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TRIBUTES

A PARADIGM OF EXCELLENCE: A TRIBUTE TO PROFESSOR CYNTHIA MATSON ADAMS

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It is a great honor and privilege to contribute to the *Indiana Law Review*'s series of tributes to Professor Cynthia Matson Adams. With the December 2025 retirement of Cynthia M. Adams, Clinical Professor of Law, Indiana University Robert H. McKinney School of Law ("IU McKinney") bids farewell to a brilliant and dedicated teacher and colleague who epitomized the qualities of a superb faculty member and institutional citizen.

Professor Adams first joined the faculty of IU McKinney, then the Indiana University School of Law–Indianapolis, as a Clinical Associate Professor of Law from 1987 to 1989. Following a brief stint away, she returned to the role in 1991 and was promoted to Clinical Professor of Law in 2008. She was appointed Vice Dean in July 2020 and served in the role until July 2024, when she returned to the faculty. She served with distinction in each of these roles and, across more than three decades, she has been recognized as a leader, an exceptional teacher and scholar, an accomplished administrator, and a valued colleague.

Teaching Excellence

As a dedicated classroom instructor, Professor Adams taught primarily in the areas of legal writing, transactional skills, secured transactions, and negotiations. She also served as faculty advisor for multiple sections of courses taught by adjunct faculty members. She taught a first-year legal writing course throughout her three decades at IU McKinney and was an integral part of the law school's highly rated legal writing program which, for eleven consecutive years, was ranked in the top twenty-five in the nation.

Beyond teaching her core legal writing and analysis courses, Professor Adams responded to the law school's curricular needs by teaching large enrollment required courses in Trusts & Estates, Civil Procedure, and Contracts and Sales and creating new courses to expand the reach of IU McKinney's offerings—particularly in international law and transactions.

Professor Adams's commitment to learning by doing is integral to her teaching style and subject areas and extended beyond the traditional classroom walls. She coached the teams for the LawMeet Transactional Negotiation

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Competition: Her 2014 team won the regionals, going on to compete in the nationals in New York at Sullivan & Cromwell LLP, and her 2018 team was runner-up and selected as the best brief at regionals. In addition, she served as the faculty supervisor for the Eli Lilly and Company In-house Corporate Counsel Externship and the Global Tax Division Externship.

Professor Adams is an innovator to the core, meeting new challenges and technologies with enthusiasm and insight and incorporating them into the substance and process of her teaching. She ventured early into online teaching as IU McKinney developed its online offerings and course capacity, offering transactional skills classes in the online environment—a rarity in legal education at the time. In one case, in collaboration with a colleague, Professor Adams developed an innovative online contract drafting class. In addition, she pioneered a Collaborative Online International Learning (COIL) course with Taiwan Yang Ming Chiao Tung University School of Law, a partner institution in Taiwan, through which IU McKinney students participated in an international contract negotiations course with students in Taiwan.

While serving as vice dean, Professor Adams stepped up to co-teach the first offerings of Hybrid Contracts in IU McKinney's pioneering Part-Time Hybrid program, providing a rigorous educational experience that reached students from across the State of Indiana. Upon her return to the faculty, Professor Adams added the innovative course to her teaching package.

Her commitment to student success was bone-deep, manifesting in her high expectations of students and her demanding standards for their work. This was coupled with support and mentorship. For example, Professor Adams is known for connecting with and mentoring international law students from around the world during their time at IU McKinney.

During her career at IU McKinney, Professor Adams's excellence in teaching was recognized with numerous honors: She was one of the first faculty members to receive Indiana University's Trustee's Teaching Award in recognition of teaching excellence and is a four-time recipient of the school's Teaching Excellence Recognition Award. Other honors she has received include the IU McKinney Law Online Innovator Award, the Faculty Leadership Award, and IU McKinney's Emerging Scholars Mentor Award.

A Scholar of Teaching and Learning

Professor Adams has made an indelible impact on the fields of contract drafting and legal communications in which she is a respected scholar and frequent presenter. She co-authored two widely adopted books: *The Guide to U.S. Legal Analysis and Communication*, now in its third (2022) edition and *A Practical Guide to Contract Drafting: From Concept to Closure*, which is used by law schools in the United States and around the world and is now in its third (2025) edition. This latter edition was the first U.S. contract drafting textbook to incorporate generative AI pedagogy.

