on conversion therapy in Indiana is necessary to ensure essential protections for members of the LGBTQ+ community.[167] Alternatively, Senate Bill 350 should be repealed to allow localities to implement their own bans.

In light of the statistical evidence, banning conversion therapy in Indiana is essential to combat the adverse mental health outcomes affecting many LGBTQ+ people. Members of the LGBTQ+ community have fought, and continue to fight, countless attacks fueled by hatred, discrimination, and blatant disregard for acceptance and equality. Accordingly, banning conversion therapy efforts to protect the rights and well-being of LGBTQ+ individuals in Indiana is imperative.

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159. Muñiz, *supra* note 5.

160. Arika Herron, *Bill to Protect Churches Offering 'Conversion Therapy' Stalls in Indiana Senate*, IndyStar (Feb. 3, 2023), https://www.indystar.com/story/news/politics/2023/02/03/indiana-statehouse-bill-protect-conversion-therapy-senate-bill-350-faith-church-lafayette/69867106007/ [https://perma.cc/C2QM-G9M2].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Muñiz, *supra* note 5; *see also* IND. CODE § 20-25-23.6-2-8.5 (2023).

166. Sylvester, *supra* note 137.

167. *Id.*

B. Conversion Therapy Ban in Indiana: Proposed Statutory Language

A. Purpose: The purpose of this section is to protect Indiana's LGBTQ+ community from sexual orientation change efforts, also called conversion therapy.

B. Definitions

1. Indiana Code defines "Health care provider" as the following:

> An individual, a partnership, a limited liability company, a corporation, a professional corporation, a facility, or an institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, health facility, emergency ambulance service, dentist, registered or licensed practical nurse, physician assistant, certified nurse midwife, anesthesiologist assistant, optometrist, podiatrist, chiropractor, physical therapist, respiratory care practitioner, occupational therapist, psychologist, paramedic, advanced emergency medical technician, or emergency medical technician, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility, or institution acting in the course and scope of the person's employment.[168]

2. "'Sexual orientation change efforts' means any practices by [health care providers] that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."[169]

a. This definition does not include psychotherapies providing (A) facilitation of individuals' coping, support, and self-exploration, including interventions to prevent unlawful conduct or address unsafe sexual behavior or practices; and (B) do not attempt to change individuals' sexual orientation.[170]

C. Prohibition of Sexual Orientation Change Efforts

1. Under no circumstances shall a health care provider engage in sexual orientation change efforts with any individual of any age.

2. Any sexual orientation change efforts attempted on an individual by a health care provider shall be considered professional misconduct,

168. IND. CODE § 34-18-2-14(1) (1998).
169. S.B. 1172, 2011–2012 Leg., Reg. Sess. (Cal. 2012).
170. *Id.*

> subjecting the health care provider to disciplinary action by the licensing entity for that health care provider.[171]

CONCLUSION

The current circuit split regarding the prohibition of conversion therapy by licensed medical professionals on LGBTQ+ patients, in conjunction with various scientific studies about the harmful effects of conversion therapy, highlights the importance of protecting LGBTQ+ individuals from such efforts. Without adequate protection from conversion therapy efforts, members of the LGBTQ+ community are undoubtedly at risk of being subject to these harmful practices, which may lead to various adverse and potentially lifelong effects.

Speaking from experience as a licensed medical professional, one of my primary concerns when advocating for patients, sexual orientation and gender identity aside, is the patient's best interest for achieving optimal health, happiness, and continued self-growth in the future. As someone who has been on the receiving end of prejudicial remarks by two different healthcare providers regarding my own sexual orientation, when licensed professionals use their status as medical experts to weave in conversations regarding conversion therapy, the focus of care shifts from being helpful to hurtful and discriminatory. Therefore, conversion therapy for LGBTQ+ patients by licensed medical professionals must be prohibited.

After discussing the history of homosexuality in the American Psychiatric Association's Diagnostic and Statistical Manual, this note examined the circuit split regarding this issue and how the courts justified their holdings. The various holdings and accompanying reasonings are essential in understanding the conflicting viewpoints of the central issue. They provided a foundation for this note to explore the significance of the circuit split with evidence from various studies and organizations. This note concluded that conversion therapy efforts harm patients, members of the LGBTQ+ community, and their extended families.

Specifically, by highlighting the numerous harmful and sometimes lifelong effects of conversion therapy including increased rates of anxiety, depression, and suicidal ideation, this note argued that conversion therapy efforts on LGBTQ+ patients by licensed medical professionals should be strictly prohibited. In addition to the numerous harmful effects of conversion therapy, this note discussed the economic burden of conversion therapy, despite no existence of any credible studies showing conversion therapy efforts may actually change a person's sexual orientation. Furthermore, this note highlighted United States Supreme Court decisions focusing on the rights of the LGBTQ+ community.

Lastly, this note argued for a statutory ban on conversion therapy in the state of Indiana, where current law prohibits local governments from banning

171. *Id.*

conversion therapy practices. While highlighting Indiana statistics regarding conversion therapy and other legislation targeting the LGBTQ+ community, this note argued for much-needed protection for LGBTQ+ community members against the harmful effects associated with conversion therapy efforts. Moreover, this note provided an example of statutory language to potentially be used to enact legislation preventing conversion therapy efforts in Indiana.

AN ALTERNATIVE APPROACH TO BLANKET DRUG SCHEDULE: WHY SCHEDULING XYLAZINE SHOULD BE LEFT TO THE STATES

ADAM DESTRAMPE*

INTRODUCTION

America is in the middle of a fentanyl epidemic. In 2021, synthetic opiates, primarily fentanyl, resulted in 70,601 reported overdose deaths.[1] Compared to the 9,173 overdose deaths attributed to heroin in 2021, fentanyl is the deadliest illicitly used opiate in America.[2] Despite fentanyl's lethal grip on the American public, an even more fatal drug cocktail is on the rise. Dr. Rahul Gupta, Director of the White House Office of National Drug Control Policy (ONDCP), warned the American public of a combination of fentanyl laced with xylazine, an "emerging threat" over illicit fentanyl.[3] Xylazine is a tranquilizer used only in veterinary practice.[4] According to some, xylazine mixed with fentanyl is contributing to the rapidly increasing fentanyl-related overdose deaths and is more deadly than consuming fentanyl alone.[5]

In response to this growing public health crisis, many states (including Ohio, Pennsylvania, West Virginia, and Florida) either temporarily or permanently labeled xylazine a scheduled drug.[6] On March 28, 2023, Representative Jimmy Panetta introduced H. R. 1839, known as the "Combating Illicit Xylazine Act," in the U.S. House of Representatives.[7] If enacted into law, the Combating Illicit Xylazine Act would foolishly label xylazine as a schedule III drug under the Controlled Substances Act (CSA).[8] However, unlike fentanyl

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1. *Drug Overdose Deaths: Facts and Figures*, NAT'L INST. ON DRUG ABUSE, https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates [https://perma.cc/H7NK-GCK8] (last visited Oct. 16, 2023).

2. *Id.*

3. *Biden-Harris Administration Designates Fentanyl Combined with Xylazine as an Emerging Threat to the United States*, THE WHITE HOUSE (Apr. 12, 2023), https://www.whitehouse.gov/ondcp/briefing-room/2023/04/12/biden-harris-administration-designates-fentanyl-combined-with-xylazine-as-an-emerging-threat-to-the-united-states/ [https://perma.cc/7U7E-PQ87].

4. *Xylazine*, *Nat'l Inst. on Drug Abuse*, https://nida.nih.gov/research-topics/xylazine [https://perma.cc/BA8N-7JFP] (last visited Oct. 16, 2023).

5. THE WHITE HOUSE, *supra* note 3.

6. *State and Federal Actions to Respond to Xylazine*, NAT'L GOVERNORS ASS'N (May 9, 2023), https://www.nga.org/news/commentary/state-and-federal-actions-to-respond-to-xylazine/ [https://perma.cc/4E3Q-MCCM].

7. H.R. 1839, 118th Cong. (2023).

8. *Id.*

or heroin, little is known about xylazine's potential for abuse, long-term effects in humans, or where illicit xylazine is coming from.[9]

There is little doubt that the short-term effects of xylazine mixed with fentanyl are disastrous.[10] Some illicit substance users who ingested fentanyl mixed with xylazine developed severe skin ulcers or even soft tissue necrosis that presented as "rotting skin."[11] However, there is a striking lack of scientific evidence definitively showing that xylazine is the cause of the increase in overdoses.[12] Furthermore, there is little data to show illicit drug users are intentionally seeking out xylazine or fentanyl mixed with xylazine.[13] Yet, the U.S. government seeks to exert federal control over xylazine.[14]

Unquestionably, protecting public health and safety is of paramount importance to the U.S. government. Historically, however, the U.S. government has not fully considered alternative courses of action or the consequences before implementing fast-acting legislation.[15] Presently, the economic impacts of scheduling xylazine under the CSA remain unknown.[16] With only *two* domestic manufacturers of xylazine in the United States, any changes to the requirements set by the CSA will likely increase the cost of xylazine and drive domestic production of xylazine towards international importation.[17] With a six-billion-dollar economic output in Texas alone, the domestic equine industry stands to experience an enormous impact if the supply of xylazine were to diminish overnight or increase in cost.[18]

By fast-tracking legislative control over xylazine, Congress is, once again, failing to consider alternative approaches to protecting public safety. The U.S. government is acutely aware of the danger fentanyl poses to public health and safety and even designated August 21st "Fentanyl Prevention and Awareness

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9. Deidre McPhillips & Nadia Kounang, *Xylazine present in more than 1 in 10 fentanyl overdose deaths in the US*, CNN (June 29, 2023, 1:23 PM), https://www.cnn.com/2023/06/29/health/xylazine-tranq-fentanyl-cdc-study/ [https://perma.cc/27EN-H7NH].

10. *Id.*

11. *Id.*

12. Mbabazi Kariisa et al., *Illicitly Manufactured Fentanyl–Involved Overdose Deaths with Detected Xylazine — United States, January 2019–June 2022*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 30, 2023), https://www.cdc.gov/mmwr/volumes/72/wr/ [https://perma.cc/LD4J-3RZR].

13. *Id.*

14. H.R. 1839, 118th Cong. (2023).

15. Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, 42 CRIME & JUST. AM. 75, 123 (2013).

16. Way Koon Teoh et al., *Abuse of Xylazine by Human and its Emerging Problems: A Review from Forensic Perspective*, 18 MALAY. J. MED. HEALTH SCI. 190, 191 (2022).

17. Corinne Tolan, *Statement on Xylazine*, PA. VETERINARY MED. ASS'N (Apr. 28, 2023), https://www.pavma.org/2023/04/28/statement-on-xylazine/ [https://perma.cc/DCK8-K98U].

18. Jim Heird, *Horses and the horse industry, Texas and beyond*, NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6898315/ [https://perma.cc/B6BU-8A5G] (last visited Oct. 17, 2023).

Day."[19] Adulterated with xylazine or not, fentanyl remains the deadliest illicitly consumed opiate for the last decade.[20] Clearly, the known danger is fentanyl, [21] yet Congress is shifting its attention to xylazine.[22] Unlike fentanyl, xylazine is not included in overdose death statistics.[23] Unlike fentanyl, the U.S. government lacks scientific research on how xylazine works in humans,[24] and this uncertainty revolving around xylazine has to be resolved before Congress has the option to pass the Combatting Illicit Xylazine Act.[25] Although xylazine may have negative impacts on the human body, it is imperative that the U.S. government keeps its attention directed toward ongoing threats to public health, like fentanyl.

This Note argues that scheduling xylazine should be left to the states and not imposed on all states under the CSA. Part I of this Note provides a background on the U.S. government's history in implementing legislation to control drugs. This section further identifies the U.S. government's tendency to enforce overly strict drug policies that are effectively moot years later. Part II of this Note then examines xylazine as a drug and provides a comparative analysis between xylazine and fentanyl. This part of the Note further examines the weaknesses present in the Combating Xylazine Act. Part III explains how a drug is incorporated into the CSA. It then identifies the dangers of controlling xylazine and the possible consequences of international importation of xylazine into the U.S. Part IV argues that xylazine should be treated similarly to gabapentin and should not be labeled under the CSA. Furthermore, Part IV offers an alternative solution under the federal sentencing guidelines to allow possession of illicit xylazine to be an enhancement to possession of an illegal substance. Overall, the U.S. Congress needs to break the cycle of exaggerated drug regulation and consider more appropriate alternatives to protecting public health than enacting rushed and poorly researched legislation like the Combatting Illicit Xylazine Act.

I. THE U.S. GOVERNMENT'S APPROACH TO DRUG LEGISLATION

Since their inception in the early twentieth century, U.S. drug policies and legislation have followed a common theme: Congress imposes harsh penalties for the use/possession of a particular drug, only to later relax drug policies to align with public perception. The resulting fallout of these penalties has come

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19. *National Fentanyl Prevention and Awareness Day Toolkit*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 21, 2024), https://www.cdc.gov/overdose-prevention/php/toolkits/fentanyl-prevention-awareness-day.html [https://perma.cc/9HSF-CD53].

20. *Drug Overdose Deaths: Facts and Figures*, *supra* note 1.

21. *Id.*

22. H.R. 1839, 118th Cong. (2023).

23. *Id.*

24. Rahul Gupta et al., *Xylazine — Medical and Public Health Imperatives*, 388 N. ENGL. J. MED. 2209, 2210 (2023).

25. 21 U.S.C. § 811(c).

at the cost of over a trillion dollars,[26] and one of the world's highest imprisonment rates at 355 per 100,000 people.[27] Despite these draconian drug policies, very little legislation for addiction treatment has ever been enacted.[28] Rather than determining how to *treat* Americans who abuse drugs, the U.S. government adopts policies that criminalize narcotics and drug abuse in a vain attempt to "solve" the nation's drug problem.[29] This trend dates as far back as the early twentieth century when Congress passed the Harrison Narcotics Act.[30]

A. The Harrison Act and the Eighteenth Amendment

The Harrison Act, passed in 1914, is largely viewed as the beginning of the U.S. War on Drugs.[31] However, the purpose behind the Harrison Act began three decades prior and is deeply entwined with the racial profiling of Chinese nationals.[32] The Angell Treaty, passed in 1887, prohibited Chinese nationals from importing opium into the United States.[33] At the same time, however, the Angell Treaty allowed Americans to take up the importation of opium into the U.S.[34] Congress considered smoking opium a "vice activity that most American citizens … saw as a detriment to society."[35] Congress was wrong.[36] The Angell Treaty had the opposite effect.[37] Opium importation and the amount of opium used by non-Chinese nationals actually increased post-Angell Treaty.[38] However, the U.S., unlike other countries, did not experience as wide of an opium epidemic as other countries.[39] The total number of opium addicts per capita in the U.S., one-tenth of one percent, was significantly lower than other countries.[40]

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26. Juhohn Lee, *America has spent over a trillion dollars fighting the war on drugs. 50 years later, drug use in the U.S. is climbing again.*, CNBC (June 17, 2021, 1:15 PM), https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html [https://perma.cc/P5HG-RNE4].

27. Ashley Nellis, *Mass Incarceration Trends*, THE SENT'G PROJECT (May 21, 2024), https://www.sentencingproject.org/reports/mass-incarceration-trends/ [https://perma.cc/X7MG-VD4D].

28. David T. Courtwright, *A Century of American Narcotic Policy*, *in* 2 TREATING DRUG PROBLEMS: COMMISSIONED PAPERS ON HISTORICAL, INSTITUTIONAL, AND ECONOMIC CONTEXTS OF DRUG TREATMENT 9 (Dean R. Gerstein & Henrick J. Harwood eds., 1992).

29. *Id.* at 1.

30. *Id.* at 9.

31. Audrey Redford & Benjamin Powel, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 INDEP. REV., 509 (2016).

32. *Id.* at 512.

33. Treaty as to Commercial Intercourse and Judicial Procedure, China-U.S., Feb. 23, 1887, 24 Stat. 409.

34. Redford & Powel, *supra* note 31, at 513.

35. *Id.* at 512.

36. *Id.* at 517.

37. *Id.*

38. *Id.*

39. *Id.* at 523.

40. *Id.*

In response to international pressures, Congress passed the Opium Exclusion Act of 1909, the first nationwide ban on opium importation regardless of nationality.[41] In 1909, following a conference in Shanghai, China, U.S. opium commissioner Hamilton Wright explained "the reason why we had to press for the passage of the opium exclusion law—so as to 'save our face' in Shanghai."[42] Although the Opium Exclusion Act did see its intended effect of reducing opium consumption nationwide, much like the Angell Treaty, opium users quickly moved on to more potent forms of opiates, such as heroin and morphine.[43] By the turn of the twentieth century, 300,000 Americans were addicted to opiates.[44]

As drug use continued to increase and pressure from other countries mounted, Congress took up the Harrison Narcotic Act of 1914.[45] Many of the issues brought in opposition to the Harrison Act revolved around state policing powers, the impact on the medical industry to prescribe opiates, and the Harrison Act's inclusion of non-habit-forming narcotics like cannabis.[46] Despite these concerns, Protestant missionaries and other religiously affiliated lobbying groups expressed the need to resolve "the obvious damage this 'sinful, depraved and immoral behavior' caused among the 'inferior races.'"[47] As a result, the Harrison Act passed as an interstate commerce regulation.[48] Administered by the U.S. Treasury Department, the Harrison Act required any prescriber or seller of narcotics to register with the government, maintain accurate records, and pay a tax on narcotic sales.[49] Importantly, any person who possessed narcotics caught without a registration was presumptively found guilty of violating the Harrison Act and, if convicted, was subject to a fine or up to five years imprisonment.[50]

The list of unintended consequences after 1914 is long. In particular, the Harrison Act allowed medical professionals to prescribe narcotics only through their professional practices.[51] The Harrison Act prohibited medical professionals from prescribing drugs to patients to maintain their addiction.[52] The ultimate result of this prohibition was driving the market for drugs into an unsafe and criminal environment.[53]

This trend of making a drug illegal, only for the public to move to crime to illegally obtain that drug, is further exemplified during the Prohibition Era. In January 1919, the states ratified the Eighteenth Amendment, which prohibited

41. *Id.* at 521.
42. *Id.*
43. *Id.* at 523.
44. Courtwright, *supra* note 28, at 2.
45. H.R. 6282 63rd Cong. (1914).
46. Redford & Powell, *supra* note 31, at 525.
47. *Id.*
48. *Id.*
49. H.R. 6282, 63rd Cong. (1914).
50. *Id.*
51. *Id.*
52. *Id.*
53. Redford & Powell, *supra* note 31, at 526.

manufacturing, selling, and transporting "intoxicating liquors" throughout the United States.[54] The Eighteenth Amendment originally provided Congress and the States the power to enforce this Amendment by their own legislative powers.[55] However, states were stripped of their legislative powers to enforce the Eighteenth Amendment through the enactment of the Volstead Act in October of 1919.[56] After Congress overrode President Woodrow Wilson's veto, the Volstead Act enforced a nationwide ban on alcohol content in excess of 0.5%.[57] Any person caught with alcohol was guilty of a misdemeanor crime of maintaining a public nuisance.[58]

From the start, many Americans doubted the national prohibition of alcohol.[59] Many Americans opposed the prohibition and swiftly switched to consuming illicitly produced alcohol.[60] Similar to the opium bans from the 1880s, the Volstead Act had the opposite intended effect on the general public. Rates of gangsterism, public corruption, and methanol poisoning rose quickly, and most Americans outright ignored the prohibition of alcohol.[61] The Volstead Act nearly annihilated the brewery, winery, and distillery industries.[62] By 1926, the 1,300 breweries that were open in 1916 closed, and the federal tax revenues from distilled spirits and fermented liquors dropped nearly $500 million.[63] Soon after the Volstead Act passed Congress, even the most enthusiastic supporters of prohibition lost confidence in the Eighteenth Amendment.[64] By 1932, Franklin D. Roosevelt proclaimed, "The 18th Amendment is doomed."[65] On December 5, 1933, just fourteen years since its enactment, the states ratified the Twenty-first Amendment, ending the national prohibition of alcohol. Conversely, no one spoke up for those who used narcotics.[66]

B. The War on Drugs

The most famous examples of the U.S. government enacting overzealous drug policies are the Comprehensive Crime Control Act of 1984 (which included the Sentencing Reform Act of 1984),[67] the Anti-Drug Abuse Act of

54. U.S. CONST. amend. XVIII, § 1 (repealed 1933).
55. *Id.* § 2.
56. H.R. 6810, 66th Cong. (1919).
57. *Id.*
58. *Id.*
59. Courtwright, *supra* note 28, at 11.
60. *Id.*
61. *Id.*
62. Jack S. Blocker Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 236 (2006).
63. *Id.*
64. Courtwright, *supra* note 28, at 11.
65. *Id.* at 12.
66. *Id.*
67. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended in scattered sections in U.S. Code).

1986,[68] and the Omnibus Anti-Drug Abuse Act of 1988.[69] These Acts originated from President Richard Nixon's declaration of the War on Drugs in 1971 and dramatically increased the sentencing length of drug-related offenses.[70] During the late 1960s, recreational drug use, mainly marijuana, was relatively common.[71] In response to the increase of recreational drug use, Attorney General John Mitchell spoke about the Controlled Dangerous Substances Act of 1969 Bill in September of 1969 to the Subcommittee on Juvenile Delinquency of the Senate Committee on the Judiciary.[72] In his statement, Attorney General Mitchell discussed an exponential increase in juvenile arrests for drug-related offenses.[73] He illustrated a 1,644% increase in total marijuana-related arrests from 1958 to 1968.[74] Using the marijuana-related arrest statistics, Attorney General Mitchell correlated the increase in marijuana-related offenses to an increase in other drug use, such as heroin.[75] Without providing statistics for any increases in other dangerous drug use, Attorney General Mitchell argued the necessity of strengthening the administrative control of drugs by eliminating inconsistencies in drug offense statutes.[76]

Following Attorney General Mitchell's arguments, Congress passed the first rendition of the CSA in 1970.[77] In an effort to combine all previous federal drug laws and allow for federal law enforcement of controlled substances, the 1970 CSA established federal regulations of manufacturing, importing/exporting, and using regulated substances.[78] President Nixon's declaration that drug abuse is public enemy number one galvanized media outlets and propelled the topic of 'drugs' to the forefront of American concern.[79] The Comprehensive Drug Abuse Prevention and Control Act repealed nearly all then-existing drug policies and created a "unified framework" of federal drug

68. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections in U.S. Code).

69. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections in U.S. Code).

70. JAN M. CHAIKEN & DOUGLAS C. MCDONALD, DRUG LAW VIOLATORS, 1980–86, 1 (Fed. Just. Stat., 1988).

71. Nicole R. Ortiz & Charles V. Preuss, *Controlled Substance Act*, NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/books/NBK574544/#article-131542.s2 [https://perma.cc/NF3B-JNYE] (last updated Feb. 9, 2024).

72. *Controlled Dangerous Substances Act of 1969: Hearing on S. 2637 Before the S. Comm. on the Judiciary*, 91st Cong. (1969) (statement of John Mitchell, Att'y Gen. of the United States).

73. *Id.* at 2.

74. *Id.*

75. *Id.* at 3.

76. *Id.* at 6.

77. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections in U.S. Code).

78. *Id.*

79. Richard R. Clayton, *Cocaine Use in the United States: In a Blizzard or Just Being Snowed?*, 61 NAT'L INST. ON DRUG ABUSE RSCH. MONOGRAPH SERIES 8 (Nicholas J. Kozel & Edgar H. Adams, eds., 1985).

control regulations.[80] The CSA was included within Title II of the Comprehensive Drug Abuse Prevention and Control Act.[81] The CSA recognizes two interests in regulating drugs. On one side, there is an interest in regulating legal drugs that have a legitimate purpose in medicine and contribute to public health.[82] On the other side, the CSA criminalizes the manufacture, importation, distribution, and possession of drugs that negatively impact public health.[83] Importantly, the CSA balances these two interests through two overlapping legal frameworks: registration and trafficking provisions.[84] The CSA's registration provision regulates entities whose businesses involve substances specifically labeled to be included with the CSA.[85] The CSA's increase in drug regulation and criminalization of illicit drugs marked the beginning of a quarter-century crusade to combat illicit drug use and illegal drug trafficking in the U.S.

Through the 1980s and the early 1990s, public and federal attention zeroed in on the prevalence of cocaine use.[86] The proliferation of crack cocaine during this timeframe resulted in a marked increase in violent crime in the U.S.[87] Between 1985 and 1992, robbery rates in U.S. cities with populations greater than 250,000 increased by 22.8%.[88] In his 1986 address to the nation, President Ronald Reagan remarked on the perceived increase in drug use and violence and labeled crack cocaine an "uncontrolled fire."[89] Seemingly inspired by President Reagan's declarations, Congress passed three separate acts that, at face value, would deter and reduce illicit drug use and crime.

The Comprehensive Crime Control Act (CCCA) of 1984 was first introduced in the Senate on August 4, 1983.[90] Passed in February of 1984, the CCCA provided new bail procedures in federal court, added an insanity defense for mentally ill defendants, and increased penalties for particular drug offenses.[91] One key provision of the CCCA was the implementation of sentencing reform.[92]

The Sentencing Reform Act (SRA) created the United States Sentencing Commission (USSC) as "an independent agency in the judicial branch

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80. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 116TH CONGRESS 2 (2019).

81. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections in U.S. Code).

82. LAMPE, *supra* note 80, at 1–2.

83. *Id.* at 2.

84. *Id.* at 1.

85. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1253 (1970) (codified as amended in scattered in 21 U.S.C. § 822(a)(1)).

86. Clayton, *supra* note 79, at 20.

87. Eric Baumer et al., *The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross-City Longitudinal Analysis*, 35 J. RSCH CRIME & DELINQUENCY 316, 318 (1998).

88. *Id.*

89. Ronald Reagan, President, U.S., Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986).

90. S. 1762, 98th Cong. (1984).

91. *Id.*

92. *Id.*

composed of seven voting and two non-voting, ex officio members."[93] The USSC is tasked with developing guidelines that champion the basic principles of criminal deterrence.[94] The three objectives of the SRA include: "honesty in sentencing" by avoiding "confusion and implicit deception" from indeterminate sentencing, "reasonable uniformity in sentencing," and "proportionality in sentencing."[95] These three objectives are intended to further the USSC's purpose of promoting justice over offenders convicted of federal crimes.[96] In upholding these objectives, the SRA sought to use a guideline that contained a defined list of relevant distinctions among different forms of criminal conduct and apply the appropriate sentence.[97] The resulting solution is a variable chart called the "Guidelines Manual" (Federal Sentencing Guidelines).[98]

Following the Comprehensive Crime Control Act, Congress enacted the Anti-Drug Abuse Act of 1986.[99] This act amended the CSA with the Narcotics Penalties and Enforcement Act (NPEA).[100] This amendment added mandatory minimum sentences for particular cocaine-related offenses.[101] Although the mandatory minimum sentences applied to both powder and crack cocaine, the amount of powder cocaine needed to trigger the mandatory minimum sentence, compared to crack cocaine, was 100 to 1.[102] For example, a ten-year mandatory minimum sentence required five kilograms of cocaine powder or fifty grams of crack cocaine.[103] Soon after the NPEA, the USSC raised concerns over the disparities between powder and crack cocaine.[104] These concerns were centered around the belief that "crack offenders were disproportionately Black" and that implementing these mandatory minimums would create a "'of unfairness.'"[105] Despite the USSC's and the public's growing concerns, Congress passed the Omnibus Anti-Drug Abuse Act of 1988 (OADAA) to establish the policy goal of a drug-free America.[106] The OADAA created the Office of National Drug Control Policy and restored the use of the death penalty by the federal government.[107] Furthermore, the OADAA amended 21 U.S.C. § 844 to make

93. U.S. SENT'G COMM'N, GUIDELINES MANUAL, ch.1 (Nov. 2021).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. H.R. 5484, 99th Cong. (1986).

100. Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 (1986) (codified as amended in scattered sections of U.S.C.).

101. *Id.*

102. *Id.*

103. *Id.*

104. MICHAEL A. FOSTER & JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10611, CRACK COCAINE OFFENSES AND THE FIRST STEP ACT OF 2018: OVERVIEW AND IMPLICATIONS OF *TERRY V. UNITED STATES* 2 (2021).

105. *Id.*

106. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections in U.S.C.).

107. *Id.*

crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession and added a definition of conspiracy to distribute charge.[108]

The USSC's and the public's growing concerns over the disparity between the sentencing requirements were not addressed by Congress until the Fair Sentencing Act of 2010 (FSA).[109] Among other changes, the FSA reduced the amount of crack cocaine needed to trigger a 10-year mandatory minimum from 100 to 18.[110] However, this period of 22 years resulted in a foundational change in the disparate treatment of Black Americans.

In 1985, one year after the Comprehensive Crime Control Act of 1984 (CCCA) was passed, federal prisons saw a 32% increase in their population.[111] Following the enactment of the CCCA, the Anti-Drug Abuse Act of 1986 (ADAA), and the OADAA, federal prisons saw a population increase of 133.8%.[112] In 1980, non-white Americans accounted for 25% of total federal drug arrests.[113] By 1995, non-white Americans accounted for 40% of total federal drug arrests.[114] From prohibition to the "crack epidemic," the common theme amongst these drug policies is the U.S. government's initial heavy-handed approach and numerous unintended adverse effects on Americans.[115]

In time, these adverse effects become so great that subsequent reversal becomes the solution.[116] Repeatedly, the U.S. government perceived a threat to public health, and implemented a policy that was summarily repealed years later.[117] By continuing this trend, the U.S. government not only wastes resources in enforcing these policies; the diversion of the government's attention from other ongoing problems, such as the opioid epidemic, comes at a cost of American lives.[118]

II. THE OPIOID CRISIS

Unlike the perceived threat of crack cocaine in the 1980s, the ongoing opioid epidemic has an iron grip on the U.S. and is a real threat to public

108. *Id.*

109. FOSTER & LAMPE, *supra* note 104.

110. *Id.*

111. Ronald Ostrow, *1984 Crime Control Act Leads to 32% Rise in Prisoners*, L.A. TIMES (Jan. 9, 1984, 3:00 AM), www.latimes.com/archives/la-xpm-1986-01-09-mn-14186-story.html [https://perma.cc/XSB2-AXJG].

112. ROBYN COHEN, U.S. BUREAU OF JUST. STAT., PRISONERS IN 1990 1 (1990) (showcasing an exponential increase in federal prison populations from 1980 to 1990).

113. FED. BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES 1996 284 (1996).

114. *Id.*

115. *See* Courtwright, *supra* note 28, at 11-12 (discussing the failures of Prohibition).

116. *See id.*

117. *See, e.g.*, *id.*

118. *See id.* at 12.

health.[119] Almost 645,000 people died from an opioid overdose between 1999 and 2021.[120] Critically, the rate of Americans dying from opioid overdoses is exponentially increasing.[121] Compared to 47,600 opioid overdoses in 2017, 81,806 people died from an opioid overdose in 2022 alone.[122] In response to the growing crisis, Congress enacted multiple laws, such as the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act,[123] in an attempt to create the infrastructure necessary to reduce the growing number of opioid-related deaths.[124] Although the number of opioid-related overdoses is increasing, since the enactment of policies like SUPPORT, the rate of increase for total opioid-related overdoses has dropped.[125]

A. Xylazine

With the rate of opioid-related overdoses dropping, the U.S. government is continuing to explore alternative methods to attack the U.S. opioid crisis.[126] Beginning in 2019, xylazine was increasingly found mixed with illicitly manufactured fentanyl.[127] Xylazine is a clonidine analog, N-(2, 6-dimethyphenyl)-5, 6-dihydro-4H-1, 3-thiazin-2-amine, discovered by Farbenfabriken Bayer in 1961.[128] Xylazine acts as a central nervous system depressant and an anesthetic.[129] Because xylazine depresses the central nervous

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119. *See Understanding the Opioid Overdose Epidemic*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 5, 2024), https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html [https://perma.cc/M7XZ-82HM].

120. *Id.*

121. *See Drug Overdose Death Rates*, NAT'L. INST. ON DRUG ABUSE (June 30, 2023), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates [https://perma.cc/KWS8-UFPF].

122. *Id.*

123. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L, 115-271, 132 Stat. 3894 (2018) (codified as amended in scattered sections in U.S.C.) (increasing funding for public health programs to increase awareness about substance use disorders, train healthcare providers in treating patients with substance use disorders, and provide treatment services for patients undergoing drug recovery).

124. Noelia Duchovny & Ryan Mutter, *The Opioid Crisis and Recent Federal Policy Responses*, CONGRESSIONAL BUDGET OFFICE 3 (Sept. 2022), https://www.cbo.gov/system/files/2022-09/58221-opioid-crisis.pdf [https://perma.cc/ZBP6-ZKE4].

125. *Understanding the Opioid Overdose Epidemic*, *supra* note 119.

126. *See ICYMI: The Biden-Harris Administration Announces $450M to Support President Biden's Unity Agenda Efforts to Beat the Overdose Epidemic & Save Lives*, THE WHITE HOUSE (Sept. 1, 2023), https://www.whitehouse.gov/ondcp/briefing-room/2023/09/01/icymi-biden-%E2%81%A0harris-administration-announces-450m-to-support-president-bidens-unity-agenda-efforts-to-beat-the-overdose-epidemic-save-lives/ [https://perma.cc/977Q-MV2X].

127. *Xylazine*, NAT'L INST. ON DRUG ABUSE, https://nida.nih.gov/research-topics/xylazine [https://perma.cc/ZZ4Y-UTHN] (last visited Oct. 16, 2023).

128. Way Koon Teoh et al., *Abuse of Xylazine by Human and its Emerging Problems: A Review from Forensic Perspective* 18 MALAY. J. MED. HEALTH SCI. 190, 190-91 (2022).

129. *Id.* at 190.

system, the Food and Drug Administration banned the use of xylazine in humans.[130] Although banned in humans, xylazine is the oldest, and one of the most commonly used, alpha2-adrenergic agonist (anesthetic) in veterinary medicine to induce short-term sedation, anesthesia, and analgesia.[131] Consequently, xylazine is well documented in veterinary practice and widely used during animal surgical procedures.[132]

Most commonly, veterinarians and farmers use xylazine as a short-term preanesthetic before administering general or local anesthesia to large animals such as horses, cattle, and exotic animals.[133] Licit xylazine for veterinarians is used as an injectable liquid solution.[134] By contrast, xylazine powder is illicitly used as a cutting agent in fentanyl and is difficult to distinguish from other drugs.[135] Like fentanyl, xylazine is quickly absorbed and can be injected into muscles or veins, insufflated, ingested, or smoked.[136]

Fentanyl, a synthetic opiate that was initially manufactured in the early 1960s, is one hundred times more potent than morphine and fifty times more potent than heroin.[137] Similar to morphine, fentanyl is used in medical practice to treat severe pain.[138] Like other analgesics, fentanyl creates short-term feelings of euphoria, sedation, and pain relief.[139] Although pharmaceutical data for xylazine is generally limited to its effects in animals, xylazine is believed to prolong the effects of illicit consumption of fentanyl.[140] Some studies show that the depressive effects of xylazine may begin within minutes and extend the feelings or "high" of fentanyl for six or more hours.[141] For this reason, some illicit drug users may intentionally seek out xylazine-laced fentanyl.[142] However, a survey conducted over social media websites indicates that many illicit drug users avoid xylazine because it worsens the effects of withdrawal.[143]

When xylazine is combined with other central nervous system depressants (e.g., opioids, benzodiazepines, or alcohol), the drug overdose symptoms are synonymous with an opioid overdose.[144] These overdose symptoms include

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130. *Id.* at 191.

131. MARK PAPICH, PAPICH HANDBOOK OF VETERINARY DRUGS 978 (5th ed. 2021).

132. *See id.; see also* Teoh et al., *supra* note 128, at 191.

133. Teoh et al., *supra* note 128, at 191.

134. Bhavani Nagendra Papudesi et al., *Xylazine Toxicity*, NAT'L LIBR. OF MED. (July 17, 2023), https://www.ncbi.nlm.nih.gov/books/NBK594271/ [https://perma.cc/A2QY-YAAU].

135. *Id.*

136. *Id.*

137. *Fentanyl DrugFacts*, NAT'L INST. OF HEALTH (June 2021), https://nida.nih.gov/publications/drugfacts/fentanyl [https://perma.cc/YWE5-4C48].

138. *Id.*

139. *Id.*

140. Papudesi et al., *supra* note 134.

141. *Id.*

142. *Id.*

143. Anthony Spadaro et al., *Self-reported Xylazine Experiences: A Mixed Methods Study of Reddit Subscribers*, NAT'L LIBR. OF MED. (Mar. 14, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10055471/ [https://perma.cc/KW7E-PZRM].

144. Papudesi et al., *supra* note 134.

muscle relaxation, respiratory depression, cardiac arrhythmias, or cardiac arrest.[145] However, unlike other illicit drugs, chronic use of xylazine mixed with fentanyl can also lead to skin ulcers, abscesses, and, in severe cases, necrosis of the skin.[146] Despite the high risk of using xylazine combined with fentanyl, the prevalence of xylazine in illicitly manufactured fentanyl has increased by 276% from January 2019 (at 2.9%) to June 2022 (at 10.9%).[147] Furthermore, xylazine's presence in illicitly manufactured fentanyl is spreading from the northeast to the south and west.[148] However, the U.S. government has not been able to determine how or why xylazine's prevalence has exponentially increased.[149] Critically, xylazine's lack of use in humans creates a void of research and understanding of xylazine's long-term effects.[150]

With the current information on xylazine, the U.S. government finds itself in a familiar position. As with the Angell Treaty, the Harrison Act, and the War on Drugs, here, the U.S. government simply lacks the requisite knowledge to adequately control and manage this increase in illicit xylazine use. Instead of repeating history and enacting legislation whose effects extend beyond its original purpose, the U.S. government needs to spend more time and resources looking into xylazine's effects and how illicit xylazine is entering the U.S.

III. THE COMBATING ILLICIT XYLAZINE ACT

Despite the general lack of knowledge surrounding xylazine, in response to the growing presence of xylazine, Senator Catherine Cortez Masto introduced the Combating Illicit Xylazine Act in the Senate on March 28, 2023.[151] The Act labels illicit xylazine as an urgent threat to public health and safety.[152] Cosponsored by 95 members of the House of Representatives, as of November 6, 2024, the Combating Illicit Xylazine Act remained in front of the Subcommittee on Health.[153] Since then, no further actions have taken place within Congress.[154]

The Act is predicated on the vague finding that the "proliferation of xylazine as an additive to illicit drugs such as fentanyl and other narcotics threatens to exacerbate the opioid public health emergency."[155] The Combating Illicit Xylazine Act claims that "prompt action" in controlling illicit xylazine by

145. *Id.*
146. *Id.*
147. Kariisa et al., *supra* note 12.
148. Papudesi et al., *supra* note 134.
149. OFF. OF NAT'L DRUG CONTROL POLICY, EXEC. OFF. OF THE PRESIDENT, FENTANYL ADULTERATED OR ASSOCIATED WITH XYLAZINE RESPONSE PLAN (2023).
150. *Id.*
151. H.R. 1839, 118th Cong. (2023).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

scheduling xylazine under the CSA will limit the further spread of xylazine and save lives.[156] However, incorporating xylazine into the CSA is not as simple as enacting the Combating Illicit Xylazine Act. Nor is doing so the most effective process to protect public health and safety.

A. Scheduling

Entities working with "controlled substances" must register with the government, protect themselves from diversion and misuse of controlled substances, and report dispensing, storage, and record-keeping information to the government.[157] The CSA's trafficking provision establishes penalties for the production, distribution, and possession of controlled substances found outside the CSA's scope.[158]

Furthermore, the CSA does not apply to all drugs.[159] Not all prescription drugs fall within the scope of the CSA.[160] However, many recreational drugs, also known as "nonpharmaceutical drugs," are controlled substances due to their perceived and scientifically researched negative impacts on public health.[161] For a specific drug or class of drugs to be included within the CSA, it must be specifically labeled and incorporated into the scope of the CSA.[162] Generally, the CSA's scope includes drugs that are deemed to require additional controls to prevent abuse and other negative impacts on public health.[163] Under the CSA, controlled drugs are categorized within different "schedules" numbered I through V.[164]

Before a drug is listed under a schedule in the CSA, 21 U.S.C. § 811 requires the complex process of labeling a drug as "controlled" under the CSA.[165] The Secretary of Health and Human Services must provide the Attorney General with a recommendation sound in scientific and medical evidence.[166] When the Secretary of Health and Human Services recommends that a drug should be "controlled," the Attorney General determines whether a drug falls within the scope of the CSA.[167] If the Secretary of Health and Human Services recommends that a particular drug should not be scheduled, then the Attorney General cannot control the drug under the CSA.[168]

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156. *Id.*
157. Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. 21 U.S.C. § 812(b)(1).
165. 21 U.S.C. § 811.
166. *Id.*
167. 21 U.S.C. § 811(a).
168. *Id.* § 811(b).

The largest hurdle to overcome to incorporate xylazine into the CSA are the eight factors under 21 U.S.C. § 811(c).[169] If the Secretary of Health and Human Services recommends a drug should be scheduled under the CSA, 21 U.S.C. 811(c) provides the Attorney General eight factors to determine whether a drug should be, or should not be, scheduled under the CSA.[170] These eight factors are as follows:

> (1) Its actual or relative potential for abuse.
> (2) Scientific evidence of its pharmacological effect, if known.
> (3) The state of current scientific knowledge regarding the drug or other substance.
> (4) Its history and current pattern of abuse.
> (5) The scope, duration, and significance of abuse.
> (6) What, if any, risk there is to the public health.
> (7) Its psychic or physiological dependence liability.
> (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.[171]

The Attorney General's analysis of these eight factors determines what schedule within the CSA a drug is labeled under.[172] If the Attorney General agrees[173] with the recommendation of the Secretary of Health and Human Services, then the drug is added to the recommended schedule.[174] After a drug is considered a controlled substance under the CSA, the federal government—most importantly, the Drug Enforcement Administration—has the authority to enforce regulations and enact controlling measures against the drug.[175]

Schedule I-controlled drugs are substances that have no accepted medical use in treatment in the U.S. and have a very high potential for abuse/addiction.[176] No prescriptions can ever be written for a Schedule I drug.[177] Heroin, psychedelic drugs (such as MDMA and LSD), and, controversially, marijuana are all listed as Schedule I drugs.[178]

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169. *Id.* § 811(c).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* § 811(c) (providing that where there is substantial evidence of potential abuse but the Secretary of Health and Human Services recommends to the Attorney General that a drug should *not* be controlled, the Attorney General may initiate proceedings for control or removal of a drug under 21 U.S.C. § 811(a)).
174. *Id.* § 811(j).
175. Registration and Reregistration Fees for Controlled Substance and List 1 Chemical Registrants, 85 Fed. Reg. 44710 (2020).
176. 21 U.S.C. § 812(b)(1).
177. *Id.*
178. Nicole R. Ortiz, *Controlled Substances Act*, NAT'L LIBR. OF MED. (Mar. 24, 2023), https://www.ncbi.nlm.nih.gov/books/NBK574544/ [https://perma.cc/JX6R-N3JF].

Schedule II-controlled drugs have a high potential for abuse and addiction but do have limited medical use in the U.S.[179] Examples of Schedule II drugs include cocaine, methamphetamine, and many opioids such as fentanyl, morphine, and oxycodone.[180] Schedule II drugs require a new, original prescription, transmitted from the practitioner each time a patient needs to refill their prescription.[181]

Schedule III-controlled drugs have a moderate risk of abuse and addiction. Like Schedule II drugs, Schedule III drugs do have an accepted medical use in the U.S.[182] Some Schedule III drugs include ketamine, buprenorphine, and anabolic steroids.[183] Prescriptions for Schedule III drugs can be transmitted orally, electronically, or in writing.[184] Furthermore, a prescription for a Schedule III drug can be reused up to five times within six months before a new prescription is needed, and all Schedule III, IV, and V prescriptions can be transmitted to a new pharmacy once.[185]

Schedule IV and Schedule V drugs have a low potential for abuse relative to drugs in Schedules I, II, and III.[186] Benzodiazepines such as alprazolam, diazepam, and tramadol are Schedule IV controlled drugs.[187] Whereas cough suppressants containing codeine, pregabalin, and lacosamide are Schedule V drugs.[188]

Regardless of the respective Schedule a drug is listed under, the drug must be thoroughly researched.[189] The research required takes time.[190] On average, researching a drug takes over nine years.[191] Even with emergency authorization, a fast-tracked clinical trial will take, on average, over six years.[192]

B. Need for Research

Largely because xylazine was never intended for human use, there is little available information to adequately answer § 811(c)'s factors.[193] Researching a drug's chemical makeup, testing its significance for abuse, determining

179. 21 U.S.C. § 812(b)(2).
180. Ortiz, *supra* note 178.
181. *Id.*
182. 21 U.S.C. § 812(b)(3).
183. Ortiz, *supra* note 178.
184. *Id*.
185. *Id.*
186. 21 U.S.C. § 812(b)(4)-(5).
187. *Id.*
188. Ortiz, *supra* note 178.
189. *The Drug Development Process*, U.S. FOOD & DRUG ADMIN. (Jan. 4, 2018), https://www.fda.gov/patients/drug-development-process/step-1-discovery-and-development [https://perma.cc/F9FG-YU5A].
190. *See* Dean Brown, et al., *Clinical development times for innovative drugs*, 21 NATURE REVIEWS DRUG DISCOVERY 793 (2022)
191. *Id.* at 794.
192. *Id.*
193. 21 U.S.C. § 811(c).

xylazine's risk to the public, and developing reversal drugs to combat abuse all require a substantial financial investment.[194] In a preliminary study, xylazine has been shown to have a potential for abuse.[195] Generally, the effects of withdrawal following abrupt cessation of xylazine are physiological in nature, and the symptoms felt are not alleviated through opiate treatment.[196] However, there is very little scientific evidence of xylazine's pharmacological effect in humans.[197] Although some effects of prolonged consumption of xylazine are documented, such as necrosis of the skin,[198] the lack of scientific evidence cannot attribute any particular symptom to xylazine.[199] Overall, millions of dollars worth of research, which requires further federal approval, is required before xylazine can be adequately analyzed through the eight factors under 21 U.S.C. § 811(c).[200] Furthermore, additional resources will be required to support the enforcement of combating illicit xylazine. During the time it would take to adequately research xylazine to the CSA's requirements, overdose deaths are *going* to increase.[201] This is because fentanyl is the illicitly consumed substance that kills over 100,000 Americans each year, not xylazine.[202]

C. Costs to Domestic Production

Attempting to compensate for the research costs through licit use of xylazine will not work either. The CSA provides the Drug Enforcement Administration (DEA) authorization to charge reasonable fees relating to the registration and control of the manufacture, distribution, dispensing, import, and export of controlled substances and listed chemicals.[203] Generally, the DEA's fees range from $3,699 per year for manufacturers of controlled substances to $888 every three years for "business activities involving dispensing."[204] Although these fees may seem marginal, many veterinarians are worried that any increase in the price of xylazine will impact the supply available to veterinarians.[205] Many veterinarians already pay the DEA's registration fees to dispense controlled substances.[206] However, because xylazine is not controlled,

194. Kariisa et al., *supra* note 12.

195. Rahul Gupta et al., *Xylazine — Medical and Public Health Imperatives*, 388 N. ENGL. J. MED. 2209, 2210 (2023).

196. *Id.* at 2209-11.

197. *Id.* at 2211.

198. Papudesi et al., *supra* note 134.

199. *See* Gupta, *supra* note 195.

200. *Id.*

201. *Drug Overdose Death Rates*, *supra* note 121.

202. *Id.*

203. 21 U.S.C. § 821; 21 U.S.C. § 958(f).

204. Registration and Reregistration Fees for Controlled Substance and List 1 Chemical Registrants, 85 Fed. Reg. 44710, 44711 (July 24, 2020).

205. Tolan, *supra* note 17.

206. *Id.*

manufacturers of xylazine do not pay the fees or follow the restricted protocols of manufacturing a controlled substance.[207]

There are only two manufacturers of xylazine in the United States.[208] Any changes to the manufacturing process, whether it be additional registration costs or other requirements under the CSA, can severely impact the production of xylazine.[209] For example, Ohio issued a special notice on April 17, 2023, that required xylazine manufacturers and distributors to operate under the same regulations as controlled-substance manufacturers and distributors.[210] Under this notice, distributors of xylazine now must conduct criminal background checks on all of their employees, update storage facilities to comply with Ohio law, report wholesale orders of xylazine, and much more within 30 days of the rule's enactment.[211] Veterinarians worry that xylazine's supply would be severely affected if the Combating Illicit Xylazine Act was applied nationwide.[212]

If domestic production of xylazine stopped, veterinarians and other pharmaceutical companies would have to import xylazine from other countries.[213] Importing drugs into the United States poses a myriad of risks, and any imported xylazine would take a considerable amount of time before it reaches veterinarians (on top of delays from the CSA's requirements).[214] Due to the U.S. Food and Drug Administration's (FDA) regulatory requirements, the only drugs that can be legally imported into the U.S. come from registered manufacturers whose quality controls are equal to domestic drug manufacturers.[215] Veterinarians worry that any shortage in the supply of xylazine would greatly impact their ability to practice.[216] According to some veterinarians, not having access to xylazine places both animals and humans at risk.[217] For example, an increase in xylazine costs could lead to veterinarians using less effective drugs in practice and increase the threat of harm in treating large animals.[218] On top of increasing risk, the $50 billion American horse industry will be greatly impacted by any xylazine shortage.[219] The U.S.