In addition, Professor Adams has presented at numerous international, national, and regional conferences on topics ranging from pedagogical

innovations, cross-cultural negotiation and arbitration principles and skills, designing innovative and effective online law courses, and incorporating lawyering skills into online courses.

Internationally respected as both a teacher and scholar, she served as a consultant to Kenya Law School in Nairobi (2011–2012) on clinical skills curriculum development; as a lecturer at the University of Economics and Law in Ho Chi Minh City, Vietnam; and as a professor in residence at Shanghai International Studies University and Guanghua Law School, Zhejiang University, Hangzhou.

National and Local Leadership and Service

Professor Adams has been active and held leadership positions in national organizations, notably the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI). Over the years, she has served on and chaired numerous committees, working on national conferences and workshops focused on leadership, diversity, and inclusion. Recognized for her scholarship in legal skills-building, Professor Adams was a member of the Governing Board on LWI's Sirico Scholarship Workshop, which mentors law scholars. Thanks in no small part to her leadership, in 2008, LWI's biennial meeting was hosted at IU McKinney, bringing more than 600 educators from around the country to Indianapolis.

In the Indianapolis and Indiana legal community, Professor Adams served on the board of directors of Indiana Legal Services (ILS), having been appointed to the role by the Indianapolis Bar Association. She served on the ILS executive committee, governance committee, government affairs committee, public relations committee, and the by-laws committee. In addition, she serves on the executive board of the Indianapolis Bar Association's business law section. Professor Adams is also a member of the Indiana State Bar Association, and the American Bar Association.

Her service within the law school is just as stellar. A committed and dedicated institutional citizen, for multiple successive years her faculty colleagues elected her to the Executive Committee—the advisory committee to the dean—and, during her career, she led or was a member of other important law school committees such as Academic Affairs, Faculty and Student Recruitment, and Promotion and Tenure. Through these efforts, her impact on the life and success of IU McKinney is incalculable.

Administrative Leadership through Crisis

Professor Adams served as vice dean from July 2020 through July 2024, undertaking a wide-ranging and complex portfolio of responsibilities. She began her service during a time of historic challenge to the law school, the university, the nation, and the world. In the face of unprecedented disruptions, Professor Adams was an undaunted leader, dedicated to successfully implementing the law school's mission of legal education. She was involved in every aspect of the law school's response to the pandemic, including devising and implementing the successful plan to resume classes (in hybrid, in-person, and virtual formats)

in August 2021 for the 2021–2022 academic year, and served at the helm of curricular design throughout.

More generally, Professor Adams oversaw the Juris Doctor, Master of Laws, and Master of Jurisprudence degree programs, leading faculty, adjunct instructors, and staff, and in her final two years, expanded her leadership to include alumni relations, external affairs, professional development, enrollment management, and significant policy initiatives.

Appointment as Clinical Professor Emerita

In recognition of Professor Adams' extraordinary career and the impact of her decades of leadership, teaching, scholarship, and service to IU McKinney and to Indiana University, in 2025 the Board of Trustees of Indiana University appointed Professor Adams as Clinical Professor of Law Emerita upon her retirement. I have known and admired Professor Adams since I first joined the IU McKinney faculty in 2004. It is a testament to the nature and depth of my respect and admiration that my first administrative decision after learning that I would be appointed as IU McKinney's next dean was to invite her to work with me in the role of Vice Dean. Little did we anticipate the challenges that lay ahead of us, as we had not yet realized the scope of the upheaval that would ensue from the then "novel coronavirus" about which we were reading in the news. I believe that we both well remember our Spring 2020 meeting and discussion about the vice deanship, as it was the last opportunity for either of the two of us, and for so many others around the world, to dine (or lunch) *out* until 2021. I am forever grateful that she accepted the invitation to work with me in this capacity and for her contributions of insights, knowledge, skills, wise counsel, friendship, commitment to excellence, and humor during those first four years of my deanship journey.