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207. *See id.*

208. *Id.*

209. *Id.*

210. OHIO BD. OF PHARMACY, SPECIAL NOTICE: XYLAZINE SCHEDULING & LICENSEE COMPLIANCE (2023).

211. *Id.*

212. Tolan, *supra* note 17.

213. *See id.*

214.*Imported Drugs Raise Safety Concerns*, U.S. FOOD & DRUG ADMIN. (Mar. 1, 2018), https://www.fda.gov/drugs/information-consumers-and-patients-drugs/imported-drugs-raise-safety-concerns [https://perma.cc/4SPF-Y8JF].

215. *Id.*

216. Tolan, *supra* note 17.

217. *Id.*

218. *Id.*

219. *See* Hannah Lochner et al., *Economic Impact of the Horse Industry*, UNIV. OF MINN. EXTENSION, https://extension.umn.edu/horse-ownership/economic-impact-horse-industry/ [https://perma.cc/MJ7P-98RE] (last visited Oct. 24, 2024).

Department of Health and Human Services Office reported the current impact of the ongoing drug shortage of other prescription medications may lead to an overall increase in drug prices by 16.6%.[220]

Moreover, xylazine imported into the United States would likely come from China.[221] According to the DEA, a kilogram of xylazine powder can be purchased from Chinese suppliers for $6–$20 U.S. dollars.[222] However, China is also a supplier of illicit xylazine and fentanyl.[223] On October 3, 2023, the U.S. Treasury Department issued a press release designating twenty-eight individuals and a "China-based network responsible for the manufacturing and distribution of ton quantities of fentanyl, methamphetamine, and MDMA precursors."[224] These Chinese entities were also involved in trafficking xylazine.[225] Although there is simply not enough information to definitively pinpoint where illicit xylazine originates from, there are many indications that illicit xylazine is following illicit fentanyl.[226] Therefore, a significant amount of xylazine is likely originating from China. By allowing China to supply the U.S. with licit xylazine, the U.S. government would be directly supporting further importation of illicit xylazine into the United States. This likely possibility is already finding support through the DEA's and Department of Homeland Security's (DHS) efforts to combat the importation of illicit xylazine.

According to the DEA and DHS, xylazine, which is intended for illicit human consumption, is entering the United States in solid form, liquid form, and, "to a lesser degree, mixed with fentanyl seized at the southern border" of the United States.[227] Rather than divert funds from the Department of Health and Human Services' $21 million budget for drug control to extensively research xylazine, the U.S. government should pour its attention into the drug that is actually killing Americans: fentanyl.[228] It is time for the U.S. government to break its own cycle of diverting its attention away from a public health crisis and remain focused on its mission to resolve the decades-old opioid epidemic. Instead of creating an entire national infrastructure to combat xylazine, the U.S.

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220. OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., IMPACT OF DRUG SHORTAGES ON CONSUMER COSTS (2023).

221. Tracey Forfa, *What We're Doing to Stop Illicit Xylazine from Getting into the U.S.*, U.S. FOOD & DRUG ADMIN. (July 11, 2023), https://www.fda.gov/animal-veterinary/news-events/what-were-doing-stop-illicit-xylazine-getting-us [https://perma.cc/X657-KC86].

222. *Id.*

223. *Treasury Targets Large Chinese Network of Illicit Drug Producers*, U.S. DEP'T OF THE TREASURY (Oct. 3, 2023), https://home.treasury.gov/news/press-releases/jy1779 [https://perma.cc/DZ74-6ZDH].

224. *Id.*

225. *Id.*

226. *DEA and DHS Issue Joint Update on Sources of Illicit Xylazine*, U.S. DRUG ENF'T ADMIN. (Sept. 22, 2023), https://www.dea.gov/stories/2023/2023-09/2023-09-22/dea-and-dhs-issue-joint-update-sources-illicit-xylazine [https://perma.cc/E6JP-WNCD].

227. *Id.*

228. *Federal Drug Control Funding*, THE WHITE HOUSE (2023), https://www.whitehouse.gov/wp-content/uploads/2022/03/ap_20_drug_control_fy2023.pdf [https://perma.cc/GV2U-DVXR].

government should rely on the states to implement and enforce their unique regulatory controls over xylazine.

IV. RECOMMENDATIONS OVER THE COMBATING ILLICIT XYLAZINE ACT

Congress should refuse to sign the Combatting Illicit Xylazine Act. The increasing prevalence of xylazine varies across states, and this variability necessarily causes diverse impacts on public health and safety that cannot be adequately addressed by federal legislation. Recognizing the unique needs of each State, Congress should consider alternative approaches. Moreover, amending the Federal Sentencing Guidelines to include xylazine will allow federal agencies to continue combatting illicit xylazine.

A. State Control of Xylazine

Congress should not overstep on U.S. states' individual authority to control xylazine providers. Individual state control provides a more comprehensive solution than blanketly controlling xylazine through the CSA. This argument is not novel, and there is precedent for it. Each state is experiencing the rise of xylazine mixed with fentanyl differently. [229] Individual states have unique economic and public health interests in industries that rely on xylazine.

The practice of states controlling drugs, without federal oversight under the CSA, is not unprecedented. The drug gabapentin, approved by the FDA for use in humans in 1993, is a direct analog to xylazine.[230] Gabapentin is licitly used to control nerve pain and as a muscle relaxer.[231] Despite pharmacological differences, gabapentin and xylazine are presently being illicitly used together with opiates.[232] Similar to xylazine, gabapentin has been illicitly used to lengthen the "high" of consuming opiates.[233] Furthermore, the FDA has concluded that gabapentin, when used alongside opioids, can create serious breathing difficulties.[234] In fact, a 2020 study of ninety-one illicit drug users showed nearly half of the survey participants used gabapentin in combination

229. Papudesi, *supra* note 134.

230. Rama Yasaei et al., *Gabapentin*, NAT'L. LIBR. OF MED. (Dec. 19, 2022), https://www.ncbi.nlm.nih.gov/books/NBK493228/ [https://perma.cc/WP4G-7AJS].

231. *Id.*

232. Alyssa Peckham et al., *Gabapentin Use, Abuse, and the US Opioid Epidemic: The Case for Reclassification as a Controlled Substance and the Need for Pharmacovigilance*, 11 RISK MGMT. HEALTHCARE POL'Y 109, 110 (2018).

233. Yasaei et al., *supra* note 230.

234. *FDA Warns About Serious Breathing Problems with Seizure and Nerve Pain Medicines Gabapentin (Neurontin, Gralise, Horizant) and Pregabalin (Lyrica, Lyrica CR),* U.S. FOOD & DRUG ADMIN. (Dec. 19, 2019), https://www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-serious-breathing-problems-seizure-and-nerve-pain-medicines-gabapentin-neurontin [https://perma.cc/Q285-JN44].

with opiates.[235] Despite the similarities of illicit use with xylazine, gabapentin is not controlled under the CSA.[236]

Even without a nationwide policy, many states independently label gabapentin as a controlled substance. As of July 2022, seven states label gabapentin as a Schedule V controlled substance.[237] Kentucky was the first state to include gabapentin as a controlled substance.[238] The Kentucky legislature cited an increase in public risk following an increase in illicit and licit use of gabapentin.[239] Other states that have not independently scheduled gabapentin are likely to schedule gabapentin soon. For example, Pennsylvania policymakers are "increasingly interested" in illicit gabapentin use following an increase in gabapentin-related overdoses.[240]

Analogous to gabapentin, states have begun their own counteroffensive in confiscating illicit xylazine.[241] In 2018, Florida became the first state to schedule xylazine as a Schedule I drug.[242] During 2022 alone, the Florida Highway Patrol confiscated 649 pounds of illicit drugs, including fentanyl, oxycodone, and xylazine.[243] Since 2018, Pennsylvania has experienced a 1,000% increase in fentanyl mixed with xylazine-related overdoses.[244] In 2022 alone, xylazine mixed with fentanyl contributed to 644 overdose deaths across thirty-eight Pennsylvania counties.[245] Following the exponential increase of xylazine's prevalence, the Pennsylvania legislature enacted H.R. 1661, which makes

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235. Mance E. Buttram & Steven P. Kurtz, *Descriptions of Gabapentin Misuse and Associated Behaviors Among a Sample of Opioid (Mis)users in South Florida*, 53 J. PSYCHOACTIVE DRUGS 47, 50 (2021).

236.Yasaei et al., *supra* note 230.

237. Makaela Premont, *Is Gabapentin a Controlled Substance? In Some States, Yes*, GOODRX HEALTH (July 26, 2022), https://www.goodrx.com/gabapentin/is-gabapentin-a-controlled-substance [https://perma.cc/9FQC-3D4T] (These States include, Alabama, Kentucky, Michigan, North Dakota, Tennessee, Virginia, West Virginia.).

238. Rachel Smith et al., *A Qualitative Analysis of Gabapentin Misuse and Diversion Among People Who Use Drugs in Appalachian Kentucky*, 32 PSYCH. ADDICTIVE BEHAV. 115 (Feb. 2018).

239. 902 KY. ADMIN. REG. § 55:015 (2023).

240. *RX DRUG SCHEDULING & MONITORING*, PA. DEP'T OF HEALTH (Mar. 2019), https://www.health.pa.gov/topics/Documents/Programs/PDMP/06b_PHMC_Drug%20Scheduling%20Fact%20Sheet.pdf [https://perma.cc/N9BA-JP48].

241. Olivia Sugarman & Hridika Shah, *Tracking "Tranq" Laws: The State of Policy Responses to the Growing Xylazine Crisis*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (2023), https://www.congress.gov/118/meeting/house/116428/documents/HMKP-118-JU00-20230928-SD003.pdf [https://perma.cc/JCF7-PXA9].

242. FLA. STAT. § 893.03 (2023).

243. *Florida Highway Patrol Criminal Interdiction Unit Seized Over $110,000,000 In Contraband In 2022*, FL. DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES (Mar. 27, 2023), https://www.flhsmv.gov/2023/03/27/florida-highway-patrol-criminal-interdiction-unit-seized-over-110000000-in-contraband-in-2022/ [https://perma.cc/K7VU-NJ6A].

244. *Historic Increases in Reported Xylazine-Related Overdose Deaths*, PA. DEP'T OF HEALTH (June 15, 2023), https://www.health.pa.gov/ topics/Documents/HAN/2023-705-6-15-ADV-Xylazine.pdf [https://perma.cc/FL2C-DY8P].

245. *Id.*

possession of xylazine a felony punishable by up to five years' imprisonment.[246] Many states, such as Ohio[247] and West Virginia,[248] are also following Florida's and Pennsylvania's lead in enacting their own drug policies to control xylazine.[249] As shown, many states are combating illicit xylazine in their own way. Allowing each state to control xylazine individually will reduce the economic impacts on domestic xylazine production, reduce the risk of international importation of illicit xylazine, and allow the U.S. government to focus on combating illicit fentanyl.

With a direct comparison between xylazine and gabapentin, the U.S. government has a clear path to follow. Many states are implementing laws and regulations to control xylazine of their own accord. Without blanket federal control of xylazine under the CSA, the states have independently allocated their own resources toward combating illicit xylazine while simultaneously preserving their individual state veterinary economies. For example, in a 2023 report, Texas attributed at least four overdose deaths to xylazine mixed with fentanyl.[250] However, as of 2015, Texas's 840,000 horses generated almost $6 billion in state revenue and supported 52,000 jobs.[251] Balancing a multi-billion-dollar industry and drug policy is a complex and highly individualized task. If the U.S. government passed the Combating Xylazine Act, the effect on Texas's and every other state's veterinary industry could be detrimental.[252] Furthermore, the risks associated with importing drugs from other countries, some of which have already proven to be contributors to America's ongoing opioid epidemic, are too high to blindly accept. By allowing the states to control xylazine individually, the U.S. government should turn its focus and mountain of resources toward the overarching issue: fentanyl.

B. Federal Sentencing Guidelines

In response to the rising need for federal action against xylazine, an alternative approach to changing national policy would be to update the Federal Sentencing Guidelines. Doing so circumvents the need to designate xylazine as a controlled substance under the CSA and allows federal agencies to punish

246. David Wenner, *"Tranq dope" Update: Pa. Takes Another Step in Fight Against xylazine*, PENN LIVE PATRIOT-NEWS (Oct. 6, 2023, 7:52 AM), https://www.pennlive.com/health/2023/10/tranq-dope-update-pa-takes-another-step-in-fight-against-xylazine.html [https://perma.cc/2LJ3-L7QU].

247. OHIO REV. CODE § 4729:9-1-03(B)(15) (2024).

248. W. VA. CODE § 60A-2-210 (2023).

249. Sugarman & Shah, *supra* note 241 (These states include Delaware, Illinois, Indiana, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Tennessee, Vermont, and West Virginia.).

250. *Health Advisory: Xylazine in Illicit Drugs Increases Overdose Risks*, TEX. DEP'T. OF STATE HEALTH SERVS. (Mar. 21, 2023), https://www.dshs.texas.gov/news-alerts/health-advisory-xylazine-illicit-drugs-increases-overdose-risks [https://perma.cc/D9X7-598U].

251. Heird, *supra* note 18, at 99.

252. Tolan, *supra* note 17.

illicit xylazine use. By changing the sentencing guidelines, the U.S. government would be able to make possession of xylazine a sentencing enhancement without having to make xylazine a controlled drug under the CSA.[253] This approach preserves domestic xylazine manufacturing while also combatting the increasing prevalence of xylazine.

The Federal Sentencing Guidelines list base offense levels for each type of crime.[254] Higher levels are determined based on the severity of the crime.[255] Following the base level, the Federal Sentencing Guidelines apply "specific offense characteristics."[256] Specific offense characteristics are factors that vary among different offenses but can increase or decrease the base offense level and, subsequently, change the length of sentence an offender receives.[257] Other factors included in the Federal Sentencing Guidelines are "adjustments" and the offender's criminal history.[258] Adjustment factors can apply to any offense and, like specific offense characteristics, can raise or lower the offense level.[259] The offender's criminal history is more crucial in determining the base level.[260] The sentence length increases depending on the number of prior criminal offenses the offender has been charged with.[261] After determining all relevant factors in the Federal Sentencing Guidelines, the advisory guidelines point towards a minimum to maximum sentencing length in months.[262] For example, if someone with no criminal history is charged with possession of less than ten grams of heroin, the base offense level is twelve.[263] Following the Federal Sentencing Guidelines' Sentencing Table, the individual's prescribed sentencing length would be ten to sixteen months.[264] However, if the charged individual imported the illicit substances through the use of an aircraft, the offense level would automatically increase from twelve to twenty-six, resulting in a prescribed sentencing length of sixty-three to seventy-eight months.[265]

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253. 28 U.S.C. § 994(p) (2000).

254. *Overview of the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N (2021), https://www.ussc.gov/sites/default/files/pdf/about/overview/2022_Guidelines-Basics-Trifold.pdf [https://perma.cc/NL8E-WZFM].

255. *Id.* (For example, a trespassing crime has a base offense level of 4, whereas a kidnapping crime has a base offense level of 32.).

256. U.S. SENT'G GUIDELINES MANUAL § 1A1.4(f) (U.S. SENT'G COMM'N 2021).

257. *Id.*

258. *Annotated 2021 Chapter 1*, U.S. SENT'G COMM'N, www.ussc.gov/guidelines/2021-guidelines-manual/annotated-2021-chapter-1#1a1 [https://perma.cc/74DE-4TQB] (last visited Oct. 20, 2023).

259. *Id.* (Examples of adjustment factors include victim-related adjustments, the offender's role in the offense, and obstruction of justice.).

260. *Id.*

261. *Id.* (For example, if a first-time offender is charged with a crime that carries an offense level of six, the advisory guideline would prescribe a 0-6 month sentence. If the offender has four prior criminal acts, that same offense level of six now carries a two-to-eight-month sentence.).

262. U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (U.S. SENT'G COMM'N 2021).

263. *See id.* § 2D1.1(c).

264. *See id.* § 5A.

265. *See id.* § 2D1.1(b)(3); *see id.* § 5A.

Under this alternative solution, possession of xylazine should fall within Part D(1)(1) as a specific offense characteristic.[266] Part D(1) of the Federal Sentencing Guidelines encompasses the unlawful manufacturing, importing, exporting, trafficking, or possession of drugs.[267] In doing so, possession of xylazine would increase the offense level by two.[268] Increasing the offense level by two mirrors many other specific offense characteristics within Part 2D(1)(1).[269] For example, Part 2D.1.1(b)(6) increases an offense level by two if the defendant is convicted of importing methamphetamine or methamphetamine precursors into the U.S.[270] This specific offense characteristic is directly comparable with the illicit xylazine that is being imported from China. Applying this change would increase a possession of eight to ten grams of fentanyl from a level sixteen offense with a suggested sentence of twenty-one to twenty-seven months, to a level eighteen offense with a suggested sentence of twenty-seven to thirty-three months.[271] Making these changes to the Federal Sentencing Guidelines would allow the U.S. government to have a hand in punishing possession of xylazine while preserving the licit use of xylazine. Furthermore, without having to expend the additional funds required to incorporate xylazine into the CSA, the U.S. government could continue to focus on combating fentanyl.

CONCLUSION

The increasing presence of xylazine in illicit opioids like fentanyl is a growing concern for public health. Without preapproved reversal drugs to combat the effects of xylazine, there could be an increase in the overall opioid-related overdose death rates. The foundational issue with xylazine remains that this threat to human health is unresearched, and too little information is known about this drug's effects on the human body. However, the known problem is fentanyl. Blanketly controlling xylazine under the CSA will take the U.S. government's attention away from battling fentanyl and have a disastrous impact on the veterinary economy.

This note examined what is currently known about xylazine, how it is affecting U.S. citizens today, and what can be done to combat this spreading problem. Understanding the impact that controlled substances have on particular industries is imperative to objectively consider what should be done about xylazine. This note argued that there is too little known about how xylazine contributes to the already increasing opioid-related overdose death rates to run headfirst into adopting legislation that impacts a multi-billion-dollar domestic

266. *See id.* § 2D1.1.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* § 2D1.1(b)(6).
271. *Id.* § 2D1.1; *id.* § 5A.

industry. To adequately research xylazine, the U.S. government would be turning its attention away from the real threat, fentanyl. Allowing states to criminalize xylazine possession provides the necessary flexibility to make the greatest impact on that individual state's public health. Doing so enables states whose populations rely on the veterinary industry and are not experiencing a xylazine-related public health crisis to protect their state economies and protect their population's welfare. Congress should throw out the "Combating Illicit Xylazine Act" and remain focused on fentanyl.

DATA ON THE MOVE: THE INTERSECTION OF AUTOMATED LICENSE PLATE READERS AND PRIVACY IN INDIANA

ISABELLA PAGE*

INTRODUCTION

The implementation of Automated License Plate Readers ("ALPRs") across Indiana has experienced rapid growth, signifying a substantial increase in the reliance on ALPR technology by law enforcement agencies in the state.[1] Since 2022, the Indianapolis Metropolitan Police Department installed over 200 ALPRs, bringing the department's total to 321 readers.[2] This expansion shows no signs of slowing down, as the 2024 proposed budget plans for up to 150 additional readers throughout Indianapolis.[3] Many other communities in Indiana, such as Fishers, Muncie, Anderson, and Plainfield, also employ ALPRs.[4] In 2023, Gary, Indiana, received a $1 million federal grant for the purchase of additional ALPRs.[5] These cameras can potentially enhance law enforcement's investigative and crime prevention capabilities but also raise significant privacy concerns. [6]

ALPRs are a powerful tool that equips law enforcement with capabilities that would otherwise be virtually impossible.[7] The combination of cameras and computer software allows indiscriminate detection and storage of license plate numbers and other information of passing vehicles.[8] In addition to solving

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1. Anthony Schoettle, *Indiana Embracing License Plate Reading Devices*, IND. CHAMBER (June 8, 2022), https://www.indianachamber.com/indiana-embracing-license-plate-reading-device/ [https://perma.cc/YH5T-ZEDS].

2. Sarah Nelson, *Curbing Crime with Technology: 200+ License Plate Readers Coming to Indianapolis Streets*, INDIANAPOLIS STAR (Sept. 7, 2022, 12:26 PM), https://www.indystar.com/story/news/2022/09/07/200-license-plate-readers-coming-to-indianapolis-streets/65742787007/ [https://perma.cc/L6WH-X6XM]; David Gay, *IMPD Seeks to Expand Use of Technology to Improve Public Safety*, FOX59 (Sept. 13, 2023, 4:37 PM), https://fox59.com/indiana-news/impd-provides-update-on-use-of-crime-fighting-technology-in-department/ [https://perma.cc/J5JT-BX53].

3. David Gay, *IMPD Seeks to Expand Use of Technology to Improve Public Safety*, FOX59 (Sept. 13, 2023, 4:37 PM), https://fox59.com/indiana-news/impd-provides-update-on-use-of-crime-fighting-technology-in-department/ [https://perma.cc/J5JT-BX53].

4. Vic Ryckaert, *License Plate Readers Are Solving Crimes but Critics Fear Misuse, Privacy Concerns*, WRTV INDIANAPOLIS (July 25, 2023, 1:20 PM), https://www.wrtv.com/news/local-news/crime/license-plate-readers-are-solving-crimes-but-critics-fear-misuse-privacy-concerns [https://perma.cc/5N66-ALDS].

5. Lizzie Kaboski, *Gary Receives DOJ Grant for License Plate Readers*, THE TIMES (Aug. 12, 2023), https://www.nwitimes.com/news/local/crime-courts/gary-police-department-license-plate-readers-justice-grant-public-safety/article_dbd7d16e-38a7-11ee-9d89-b32fe4748a22.html [https://perma.cc/JR8Z-PVZG].

6. Ryckaert, *supra* note 4.

7. Ángel Diaz & Rachel Levinson-Waldman, *Automatic License Plate Readers: Legal Status and Policy Recommendations for Law Enforcement Use*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/automatic-license-plate-readers-legal-status-and-policy-recommendations [https://perma.cc/MJZ4-LKVD].

8. *Id.*

crimes, ALPRs can be used to "investigate petty offenses, apprehend undocumented immigrants, generate fines and fees revenue, and track individuals over long periods of time."[9] The trail of data resulting from ALPRs allows law enforcement to view individuals' historical location information, which in turn can reveal sensitive details about someone's personal life.[10] There have been no state or federal constitutional challenges thus far with respect to the privacy implications of ALPRs; however, it is unlikely that Article 1, Section 11 of the Indiana Constitution or the Fourth Amendment of the United States Constitution provides sufficient protection.[11]

This Note argues that the best way to protect Hoosiers' individual privacy is by enacting legislation restricting the use, retention, and distribution of data collected by ALPRs. Part I of this Note explains how ALPR technology functions and the tradeoffs of its use. Part II then examines ALPRs under the Fourth Amendment, primarily relying on *Carpenter v. United States* to suggest that Fourth Amendment protection does not extend to encompass the privacy infringements arising from ALPRs, at least with respect to the current state of the technology.[12] Part III examines ALPRs under Article 1, Section 11 under the Indiana Constitution. Because of the lack of constitutional protection, Part IV argues it is incumbent on the Indiana Legislature to provide the necessary safeguards for their citizens and suggests model statutory language to accomplish this.

I. AUTOMATED LICENSE PLATE READER TECHNOLOGY

A. Capabilities

Indiana relies heavily on ALPR technology, as "[i]t's difficult to comb through Indiana police reports without stumbling across a mention of [ALPRs] these days."[13] An Indiana Assistant Police Chief praised ALPR's capability to identify license plates and search for the make, model or color of a vehicle; moreover, if queried for a "'person walking a dog, . . . it'll give you a picture of every person, and those are high-definition pictures and they work just as well

9. *Comprehensive Legislation on Automatic License Plate Readers: Overview*, POLICING PROJECT N.Y.U., https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/636f246df771a404c390bd3d/1668228205291/Legislative+Overview+ALPR.pdf [https://perma.cc/E3QV-EFNV] (last visited Nov. 26, 2023).

10. CATHERINE CRUMP ET AL., AM. CIV. LIBERTIES UNION, YOU ARE BEING TRACKED: HOW LICENSE PLATE READERS ARE BEING USED TO RECORD AMERICANS' MOVEMENTS 7-8 (2013), https://www.aclu.org/files/assets/071613-aclu-alprreport-opt-v05.pdf [https://perma.cc/V6FG-6V58].

11. *See generally* Litchfield v. State, 824 N.E.2d 356 (Ind. 2005).

12. Carpenter v. United States, 585 U.S. 296 (2017).

13. Schoettle, *supra* note 1.

at night as they do in the day.'"[14] Although there are various types of ALPRs, such as stationary or mobile cameras, their essential features are consistent.[15]

As the name suggests, ALPRs automatically photograph "all license plate numbers that come into view, along with the location, date, and time."[16] The captured data, which may include images of the vehicle and occasionally its driver and passengers, is then transmitted to a central server.[17] This enables law enforcement agencies to cross-reference plate numbers with "one or more databases of vehicles of interest."[18] Instead of mounting ALPRs on police vehicles as was done previously, Indiana has found it more effective to install them along roadways and attach them to traffic poles.[19] This placement provides for twenty-four-seven functionality, overcoming potential limitations such as officers having days off or their vehicles undergoing maintenance.[20]

ALPRs capture up to 1,800 license plates in a single minute at any time of the day.[21] Vigilant Solutions, an ALPR vendor Indiana is known to contract with,[22] offers stationary cameras with "infrared global shutter sensors that each scan at [thirty] frames per second," capturing clear images of vehicles moving up to 150 miles per hour, "even in zero lux conditions."[23] The cameras are designed for year-round use, as their lenses can scan as far as 125 feet away in

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14. Steve Brown, *Police Access to Surveillance Cameras Concerns ACLU-Indiana*, FOX59 (Mar. 27, 2023, 5:43 PM), https://fox59.com/indiana-news/police-access-to-surveillance-cameras-concerns-aclu-indiana/ [https://perma.cc/ZRG7-HN8A].

15. *Street Level Surveillance: Automated License Plate Readers*, ELECTR. FRONTIER FOUND. (Oct. 1, 2023), https://www.eff.org/pages/automated-license-plate-readers-alpr#:~:text=ALPRs%20automatically%20capture%20all%20license,uploaded%20to%20a%20central%20server [perma.cc/3BUB-RMS4].

16. *Id.*

17. *Id.*

18. *Automated License Plate Recognition*, INT'L ASS'N OF CHIEFS OF POLICE, https://www.theiacp.org/projects/automated-license-plate-recognition [perma.cc/YGL9-B7TK] (last visited Nov. 26, 2023).

19. Casey Smith, *Data Privacy: What About License Plate Readers?*, IND. CAP. CHRON. (Feb. 1, 2023), https://www.heraldbulletin.com/news/state_news/data-privacy-what-about-license-plate-readers/article_986f6872-a25e-11ed-b9e7-1720d273f6cc.html#:~:text=Lawmakers%20have%20previously%20commended%20the,to%20follow%20the%20same%20rules [https://perma.cc/XP98-UDHH].

20. *Id.*

21. Kaveh Waddell, *How License-Plate Readers Have Helped Police and Lenders Target the Poor*, THE ATLANTIC (Apr. 22, 2016), https://www.theatlantic.com/technology/archive/2016/04/how-license-plate-readers-have-helped-police-and-lenders-target-the-poor/479436/ [https://perma.cc/4SYG-X3N5].

22. IND. INTEL. FUSION CTR., LICENSE PLATE READER POLICY 3 (2022), https://www.in.gov/iifc/files/Indiana-Intelligence-Fusion-Center-License-Plate-Reader-Privacy-Policy-2022.pdf [https://perma.cc/XN9S-6NDQ].

23. *L5F Fixed License Plate Recognition System*, MOTOROLA SOLS., https://www.motorolasolutions.com/en_us/video-security-access-control/license-plate-recognition-camera-systems/l5f-fixed-lpr-camera-system.html [perma.cc/YUT5-A7WR] (last visited Nov. 26, 2023).

rain, wind, or snow.[24] Even if cameras were purchased years ago, automatic software updates allow the devices to stay up-to-date.[25]

This initial "[d]ata collection is only the tip of the iceberg."[26] The camera systems are equipped with sophisticated software that enables creating and managing "hot lists and alerts, conducting detailed searches, and running patented, advanced analytics to reveal transformative vehicle location intelligence."[27] In Indiana, the oversight and administration of this software, provided by Vigilant Solutions, falls under the purview of the Indiana Intelligence Fusion Center Executive Director.[28] Their responsibility includes "ensur[ing] compliance with applicable laws, regulations, standards, and policy."[29] However, there are currently no specific Indiana or federal laws or regulations governing ALPR technology.[30]

B. Risks vs. Rewards

ALPR technology vendors emphasize the deterrent effects on crime, asserting that "as soon as cameras go up, police immediately solve more crimes . . . [a]nd then crime rates go down."[31] A 2018 controlled study found that police cars equipped with mobile ALPR technology demonstrated "a 140% greater ability to detect stolen cars" and identified up to four times more lost or stolen plates than cars without such technology.[32] This technology empowers the police "to be proactive with safety . . . [i]nstead of waiting for an incident to possibly occur, they will, in real-time, be alerted to any suspicious activity or persons that might present a safety issue."[33] To the extent ALPRs are used to prevent and solve crime, they can provide benefits to the community. However, the limited data available has led to widespread skepticism about the technology's actual effectiveness in reducing crime.[34]

While ALPRs earn praise for their crime prevention capabilities, they simultaneously evoke concerns about their impact on individual privacy. Single photos of license plates may not inherently raise alarms, but accumulating

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. IND. INTEL. FUSION CTR., *supra* note 22.
29. *Id*.
30. *Id.*; *ALPR FAQs*, INT'L ASS'N OF CHIEFS OF POLICE (Aug. 8, 2018), https://www.theiacp.org/resources/alpr-faqs [https://perma.cc/9QH4-2FR4].
31. Schoettle, *supra* note 1.
32. Jason Potts, *Research in Brief: Assessing the Effectiveness of Automatic License Plate Readers*, POLICE CHIEF, Mar. 2018, at 14, https://theiacp.org/sites/default/files/2018-08/March%202018%20RIB.pdf [https://perma.cc/CEH3-E9FV].
33. Schoettle, *supra* note 1.
34. *Automated License Plate Readers: A Study in Failure*, INDEP. INST. (Nov. 30, 2021), https://www.independent.org/news/news_detail.asp?newsID=2294 [https://perma.cc/E832-7JPQ].

individual information in databases over prolonged periods warrants attention. The far-reaching capabilities of modern ALPR technology allow government agencies to transcend simple searches and hot list alerts, as the databases use powerful vehicle location analytics and possess billions of records.[35] Rather than capturing individuals' movements at a few locations, the vast amount of location data can result in a comprehensive view of individuals' daily movements, such as their places of worship, doctor's offices, educational institutions, residences, and more.[36]

In instances where police departments either lack policies or fail to enforce them rigorously, there is a heightened risk of technology abuse.[37] Just as cell phone data has been misused, ALPR data could easily be used to facilitate stalking.[38] Moreover, there are concerns about institutional abuse, as ALPRs allow law enforcement agencies to carry out systematic surveillance of political protestors, which has been seen in other nations employing this technology.[39] And generally, "[a]wareness that the government may be watching chills associational and expressive freedoms."[40]

With increases in the number of cameras, lengthy retention periods, and widespread sharing amongst agencies, law enforcement can assemble individual puzzle pieces to depict a high-resolution image of our individual lives.[41] The contribution of ALPR technology to police investigations should not be achieved at the cost of compromising individual privacy.

II. LACK OF CONSTITUTIONAL PROTECTION

A. Federal Fourth Amendment

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[42] Its purpose is to "safeguard the privacy and security of individuals

35. *L5F Fixed License Plate Recognition System*., *supra* note 23.

36. CRUMP ET AL., *supra* note 10, at 7.

37. United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) ("The government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."); CRUMP ET AL, *supra* note 10, at 8; Marcus Green, *Kentucky and Indiana Police Are Collecting License Plate Data. Some Have No Policies for It*, WDRB.COM (Nov. 17, 2022), https://www.wdrb.com/wdrb-investigates/kentucky-and-indiana-police-are-collecting-license-plate-data-some-have-no-policies-for-it/article_6f637084-6692-11ed-9e9b-df1c220fe9b9.html [perma.cc/C7XS-7QES].

38. CRUMP ET AL, *supra* note 10, at 9.

39. For example, in the United Kingdom, an individual was pulled over based on an ALPR hit after his license plate was put on a hot list after an anti-war protest. *Id.*

40. United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

41. CRUMP ET AL, *supra* note 10.

42. U.S. CONST. amend. IV.

against arbitrary invasions by government officials."[43] Accordingly, "when an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,'" intrusion into that private sphere generally qualifies as a search and requires a warrant.[44] Thus, a two-part test has emerged: (1) whether the subject of the search has an expectation of privacy, and, if so, (2) whether that subjective expectation is reasonable, judged by the objective criterion of the views of society as a whole.[45]

Whether an expectation of privacy is objectively reasonable is "informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'"[46] The Supreme Court has recognized two corresponding "guideposts" to inform the Court's analysis: (1) "seek[] to secure 'the privacies of life' against 'arbitrary power'"; and (2) "place obstacles in the way of a too permeating police surveillance."[47] However, when an "intrusion serves special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the [g]overnment's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[48] Still, "[e]ven where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause."[49]

1. Defining the "Search."—The single capture of a license plate is not the cause of concern but rather the sensitive information that can potentially be revealed from the accumulated data when assembled and compared to other relevant information. Without restrictions, ALPR data can be retained for years, and when compiled, it reveals much more detailed information than in isolation.[50] With this in mind, it is important to specify that the "search" does not occur when the ALPR captures a single photo of a license plate or from the passive accumulation of data within the database.[51] Rather, the search arguably occurs when law enforcement accesses and subsequently assembles vast amounts of historical data in a way that reveals personal information about an

43. Carpenter v. United States, 585 U.S. 296, 303 (2018) (quoting Camara v. Mun. Ct. of City & Cnty. Of S.F., 387 U.S. 523, 528 (1967)).

44. *Id.* (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)).

45. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

46. *Carpenter*, 585 U.S. at 304-05 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

47. *Carpenter*, 585 U.S. at 304-05 (first quoting Boyd v. United States, 116 U.S. 616, 630 (1886); then quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

48. Nat'l Treasure Emps. Union v. Von Raab, 489 U.S. 665-66 (1989).

49. *Id.* at 667.

50. CRUMP ET AL., *supra* note 10.

51. *See* Peterson v. State, 674 N.E.2d 528, 535 (Ind. 1996) (recognizing a search connotes prying into hidden places); United States v. Brown, No. 19 CR 949, 2021 WL 4963602, at *3 (N.D. Ill. Oct. 26, 2021) (citing United States v. Miranda-Sotolongo, 827 F.3d 663, 667-68 (7th Cir. 2016)) (finding no privacy interest in license plates).

individual that is otherwise not available to the naked eye.[52] This concept parallels the mosaic theory, which asserts that the "government can learn more from a given slice of information if it can put that information in the context of a broader pattern, a mosaic."[53]

The mosaic theory first emerged when the D.C. Circuit Court ruled that the government's warrantless installation of a GPS device on a defendant's car and subsequent tracking of the defendant for twenty-eight days was an unreasonable search.[54] Invoking the mosaic theory, the Court held that "the whole of a person's movement over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil."[55] However, when the Supreme Court affirmed the D.C. Circuit Court on the merits in *United States v. Jones*, it did so under a narrower trespass of property rights theory.[56] Nonetheless, an argument for ALPR privacy violation emerges from the majority's acknowledgment that 4-week electronic surveillance "*without an accompanying trespass* [could result in] an unconstitutional invasion of privacy."[57]

The concurrences in *Jones* more closely echo the mosaic theory and are applicable to ALPR technology.[58] Justice Sotomayor explained how "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[59] And the fact that "GPS monitoring is cheap" and "proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'"[60] Also relevant to license plates, Justice Sotomayor opined that simply because an individual discloses information voluntarily to the public for a limited purpose does not disentitle that information to Fourth Amendment protection.[61] Justice Alito suggested that length of time matters because although "short-term monitoring of a person's

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52. *See* CRUMP ET AL, *supra* note 10, at 9 (explaining that this assembly might often occur with reference to other sets of data or information. For example, if data is shared across various agencies, more detailed information will be revealed. Also, if the location points are mapped out against identified buildings, law enforcement could reasonably infer where someone frequents.).

53. United States v. Tuggle, 4 F.4th 505, 517 (7th Cir. 2021) (quoting Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205 (2015)).

54. United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010), *aff'd sub nom.* United States v. Jones, 565 U.S. 400 (2012).

55. *Id.* at 560.

56. United States v. Jones, 565 U.S. 400, 404 (2012) ("Government physically occupied private property for the purpose of obtaining information.").

57. *Id.* at 412 (emphasis added).

58. *Id.* at 413-31 (Sotomayor, J., concurring) (Alito, J., concurring).

59. *Id.* at 415 (Sotomayor, J., concurring) (citing People v. Weaver, 12 N.Y.3d 433, 441-42 (2009)).

60. *Id.* 415-16 (Sotomayor, J., concurring) (citing Illinois v. Lidster, 540 U.S. 419, 426 (2004)).

61. *Id.* at 418 (Sotomayor, J., concurring).

movements on public streets accords with [society's reasonable] expectations of privacy, . . . longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[62]

Shortly after *Jones*, the Supreme Court endorsed the mosaic theory in *Riley v. California* by ruling that a warrantless search of cell phone contents was unconstitutional.[63] The court noted that a "cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record . . . [and] data on the phone can date back for years."[64] The Supreme Court acknowledged there will be "some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from a search; it is that a warrant is generally required before a search."[65]

Furthermore, the Supreme Court in *Carpenter v. United States*[66] effectively endorsed the mosaic theory when it held the government's collection of a defendant's cell-site location information for 127 days amounted to a search.[67] The location information provided an "all-encompassing record" which uncovered "an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[68] *Carpenter* ultimately delineated the difference between short-term tracking of public movements and "prolonged tracking that can reveal intimate details through habits and patterns"; the latter form of surveillance invades expectations of privacy in the whole of a person's movements and therefore requires a warrant.[69]

Given that license plate numbers are intended to furnish information to law enforcement and are always visible to the public, the mere act of capturing a photo or maintaining a record of license plate numbers is unlikely to be deemed a search. Nevertheless, a compelling Fourth Amendment challenge to ALPRs emerges within the framework of the mosaic theory. Still, the tracking must reach a level of pervasiveness that effectively "paint[s] the type of exhaustive picture of [someone's] every movement that the Supreme Court has frowned upon."[70] Additionally, while the Supreme Court has implicitly endorsed the

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62. *Id.* at 430 (Alito, J., concurring) (citing United States v. Knotts, 460 U.S. 276, 281-82 (1983)).

63. Riley v. California, 573 U.S. 373 (2014).

64. *Id.* at 375.

65. *Id.* at 376.

66. *See* discussion of *Carpenter* applied to ALPRS *infra* Sections II.A.2.

67. Carpenter v. United States, 585 U.S. 296, 316 (2018); Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J.L. & TECH. 357, 373 (2019).

68. *Carpenter*, 585 U.S. at 311 (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

69. *Carpenter*, 585 U.S. at 296; Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 341 (4th Cir. 2021).

70. United States v. Tuggle, 4 F.4th 505, 524 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022) (reasoning that stationary cameras around the defendant's home captured an important sliver of his life but were not exhaustive enough to be unreasonable).

mosaic theory in several cases,[71] it has "not received the Court's full and affirmative adoption," and thus, lower courts are not bound to apply it when assessing a Fourth Amendment challenge.[72]

2. An Expanded Analysis of Carpenter v. United States and ALPRs.—In *Carpenter*, the Supreme Court ruled the government's warrantless acquisition of cell-site location data via a third-party company violated the Fourth Amendment.[73] In this case, law enforcement "obtained 12,898 location points cataloging [Defendant's] movements [over 127 days]—an average of 101 data points per day."[74] The Supreme Court held that the "detailed, encyclopedic, and effortlessly compiled" data violated an individual's "legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information] (CSLI)," whether the surveillance is employed by the government or by a third party.[75] The Court further noted that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere."[76]

Like the CSLI data, the location records resulting from ALPRs have the potential to "hold for many Americans the 'privacies of life.'"[77] ALPR databases similarly possess a "retrospective quality," providing law enforcement with access to "information otherwise unknowable."[78] And "[c]ritically, because the location information is continually logged for [every person that passes by]—not just those [] who might happen to come under investigation—this newfound tracking capacity runs against everyone."[79] In *Carpenter*, there is some contention regarding the precision of cell-tower location data—specifically whether it is as precise as GPS data or only provides a general location.[80] With ALPRs, there is no question that the technology possesses GPS-level precision, regardless of whether the reader is fixed or mobile.[81] Further, a person should not be deemed to "voluntarily 'assume[] the risk' of turning over a

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71. *See Carpenter*, 585 U.S. at 296; *Jones*, 565 U.S. at 400 (2012) (Sotomayor, J., concurring) (Alito, J., concurring); Riley v. California, 573 U.S. 373 (2014).

72. *Tuggle*, 4 F.4th at 517, 519-20.

73. *Carpenter*, 585 U.S. at 310 (2018).

74. *Id.* at 302.

75. *Id.* at 309-10 (comparing to GPS monitoring considered in *Jones*, 565 U.S. 400 (2012)).

76. *Id.* at 310 (citing Katz v. United States, 389 U.S. 347, 351 (1967) ("What [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.")); *see also Jones*, 565 U.S. at 430 (individuals have a reasonable expectation of privacy in the whole of their movements).

77. *Carpenter*, 585 U.S. at 311 (quoting Riley v. California, 573 U.S. 373, 403 (2014)); *see also* CRUMP ET AL., *supra* note 10.

78. *Carpenter*, 585 U.S. at 312 (2018).

79. *Id.* ("Police need not even know in advance whether they want to follow a particular individual, or when.").

80. *Id.* at 313.

81. *L5M Mobile LPR Camera System*, MOTOROLA SOLS., https://www.motorolasolutions.com/en_us/video-security-access-control/license-plate-recognition-camera-systems/l5m-mobile-lpr-camera-system.html [https://perma.cc/J3V5-3TSR] (last visited Nov. 25, 2023).

comprehensive dossier of his physical movements" merely by driving a car.[82] A license plate is logged by ALPRs by "dint of its operation, without any affirmative act" beyond driving down the road.[83]

Although ALPR *capabilities* are comparable to CSLI data, the current *reality* of ALPR implementation likely does not warrant Fourth Amendment protection.[84] Where the CSLI data provided an "all-encompassing record of the holder's whereabouts," ALPRs are less prevalent than cell towers.[85] Rather than being "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years,"[86] there are gaps in a person's movements due to the limited number of cameras actually installed, even though the surveillance is activated twenty-four-seven. While the government can access a "deep repository of historical location information" with "just the click of a button," the depth of data on a particular individual is limited.[87]

Additionally, there is some suggestion in *Carpenter* that no matter how many ALPRs are implemented, the technology may never invoke Fourth Amendment protection:

> While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. . . . Accordingly, when the [g]overnment tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.[88]

Thus, it seems that because license plates only follow their owners on public thoroughfares, the government cannot achieve perfect surveillance like it can with cell phone data.

However, "the Court has already rejected the proposition that 'inference insulates a search.'"[89] Although license plates do not follow their owners indoors, with enough license plate readers, law enforcement could often infer which buildings someone entered and exited without knowing what they did while inside.[90] Accordingly, if ALPRs were situated sufficiently, the government could, in combination with other information and with the ability

82. *Carpenter*, 585 U.S. at 315 (quoting Smith v. Maryland, 442 U.S. 735, 745 (1979)).

83. *Id.*

84. *See* Kyllo v. United States, 533 U.S. 27, 36 (2001) ("Must take account of more sophisticated systems that are already in use or in development"); *Carpenter*, 585 U.S. at 313 ("While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision.").

85. *Carpenter*, 585 U.S. at 311.

86. *Id.* at 315.

87. *Id.* at 311.

88. *Id.* at 311-12 (citing Riley v. California, 573 U.S. 373, 403 (2014)).

89. *Id.* at 312 (quoting *Kyllo*, 533 U.S. at 36).

90. Diaz & Levinson-Waldman, *supra* note 7.

to cross-reference the plate with other systems, "deduce a detailed log of [an individual's] movements."[91]

3. Post-Carpenter and ALPR Challenges.—Nevertheless, post-*Carpenter* Fourth Amendment challenges to ALPRs align with *Carpenter's* suggestion that ALPRs are not pervasive enough. Although the Supreme Court has yet to address the Fourth Amendment implications associated with ALPRs specifically, several district courts have asserted that ALPR usage does not constitute an unreasonable search. For instance, in *United States v. Brown*, the Illinois District Court found no privacy violation because law enforcement "did not obtain the 'privacies' of [the defendant's] life or exploit a too permeating police surveillance."[92] The ALPR found the car on public streets twenty-three times in a little over two months, and the court reasoned this was "the product of routine, non-invasive surveillance and did not upset settled expectations of privacy."[93]

Similarly, in *United States v. Bowers*, the Pennsylvania District Court held the government's acquisition of ALPR data was not an unreasonable search when it revealed the defendant's location on "106 occasions in thirty-three unique public locations over a four-and-a-half month period."[94] The court stated "there is no reasonable expectation of privacy in the information on license plates"; in fact, the "very purpose of a license plate number . . . is to provide identifying information to law enforcement and others."[95] The court also addressed and ultimately rejected the applicability of the mosaic theory, stating:

> Even in the aggregate, the ALPR cameras "capability to capture multiple shots of a single vehicle and/or store historical data does not approach the near-constant surveillance of cell-phone users" public and private moves that so concerned the Court in *Carpenter*. Rather, the technology is more akin to the conventional surveillance methods, such as security cameras, that the *Carpenter* Court was careful not to call into question.[96]

On the other hand, in *Leaders of a Beautiful Struggle v. Baltimore Police Department*, the Fourth Circuit did not answer the narrow question of whether

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91. Carpenter v. United States, 585 U.S. 296, 312 (2018).

92. United States v. Brown, No. 19 CR 949, 2021 WL 4963602, at *3 (N.D. Ill. Oct. 26, 2021).

93. *Id.*

94. United States v. Bowers, 2:18-CR-00292-DWA, 2021 WL 4775977, at *4-*5 (W.D. Pa. Oct. 11, 2021) ("This limited data collection does not even begin to approach the same degree of information as that gathered in *Carpenter*.").

95. *Id.* at *3 (citing United States v. Ellison, 462 F.3d 557, 561-62 (6th Cir. 2006).

96. *Id.* (citing Carpenter, 585 U.S. 296, 316 (2018)); *see also* United States v. Toombs, 671 F.Supp.3d 1329, 1340-41 (N.D. Ala. 2023) (finding the officer only received one data point from his query; obtaining suspect's location at a discrete time while traveling on a public road was not an unreasonable search (distinguishing United States v. Knotts, 460 U.S. 276 (1983))).

ALPRs violate Fourth Amendment privacy interests; however, the technology at issue, drone surveillance, is a useful comparison.[97] In this case, the court found that aerial footage of the city, which was retained for at least forty-five days, was "a 'detailed encyclopedic,' record of where everyone came and went within the city during daylight hours over the prior month-and-a-half."[98] The retained drone surveillance allowed "[l]aw enforcement [to] 'travel back in time' to observe a target's movements, forwards and backwards."[99] Even though the data was only collected in twelve-hour increments, "the program enable[d] photographic, retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with. That is enough to yield 'a wealth of detail,' greater than the sum of the individual trips."[100] Notably, the Court disregarded the fact that the drone surveillance did not follow individuals indoors because the resulting data still "enable[d] deductions about 'what a person does repeatedly [and] what he does not do,'" and thus revealed, "'an intimate window' into a person's associations and activities."[101]

Like drone surveillance, sufficient ALPR data would arguably allow deductions about a person's movements without following them indoors.[102] Although ALPRs are likely even more pervasive due to their twenty-four-hour-a-day surveillance, the state of ALPR technology in Indiana likely does not capture enough movement to enable such deductions; the cameras are sufficiently distant from one another and only capture data where they are located. If enough cameras were employed to produce a quantity of data points rivaling CSLI or drone footage, it would be more likely to invoke Fourth Amendment protection. But merely presenting the potential of the technology, especially when weighed against benefits to law enforcement, likely does not amount to an unconstitutional search.