I and the entire Indiana University and IU McKinney community are grateful that she will continue her affiliation with our university and school.

A TRIBUTE TO CYNTHIA ADAMS

PETER K. CRAMER*

I have known Cynthia Adams for over twenty-five years now. At the beginning, I knew Cynthia as the "Legal Writing Prof," and someone who was very dedicated to working with international students, but that was about all. Later, when I decided to get an LLM from IU Bloomington, her name started to become more familiar to me.

It was in 2005, though, that I met Cynthia in person at the first Global Legal Skills Conference in Chicago, a conference convened by the legendary Mark Wojcik from John Marshall.[1] It has since become the largest event for legal professionals and ESL teachers who are involved in teaching legal skills and legal writing, especially in international environments. At that time, however, it was more like a small gathering around the campfire for a few dedicated legal and language professionals. It was fun to find out about our overlapping interests, especially when talking about teaching LLM students. I came at it from a linguistic perspective while Cynthia approached things from a cross-jurisdictional one.

This was the starting point of a long professional friendship that took us to conferences in places like Mexico, Costa Rica, and Israel, where we first presented insights gained from working together as a lawyer-linguist team.

Around 2010, Cynthia also provided the impetus for creating our first book project on contract drafting for Non-Native Speakers of English (NNs).[2] In one of our many conversations, she mentioned that so many of the then-current contract drafting books, be it for native speakers or nonnative speakers, rarely contained samples of actual contracts. We brainstormed for a while and discovered a resource, SEC's EDGAR, the largest public collection of actual contracts involving public companies.

For me, as a linguist trained in law in two different legal systems, Germany and the U.S., the database was a treasure trove of information for language-related activities, often also containing international contracts. As an aside, a database such as that in EDGAR is called a CORPUS in linguistics, a collection of text or speech that can be analyzed for specific patterns. In contract drafting, it can be used to find technical terms or frequently occurring contract phrasing, and it can also be used to find common collocations, i.e., typical word combinations such as *commercially reasonable efforts*. Non-native drafters unfamiliar with the correct idiomatic use often resort to using dictionaries and end up with awkward combinations of synonyms such as in "reasonable trade

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* Ph.D., MA.TESOL, and LLM., retired Assistant Dean for Graduate Programs at Washington University School of Law and former Associate Director of the Center for Global Legal English at Georgetown University.

1. *Global Legal Skills Conference*, U. ILL. CHI., https://glsc.law.uic.edu/about/past-conferences/ (last visited Jan. 12, 2026) (listing Global Legal Skills Conference I, which took place May 7–8, 2005, at the John Marshall Law School in Chicago, Illinois).

2. CYNTHIA M. ADAMS & PETER K. CRAMER, DRAFTING CONTRACTS IN LEGAL ENGLISH: CROSS-BORDER AGREEMENTS GOVERNED BY U.S. LAW (2013).

attempts," instead of the more idiomatic expression, sounding more like being part of a badly translated usage manual from a faraway place.

Interestingly, I believe our early efforts to draw from a large database might today be compared in some ways to the use of large databases in AI-generated document drafting. In our case, we had an enormous database with thousands of contracts, but unlike many of the AI-based systems, we had a superpower in Cynthia Adams, a legal professional who had many years of contract drafting experience, providing top-notch quality control for many parts of our book. On top of sharing her extensive drafting experience, she created comprehensive checklists at the end of most chapters on what to observe and what to avoid when drafting specific contract clauses. Thus, we were able to avoid one of the biggest pitfalls troubling current AI-mediated contract drafting. AI often compiles vast databases and creates output that is based on material that can be faulty or incorrect. With AI, the result is often referred to as GIGO—"Garbage In, Garbage Out."[3] Thus, we were able to put in a system of checks and balances that made our book an early predecessor of what was to follow in AI—but with an inbuilt security system.

Cynthia knew intuitively which passages in the contracts from the database used archaic legalese expressions, and which passages might raise legal concerns. I then focused on the linguistic aspects of contract drafting, such as streamlining verbose passages or pointing out how to avoid ambiguities that might lead to costly litigation, and I provided insights on legal caveats when drafting an international contract.