B. Indiana's Article 1, Section 11

Although the language of the Fourth Amendment and Article 1, Section 11 ("Section 11") of the Indiana Constitution are identical, Indiana's analysis differs from the federal analysis.[103] First, Indiana imposes a standing requirement independent of privacy expectations;[104] to challenge a search as

97. *Beautiful Struggle*, 2 F.4th 330, 341 (4th Cir. 2021).

98. *Id.* at 341.

99. *Id.* (quoting *Carpente*r, 585 U.S. at 297).

100. *Id.* at 342 (quoting United States v. Jones, 565 U.S. 400, 415-17 (2012) (Sotomayor, J., concurring)).

101. *Id.* (quoting United States v. Maynard, 615 F.3d 544, 562-63 (D.C. Cir. 2010)).

102. CRUMP ET AL., *supra* note 10.

103. IND. CONST. art. I, § 11; Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005) ("Indiana has explicitly rejected the expectation of privacy as a test of the reasonableness of a search or seizure.").

104. *Cf.* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (explaining that federal standing inquiry is "properly placed within the purview of substantive Fourth Amendment law.").

unreasonable under Section 11, a defendant must show "ownership, control, possession, or interest in either the premises searched, or the property seized."[105]

Not only does the standing requirement distinguish Section 11 from the Fourth Amendment analysis, but the reasonableness analysis itself differs. Under Section 11, the court evaluates the "reasonableness of the police conduct under the totality of the circumstances"; Indiana's analysis is entirely objective and focuses on the police conduct, as opposed to the federal counterpart's focus on an individual's objective *and* subjective expectation of privacy.[106]

In addition, the totality-of-the-circumstances framework requires the court to attempt to "strike the proper balance between" the underlying competing interests:[107] limiting "excessive intrusions by the State into their privacy"[108] and "supporting the State's ability to provide 'safety, security, and protection from crime.'"[109] In light of these principles and any other relevant considerations, evaluating the reasonableness of a search requires a balancing of: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."[110]

1. Section 11 Analysis.—There are two challenging aspects to bringing a Section 11 claim against ALPRs. First, to succeed on a facial challenge, the claimant has "the burden of demonstrating that there is no set of circumstances under which the statute can be constitutionally applied."[111] This heavy burden, along with the fact that a challenge would be against unclear government practices rather than a defined statute, causes a facial challenge to be somewhat impractical—it is difficult to apply a practice to any set of circumstances when the practice itself is unknown. By the same token, the public's inability to monitor law enforcement's use of ALPRs likely disallows an individual from bringing an as-applied challenge because they will be unable to prove whether law enforcement actually assembled the individual's location data in a way that

105. Peterson v. State, 674 N.E.2d 528, 534 (Ind. 1996) (finding that although defendant had an interest in the property seized, the defendant had no interest in the apartment searched because it was leased to his mother and sister, the mother paid rent, and mother had sole determination whether the defendant could reside at the apartment); Allen v. State, 893 N.E.2d 1092, 1096 (Ind. Ct. App. 2008) (finding that defendant was a trespasser and showed no legitimate right to the premises searched).

106. *Litchfield*, 824 N.E.2d at 359 (citing Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994)).

107. Hardin v. State, 148 N.E.3d 932, 943 (Ind. 2020) ("It is because of concerns among citizens about safety, security, and protection that some intrusions upon privacy are tolerated, so long as they are reasonably aimed toward those concerns." (citing Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006)).

108. *Id.* at 942-43 (citing State v. Washington, 898 N.E.2d 1200, 1206 (Ind. 2008); Marshall v. State, 117 N.E.3d 1254, 1261 (Ind. 2019)) ("And so we liberally construe . . . Section 11 to protect individuals.").

109. *Id.* at 943 (citing Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006)).

110. Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).

111. Meredith v. Pence, 984 N.E.2d 1213, 1218 (Ind. 2013).

reveals private information.[112] In other words, establishing the presence of a search is a preliminary hurdle that is likely insurmountable, making it challenging to address any broader issues of misuse.

The second challenging aspect, which in some ways stems from the first challenge, regards the threshold issue of what constitutes a search. To properly understand the application of Section 11 to ALPRs, it is worth reiterating what aspect of ALPR technology should be defined as a "search." As previously mentioned, the search does not occur when the cameras photograph individual license plates or when the data sits idle in the database;[113] instead, the search arguably occurs when the long-term data is used to map out an individual's movements over a period of time, revealing private information about the individual.[114] Although it seems obvious that this information is not available to the public in the same way a license plate is exposed to public view, Indiana has not accepted or rejected, implicitly or explicitly, any form of the mosaic theory.[115] However, there is also support for the proposition that Section 11 provides greater protection than the Fourth Amendment.[116] For purposes of the analysis, it is assumed that Indiana recognizes that the assembly of long-term location information is a search, but it is important to recognize that this threshold issue could potentially be detrimental to the claim.

a. Standing.—The Indiana Supreme Court has recognized a privacy interest in a person's vehicle but noted that this interest does not "render [vehicles] beyond the reach of reasonable police activity."[117] However, because the proffered search involves the assembly of location information rather than the isolated capture of license plate numbers, the appropriate inquiry is whether an individual has an interest in their movements that could potentially reveal sensitive information. Again, there is no precedent to confirm Indiana recognizes this interest, but an individual's movements are within their control, and it is reasonable to believe that an individual has an interest in movements that can reveal sensitive information.

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112. Smith, *supra* note 19 ("If there are no guidelines, how do we know it is not being abused?").

113. Wilkinson v. State, 743 N.E.2d 1267, 1270 (Ind. Ct. App. 2001) ("Suspicionless check of license plate numbers is not an improper search."); *See* Peterson v. State, 674 N.E.2d 528, 535 (Ind. 1996) (explaining that search connotes "prying into hidden places" but no explicit adoption of federal "plain view doctrine").

114. *See* Carpenter v. United States, 585 U.S. at 296, 311-12 (2018).

115. Zanders v. State, 118 N.E.3d 736, 741 n.4 (Ind. 2019), *remanded for further consideration in light of Carpenter*, 585 U.S. 296 (deciding the reasonableness of Fourth Amendment search of CSLI data on the grounds of harmless error; Court declined to reconsider the state constitutional claim, noting Section 11 does not depend on Fourth Amendment).

116. Linke v. Northwestern School Corp., 734 N.E.2d 252 (Ind. Ct. App. 2000), *vacated*, 763 N.E.2d 972 (Ind. 2002) (citing Moran v. State, 644 N.E.2d 536, 538 (Ind. 1994)); Peterson v. State, 674 N.E.2d 528, 533 (Ind. 1996).

117. Hardin v. State, 148 N.E.3d 932, 945 (Ind. 2020) (citing Taylor v. State, 842 N.E.2d 327, 334 (Ind. 2006)) ("Automobiles are among the 'effects' protected by … Section 11.").

b. Reasonableness.—

(i) Degree of suspicion.—Pursuant to a totality of the circumstances approach, the court "consider[s] all '. . . information available to [officers] at the time' of the search" when determining the degree of suspicion that a violation has occurred.[118] The Indiana Supreme Court has stated explicitly that "an important factor in evaluating a reasonable search is appropriate restriction on arbitrary selection of persons to be searched."[119] When license plate information is captured and assimilated into the larger database, it is done so indiscriminately; most of the detailed location information is stored for prolonged periods of time without attributable suspicion.[120] But the capture and mere storage of information is not the "search" being challenged, so the degree of suspicion depends on the information available to law enforcement when they subsequently assemble the information and cross-reference other databases.[121]

It is reasonable to infer that the Indiana Supreme Court would require officers to possess "articulable individualized suspicion" before accessing and assembling sensitive location information, as the Court has urged that this requirement appropriately balances citizens' privacy interests and law enforcement's needs.[122] But while law enforcement technically has the freedom to assemble location information indiscriminately, it would be difficult to use this mere possibility to succeed on a facial challenge. Although there is an opportunity for law enforcement to access and subsequently assimilate data about an individual who has not caused any suspicion, there is conversely a circumstance where the officer has reason to believe an individual has committed a crime, and the ALPR data could be useful in solving that crime. In the latter circumstance, the degree of suspicion is high and likely justifies accessing and assembling the information.

The complications arising from a facial challenge are evident in this prong. If an *innocent* individual were able to prove that law enforcement accessed their ALPR records and assembled the data in a way that revealed the privacies of their life, this prong would likely weigh in favor of the individual. However, because of the lack of oversight on law enforcement agencies' use of ALPR databases, individuals are unaware of whether and how their information is used.[123]

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118. *Id.* at 943 (citing Duran v. State, 930 N.E.2d 10, 18 (Ind. 2010)).

119. Litchfield v. State, 824 N.E.2d 356, 364 (Ind. 2005).

120. *2019 ALPR Hit Ratio Report for Indianapolis Metropolitan Police Department by Vigilant Solutions*, MUCKROCK (Jan. 28, 2020), https://www.muckrock.com/foi/indianapolis-160/2020-vigilant-data-sharing-information-automated-license-plate-reader-alpr-indianapolis-metropolitan-police-department-86940/#file-840642 [https://perma.cc/NP4N-NR3F]; CRUMP ET AL., note 10, at 13.

121. *Litchfield*, 824 N.E.2d at 361 (applying "degree of suspicion" prong to ALPR search challenge).

122. *Id.* at 364 (requiring officers to possess articulable individualized suspicion before obtaining and searching through garbage); Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999) (requiring individualized suspicion of seat belt violation before stopping motorist).

123. Smith, *supra* note 19.

(ii) Degree of intrusion.—Focusing on the degree of intrusion caused by the *method* of the search emphasizes the importance of *how* officers conduct a search.[124] The intrusion is considered from the defendant's point of view, making a defendant's consent and ability to avoid the search relevant.[125] Moreover, examining the degree of intrusion into an individual's ordinary activities considers the intrusion into their physical movements and privacy.[126] For example, in traffic stop cases, Indiana courts have focused on the degree of intrusion into the defendant's physical movements,[127] whereas in trash-search and other cases, courts have focused on the intrusion into the defendant's privacy.[128] Both types of intrusions are relevant to the analysis, so although overall, there are differences between the Indiana and federal analyses, an inquiry into the degree of intrusion inevitably considers privacy expectations.[129] Because the interest at issue concerns a person's physical movements, analyzing the degree of intrusion essentially compares the extent to which law enforcement tracks a person in a vehicle against that person's privacy expectations and freedom of movement.

Individuals do not consent to the initial capture of their location information through ALPRs, nor are they asked for consent regarding any subsequent use of that information.[130] Moreover, to avoid ALPRs altogether, an individual would either have to map out the location of all readers and take alternate routes, drive a car that is not registered in their name, or avoid driving altogether. ALPR detection likely does not need to be entirely voluntary, but the lack of consent and inability to avoid ALPRs suggest a high degree of intrusion.[131]

However, practically, the degree of intrusion into an individual's privacy is likely low because it is improbable that law enforcement currently can use ALPR data to reveal an individual's everyday movements. In other words, the actual tracking is likely not persistent enough; ALPRs are scattered, and the relatively limited quantity prevents consistent revelation of an individual's movements over a prolonged period.[132] The fact that law enforcement only intrudes on someone's location information, which is observable by the public,

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124. Hardin v. State, 148 N.E.3d 932, 945 (Ind. 2020).

125. *Id.* at 944 (citing Carpenter v. State, 18 N.E.3d 998, 1002 (Ind. 2014)); Duran v. State, 930 N.E.2d 10, 18 n.4. (Ind. 2010); State v. Gerschoffer, 763 N.E.2d 960, 969 (Ind. 2002).

126. *Hardin*, 148 N.E.3d at 944.

127. *Id.* at 944-45 (citing Austin v. State, 997 N.E.2d 1027, 1035-36 (Ind. 2013)); State v. Hobbs, 933 N.E.2d 1281, 1287 (Ind. 2010).

128. *Hardin*, 148 N.E.3d at 945 (citing *Duran*, 930 N.E.2d at 18; Litchfield v. State, 824 N.E.2d 356, 363-64 (Ind. 2005)).

129. *Hardin*, 148 N.E.3d at 944-45 (citing *Duran*, 930 N.E.2d at 18; *Litchfield*, 824 N.E.2d at 363-64).

130. Diaz & Levinson-Waldman, *supra* note 7.

131. *Cf.* Indiana v. Gerschoffer, 763 N.E.2d 960, 969 (Ind. 2002) (sobriety checkpoint need not be entirely voluntary, but the more avoidable it is, the less it interferes with liberty of drivers).

132. *See generally* Nelson, *supra* note 2.

also weighs in favor of a low degree of intrusion.[133] The revelation of intimate details, when the location information is assembled and compared with other data, is not observable by the public, but there still needs to be an ample number of cameras to actually paint a full picture.

In addition, the degree of intrusion into an individual's physical movements is low. Law enforcement's assembly of location data does not interfere with an individual's physical movements, as individuals are unaware of any assembly. In addition, law enforcement is not physically stopping anyone's vehicle with the technology.[134] While civil liberties organizations fear that the use of ALPRs can cause individuals to "become more cautious in the exercise of their protected rights of expression, protest, association, and political participation because they consider themselves under constant surveillance," this remains only a risk.[135]

(iii) Extent of law-enforcement needs.—"[L]aw-enforcement needs exist not only when officers conduct investigations of wrongdoing but also when they provide emergency assistance or act to prevent some imminent harm."[136] Law-enforcement needs refer to the "needs of the officers to act in a general way,"[137] but also to "act in a particular way and at the particular time they did."[138] The technology's effectiveness and potential deterring effects are relevant in determining the extent of law enforcement needs.[139]

Although law enforcement's general need to prevent and solve crime is recognized by society, that general need alone likely does not justify random searches into someone's location information because this "gives excessive discretion to engage in fishing expeditions," which the Indiana Supreme Court has expressly sought to prevent.[140] While recent data regarding the effectiveness of ALPRs is limited, a 2019 report for Indianapolis readers provides that of 1,164,281 plate detections, only 34,076 were hits.[141] In other words, less than 3% of detections triggered a hit, and whether those hits resulted in an arrest is unknown.

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133. *Cf.* Carpenter v. State, 18 N.E.3d 998, 1002 (Ind. 2014) (quoting Moran v. State, 644 N.E.2d 536, 540 (Ind. 1994)) ("Houses and premises of citizens receive the highest protection.").

134. *See Gerschoffer*, 763 N.E.2d at 960.

135. CRUMP ET AL., *supra* note 10, at 8.

136. Hardin v. State, 148 N.E.3d 932, 946 (Ind. 2020) (citing *Carpenter*, 18 N.E.3d at 1002; Trimble v. State, 842 N.E.2d 798, 804 (Ind. 2006)).

137. *Id.* at 946-47 (citing Marshall v. State, 117 N.E.3d 1254, 1262 (Ind. 2019) (discussing the general need to enforce traffic-safety laws); Austin v. State, 997 N.E.2d 1027, 1036 (Ind. 2013) (discussing the general need to combat drug trafficking)).

138. *Id.* at 947 (citing Duran v. State, 930 N.E.2d 10, 19 (Ind. 2010)) (finding the specific needs were not pressing to execute arrest warrant because officers had shaky information on subject's location and no flight risk); Myers v. State, 839 N.E.2d 1146, 1154 (Ind. 2005) (search of vehicle upheld partly because elevated specific needs when driver was not under arrest and might have driven away)).

139. Indiana v. Gerschoffer, 763 N.E.2d 960, 970 (Ind. 2002).

140. Litchfield v. State, 824 N.E.2d 356, 364 (Ind. 2005).

141. *2019 ALPR Hit Ratio Report for Indianapolis Metropolitan Police Department by Vigilant Solutions*, *supra* note 120.

However, when the officer is notified of a hit and consequently assembles appropriate location data, the specific need to act quickly weighs in favor of constitutionality. Regarding deterrence, psychology studies confirm that people alter their behavior when they know they are being watched.[142] While this proposition can be used to argue that ALPRs chill the associational freedoms of innocent people, it similarly supports the argument that the cameras deter the commission of crimes.[143]

2. Related Indiana Precedent.—There have not yet been any challenges to law enforcement's use of ALPR data in Indiana. Although not directly on point, the defendant in *Maloney v. State* contended that "the viewing of [his] license plate was not improper, but the subsequent search of [his] personal records" was unconstitutional.[144] In *Maloney*, the law enforcement officer randomly checked the defendant's license plate number and discovered, through records shared by the Bureau of Motor Vehicles ("BMV"), that the vehicle's registered owner had a suspended license.[145] Because law enforcement was statutorily authorized to search records maintained by the BMV, the Indiana Court of Appeals held the search was reasonable.[146]

The challenge in *Maloney* is distinguishable from an ALPR challenge for several reasons. First, the statutory authorization the court relied on is inapplicable in the context of ALPRs because the BMV does not manage the ALPR database.[147] Second, the potential scope of ALPR data significantly exceeds the personal data maintained by the BMV;[148] although a mere license plate number is comparable, the sensitive information that can be deduced from the ALPR's recording of plate number, time, and precise location is unconventional. Third, and for similar reasons, it is expected that the BMV possesses the records discussed in *Maloney*, specified in the relevant statute, and shares such records with law enforcement.[149]

Although not directly addressing ALPR technology, in *McCowen v. State*, the defendant challenged law enforcement's procurement of his cell phone records.[150] In this situation, the Indiana Court of Appeals found the police had a great degree of suspicion that the defendant had information about a missing individual and that the defendant's movements would be informative of the

142. CRUMP ET AL., *supra* note 10, at 8.

143. *Id.*

144. Maloney v. State, 872 N.E.2d 647, 650 (Ind. Ct. App. 2007) (internal quotation marks omitted).

145. *Id.* at 648.

146. *Id.* at 652; IND. CODE § 9-14-3-5 (repealed 2016); IND. CODE § 9-14-3.5-10 (repealed 2016).

147. IND. INTEL. FUSION CTR, *supra* note 22.

148. IND. CODE § 9-14-13-2 (2016) (effectively replacing the statute discussed in Maloney v. State, 872 N.E.2d 647 (Ind. Ct. App. 2007)) (listing social security number, federal identification number, driver's license number, etc.).

149. *Id.*

150. McCowan v. State, 10 N.E.3d 522, 525 (Ind. Ct. App. 2014), *rev'd on other grounds*, 27 N.E.23d 760 (Ind. 2015).

missing person's whereabouts.[151] The degree of intrusion was minimal because law enforcement requested records from the cell phone provider as a routine part of their recordkeeping, the defendant did not have to surrender his phone, and the request did not disrupt his activities.[152] Additionally, the police only requested records of his activity between the eighteen hours.[153] Finally, the court found the extent of law enforcement needs was great because the police searched for a recently missing individual when they requested the records.[154]

McCowen reaffirms the idea that the mere capture and passive accumulation of ALPR data is likely not a "search" but instead considered routine recordkeeping.[155] However, manipulating the data to reveal a comprehensive record of an innocent individual's past should not be considered routine recordkeeping. The fundamental obstacle preventing innocent individuals from bringing a successful challenge that will effectually protect their privacy is, given the lack of transparency, the unlikeliness that an innocent individual will ever be informed of law enforcement's actions.[156] Consequently, innocent individuals must tolerate the invasion of privacy until the technology is so pervasive that the proper defendant can challenge law enforcement's warrantless search and subsequent assembly of ALPR data, revealing the intimate details of the defendant's whereabouts.[157]

C. No Constitutional Protection: Problem of Degree

Both Fourth Amendment federal claims and Section 1, Article 11 State claims essentially fail because of the minimal degree of intrusion.[158] While the mosaic theory applies to the *capabilities* of ALPR technology, it is not currently applicable to its actual implementation. Federal claims have failed because of the minimal data points from ALPR searches, which were submitted as evidence. Knowing a few places where someone publicly travels cannot be reasonably considered a violation of privacy, especially considering the established principle that there is no reasonable expectation of privacy for someone traveling in an automobile on public thoroughfares.[159] State claims will likely fail for the same reason, as Article 1, Section 11's test of reasonableness explicitly addresses the degree of intrusion.[160]

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151. *Id.* at 534.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *See* Smith, *supra* note 19.
157. *See* Ramirez v. State, 174 N.E.3d 181 (Ind. 2021); Zanders v. State, 118 N.E.3d 736 (Ind. 2016). Circumstances will also have to overcome the exigent circumstances exception to the warrant requirement. *Id.*
158. *See generally* Carpenter v. United States, 585 U.S. 296, 311-13 (2018); Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).
159. United States v. Knotts, 460 U.S. 276, 281 (1983).
160. Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).

In other words, until a case demonstrates that ALPR data is far more comprehensive than previously shown, law enforcement will continue collecting location information on individuals. The timeline for reaching a level of surveillance that warrants constitutional scrutiny will vary depending on the extent to which local or state authorities have advanced in deploying ALPR technology.

As previously mentioned, implementation of this technology shows no signs of stopping, and it is reasonable to expect ALPR usage will grow exponentially; while there may only be a couple hundred cameras in Indianapolis today, there could be a couple thousand in the near future.[161] The more cameras there are, the more data points the government can collect about each individual, and "[a]s technological capabilities advance, . . . confidence that the Fourth Amendment (as currently understood by the courts) will adequately protect individual privacy from government intrusion diminishes."[162]

Put differently, the degree of tolerance for government intrusion into privacy, shaped by the current circumstances, essentially sets the standard for society's initial baseline of what qualifies as a reasonable expectation of privacy.[163] As the government's use of ALPRs incrementally, and likely inconspicuously, expands, one could argue that society's reasonable expectation of privacy expands simultaneously, so long as no one challenges the technology. Eventually, when ALPR usage becomes so pervasive that it consistently captures an individual's location data numerous times throughout the day, the government will have wide latitude to argue that such surveillance fits within the boundaries of society's reasonable expectation of privacy.[164]

The question follows: How far are Americans willing to allow government surveillance technologies to encroach upon their daily lives before deciding that this violates a reasonable expectation of privacy? To prevent the passage of time from defining this standard, policymakers and citizens must voice their concerns regarding the trade-offs between security and privacy.[165] Truly securing the bounds of a reasonable expectation of privacy must come in the form of legislation.

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161. Lavernacole, *Automatic License Plate Recognition (ALPR) Market Size, Growth, Forecast 2023–2030*, MEDIUM (Nov. 10, 2023), https://medium.com/@lavernacole2023/automatic-license-plate-recognition-alpr-market-size-growth-forecast-2023-2030-f6f03b3018ff [https://perma.cc/NM6Q-CN4L].

162. United States v. Tuggle, 4 F.4th 505, 527-28 (7th Cir. 2021) (citing Kyllo v. United States, 533 U.S. 27, 33-34 (2001)).

163. *See id.*

164. *See id.* at 527 (citing United States v. Jones, 565 U.S. 400, 404-11 (2012)).

165. *See* Diaz & Levinson-Waldman, *supra* note 7.

III. PROPOSED LEGISLATION

Because of the lack of constitutional protection, the best solution for ensuring law enforcement does not invade our privacy via ALPR data while preserving its crime-fighting benefits is by enacting statutory restrictions. Indiana currently lacks any legislation or statewide guidelines regarding ALPRs.[166] At least sixteen other states have enacted legislation; the statutory language, for the most part, varies greatly.[167] Indiana's legislation should be tailored to the specific goals of ALPR usage in Indiana. The proposed legislation will primarily address ALPR use by law enforcement agencies.[168]

A. Restrictions Based on Intended Use

The restrictions on ALPR data access should depend on law enforcement's intended use. While an officer should be able to easily check a plate number during a routine traffic stop to promote the officer's safety, it should be more difficult to retain records of an individual car for purposes of long-term tracking.[169] In addition, the sensitivity of the data necessitates a higher bar for the distribution of the data. Regardless of the intended use, the ALPR operator should be required to submit the reason for inquiry into the system.

1. Quick Access: Legitimate Law Enforcement Purposes.—Law enforcement's access to the information collected by ALPRs should be statutorily restricted to "legitimate law enforcement purposes." This will allow ALPRs' crime prevention and solving capabilities to persist while mitigating the invasion of innocent individuals' private data. The existing Indiana State Police ALPR policy ("ISP Policy") currently restricts the utilization of hot lists to legitimate law enforcement purposes; however, this term is not defined.[170]

A statutory definition of "legitimate law enforcement purposes" should delineate the primary objectives of ALPRs while maintaining a nonexclusive character. Providing context-based examples in the definition will illuminate the intended applications of ALPR data usage.[171] However, acknowledging that the

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166. Smith, *supra* note 19.

167. *Automated License Plate Readers: State Statutes*, NAT'L CONF. STATE LEGISLATURES (Feb. 3, 2022), https://www.ncsl.org/technology-and-communication/automated-license-plate-readers-state-statutes [https://perma.cc/QV6K-8VMJ].

168. *See, e.g.*, ARK. CODE 12-12-1803(b) (2017) (defining separate uses for parking enforcement entities and Department of Transportation); ME. REV. STAT. tit. 29, § 2117-A(3) (2013) (creating exceptions for the Department of Transportation and Department of Public Safety).

169. *Comprehensive Legislation on Automatic License Plate Readers: Overview*, *supra* note 9.

170. *Standard Operating Procedure: License Plate Reader*, IND. STATE POLICE (Aug. 18, 2023), https://public.powerdms.com/Ind3899/documents/2007753/ENF017%20License%20Plate%20Reader [https://perma.cc/W9U4-JD4V].

171. *Comprehensive Legislation on Automatic License Plate Readers: Overview*, *supra* note 9.

list is not exhaustive will afford law enforcement flexibility if the technology proves advantageous in unforeseen ways not initially contemplated. The absence of evidence indicates that Indiana law enforcement utilizes ALPRs for non-investigative purposes, so the list should only pertain to investigative use.[172]

2. Retaining Data/Long-Term Tracking: Thirty Days.—The information retention limit within other states' applicable statutory schemes ranges from three minutes[173] to thirty months;[174] there is nearly always an exception provision allowing for an extended retention period for specific circumstances or upon request. The existing ISP Policy allows for thirty days of data retention "before being purged from the system," unless collected information is placed into the incident management system.[175] Two of the three proposed Indiana bills suggested a twenty-four-hour retention period unless the situation satisfies specific requirements.[176] The third bill suggested a thirty-day retention period with largely the same exceptions.[177]

A thirty-day retention period balances crime-stopping benefits while mitigating any negative privacy impacts.[178] Rather than immediately purging data, thirty days of retention allows law enforcement to maintain both the real-time and archival benefits of ALPRs.[179] Law enforcement would be able to use limited historical data, but the data would not date so far back that an assembly could reveal an extensive pattern of an individual's whereabouts. Instead, law enforcement can use short-term patterns to identify areas of crime and implement preventative measures when appropriate.[180] To retain the data for longer than thirty days and subsequently access this historical data, law enforcement should be required to obtain a warrant or submit a preservation request. This requirement will ensure law enforcement is validly exercising their invasion on an individual's privacy by "[placing] obstacles in the way of a too permeating police surveillance."[181]

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172. ARK. CODE § 12-12-1803(b) (2017) (controlling access to secured areas, verification of registration, logs, and other compliance data for highway travel).

173. N.H. REV. STAT. § 261.75-b(VIII) (2017).

174. GA. CODE § 35-1-22(b) (2018).

175. *Standard Operating Procedure: License Plate Reader*, supra note 170.

176. S.B. 238, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 417, 118th Gen. Assemb., 2nd Reg. Sess. (Ind. 2014) (exceptions include if obtained under warrant, is relevant to ongoing criminal investigation, location or identity of fugitive, location of missing person, commission of crime, or person who owns license plate requests retention).

177. H.B. 1558, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017).

178. *See* Diaz & Levinson-Waldman, *supra* note 7.

179. Joel F. Shultz, *How ALPR Data Drives Intelligence-Led Policing*, LEXIPOL (May 3, 2018), https://www.police1.com/police-products/traffic-enforcement/license-plate-readers/articles/how-alpr-data-drives-intelligence-led-policing-BQmAMSJFCHtld7lc/ [https://perma.cc/5S99-42GH].

180. *Id.*

181. Carpenter v. United States, 585 U.S. 296, 305 (2018) (first quoting Boyd v. United States, 116 U.S. 616, 630 (1886); then quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

3. Disclosing Data: Confidentiality.—Disclosure of ALPR data should be limited due to the sensitive nature of the information.[182] Disclosing information is distinct from retaining information, as the data can be retained in the database without being distributed or accessed. Without restrictions, the mass collection of data can be fed into even larger regional databases or shared with private companies; once a law enforcement agency shares the data, it can lose control of how it is used, stored, and further distributed.[183]

Restricting law enforcement's sharing abilities to legitimate law enforcement purposes and in response to specific requests from other agencies allows agencies to support each other in solving crime while ensuring innocent individuals' data is not carelessly disseminated.[184] To further protect individual privacy, there should be a higher bar to disclose information to non-law enforcement agencies. The data should only be able to be disclosed to specified recipients pursuant to a valid court order. Establishing a heightened threshold for disclosing information to law enforcement agencies and the general public will reinforce individual privacy protections.[185]

B. Ensuring Transparency

Requiring agencies to create and adopt policies will provide guidance and help ensure internal agency conduct does not violate individual privacy. [186] These policies, along with statistical data resulting therefrom, should be published so citizens can see how law enforcement uses their location information and, when necessary, challenge any practices they believe to be violative of their privacy.[187]

Only authorized law enforcement personnel trained, certified, and subjected to a background check should have access to the ALPR database.[188] The adopted policy should describe the training and certification process. In addition, the policy should describe how the agency will maintain statistical data regarding ALPR usage and retention to hold agencies accountable for their use.[189] All queries in the database should be subject to auditing, so the statistical data

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182. *Cf.* IND. CODE § 9-14-13-2 (2024) (restrictions on the BMV's disclosure of sensitive personal information); *but see* IND. INTEL. FUSION CTR, *supra* note 22 (BMV does not manage ALPR database).

183. CRUMP ET AL., *supra* note 10, at 18.

184. *Id.*

185. *See* Albert Gidari, *Public Access to Smart Data*, CTR. FOR INTERNET AND SOC'Y (Sept. 25, 2017, 10:14 AM), https://cyberlaw.stanford.edu/blog/2017/09/public-access-smart-data [https://perma.cc/EU6Q-Q39Y].

186. *E.g.*, MD. CODE PUBLIC SAFETY § 3-509(c) (2023); MONT. CODE ANN. § 46-5-117(2)(d)(i) (2017); NEB. REV. STAT. § 60-3206(1)-(2) (2018); N.C. GEN. STAT. § 20-183.30 (2015).

187. Diaz & Levinson-Waldman, *supra* note 7.

188. *ALPR FAQs*, *supra* note 30.

189. *Comprehensive Legislation on Automatic License Plate Readers: Overview*, *supra* note 9.

should be logged and stored in a format that permits auditing.[190] This log should include details about automated ALPR alerts, including the reason for the alert, whether any information was shared with other agencies, and the outcome of the alert.[191] The logs should track every time an officer seeks to access historical ALPR data, specifying the officer and crime being investigated.[192] Maintaining statistical data of this nature will also allow for thorough empirical studies on the efficacy of ALPRs.[193]

C. Example Statutory Language

In order to safeguard individuals' privacy against the potential misuse of ALPRs, it is imperative to incorporate the following provisions into Indiana law:

A. Definitions
   1. "Active data" refers to data uploaded to individual automated license plate reader systems before operation or data gathered during the operation of an automatic license plate reader. "Active data" does not include historical data.
   2. "Legitimate law enforcement purposes" includes[194] identifying a vehicle that is stolen, associated with a wanted, missing, or endangered person, registered to a person against whom there is an outstanding warrant, in violation of commercial trucking requirements, involved in case-specific criminal investigative surveillance, involved in a homicide, shooting, or other major crime or incident, or in the vicinity of a recent crime and may be connected to that crime.[195]
   3. "Captured plate data" means the global positioning system coordinates, dates and times, photographs, license plate numbers, and any other data collected by or derived from an automated license plate reader, including active and historical data.
   4. "Historical data" refers to license plate data that is stored in an automated license plate reader database, including data retained beyond 30 days.

B. Accessing Data
   1. Captured Data

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190. *See* MD. CODE ANN., PUBLIC SAFETY § 3-509(c) (2023).

191. Diaz & Levinson-Waldman, *supra* note 7.

192. *Id.*

193. *Comprehensive Legislation on Automatic License Plate Readers: Overview*, *supra* note 9.

194. *A Guide to Reading, Interpreting, and Applying Statutes*, WRITING CTR. GEO. U. LAW CTR. 5 (2017), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf [https://perma.cc/SY9S-XTUU] (presumption of nonexclusive "include").

195. *See* MONT. CODE ANN. § 46-5-117(2)(d)(iii) (2017); N.H. REV. STAT. § 261.75-b (2017).

a. Operation of a license plate reader and access to captured plate data by a law enforcement agency must be for legitimate law enforcement purposes only.
b. The operator must submit the reason for inquiry into the system in accordance with the agency's policy.

2. Historical Data
a. Law enforcement may not access historical data without a warrant.

C. Data Retention
1. Captured license plate data may not be preserved for more than 30 days after the date that it is captured, unless
a. The captured data was obtained under a warrant; or
b. Pursuant to a valid preservation request.
2. A preservation request may be submitted by
a. Law enforcement agency, or
b. The person whom a license plate was issued.
c. A party to a pending or potential litigation.
3. A preservation request must specify in a sworn written statement:
a. The location of the particular camera or cameras for which captured license plate data must be preserved;
b. The particular license plate for which captured license plate data must be preserved; and
c. The date and time frames for which captured plate data must be preserved.
4. One year from the date of the initial preservation request, the captured license plate data obtained by an automatic license plate reader system must be destroyed, unless another preservation request is submitted within the 1-year period, in which case the 1-year retention period will be reset.

D. Data disclosure
1. Law enforcement agencies may exchange or share captured license plate data with other law enforcement agencies for law enforcement purposes upon request.
2. A governmental entity or defendant in a criminal case may apply for a court order for disclosure of captured plate data, which shall be issued by the court if the governmental entity or defendant in a criminal case offers specific and articulable facts showing that there are reasonable grounds to believe the captured license plate data is relevant and material to the criminal or civil action.
3. Captured plate data is otherwise confidential and may not be sold or transferred by a law enforcement agency to another person.

E. Policy
   1. Any law enforcement agency deploying an automated license plate reader shall adopt and publish a written policy for the use and operation of such system.
   2. The policy shall include:
      a. Procedures for training law enforcement officers in the use of captured license plate data consistent with this Code section;
      b. An audit process to ensure that information obtained through an automated license plate reader is used only for legitimate law enforcement purposes; and
      c. Any other subjects related to automated license plate reader use by the law enforcement agency.

CONCLUSION

As the prevalence of automated license plate readers continues to expand, it becomes increasingly important to address the potential erosion of privacy rights. Instead of waiting for privacy infringements to become serious enough to invoke obvious constitutional protection, Indiana policymakers should proactively safeguard the interests of its citizens. To achieve this, Indiana should consider enacting legislation that:

(1) Restricts law enforcement's access to ALPR data, specifying the permissible purposes and retention periods;

(2) Mandates all local law enforcement agencies to establish transparent protocols for the operation and utilization of ALPR technology;

(3) Demands the publication of statistical data to shed light on the actual usage of ALPR technology; and,

(4) Calls for an audit of relevant records to ensure compliance and accountability.

By establishing clear guidelines, checks, and balances for the use of surveillance technologies like ALPRs, we can protect our individual freedoms and maintain the delicate equilibrium between security and privacy. Under the proposed legislation, Indiana's law enforcement agencies, and by extension, the citizens of Indiana, can enjoy the crime-prevention advantages of ALPR technology, all the while maintaining a robust safeguard against unwarranted government intrusion into individuals' privacy. Through a combination of vigilant public awareness, responsible policymaking, and the active protection of our rights, we can navigate the ever-evolving landscape of privacy in the digital age.

SOLE INTEREST VS. BEST INTEREST: MODELING FUTURE ANTI-ESG LEGISLATION OFF OF INDIANA CODE § 5-10.2-14-2 TO PROTECT THE FIDUCIARY DUTIES OWED BY TRUSTEES BY REQUIRING SOLE INTEREST IDEOLOGY

KRISTEN PARRISH*

INTRODUCTION

When deciding when and where to invest their money, most people consider several factors, such as a business's financial performance or evidence-based market trends. Others may consider the risk of the investment or the potential for return on investment. If someone hires a fiduciary to make investment decisions on his/her behalf, he/she expects the fiduciary to consider the beneficiary's interest over the fiduciary's interest. The investment world is evolving, and new factors outside of the traditional risk of investment and market trends are starting to influence investment decisions made by fiduciaries. Environmental, Social, and Governance (ESG) investing has quickly grown in popularity in the investment sector since 2020.[1] ESG investing is an investment strategy that stresses a company's governance structure and the environmental and social impacts of the company's products or services.[2] ESG ratings are used to evaluate a company's performance in terms of environmental, social, and governance issues within their organization.[3]

Measuring a company's ESG goals, initiatives, and impacts is not transparent or regulated. Several different international and private organizations have attempted to create systems that accurately measure a company's ESG rating.[4] For example, Global Reporting Initiative, an international group, seeks to enable organizations to self-report their company's "impact . . . on the economy, environment and people in a manner that is both credible and comparable."[5] Furthermore, MSCI, a private organization known for rating companies' ESG performances, aims "to measure the 'company's

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1. *See* Joan Michelson, *ESG Investing is 'Soaring.' What Does it Mean?*, FORBES (Nov. 18, 2022, 5:01 PM), https://www.forbes.com/sites/joanmichelson2/2022/11/18/esg-investing-is-soaring-what-does-it-mean/?sh=6cedd351bcd3 [https://perma.cc/Z9CK-BL3J] ("Investors globally are embracing Environment, Social and Governance (ESG) investing on a massive scale" with trends suggesting ESG investing will be responsible for nearly 21.5% of total assets under management.).

2. *See* Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeting Investments, 80 Fed. Reg. 65135 (Oct. 26, 2015) (to be codified at 29 C.F.R. pt. 2509).

3. *See* Gabriela Camacho, *Anti-Corruption in ESG Standards*, TRANSPARENCY INT'L ANTI-CORRUPTION HELPDESK ANSWER 1 (May 31, 2022), https://knowledgehub.transparency.org/assets/uploads/kproducts/Anti-corruption-in-ESG-standards_Final_15.06.2022.pdf [https://perma.cc/24PT-FDQN].

4. *Id.*

5. *Id.* at 5.

resilience to long-term industry material environmental, social and governance (ESG) risks.'"[6]

Trends have suggested that investors consider a company's values and ESG ratings when making investment decisions.[7] With the increase in popularity of ESG investing, fiduciaries are under increasing pressure to consider a corporation's ESG factors in their investment decisions.[8] However, considering ESG factors as a fiduciary could lead to a breach of the fiduciary duties of prudence, impartiality, and loyalty owed by a fiduciary to a beneficiary under United States Trust Law if the fiduciary is considering ESG factors for their own self-interest when making investment decisions on behalf of the beneficiary.

According to the Restatement (Third) of Trusts, "a trustee has a duty to administer the trust solely in the interest of the beneficiaries" and "the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests."[9] Historically, fiduciaries and trustees have a strict duty to act in the sole interest of their beneficiary.[10] Duty of loyalty in trust law has "traditionally placed strict obligations on fiduciaries to act not in their own self-interest, but in the sole interest of their beneficiaries."[11]

Because of the heightened interest and presence of ESG investing, state and federal legislatures have drafted legislation to ensure that fiduciary duties are preserved. Republican-led state legislatures around the country aggressively fought to protect fiduciary duties by introducing 156 anti-ESG bills in thirty-seven states in the first six months of 2023.[12] Indiana is one of several states that successfully passed an "anti-ESG investing" bill in 2023 to prevent state pension fiduciaries from considering ESG factors while making investment decisions.[13] Indiana's law utilizes the sole interest rule ideology, which takes the position that state pension fiduciaries must act in the sole interest of their beneficiaries or else they are breaching their fiduciary duty.[14]

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6. *Id.* at 6.

7. *Id.* at 4.

8. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 384 (2020).

9. RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. L. INST. 2007).

10. Richard R.W. Brooks, *Loyalty and What Law Demands: Self Interest, Sole Interest or Best Interest*, NW. UNIV. 1 (Sept. 1, 2019), https://wwws.law.northwestern.edu/research-faculty/events/colloquium/law-economics/documents/fall19brooks.pdf [https://perma.cc/Y6C6-FNXX].

11. *Id.*

12. Joan Michelson, *Wave of 'Anti-ESG' Investing Legislation, New Study Found*, FORBES (Aug. 29, 2023, 7:45 AM), https://www.forbes.com/sites/joanmichelson2/2023/08/29/wave-of-anti-esg-investing-legislation-new-study-found/?sh=3686e14f7286 [https://perma.cc/79XF-PBF2].

13. Tom Davies, *Indiana Lawmakers Give Approval to Anti-ESG Investing Bill*, AP NEWS, (Apr. 24, 2023, 6:31 PM), https://apnews.com/article/indiana-republicans-esg-investing-ban-a2f8bd032dcdc83a43cba2a422608058#:~:text=House%20members%20voted%2066%2D29,principles%20in%20their%20investment%20decisions [https://perma.cc/K59L-82LY].

14. IND. CODE § 5-10.2-14-2 (2023).

This Note argues that states interested in passing anti-ESG regulation should model their bills after Indiana's anti-ESG legislation because Indiana's law requires fiduciaries and trustees of state pension plans to act in the sole interest of the beneficiary. The sole interest ideology, as opposed to the best interest ideology, is the only way to preserve the trustees' duties of prudency, impartiality, and loyalty that are owed by the trustee to the beneficiaries. This Note further argues that it is currently impossible to ensure that ESG investments are within the sole interest of the beneficiary because there is insufficient evidence and research to support the notion that ESG investing leads to higher returns on investment and better financial outcomes compared to non-ESG-focused investing.

Part I of this Note gives a more detailed explanation of ESG investing, including ESG investing origins and current opinions on ESG investing. Part II identifies relevant trust law explaining fiduciary duty and what is required of fiduciaries by law. Part III provides an explanation of the current political landscape of ESG investing in the United States, including a detailed analysis of how Indiana is approaching ESG investing decisions in state pension plans. Part IV analyzes the sole interest rule and the best interest rule in trust fiduciary law, including an analysis of why the sole interest rule should be the standard for anti-ESG statutes. Part V argues that states wishing to pass anti-ESG legislation should follow the sole interest rule ideology to prevent state pension plan trustees from violating their fiduciary duties by considering ESG factors in investment decisions.

I. OVERVIEW OF ESG INVESTING

A. What Is ESG Investing?

ESG investing stands for Environmental, Social, and Governance investing.[15] Although there are several working definitions of what ESG investing entails, the common understanding is that ESG investing is an umbrella term that "refers to an investment strategy that emphasizes a firm's governance structure or the environmental or social impacts of the firm's products or practices."[16] Ultimately, ESG assessments on companies "evaluate a company's performance on environmental, social and corporate governance issues," and these assessments "thus inform investing decisions."[17]

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15. Marty Hart-Landsberg, *Don't Believe the Hype, Big Finance Continues to Threaten our Survival*, REP. FROM THE ECON. FRONT (Feb. 21, 2022), https://economicfront.wordpress.com/2022/02/21/dont-believe-the-hype-big-finance-continues-to-threatens-our-survival/ [https://perma.cc/ND2Q-J2JQ].

16. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72857 (Nov. 13, 2020) (to be codified at 29 C.F.R. pt. 2509, 2550).

17. *See* Camacho, *supra* note 3.

B. Origins of ESG Investing

The first known usage of the term "ESG" was by UN Secretary-General Kofi Annan in 2004.[18] In a UN Global Compact, Secretary General Annan encouraged financial institutions and companies to "develop guidelines and recommendations on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services and associated research functions."[19] The Secretary also encouraged investors, pension fund trustees, consultants, and financial advisers to consider environmental, social, and governance principles in their areas of expertise.[20]

In 2018, BlackRock, one of the largest asset management companies in the world, expressed opinions on ESG investing.[21] Chief Executive Officer (CEO) Larry Fink said in a letter to the board of directors that he was seeking support from leading global investment firms to prioritize ESG issues, as well as promote diversity on boards and clarify long-term strategies.[22] This statement created a shift in emphasis toward ESG-related goals in the world's leading organizations and investment firms. In 2019, Business Roundtable released a new "Statement on the Purpose of a Corporation" signed by 181 CEOs of America's largest companies.[23] The fundamental commitment each of these companies made to their stakeholders included protecting the environment by embracing sustainable practices and fostering diversity and inclusion in the workforce.[24]

ESG investing intensified drastically in 2020[25] and 2021.[26] "ESG funds captured $51.1 billion of net new money from investors in 2020, a record and more than double" the amount from 2019.[27] In 2019, only roughly $21 billion

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18. Rep. of the U.N. Global Compact, *Who Cares Wins: Connecting Financial Markets to a Changing World* (2004), https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf [https://perma.cc/TVP7-7LND].

19. *Id.*

20. *See id.*

21. *See* Letter from Laurence D. Fink, Chairman/CEO, BLACKROCK (Jan. 12, 2018), http://www.wlrk.com/files/2018/BLKCEOLetter2018.pdf [https://perma.cc/V4V8-6VU8].

22. *Id.*

23. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19. 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/G67S-56W4].

24. *See id.*

25. *See* Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258, 261 (2022).

26. *See* Ross Kerber & Simon Jessop, *How 2021 Became the Year of ESG Investing*, REUTERS (Dec. 23, 2021, 4:20 PM), https://www.reuters.com/markets/us/how-2021-became-year-esg-investing-2021-12-23/#:~:text= [https://perma.cc/TY82-FMUN].

27. Greg Iacurci, *Money Invested in ESG Funds More Than Doubles in a Year*, CNBC (Feb. 11, 2021, 12:44 PM), https://www.cnbc.com/2021/02/11/sustainable-investment-funds-more-than-doubled-in-2020-.html [https://perma.cc/9ENE-KLTD].

was funneled into ESG Funds.[28] The challenges during 2020, such as the COVID-19 pandemic and the social justice issues brought to light during the George Floyd protests, fostered society's focus on social justice and environmental issues. [29] ESG goals continued to top the agenda of investors, companies, and policymakers in 2021 because of this shift in society's focus to social justice and environmental issues.[30] The trend of ESG investing is still on the rise and shows no signs of slowing down, as "the sale of [ESG] investments is now the fastest-growing segment of the global financial services industry."[31] ESG Funds accounted for 10% of the worldwide fund assets in 2021, with the total monetary value of worldwide ESG Fund assets climbing to $649 billion.[32] This was a $107 billion increase from 2020.[33]

C. Current Opinions on ESG Investing: Corporations as Vehicles for Change

With the boom of ESG investing over the past few years, there is no shortage of opinions from the corporate world, consumers, investors, fiduciaries, and countless others. Some argue that ESG investing is a statement "that government no longer has credibility as an engine of social change."[34] Proponents of this viewpoint opine that the "government has failed to produce results" of social change and "failed to even offer hope of achieving meaningful and effective policies" to meet ESG goals in the future.[35] Thus, people must rely on large corporations and investments to create meaningful change in the world.