For the next two years, we then set out to write a contract drafting book for non-native speakers. The second edition was expanded to include native speakers,[4] and the third edition added extra exercises that involved using AI critically, checking on the outcomes for correctness[5] Let's see what the fourth edition may bring, but one thing is sure: Cynthia Adams will be a driving force and an influence on legal writing for non-native speakers and native speakers for years to come. I will forever be grateful for that first "conference around the campfire," where I met a compassionate professional and a future friend. Thank you, Cynthia!

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3. *Work with New Electronic 'Brains' Opens Field for Army Math Experts*, THE TIMES (HAMMOND IND.), Nov. 10, 1957 (describing the use of the term "Garbage In-Garbage Out" in relation to early computers).

4. CYNTHIA M. ADAMS & PETER K. CRAMER, A PRACTICAL GUIDE TO DRAFTING CONTRACTS: FROM CONCEPT TO CLOSURE (2d ed. 2020).

5. CYNTHIA M. ADAMS & PETER K. CRAMER, A PRACTICAL GUIDE TO DRAFTING CONTRACTS: FROM CONCEPT TO CLOSURE (3d ed. 2025).

ON THE RETIREMENT FROM TEACHING LAW OF PROFESSOR OF LAW EMERITA CYNTHIA M. ADAMS

HON. A. RICHARD M. BLAIKLOCK*

ISSUE: Professor of Law Emerita Cynthia K. Adams ("Professor Adams") is retiring from the Indiana University McKinney School of Law ("IU McKinney").
RULE: Exceptional professors of law should be recognized and celebrated.
APPLICATION: I started night law school at IU-McKinney in the Fall Semester of 1993. My first and second semester curricula included Legal Research & Writing. I was eminently fortunate to have been assigned Professor Adams as my instructor. Writing was an important and regular part of my undergraduate experience, but I had never taken a class focused solely on the art and craft of writing.

Professor Adams—who started teaching at McKinney in 1991—was engaging, challenging, and thoughtful. She offered precise edits and feedback on our written and oral (mock argument) assignments. She made legal writing engaging.

What stands out to me now—and what I took from Professor Adams into private practice and the bench—was a focus on precise and concise writing in "plain English;" organizing and structuring your work product; and thinking about what it is your writing is meant to accomplish. Be meaningful and to the point. Do so without resorting to legalese. Have headings that tell a story and provide the reader with a roadmap. Who is your audience? Are you writing to a client or a judge? Proofread. And proofread again.

Through that class, Professor Adams focused in my mind the separate but critically important art and skill of legal writing. Mastery of substantive law such as property or contracts alone is not enough; as a lawyer, you must effectively and persuasively communicate that knowledge to your intended audience. Professor Adams taught me—and countless others—how to do so.

The lessons I and others learned in her class found their way into Professor Adams' written scholarship. Her impact extends beyond the four walls of IU McKinney.[1] It is no surprise to me that the first three words in *A Practical Guide to Drafting Contracts: From Concept to Closure*, are these: "Clear. Concise. Precise."[2] Those words were burned somewhere onto my brain circa 1993–1994.

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* 1997 *summa cum laude* graduate of the Indiana University Robert H. McKinney School of Law, where he was a 1L student of Professor Adams in Legal Research & Writing.

1. *Cynthia Adams, '83, Named Vice Dean*, *IU McKinney School of Law*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF L. (July 1, 2020), https://mckinneylaw.iu.edu/news/releases/2020/07/cynthia-adams-83-named-vice-dean-iu-mckinney-school-of-law.html [https://perma.cc/2WLU-VYKE] (Professor Adams "is co-author of two books: *A Practical Guide to Drafting Contracts: From Concept to Closure* (2d ed., Wolters Kluwer 2020), and *The Guide to U.S. Legal Analysis and Communication* (3d ed. forthcoming, Wolters Kluwer 2021). Over the years, she has made numerous presentations nationally and internationally on transactional issues, related ADR issues, and transactional pedagogy.").