In the past, the government routinely had a hand in furthering ESG-type issues, including passing legislation.[36] Environmental advancements can be seen in the Clean Air Act,[37] Clean Water Act,[38] and the Comprehensive Environmental Response, Comprehension, and Liability Act.[39] Each of these acts imposed environmental regulations on corporations and businesses within the United States to further environmental goals. Businesses are still held to these restrictions to this day. Examples of social issues that the government has

28. *Id.*
29. *See* Kerber & Jessop, *supra* note 26.
30. *Id.*
31. Cam Simpson et al., *The ESG Mirage*, BL (Dec. 10, 2021), https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/ [https://perma.cc/3L9E-5JUF].
32. Kerber & Jessop, *supra* note 26.
33. *Id.*
34. *See* Macey, *supra* note 25, at 262.
35. *See id.*
36. *Id.* at 267.
37. 42 U.S.C. § 7401 et. seq. (1970).
38. 33 U.S.C. § 1251 et. seq. (1972).
39. 42 U.S.C. § 9601 et. seq. (1980).

actively had a hand in include labor laws and regulations such as the Occupational Safety and Health Act[40] and the Family and Medical Leave Act.[41]

Traditionally, the corporation's role in social and environmental change was to obey the laws the government passed while ensuring they were maximizing profits.[42] However, with the sudden emphasis on ESG investing, some argue that ESG provides an opportunity for corporations, not government, to be "the main source of solutions to the grave social and moral problems that plague the nation."[43] The divisive political environment and recent mistrust in the government have led people to turn to corporations to solve some of the politically divisive social issues in the country.[44] The shift toward ESG investing and governance in corporate law is vitally important because it "reflects a new, broad societal perspective that corporations, not government, are the main source of solutions to the grave social and moral problems" in the United States.[45]

Another viewpoint on ESG investing is that ESG is largely a fraud.[46] Tariq Fancy, former Chief Information Officer of BlackRock, stated that sustainable investing boiled down to little more than a "marketing hype, PR spin, and disingenuous promises from the investment community."[47] Some argue that ESG investing is a fraud because it "allows leading asset management companies to dramatically boost their profits, and the rest of the business community to continue on with their destructive business practices without fear of bad publicity or public action."[48]

D. Fallacious ESG Rating Systems

ESG rating systems "measure a company's exposure to environmental, social and governance risks."[49] A high score means that a company generally is focused on how environmental, social, and governance factors impact the

40. 29 U.S.C. § 651 et. seq (1970).
41. 29 U.S.C. § 2601 et. seq (1993).
42. *See* Macey, *supra* note 25, at 263.
43. *Id.*
44. *Id.*
45. *Id.*
46. Hart-Landsberg, *supra* note 15, at 3.
47. Tariq Fancy, *Financial World Greenwashing the Public with Deadly Distraction in Sustainable Investing Practices*, USA TODAY (Mar. 16, 2021, 4:00 AM), https://www.usatoday.com/story/opinion/2021/03/16/wall-street-esg-sustainable-investing-greenwashing-column/6948923002/ [https://perma.cc/Q9SZ-TDDD].
48. Hart-Landsberg, *supra* note 15, at 3.
49. Jess Ullrich & Farran Powell, *What is an ESG Score for Investing?*, USA TODAY (Mar. 1, 2023, 5:01 AM), https://www.usatoday.com/money/blueprint/investing/what-is-esg-investing/ [https://perma.cc/T9X3-JVBC].

company's financial performance.[50] A lower ESG score could indicate that a company is less focused on considering these factors.[51]

There are two understandings of how these ESG rating systems work.[52] One maintains that ESG measures the "impact a company has on the welfare of its stakeholders."[53] A company's ESG score could benefit from discontinuing activities that could harm stakeholders or enhancing business practices to benefit stakeholders.[54] The other understanding of ESG ratings is that ESG measures social and environmental factors impact on a company.[55] Under this understanding, "an ESG framework provides a set of risk factors that the company can plan for or mitigate through strategic planning, targeted investment, or a change in operating activity."[56] This understanding of the rating system does not "measure a company's impact on the Earth and society."[57] Rather, the ESG rating merely gauges "the potential impact of the world on the company and its shareholders."[58]

International systems have developed guidelines and established frameworks for calculating ESG ratings.[59] Internationally, the two biggest ESG framework providers are the United Nations Global Compact and the Global Reporting Initiative.[60] The Global Compact provides a reference point for action and leadership within the corporate sustainability movement.[61] Specifically, the Global Compact supplies frameworks that corporations can adopt to embed all ten principles of the UN Global Compact into their operations.[62] The ten principles cover topics such as human rights, labor rights, and the environment.[63]

Through the Global Compact, the UN created the Principles for Responsible Investment (PRI).[64] The PRI is another international network that helps set standards for a group of "international investors working together to put the six

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50. *See id.*

51. *See id.*

52. *See* Brian Tayan, *ESG Ratings: A Compass Without Direction*, HARV. L. S. F. ON CORP. GOVERNANCE (Aug. 24, 2022), https://corpgov.law.harvard.edu/2022/08/24/esg-ratings-a-compass-without-direction/ [https://perma.cc/33EU-G983].

53. *Id.*

54. *See id.*

55. *See id.*

56. *Id.*

57. Simpson et al., *supra* note 31.

58. *Id.*

59. *See* Camacho, *supra* note 3, at 5.

60. *Id.* at 2.

61. *See UN Global Compact Strategy 2021–2023*, UNITED NATIONS GLOB. COMPACT (2021), https://unglobalcompact.org/what-is-gc/strategy [https://perma.cc/3PAU-GSPV].

62. *See id.*

63. *See id.*

64. *See* Camacho, *supra* note 3, at 5.

Principles for Responsible Investment into practice."[65] The investment community devised the PRI to reflect the view that environmental, social, and governance issues must be given appropriate consideration by investors if they are to fulfill their fiduciary duty.[66] The PRI provides "a voluntary framework by which all investors can incorporate ESG issues into their decision-making and ownership practices" to "better align their objectives with those of society at large."[67] Currently, the PRI has over 1,500 investment institutions that "have become signatories, with approximately US $62 trillion assets under management."[68] Through the PRI, the UN created a Global Reporting Initiative (GRI), enabling organizations "to report on the impact their business has on the economy, environment and people."[69] In theory, the reporting system through the GRI allows corporations to report in a manner that is both credible and comparable.[70] There are three types of reporting standards in the GRI: universal (applies to all organizations), sectoral (applies to specific sectors), and topical (dedicated to particular topics).[71] Reporting in accordance with GRI Standards is preferred by GRI.[72] However, corporations can use only selected GRI Standards and report with reference to GRI Standards if that corporation either (1) cannot fulfill some of the reporting requirements or (2) the corporation only wants to report specific information.[73] Thus, corporations are not required to follow GRI standards in their self-made reports; it is only recommended.

Aside from these international frameworks, many private organizations have established ESG rating systems.[74] Some of the most prevalent ESG rating firms include MSCI, Bloomberg, ISS ESG, Sustainalytics, Refinitiv, and FTSE Russell.[75] Bloomberg and Sustainalytics analyze data on audit risks and risk assessments for investors.[76] MSCI ESG Ratings seek to measure a "company's resilience to long-term industry material environment, social and governance (ESG) risks."[77]

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65. *Integrate the Principles for Responsible Investment*, UNITED NATIONS GLOB. COMPACT (2023), https://unglobalcompact.org/take-action/action/responsible-investment [https://perma.cc/LZL3-NX6J].

66. *Id.*

67. *Id.*

68. *Id.*

69. *See* Camacho, *supra* note 3, at 5.

70. *See id.*

71. *Id.*

72. *See A Short Introduction to the GRI Standards*, GLOB. REPORTING INITIATIVE https://www.globalreporting.org/media/wtaf14tw/a-short-introduction-to-the-gri-standards.pdf [https://perma.cc/LE3M-NV8B].

73. *See Id.*

74. *See* Camacho, *supra* note 3, at 1.

75. *See* Tayan, *supra* note 52.

76. Camacho, *supra* note 3, at 6.

77. *Id.*

ESG rating systems "lack clarity, rely on inconsistent criteria, and suffer from conflicts of interest."[78] Generally, ESG rating systems lack standardization, meaning that ESG rating reports vary widely from firm to firm, which impedes comparability and reduces the value of the disclosure.[79] For example, each ESG rating provider uses its own proprietary system, algorithm, metrics, definitions, and sources of non-financial information.[80] A recent study conducted by the Harvard Business School found that the more information a company discloses related to ESG, the larger the discrepancies from the top ESG rating agencies.[81] The study found that "a [ten] percent increase in corporate disclosure is associated with a 1.3 to 2 percent increase in ESG score variation among major rating providers."[82] There is a lack of transparency in the ratings and no agreement on best practices to produce these ratings.[83] The ESG rating systems are also criticized for relying heavily on self-reporting by the companies they rate.[84]

Furthermore, United States companies' ESG disclosure framework remains voluntary at this time.[85] Voluntary disclosure frameworks mean that there is no standardized reporting system that companies and corporations have to follow to prove that they are meeting their stated ESG-related goals.[86] Voluntary disclosure of information has meant that ESG ratings only give part of the picture of a company's ESG performance.[87] There is little to no accountability for US corporations to ensure they follow through with their ESG pledges.

The only thing consumers can base a corporation's ESG goals on is arbitrary ESG ratings from the various ESG rating systems in the world and the United States. These ratings can be a powerful attraction for a significant number of investors.[88] BlackRock and other investment salesmen use these ESG ratings to justify a sustainable label on stocks and bond funds.[89]

The MSCI ESG rating system illustrates how fallacious different ESG rating systems can be. MSCI "dominates a foundational yet unregulated piece of the business: producing ratings on corporate [ESG] practices."[90] MSCI's rating

78. Kurt Wolfe, *Who Regulates the ESG Ratings Industry?*, BL (Feb. 22, 2022, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/esg/X7P9Q90S000000?bna_news_filter=esg#jcite [https://perma.cc/TZ9C-RELN].

79. *See* Akio Otsuka, *ESG Investment and Reforming the Fiduciary Duty*, 15 OHIO ST. BUS. L.J. 136, 160 (2021).

80. *See* Simpson et al., *supra* note 31.

81. *See* Kristen Senz, *What Does an ESG Score Really Say About a Company?*, HARV. BUS. SCH. (July 21, 2021), https://hbswk.hbs.edu/item/what-does-an-esg-score-really-say-about-a-company [https://perma.cc/63LS-HGGZ].

82. *See id.*

83. *See* Macey, *supra* note 25, at 275.

84. *See* Simpson et al., *supra* note 31.

85. *See* Otsuka, *supra* note 79, at 160.

86. *See id.*

87. *See* Camacho, *supra* note 3, at 1.

88. *See* Simpson et al., *supra* note 31.

89. *See id.*

90. *Id.*

practices come with a slew of issues, making the ratings less than reliable. One such issue is the lack of comparability with other ESG-rating companies. MSCI and its competitors in ESG ratings often disagree with each other, sometimes drastically.[91] Another issue with the MSCI rating system is the lack of transparency to consumers. Currently, MSCI rating reports are only available to its financial industry clients.[92]

A larger issue with MSCI's rating system is how the rating is calculated. Of the 155 companies that received upgrades to their MSCI ratings in 2020, half received upgrades because of the changes to the way the score was calculated, not because of changes that they made in their businesses.[93] Furthermore, "MSCI was looking only at whether environmental issues had the potential to harm the company," not whether the company was focused on reducing environmental harm.[94] Of the 155 upgrades to ESG ratings, only one company (International Paper) cited an actual cut in emissions, even though over half of the companies received an increase in MSCI ESG Ratings.[95]

Problems with MSCI rating calculations can be seen in the rating increase given to the McDonald's Corporation in 2020. McDonald's produced fifty-three million metric tons of greenhouse gas emissions in 2019.[96] McDonald's generated more greenhouse gas emissions in 2019 than Portugal or Hungary.[97] Despite the high greenhouse gas emissions, "MSCI gave McDonald's a rating upgrade, citing the company's environmental practices."[98] MSCI focused on McDonald's "mitigating 'risks associated with packaging material and waste' relative to its peers."[99] McDonald's had implemented new recycling bins in restaurants in France and the United Kingdom, and the company could face sanctions if it did not start recycling.[100] MSCI did not consider carbon emissions in the calculation of McDonald's rating because "MSCI determined that climate change neither pose[d] a risk nor offer[ed] 'opportunities' to the company's bottom line."[101]

Another problematic example to illustrate how arbitrary the MSCI Rating system can be found in D.R. Horton, Inc.'s increase in ESG Rating from 2019 to 2020.[102] D.R. Horton, Inc. is one of the leading home construction companies

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91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See McDonald's Corporation – Climate Change 2020*, CDP DISCLOSURE INSIGHT ACTION (2020), https://corporate.mcdonalds.com/content/dam/sites/corp/nfl/pdf/McDonalds_Corporation_%20CDP_Climate_Change_2020.pdf [https://perma.cc/4Y2P-ML33].
97. *See* Simpson et al., *supra* note 31.
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.*
102. *See id.*

in the United States.[103] The construction industry is one of the world's highest contributors to greenhouse gas emissions, accounting for nearly 40% of global emissions in 2019.[104] D.R. Horton did not disclose any of its emission statistics in 2019; however, the percentage of D.R. Horton homes that received industry green certifications dropped from 3.8% in 2019 to 3.4% in 2020.[105] Regardless, MSCI upgraded D.R. Horton's ESG rating because of "policies on business ethics and corruption."[106] Although the increase in score was based on another element of the ESG framework, the company still experienced a drastic decrease in environmental advancements.[107] Thus, only part of the picture was considered when assigning the ESG rating.

The MSCI rating system is just one example of how ESG rating systems are unreliable, biased, and untrustworthy in determining whether a company is meeting its pledged sustainability and ESG goals.

II. FIDUCIARY DUTY AND WHAT IS REQUIRED OF FIDUCIARIES UNDER TRUST LAW

A. Restatement of Trusts Fiduciary Duty

Although trust law is generally reserved for the states to decide, states often base their legislation on the Restatement of Trusts. The Restatement provides a summary of different states' trust laws. The Third Restatement of Trust law imposes three main duties on trustees in trust administration: the duty of prudence, impartiality, and loyalty.[108]

Under the duty of prudence, the trustee must "administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust."[109] Furthermore, the duty of prudence "requires the exercise of reasonable care, skill, and caution."[110] Additionally, if the trustee "possesses . . . special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill."[111] "The duty of prudence encompasses the duty to exercise reasonable care and skill in trust administration and the duty to act with a degree of caution suitable to the particular trust and its objectives, circumstances, and overall plan of administration."[112] The general standard of prudent investment states "the trustee has a duty . . . to invest and manage the funds of the trust as a prudent

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. RESTATEMENT (THIRD) OF TRUSTS §§ 77-78 (AM. L. INST. 2007).
109. *Id.* § 77(1).
110. *Id.* § 77(2).
111. *Id.* § 77(3).
112. *Id.* § 77 cmt. b.

investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust."[113]

Under the duty of impartiality, a trustee must "act impartially and with due regard for the diverse beneficial interests created by the terms of the trust."[114] Impartiality can be seen as an extension of the duty of loyalty.[115] Impartiality imposes a duty of the trustee to "reasonably and without personal bias, seek to ascertain and to give effect to the rights and priorities of the various beneficiaries or purposes as expressed . . . by the terms of the trust."[116] Trustees must balance the interests of the income beneficiaries and consider the needs of all current and future beneficiaries.[117]

Under the duty of loyalty, "a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose."[118] "The trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests."[119] Furthermore, "whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter."[120] Concerns over conflict of interest and self-dealing are prevalent in the history of the duty of loyalty because "the fiduciary controls the assets and could easily make decisions to garner a private benefit."[121]

B. Employment Retirement Income Securities Act of 1974 (ERISA) and Fiduciary Duty Under ERISA

The Employee Retirement Income Security Act (ERISA) of 1974 is a federal law that sets minimum standards for retirement and health plans in private industry.[122] ERISA is "the primary law that regulates employer-sponsored retirement plan investment decision-making in the United States."[123]

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113. *Id.* § 90.
114. *Id.* § 79.
115. *Id.* § 79 cmt. b.
116. *Id.*
117. *Id.* § 79 cmt. c.
118. *Id.* § 78(1).
119. *Id.* § 78(2).
120. *Id.* § 78(3).
121. *See* Susan N. Gary, *Best Interest in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 785 (2019).
122. *See ERISA*, U.S. DEP'T OF LAB. (2023), https://www.dol.gov/general/topic/health-plans/erisa#:~:text=The%20Employee%20Retirement%20Income%20Security,for%20individuals%20in%20these%20plans [https://perma.cc/CS9W-HFTQ].
123. *See* Elizabeth S. Goldberg, *Can ERISA Fiduciaries Use ESG? Yes, and Case Law Can Provide Some Guidelines*, LEXISNEXIS (2021), https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2021/canerisafiduciariesuseesgyesandcaselawcanprovidesomeguidelines.pdf [https://perma.cc/3GHX-J2WE].

Although ERISA technically does not apply to public and government-sponsored retirement plans, "many such plans incorporate ERISA's fiduciary standards" into their respective plans.[124]

Under ERISA, fiduciaries are also required to make prudent investment decisions with "loyalty to the interests of the plan and its participants."[125] ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[126] The fiduciary shall discharge his duties "for the exclusive purpose of providing benefits to participants and their beneficiaries."[127] The fiduciary shall also discharge his duties by:

> [D]efraying reasonable expenses of administering the plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.[128]

Additionally, the fiduciary shall act "in accordance with the documents and instruments governing the plan."[129]

Relevant case law has also weighed in on fiduciary duty and what it entails. The fiduciary duty prohibits fiduciaries from "engaging in transactions that involve self-dealing or that otherwise involve or create conflict between the fiduciary duties and personal interests."[130] "A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard."[131] Thus, fiduciaries must ensure they are researching and understanding their investment decisions to meet their fiduciary duty. In assessing prudence, courts evaluate whether the fiduciary "employed the appropriate methods to investigate the merits of the investment" at the time of the transaction.[132] Thus, "the court focuses not only on the merits of the transaction but also on the thoroughness of the investigation into the merits of the transaction."[133]

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124. *See id.*

125. *See id.*

126. Employee Retirement Income Security Act (ERISA) § 404(a) (29 U.S.C. § 1104(a)).

127. *Id.*

128. *Id.*

129. *Id.*

130. Terraza v. Safeway Inc., 241 F. Supp. 3d 1057, 1069 (N.D. Cal. 2017) (quoting RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. L. INST. 2007).

131. Fink v. Nat'l Sav. & Trust Co., 772 F.2d. 951, 957 (D.C. Cir. 1985).

132. Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1097 (9th. Cir. 2004) (quoting Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th. Cir. 1983).

133. Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996).

A fiduciary must "treat beneficiaries of all generations impartially, act in the best interests of the beneficiaries, not in the interest of the fiduciary, and follow prudent investor standards in investing in the assets of a company."[134] These duties are interrelated with long-term trusts, pension plans, and endowments.[135] Investment advisors are bound by law to fulfill their fiduciary duty to put the investor's benefit first at all times. The investor is to decide what benefits they want, in both risk and reward.[136] Risk avoidance and risk reduction are two strategies used to manage risk. Risk avoidance deals with eliminating any exposure risk that poses a potential loss. Risk reduction deals with reducing the likelihood and severity of a possible loss.[137] Both strategies are popularly used by fiduciaries to ensure that they are meeting the interests of their beneficiaries and adhering to their fiduciary duties.

C. ESG Investing and Fiduciary Duty

ESG investing has added another layer of analysis in understanding fiduciary duty. Currently, "case law highlights that decisions based solely on ESG factors . . . . are more likely to risk a breach" of fiduciary duty as defined by ERISA.[138] Investments using solely or primarily ESG factors can be considered a breach of the duty of loyalty.[139] However, some case law provides that incorporating ESG factors as additional investment factors or considering ESG impact as a collateral benefit do not necessarily breach the fiduciary duty of trustees.[140]

Blankenship v. Boyle provides an illustration of how focusing investment decisions based solely on social goals is a violation of the duty of loyalty.[141] This case arose under the Labor Management Relations Act (LMRA), which requires a duty of loyalty resemblant to the duty imposed by ERISA.[142] In this case, trustees of a retirement fund purchased stock of certain electric utility companies.[143] These utility companies were on the list of acceptable companies where the trustees could invest the fund's money.[144] However, these investments were challenged on the ground that they were made "primarily for the purpose of benefiting the Union and the operators, and assisting them in their efforts to

134. Otsuka, *supra* note 79, at 141.

135. *See* Akio Otsuka, *For Institutional Investors, the Alternative of "Exit or Voice," or "Empowerment or Engagement" in the United States and the United Kingdom*, 2 INT'L COMP. POL'Y & ETHICS L. REV. 674, 706-07 (2019).

136. *See* Michelson, *supra* note 12.

137. *See id.*

138. *See* Goldberg, *supra* note 123.

139. *See id.*

140. *See id.*

141. Blankenship v. Boyle, 329 F. Supp. 1089, 1099 (D.C. Cir. 1971).

142. Goldberg, *supra* note 123.

143. *Blankenship*, 329 F. Supp. at 1105.

144. *Id.*

force public utilities to burn Union-mined coal."[145] The court found that "the intimate relationship between the Union's financial and organizing activities and the utility investment activities of the trustees demonstrates that the Fund was acting primarily for the collateral benefit of the Union" and this "clear case of self-dealing on the part of [the] trustees . . . constituted a breach of trust."[146] *Blankenship* is an early example of how investments made because of a likely "social" benefit such as supporting the union, can violate the fiduciary duty of loyalty.[147] Social benefits were not material to the participants' retirement needs.

Davidson v. Cook provides another example of how union retirement plan trustees violated the duty of loyalty.[148] In this case, trustees made an investment decision based on the "desires and needs" of the Union.[149] This investment decision was held to violate the duty of loyalty because the investment was not made for the exclusive purpose of providing plan benefits.[150]

In a more recent case, the Supreme Court interpreted ERISA's benefits and the duty of loyalty. In *Fifth Third Bancorp v. Dudenhoeffer*, the Court held that the term "benefits" under ERISA "does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock."[151] Some have interpreted this holding to mean that social benefits "are not appropriate factors for ERISA fiduciaries to consider" in investment decisions without breaching their duty of loyalty.[152] Others argue that this holding from the Court supports the notion that only financial investment decisions based solely on nonfinancial benefits breach the fiduciary duty of loyalty.[153] Under either interpretation, considering social factors in investment decisions runs the risk of violating the fiduciary duty owed under ERISA.

III. POLITICAL LANDSCAPE OF ESG INVESTING

With ESG investing gaining popularity in the past several years, government and political institutions have started noticing. While trust law is typically designated for the states to legislate, some federal actors have also been influenced by the influx of ESG talks. This section will provide an overview of the political landscape surrounding ESG investing at the federal and state levels and discuss the recent Indiana anti-ESG legislation.

145. *Id.*
146. *Id.* at 1106.
147. Goldberg, *supra* note 123.
148. Davidson v. Cook, 567 F. Supp. 225, 237 (E.D. Va. 1983).
149. *Id.* at 236.
150. *Id.*
151. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 421 (2014).
152. *See* Goldberg, *supra* note 123.
153. *See id.*

A. Nation-Wide Anti-ESG Actions

ESG investing regulation has received some federal attention over the past few years. "Although corporations remain free to pursue additional ESG goals beyond what the law requires, the government carries the burden of ESG regulation, rather than letting it fall to individual actors," such as large corporations.[154] The American Legislative Exchange Council, "an organization of state legislators 'dedicated to the principles of limited government, free markets, and federalism,' has drafted two model bills" for state legislatures to follow.[155] The two model bills included the Fiduciary Duty Bill and the Economic Boycotts Bill.[156] The Fiduciary Duty Bill bans public pension funds' consideration of ESG-related factors because considering those factors is inconsistent with fiduciary duty.[157] The Economic Boycotts Bill prohibits government entities from doing business with firms that boycott highly environmentally harmful corporations, such as coal manufacturers.[158] Several states have modeled anti-ESG legislation based on these model bills.

B. Trends in Anti-ESG State Statutes

While 2020 was the year of ESG investing, 2023 was the year of anti-ESG legislation. Republican-led state legislatures around the country aggressively fought ESG investing by introducing 165 anti-ESG bills in thirty-seven states in the first six months of 2023.[159] Of the thirty-seven states that introduced Anti-ESG legislation across the United States, eleven states[160] have enacted legislation restricting the use of ESG factors in public investments and procurements.[161] There are three main types of anti-ESG statutes that states

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154. *See* Macey, *supra* note 25, at 265.

155. David H. Webber et al., *The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 27, 2023), https://corpgov.law.harvard.edu/2023/02/27/the-liability-trap-why-the-alec-anti-esg-bills-create-a-legal-quagmire-for-fiduciaries-connected-with-public-pensions/ [https://perma.cc/X7NP-BH26].

156. *Id.*

157. *Id.*

158. *See id.*

159. Karin Rives, *Half of Anti-ESG Bills in Red States have Failed in 2023 as Campaign Pushes On*, S&P GLOBAL (June 28, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/half-of-anti-esg-bills-in-red-states-have-failed-in-2023-as-campaign-pushes-on-76276575 [https://perma.cc/XD5J-DAP6].

160. *See* Townsend Brown, *Anti-ESG Legislation Proliferated in the States in 2023, but Traditional ESG Still Had Some Wins*, MULTISTATE (Oct. 31, 2023), https://www.multistate.us/insider/2023/10/31/anti-esg-legislation-proliferated-in-the-states-in-2023-but-traditional-esg-still-had-some-wins [https://perma.cc/LD7Q-AFPH] (explaining that the eleven states that successfully passed anti-ESG statutes in 2023 are Alabama, Arkansas, Florida, Indiana, Kansas, Missouri, Montana, North Carolina, New Hampshire, Texas, and Utah).