2. CYNTHIA M. ADAMS & PETER K. CRAMER, A PRACTICAL GUIDE TO DRAFTING CONTRACTS: FROM CONCEPT TO CLOSURE 1 (3d ed. 2025).

I encountered Professor Adams early in her teaching career. She continued to excel in her field. She has received several awards for her effective teaching. Professor Adams "was one of the first [IU McKinney] faculty members to receive Indiana University's Trustee's Teaching Award in recognition of teaching excellence and is a four-time recipient of the school's Teaching Excellence Recognition Award."[3] The "primary factor for selection" of Professor Adams for the Indiana University Board of Trustees recognition was her "excellence in teaching."[4]

Recognizing the need for more practical courses for law students, Professor Adams initiated and led IU McKinney's addition of a contract drafting course to the curriculum—later supported by the book she co-authored: *A Practical Guide to Drafting Contracts*.[5] That class now has four to five sections and a regular waiting list. Reflecting the breadth of her substantive expertise, she taught classes in various other areas of the law: Secured Transactions, Negotiations, Small Business Planning, Legal Communication and Analysis, Integrated Contracts, Civil Procedure, and, for good measure, Trusts and Estates.[6]

Along the way, Professor Adams took the position of Vice Dean of the law school in 2020,[7] a position to which she would not have been appointed if she did not enjoy the respect of colleagues and students alike. And, she coached students in the National Transactional LawMeet Competition.[8]

CONCLUSION: Professor Adams' lasting legacy is the meaningful and enduring impact she had on the law students who passed through her classes at IU McKinney during her tenure. "Many of us end up with no more than five or six people who remember us. Teachers have thousands of people who remember them for the rest of their lives."[9] Professor Adams will be fondly remembered by her many students, who, on a daily basis, use the skills she taught them in law school. On behalf of myself and the many other IU McKinney graduates who were fortunate enough to have had Professor Adams in class: Thank you for what you taught me. What I learned from you was a critical part of what has allowed me to enjoy a fulfilling legal career.

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3. IND. UNIV. ROBERT H. MCKINNEY SCH. OF L., *supra* note 1.

4. *Trustee's Teaching Award*, IND. UNIV., https://medicine.iu.edu/faculty/professional-development/awards/trustees-teaching [https://perma.cc/CJX7-B54X] (last visited Jan. 16, 2026).

5. *See* IND. UNIV. ROBERT H. MCKINNEY SCH. OF L., *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. Andy Rooney, BRAINYQUOTES, https://www.brainyquote.com/quotes/andy_rooney_194052 [https://perma.cc/42K9-7ML5] (last visited Jan. 16, 2026).

A TRIBUTE TO THE TRAILBLAZING PROFESSOR CYNTHIA ADAMS

JOEL M. SCHUMM*

I had the remarkable good fortune to work with, learn from, and laugh with Professor Cynthia Adams for nearly twenty-five years. Cynthia and I followed similar paths to law teaching as graduates of the part-time evening program at McKinney. Working one's way through law school brings a refreshing practicality and a desire to get the job done without the pretense and puffery sometimes found in the academy. Building on that foundation, Cynthia became a highly regarded teacher, a widely revered colleague and leader at the law school, and a force in the national and international legal writing community.

Those outside the legal academy may not appreciate the hierarchy of professors. Legal writing professors have long been at or near the bottom—paid considerably less, afforded lower status, and often not even regarded as "professors" or "faculty" but rather "instructors" or "lecturers." In the spring of 2002, Dean Norm Lefstein spearheaded an effort to improve the status of legal writing faculty from instructors on year-to-year contracts to clinical professors who could earn tenure-like long-term contracts after demonstrating their excellence and national reputation in either teaching or service.

The legal writing faculty at McKinney, where I had just begun teaching, were eager to take on the challenge. We were incredibly fortunate to have Professor Adams as pioneering trailblazer (along with Professor Debby McGregor), the first to compile and submit their impressive dossiers—easily earning universal support of the faculty and university for promotion. Professor Adams's exceptional contributions to the law school were grounded both in her remarkable teaching and service work, but those early efforts were just the tip of the iceberg for all that followed.



The IU McKinney legal writing faculty in 2004. From left: Professor Schumm, Professor Adams, Professor Allison Martin, Professor Joan Ruhtenberg, Professor Ken Chestek, Professor Jim Dimitri, and Professor Debby McGregor.

* Carl M. Gray Professor of Law, Indiana University Robert H. McKinney School of Law. B.A. 1992, Ohio Wesleyan University; M.A. 1994, University of Cincinnati; J.D. 1998, Indiana University Robert H. McKinney School of Law.

Few professors have taken on such a wide range of courses, and none have done it with the vigor and innovation of Professor Adams. Beyond the first-year writing course she taught throughout her three decades at the law school, Professor Adams taught other courses to help fill curricular needs and created new courses to share her expertise while broadening the curriculum, especially in the international and transactional realms. Professor Adams's teaching portfolio included Secured Transactions, Contract Drafting, Negotiations, Small Business Planning, Legal Communication and Analysis, Integrated Contracts, Contracts (hybrid), Civil Procedure, and Trusts and Estates.

Although many faculty find safety and comfort in teaching the same courses in the same ways, Professor Adams continually innovated and was always looking for ways to develop something new, different, and better. More importantly, she always did so in especially thoughtful and effective ways that are shared with others. While pioneering a writing course for foreign LL.M. students, she co-authored a book on the subject that is used at law schools in the United States and beyond.[1] A subsequent course on international contract drafting was quickly followed by a co-authored text, again used throughout the world.[2] Her transactional courses filled an important curricular gap while her efforts in online instruction, years before the COVID pandemic, paved the way for others. Professor Emeritus McGregor, who co-taught classes and co-authored a textbook, noted that Professor Adams was always incredibly prepared, engaged, and engaging. She would not only meticulously update her materials but would also be abreast of and incorporate technology.[3]

Instead of cruising into retirement, Professor Adams kept foot firmly on the gas to the end of the end. She developed two new courses in her final year of teaching—a hybrid contracts course for the evening students in the Spring of 2025 that included one-third asynchronous online content. And in the Fall of 2025, she completely revamped her asynchronous Contract Drafting class during her final semester of teaching. Among other things, that course fully tackled the promise and pitfalls of generative AI, a major component of the third edition of her Contract Drafting textbook a year earlier.

Beyond the classroom, Cynthia developed and nurtured important relationships that have created remarkable opportunities for our students to learn outside the classroom—including externship opportunities for Eli Lilly and, from scratch, law student teams that have earned national recognition in the LawMeet Transactional Negotiation competition.

Although Professor Adams's CV may detail her vast committee and administrative service, it does not begin to reflect the depth of her commitment and effectiveness. She served as chair of nearly every one of the most important

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1. DEBORAH B. MCGREGOR, CYNTHIA M. ADAMS AND KATRINA LEE, THE GUIDE TO U.S. LEGAL ANALYSIS AND WRITING (Aspen 3d ed. 2022) (The Guide).

2. CYNTHIA M. ADAMS & PETER K. CRAMER, DRAFTING CONTRACTS IN LEGAL ENGLISH: CROSS-BORDER AGREEMENTS GOVERNED BY U.S. LAW (2013); *see* Peter K. Cramer, *A Tribute to Cynthia Adams*, 59 IND. L. REV. 599 (2026).

3. Email from Deborah B. McGregor, Professor Emerita, Ind. Univ. McKinney Sch. of L., to author (on file with author).

law school committees, such as the academic affairs (curriculum) committee and the colloquium committee through which she created a junior scholars' workshop. Professor Adams was elected by her colleagues whenever she ran for the executive committee, which is a testament to the enormous wisdom and insight she brought to every issue and discussion. When Professor Adams spoke, everyone at the law school paused to listen because of our respect for her thoughtful views and the care with which her words are chosen.

Beyond these remarkable contributions within the law school, Professor Adams was a terrific ambassador for the law school on the state, national, and world stage. Her textbooks have an international audience, as did many of her presentations. Having attended several conferences with Professor Adams, I can attest to her icon status on the national and international front. Knowing they will learn something new and profound, professors and practitioners flock to her presentations, including one at Northwestern Pritzker School of Law just weeks before her retirement.