161. *See* Michelson, *supra* note 12.

passed.[162] One is "no boycott" legislation, which requires "state entities to divest from and refuse to contract with companies that boycott certain industries, such as fossil fuels or firearms."[163] Another popular statute requires a prohibition on ESG discrimination, which "prohibits state entities from contracting with companies that state officials determine are 'discriminating' against certain industries."[164] One other popular type of anti-ESG legislation calls for a prohibition of considering "ESG factors or the pursuit of ESG-related goals when making state-sponsored investments."[165]

Conversely, forty-two pro-ESG bills were introduced in eleven states, but just one pro-ESG bill has become law.[166] Pro-ESG bills "generally direct pension plans to divest from certain industries (e.g., fossil fuels or firearms), . . . or adopt sustainable investment policies."[167]

C. Indiana Anti-ESG Statute Analysis

During the 2023 legislative session, State Representative Ethan Manning proposed an anti-ESG bill to ensure that "financial returns trump[ed] all" in any investment decision made by pension plan fiduciaries.[168] The anti-ESG bill proposed by State Representative Manning closely resembled the Fiduciary Ban Bill proposed by the American Legislative Exchange Council. Manning expressed his main concern was that "large asset managers on Wall Street are using their outsized market power to force decisions on companies when it is not best for them."[169]

The bill's goal is to prevent "leaders of the state's pension funds for teachers and other government workers from investing any of their some $45 billion with firms that consider environmental, social, and governance principles in their investment decisions."[170] Ultimately, the bill passed both chambers and was signed into law by Governor Eric Holcomb.[171] Indiana Code section 5-10.2-14 took effect July 1, 2023.[172]

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162. *See* Mana Behbin et al., *ESG Investing Regulations Across the 50 States*, MORGAN LEWIS (July 21, 2023), https://www.morganlewis.com/pubs/2023/07/esg-investing-regulations-across-the-50-states [https://perma.cc/3725-7KLC].

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Michelson, *supra* note 12.

167. Lance C. Dial et. al., *2023 ESG State Legislation Wrap Up*, K&L GATES HUB (July 25, 2023), https://www.klgates.com/2023-ESG-State-Legislation-Wrap-Up-7-19-2023 [https://perma.cc/V3WH-3YX8].

168. *See* Davies, *supra* note 13.

169. *Id.*

170. *Id.*

171. Casey Smith, *Holcomb signs new two-year budget, 90 other bills into law*, IND. CAP. CHRON. (May 5, 2023, 6:45 AM), https://indianacapitalchronicle.com/2023/05/05/holcomb-signs-new-two-year-budget-90-other-bills-into-law/ [https://perma.cc/K36Y-7PGQ].

172. *Id.*

Indiana Code section 5-10.2-14 sets out specific requirements for Service providers[173] (investment managers and proxy advisors) of the Indiana Public Retirement System[174] (INPRS) to avoid ESG commitments.[175] ESG commitments were defined as "an action taken or a factor considered by a service provider: (1) with respect to or including the system's assets; and (2) with the nonfinancial purpose to further social, political, or ideological interests based on evidence indicating the purpose."[176]

The new Anti-ESG bill has further specified the fiduciary duty of the INPRS. Under Indiana Code section 5-10.2-14-8, the Board of Trustees "may not make an investment decision with the purpose of: (1) influencing any social or environmental policy; or attempt[t] to influence the governance of any corporation for nonfinancial purposes."[177] According to Indiana Code section 5-10.2-14-9, "the board shall discharge its duties solely in the financial interest of the participants and beneficiaries of the system for the exclusive purpose of: (1) providing benefits to participants and beneficiaries; and (2) defraying reasonable expenses of administering the system."[178]

Because of its duty to act solely in the financial interest of the beneficiaries, the Board of Trustees "shall not: enter into a contract; or modify, amend, or continue a contract with a service provider that has made an ESG commitment."[179] Furthermore, "the board shall replace a service provider that has made an ESG commitment with a service provider that is comparable in financial performance, to not violate the board's fiduciary duty."[180] "If the treasurer of the state has reasonable cause to believe that a service provider has made an ESG commitment, the treasurer of state shall research the matter and make a determination as to whether the service provider has made an ESG commitment."[181]

The INPRS' Board of Trustees released a statement following the new Indiana Anti-ESG statute's passing that the Board "has and will continue to invest the system's assets solely in the interest of our members and beneficiaries."[182] The statement also specifically mentioned the Board's policy on ESG investing.[183] Accordingly, the Board declared that "the System follows fiduciary principles as established by statutes, by the industry, and consistent

173. IND. CODE § 5-10.2-14-2 (2023).
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* § 5-10.2-14-8.
178. *Id.* § 5-10.2-14-9 (emphasis added).
179. *Id.* § 5-10.2-14-10(a).
180. *Id.* § 5-10.2-14-10(b).
181. *Id.* § 5-10.2-14-7.
182. *See INPRS' Indiana Investments*, IND. PUB. RET. SYS. (2023), https://www.in.gov/inprs/about-us/board-of-trustees/inprs-indiana-investments/ [https://perma.cc/HK7W-PUPA].
183. *Id.*

with [the INPRS'] Policy to achieve the risk and return objectives of the Retirement Funds."[184] The Board further expressed:

> The investment of system assets, or the use of rights or powers appurtenant to System assets, is not an appropriate or legally permissible instrument for the achievement of public policy objectives. Service Providers contracted by the System that would engage in Nonfinancial Investment Activities derived in whole or in part from the power associated with the System's assets, may be perceived as elevating others' interests above those of the System. Such activities would introduce non-quantifiable risk into the investment of System assets potentially inconsistent with fiduciary obligations.[185]

IV. SOLE INTEREST RULE VS. BEST INTEREST RULE

There are two main understandings of the duties owed by trustees: best interest and sole interest.[186] Under the sole interest rule, the trustee must administer the trust in the sole interest of the beneficiaries.[187] Conversely, under the best interest rule, fiduciaries have more freedom in investment decisions and do not have to adhere to the strict obligations under the sole interest rule. The best interest rule provides that "a fiduciary is not categorically prohibited from acting involving a conflict of interest, but rather must act in the best interest of the principal despite the conflict."[188] The best interest standard "allows fiduciaries to rebut presumptions of disloyalty in conflicted transaction by showing good faith and prudence, care, competence or fairness to beneficiaries."[189] This section provides an overview of different nuances of both the best interest rule and the sole interest rule, as well as arguments for adherence to the sole interest rule in future state anti-ESG legislation.

A. Best Interest Rule

Historically, the best interest rule has been the standard for fiduciaries in charity or non-profit investing.[190] Within charity investment, the fiduciaries must ensure they choose investments based on financial returns and mission-related benefits.[191] Because investment decisions are made partially based on mission-related benefits, there is more leeway for fiduciaries to make decisions

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184. *See Investment Policy Statement*, IND. PUB. RET. SYS. (Sept. 8, 2023), https://www.in.gov/inprs/files/INPRS_IPS.pdf [https://perma.cc/PP7Q-K6M4].

185. *Id.*

186. *See* Otsuka, *supra* note 79, at 142.

187. *See id.*

188. *Id.*

189. Brooks, *supra* note 10.

190. *See* Gary, *supra* note 121, at 785.

191. *See id.* at 787.

based on the best interest of their beneficiaries rather than in the sole interest of beneficiaries because the fiduciaries' idea of benefits might differ slightly from their beneficiaries. "Mission-Related benefits" is a broad term that can be interpreted countless different ways, so the fiduciary standard of loyalty for fiduciaries in charity law must be lower than the sole interest rule.[192]

The Internal Revenue Code specifically provides an exception for mission-related investments called the jeopardizing investment rule.[193] The purpose of this rule is to ensure that private foundation managers are allowed to invest using the best interest rule without fear of facing penalties.[194] "The exception for program-related investments took care of investments made primarily for mission-related purposes" and investments that were related to the mission but were not made primarily to carry out the charity's mission.[195]

Although the best interest rule has historically been applied to non-profit and charity investing standards, it is gaining popularity in other investment areas. The best interest rule would allow trustees to make investment decisions, including conflicts of interest and personal gains for the trustee. Proponents of the best interest rule argue that as long as the trustee is acting in the best interest of the beneficiary, any overlap of conflicts of interest should be permitted.[196] The trustee is only required to "prove that the transaction was prudently undertaken in the best interest of the beneficiaries."[197] This test reforms the prudent investment standard provided in the Restatement of Trusts and other relevant trust laws and loosens the standard to the best interest standard. If the fiduciary can show they were acting in a manner with the best interest of the beneficiaries in mind and they were acting prudently while doing so, they are within the scope of the fiduciary duty of loyalty.

Supporters of considering ESG factors in investment decisions argue that ESG factors can help identify potential opportunities and risks.[198] Proponents of the best interest rule defend ESG investing by seeking not only a financial return on investment but a social and environmental return on investment.[199] Under the best interest rule, fiduciaries can consider nonfinancial, third-party impacts when making investment decisions rather than strictly the financial return on investment provided to the beneficiary. "Maximizing shareholder interests in the corporate case should be maximizing shareholder welfare, not market value."[200] In other words, trustees should not only focus on return on investment

192. *See id.*
193. I.R.C. § 4944(c) (2012).
194. Treas. Reg. § 53.4944-1(a)(2)(i) (1973).
195. *See* Gary, *supra* note 121, at 787.
196. *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE. L.J. 929, 933 (2005).
197. *Id.* at 932.
198. *See* Gary, *supra* note 121, at 746.
199. *See id.* at 743.
200. Otsuka, *supra* note 79, at 162.

and increase in monetary value but also consider the beneficiary's overall welfare as they make investment decisions.

An illustration of how the best interest rule is applied to ESG investment decisions is visible in how some fiduciaries invest based on climate change concerns. Focusing investment decisions on combatting the impact of climate change is a conflict of interest for the fiduciary. The fiduciary is then focusing their investment decisions on reducing the impacts of climate change, so they have an interest in making the best investment that will have the most beneficial impact. Under the best interest rule, as long as the fiduciary can show the investment decision was made prudently, with the best interest of the beneficiaries in mind, the fiduciary duty of loyalty remains intact despite consideration of ESG factors in the investment decision.

Using the same climate change illustration, proponents of the best interest rule also argue that investing to reduce the impact of climate change will be in the best interest of all beneficiaries because of the adverse effects climate change will have on everyone.[201] For example, investing in a company that supports and implements several climate-saving initiatives would be in the best interest of the beneficiary because it would allow for a financial return on investment as well as an environmental return on investment because, in theory, those initiatives would help reduce the impacts of climate change on everyone.

One downfall of the best interest rule is that it can be hard for fiduciaries to obtain the necessary information to ensure that the investments will result in a return on investment and a return on the social cause. It is important that beneficiaries obtain sufficient information by monitoring and disclosure to examine the transaction before they make the investment decision accurately.[202] Because of the lack of accurate ESG rating systems, it can be difficult to ensure that investment decisions based on ESG factors will actually result in a return on investment and returns on social and environmental change.[203]

B. Sole Interest Rule

The sole interest rule is widely regarded as the most fundamental rule of trust law and is often regarded as the "default rule" of trust law.[204] Sole interest was created to ease concerns that "a trustee operating under a potential conflict could easily conceal wrongdoing."[205] The rule continues to be present in several trust and financial investment-related statutes. The sole interest rule is also prominent in the Third Restatement of Trusts, specifically in the duty of loyalty, which states that a trustee must "administer the trust solely in the interest of the

201. *Id.* at 158.
202. *See id.*
203. *Id.* at 160.
204. Schanzenbach & Sitkoff, *supra* note 8, at 401.
205. Langbein, *supra* note 196, at 932.

beneficiaries."[206] This language requires investment decisions to be made solely in the beneficiary's interest, which is also mandatory under ERISA.[207]

Under the sole interest rule, a trustee violates the duty of loyalty, even in the absence of self-dealing, if the trustee has any motive or rationale for undertaking an action other than the beneficiary's sole interest or exclusive benefit.[208] The duty of loyalty in trust law has traditionally placed strict obligations on fiduciaries to act not in their own self-interest but in the sole interest of their beneficiaries.[209]

The sole interest rule prohibits a trustee from placing himself in a position where his personal interests conflict or may conflict with the beneficiary's interests. The Joint Economic Committee Republicans have warned against considering outside factors in investment decisions since the mid-1990s because "[o]nce an investment manager ceases to focus exclusively on maximizing the return for beneficiaries, it is very difficult to avoid social or even political considerations."[210] Investment decisions become inherently political in nature when fiduciaries start considering ESG factors and social goals over the simple return on investment. For example, suppose a public pension plan fiduciary decides to invest in Company A because Company A shows strong intentions to reduce its annual carbon emissions. This investment decision may be viewed as political if some beneficiaries do not value reducing carbon emissions or consider protecting the environment necessary. Thus, the fiduciary's decision to invest in Company A based on the company's environmental goals could lead to beneficiaries being unhappy with investment decisions and debates over whether the fiduciary has the sole interest of the beneficiaries in mind when making decisions.

The meaning of the sole interest rule has become even more important in understanding ESG investing and how fiduciary duties are influenced. Under the sole interest rule, a trustee's use of the ESG factors violates the duty of loyalty if motivated by the trustee's own ethics or used to obtain collateral benefit to a third party.[211] A fiduciary is not in a position to consider related, nonfinancial issues when making investment decisions without violating the duty of loyalty.

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206. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. L. INST. 2007).

207. *See generally* 29 U.S.C. § 1104(a)(1).

208. *See* Schanzenbach & Sitkoff, *supra* note 8, at 388.

209. *Id.* at 381.

210. *See* JOINT ECON. COMM. REPUBLICANS, 104TH CONG., ECONOMICALLY TARGETED INVESTMENTS (ETIS) (June 7, 1995), https://www.jec.senate.gov/public/_cache/files/40c6425b-59ae-432c-ad1c-aa60606c0370/economically-targeted-investments-etis-june-7-1995.pdf [https://perma.cc/RA9Z-4JXA].

211. *See* Schanzenbach & Sitkoff, *supra* note 8, at 381.

C. States Should Follow the Sole Interest Rule Over the Best Interest Rule

States interested in passing anti-ESG legislation similar to Indiana's should require trustees to follow the sole interest rule ideology in the legislation. The sole interest rule protects both fiduciaries and beneficiaries in investment decisions because fiduciaries know what is expected of them, and beneficiaries are protected from opportunistic fiduciaries making investment decisions the beneficiaries do not agree with. Furthermore, adhering to the sole interest rule in investing is the best way to ensure fiduciary duties of prudency, impartiality, and loyalty are met. Additionally, the Indiana anti-ESG statute uses clear and concise language that requires using the sole interest rule ideology in state pension plan investment schemes that other states can easily model.

Straying from the sole interest rule will allow third-party considerations and factors to influence investment decisions, contradicting the long-standing history of sole interest ideology in United States trust law. Proponents of the sole interest rule are hesitant to abandon the default standard in trust law relating to fiduciary duty. Society should not be so quick to discard a rule that protects beneficiaries against opportunists and fiduciaries, against their self-doubt, temptation, moral hazard, and uncertainty.[212] The sole interest rule protects the fiduciary because it sets out strict standards that the fiduciary must follow. There is no question about how the fiduciary is supposed to approach a situation in investing because they know that they must act in the sole interest of the beneficiary and without influence from third parties or self-interest. The sole interest rule also protects the beneficiary because they know the fiduciary acts are in their sole interest and are not conflicted by outside influence. Additionally, the sole interest rule allows beneficiaries to hold the fiduciary responsible if the fiduciary is not acting in the sole interest of the beneficiary.

To act prudently, a trustee must "administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust," and the trustee must "exercise [] reasonable care, skill, and caution."[213] A trustee would not be exercising reasonable care, skill, and caution if he or she based their investment decisions on fallacious ESG rating systems. Without a uniform ESG rating system in place, it is difficult to ensure investments into companies that pledge certain ESG objectives are, in fact, meeting objectives and leading to greater returns for investors. As illustrated in the MSCI McDonald's rating, just because a company pledges to make environmental changes does not mean it is doing it. Additionally, just because a company's ESG rating increased does not necessarily mean that the company is drastically improving or working toward improving ESG-related goals. A company's ESG score can increase based on environmental practices as long as climate change neither poses a risk nor offers opportunities to the company's bottom line. By utilizing the sole interest rule, fiduciaries and trustees cannot consider questionable ESG ratings

212. Brooks, *supra* note 10.

213. RESTATEMENT (THIRD) OF TRUSTS §§ 77(1), 77(2) (AM. L. INST. 2007).

and investment factors because they must focus on the beneficiaries' sole interests.

Common law emphasizes that courts determine whether a fiduciary duty was broken by evaluating whether the fiduciary employed appropriate methods to investigate the merits of an investment decision at the time of the investment.[214] Courts focus on both the merits of the transaction and the thoroughness of the investigation into the transaction's merits.[215] As previously stated, if there is no standard ESG rating system and enforcement method actually to hold businesses accountable for their pledged ESG goals, then a trustee cannot ensure that they used appropriate methods to investigate the merits of their decisions. Ultimately, there is no proven method to ensure that ESG investment decisions actually lead to a beneficial return on investment.

Some have opined that ESG investing is not a violation of duties required under American Trust Law if two conditions are met, "(1) the trustee reasonably concludes that ESG investing will benefit the beneficiary directly by improving risk-adjusted return; and (2) the trustee's exclusive motive for ESG investing is to obtain this direct benefit."[216] However, this argument is weak considering the lack of conclusive evidence that ESG investing leads to higher returns on investment.[217] Countless studies have been conducted to look at the relationship between ESG investing and return on investment, and the studies have yet to come to a consensus on the effects of ESG investing on return on investment. A study by Charles Schwab did not find convincing evidence that "ESG funds are reliably better than non-ESG funds" and that the differences between the two tended to be small.[218] Even where differences in the funds were suitable for ESG funds, some ESG funds did worse.[219] Although this study went on to mention that there is no evidence to support the notion that "choosing ESG funds puts investors at any kind of disadvantage when it comes to risks or returns,"[220] there is no guarantee that investing in ESG-focused funds will increase your return on investments, and there are several studies that support the premise that ESG investing can negatively impact return on investments. One study examining the relationship between ESG factors and financial performance found a

214. Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1097 (9th. Cir. 2004).

215. *See* Tribble v. Edison Int'l, 843 F.3d 1187, 1197 (9th. Cir. 2016).

216. Schanzenbach & Sitkoff, *supra* note 8, at 382.

217. *See Does ESG Investing Generate Higher Returns?*, KENAN INST. OF PRIV. ENTER., (Apr. 20, 2022), https://kenaninstitute.unc.edu/kenan-insight/does-esg-investing-generate-higher-returns/ [https://perma.cc/BF7L-9X59].

218. Michael Iachini, *How Well has Environmental, Social, and Governance Investing Performed?*, CHARLES SCHWAB (Sept. 9, 2021), https://www.schwab.com/resource-center/insights/learn/story/how-well-has-environmental-social-and-governance-investing-performed?cmp=em-QYC [https://perma.cc/BPC2-WFBJ].

219. *Id.*

220. *Id.*

combination of neutral, mixed, and negative relationships.[221] Another study that compared the ESG record of U.S. companies in 147 ESG fund portfolios to 2,428 companies with non-ESG portfolios found no evidence to support that the ESG fund's portfolio outperforms the non-ESG portfolio forms.[222]

The duty of impartiality requires a trustee to "reasonably and without personal bias, to seek to ascertain and to give effect to the rights and priorities of the various beneficiaries or purposes as expressed or implied by the terms of the trust."[223] Trustees must consider the differing interests of current and future beneficiaries.[224] Although trustees are not required to consider all of the beneficiaries equally, they must make informed decisions and consider the various needs of the beneficiaries.[225] State pension plans have thousands of current and future beneficiaries that trustees must consider when making investment decisions. Because of the lack of consensus on how ESG investing influences return on investment, staying impartial as a trustee can be challenging. One study found that firms with high ESG ratings can temporarily increase "realized returns" but decrease expected long-term returns.[226] This means that although investing in companies that currently have high ESG ratings might temporarily increase the return on investment, the long-term effects of that investment could be a lower return on investment. Although a trustee could view the current investment in highly rated ESG companies as beneficial to their beneficiaries, this investment would violate the duty of impartiality because they are not considering the long-term effects of this investment on future beneficiaries.

Similarly, another study found that after 10 years, "a $10,000 ESG portfolio . . . would be 43.9 percent smaller after 10 years compared to a $10,000 investment into an S&P 500 index fund."[227] This study is another example of how ESG investing might seem beneficial in the short run, but the long-term consequences of these investments could lead to issues with impartiality

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221. *See generally* Tensie Whelan et al., *ESG and Financial Performance: Uncovering the Relationship By Aggregating Evidence from 1,000 Plus Studies Published between 2015–2020*, NYU STERN CTR. FOR SUSTAINABLE BUS. (2021), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf [https://perma.cc/P9X6-J6T6] (The meta-analysis conducted by NYU Stern found that studies looking at the relationship between ESG and financial performance that used "operational metrics such as ROE [return on equity], ROA [return on assets], or stock price with 13% showing neutral impact, 21% with mixed results . . . and only 8% showing a negative relationship.").

222. *See* Aneesh Raghunandan & Shiva Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?*, REV. OF ACCOUNT. STUD., FORTHCOMING, June 27, 2022, at 3.

223. RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. b (AM. L. INST. 2007).

224. *See id.*

225. *See id.*

226. *See* Rocco Ciciretti et al., *The Contributions of Betas versus Characteristics to the ESG Premium*, 15 CEIS TOR VERGATA 1, 2 (Dec. 2019).

227. Wayne Winegarden, *Environmental, Social, and Governance (ESG) Investing: An Evaluation of the Evidence*, PAC. RSCH. INST. 5 (May 2019), https://www.pacificresearch.org/wp-content/uploads/2019/05/ESG_Funds_F_web.pdf [https://perma.cc/M3CY-6CSY].

because trustees are not fully considering the impact these ESG investments could have on future beneficiaries.[228]

The duty of loyalty, as written, requires a trustee "to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose."[229] No form of social investing is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of the trust beneficiaries.[230] For example, accepting below-market returns in favor of the interests of persons supposedly benefited by pursuing a particular social cause does not meet the fiduciary duty of loyalty.[231] In 1994, the Department of Labor issued an interpretative bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA sections 403 and 404.[232] Further, common law finds that pension plan investment decisions based solely on social goals violate the duty of loyalty.[233] Courts have held that the term "benefits" under ERISA "does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock." Nonpecuniary benefits can include social benefits to an employee. Thus, considering any type of social benefits in investment decisions is directly contrary to ERISA framework and would lead to a violation of the fiduciary duty of loyalty. The sole interest rule ensures that trustees do not consider nonpecuniary interests in their investment decisions because it would be directly contrary to their fiduciary duty.

States interested in passing anti-ESG legislation should model their bills after Indiana's 2023 law because the code clearly requires the use of sole interest rule ideology. According to Indiana Code section 5-10.2-14-9,

> "[T]he [Indiana Public Retirement System's] board [of trustees] shall discharge its duties solely in the financial interest of the participants and beneficiaries of the system for the exclusive purpose of: (1) providing financial benefits to participants and beneficiaries; and (2) defraying reasonable expenses of administering the system."[234] Under this statute, the Board of Trustees is strictly prohibited from entering into contracts or continuing to contract "with a service provider that has made an ESG commitment."[235]

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228. *Id.*

229. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. L. INST. 2007).

230. *Id.* § 78 cmt. f.

231. *Id.*

232. *See* Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 59 Fed. Regis. 32606 (June 23, 1994) (to be codified at 29 C.F.R. Pt. 2509.94-1).

233. Fifth Third Bancorp v. Dudenhoeffer, 571 U.S. 409 (2014).

234. IND. CODE § 5-10.2-14-9 (2023) (emphasis added).

235. *Id.* § 5-10.2-14-10(a).

The statute also requires the Board to "replace a service provider that has made an ESG commitment with a in financial performance so as not to violate the board's fiduciary duty."[236] This statute's wording specifically requires the sole interest rule and bans state pension plan trustees from contributing funds to ESG investing to promote meeting their fiduciary duties. The language of this statute can easily be used by other states who wish to pass similar legislation regarding anti-ESG investing in their state pension plans.

V. CONCLUSION

States interested in passing anti-ESG regulation should follow the sole interest rule of fiduciary trust law because the fiduciary duties of loyalty, prudence, and impartiality are broken when fiduciaries consider ESG factors in investments. Until there is a uniform and reliable ESG rating system, ESG factors cannot be relied on to make investment decisions without violating the fiduciary duty because there is no way to ensure that investment decisions based on these fallacious ESG ratings are prudent and conducted in the sole interest of the beneficiary. All states interested in passing anti-ESG legislation to protect the fiduciary duties of loyalty, impartiality, and prudence owed to beneficiaries should model Indiana's anti-ESG statute because the sole interest rule is the only way to ensure these duties are met and protected.

236. *Id.* § 5-10.2-14-10(b).