The law school's legal writing program has long been ranked nationally because of the reputation of respect enjoyed by Professor Adams and its other faculty. Beyond her acclaimed textbooks and scores of renowned presentations, Professor Adams devoted her time and energy to mentoring others, through programs like the Sirico Scholars' Workshop and important committee work.

Newly appointed Dean Karen Bravo wisely chose Professor Adams to serve as Vice Dean in 2020, making her the first clinical faculty member to hold that role. True to form, Professor Adams excelled not merely in getting through the COVID-19 pandemic but in working tirelessly to improve the law school in ways big and small.[4]

Long-time LCA colleague Allison Martin, who later served as Vice Dean, put it well. Professor Adams "led with professionalism, integrity, and quiet confidence. She set a standard that others aspired to meet, not by demanding recognition, but by consistently doing the work well and doing it the right way. She opened doors through excellence, and in doing so, made it easier for those who followed to walk through them. . . . As she enters retirement, her legacy is firmly established—in the people she mentored, the paths she helped clear, and the example she set."[5]

As Cynthia Adams transitions to the next chapter of her life as a Ph.D. student in philosophy, she will continue to blaze new trails while countless students and professors, former and future, will benefit immensely from the trails she blazed for us.

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4. *See* Karen E. Bravo, *A Paradigm of Excellence: A Tribute to Professor Cynthia Matson Adams*, 59 IND. L. REV. 595 (2026).

5. Email from Allison Martin, Vice Dean & Clinical Professor of Law, Ind. Univ. McKinney Sch. of L., to author (on file with author).

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ARTICLES

INSTITUTIONALIZING THE COLLABORATIVE ALIGNMENT PROCESS OF THE JUDICIAL REINVESTMENT INITIATIVE: SOLVING THE WICKED PROBLEMS AT THE INTERSECTION OF CRIMINAL JUSTICE AND BEHAVIORAL HEALTH SYSTEMS

CHRISTOPHER M. GOFF[*]

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[*] Associate Justice, Indiana Supreme Court; Chair, Indiana Justice Reinvestment Advisory Council; and Member, National Judicial Task Force to Examine State Court Response to Mental Illness. Thank you to my wife, Raquel, for her patience and kindness while I completed this project, to my faculty advisor, Professor Jack Knight, for his wisdom and guidance, to my law clerk, Isra Haider, for her thoughtful edits, and to my many justice partners who have always inspired me to work with them to improve our criminal justice system.

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Over the past half-century, national policies of deinstitutionalization shifted responsibility for addressing behavioral health problems from state-funded institutions to local communities, disbursing it, to varying degrees, among a variety of local behavioral health and criminal justice stakeholders. Although some of these stakeholders, including community mental health centers, were designed to address some of these problems, they were never adequately resourced to address ***all*** *the problems that now confront them. Consequently, most communities rely on other local stakeholders, usually their criminal justice system, as their first response to behavioral health problems. But reliance on the criminal justice system to address behavioral health problems has created an unsustainable financial strain. In response, most states have used the Justice Reinvestment Initiative's collaborative alignment process to reduce reliance on their state-funded prison systems. Aligning the work of stakeholders at the intersection of criminal justice and behavioral health systems improves outcomes, makes communities safer, and saves money. But the alignment process itself can be difficult and time-consuming, often discouraging collaborative efforts until crises make them necessary. Therefore, once the difficult work of system alignment has been accomplished, that alignment should be* ***institutionalized****, both as a means of recognizing emerging problems before they become a crisis and of providing a means of continuous system improvement.*

INTRODUCTION

In planning and policy, a wicked problem is one that's difficult or impossible to solve because of incomplete, changing, and contradictory requirements that are often difficult to recognize.[1] The intersection of the American criminal justice and behavioral health systems[2] presents many wicked problems. Sometimes these systems operate independently. But sometimes they also intersect in important ways, creating a hybrid ecosystem where

1. *Wicked problem*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Jan. 14, 2026, at 15:20 UTC), http://en.wikipedia.org/wiki/Wicked_problem [https://perma.cc/R7JG-CJEK].

2. Behavioral health generally refers to mental health conditions, mental distress, substance abuse, and suicidal thoughts. *About Behavioral Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2025), https://www.cdc.gov/mental-health/about/about-behavioral-health.html [https://perma.cc/4LFK-RZP2].

stakeholders in separate systems find themselves sharing responsibility for a problem that is part behavioral health but also part criminal justice. At these intersections, problems in one system can create problems throughout the entire ecosystem. Once this happens, solving these problems requires collaboration among the various systems.

Unfortunately, the systems are not always aligned in a way that allows them to recognize, much less address, such problems until they reach a crisis point. But when a problem becomes big enough to affect the entire ecosystem, it can motivate the independent systems to bring themselves into alignment to confront the common crisis. When this happens, stakeholders can develop comprehensive solutions to the crisis. Aligning criminal justice and behavioral health systems can help leaders at the state and local levels work collaboratively to address behavioral health problems, reduce reliance on scarce public safety resources, make communities safer, and save money.[3] Perhaps more importantly, aligning these systems at the state and local level can help stakeholders recognize and respond to emerging threats from the national level.[4] Because the responsibility of addressing behavioral health problems has been dispersed among so many stakeholders, it's important for every stakeholder to understand the significance of their role within the system and be empowered to speak up when they recognize either a problem or a solution.

But the process of aligning these systems is difficult and time consuming. Therefore, once alignment has been accomplished, it should be *institutionalized*—that is to say, it should become part of the formal operational structure of each system—as a means of averting future crises and of continuous system (or ecosystem) improvement. I've spent my career working in Indiana's criminal justice system. I've served as a trial advocate, appellate advocate, trial judge, and, most recently, associate justice of our state supreme court. In these roles, I've collaborated closely with colleagues in my state's behavioral health system. I've also collaborated with other justice stakeholders (e.g., prosecutors, public defenders, probation officers, sheriffs, police officers, county commissioners, and treatment providers) to develop and implement processes to understand common problems and align our efforts to solve them. Whether trying to navigate the opioid crisis in our rural community or trying to connect communities across the state with effective mental health resources, our goal was always a modest one. We just wanted to ensure our system could meet its core public safety functions and connect people to the treatment they needed. But the collaborative process always exceeded our goal. It helped us understand our system better and identify ways to improve it. Still, we'd always spend too much time developing or redeveloping the same collaborative process, ultimately preventing us from reaching our full potential.

And it turns out we didn't have to. The same basic collaborative process has

3. *Aligning Health and Safety*, COUNCIL OF STATE GOV'TS (2026), http://projects.csgjusticecenter.org/aligning-health-and-safety/collaboration/ [https://perma.cc/B87T-XM4J].

4. *Id*.

been written about extensively, and it's even been adopted, in some form, in most states. The Justice Reinvestment Initiative (JRI) is a public-private partnership between the Bureau of Justice Assistance (BJA), the Pew Charitable Trust, the Council of State Governments (CSG), and others.[5] It was born out of necessity to help states, overburdened with the costs of their criminal justice systems, incarcerate fewer people safely.[6] It achieves this goal through a process of consensus building between stakeholders around a common challenge—cost.[7] The cost of imprisoning people is high, public resources are scarce, and it's therefore necessary to prioritize the system's needs to ensure sufficient resources are available to preserve public safety.[8] The process of consensus building among criminal justice stakeholders can be transformative for a state's criminal justice system, allowing states to plan and budget more effectively, save money, and improve public safety.[9] And once alignment of interdependent systems has been achieved, it can also accelerate each stakeholder's understanding of the importance of their own role to the shared mission of both the criminal justice and behavioral health systems. When stakeholders from each system meet regularly to discuss their interconnected work, they can understand the entire ecosystem better. This enhanced understanding enables them to identify potential problems earlier and to suggest improvements that might not be identified absent regular collaborative interaction.

The focus of this Article is JRI as a means of institutionalizing system alignment at the intersection of criminal justice and behavioral health systems. But it is likely that JRI's collaborative alignment process would improve a state justice system's ability to roll out almost any collaborative initiative. And since JRI has been adopted, to varying degrees, by most states, it offers an *established* alignment process, potentially saving states the significant difficulty and expense of starting the process from scratch every time they undertake a new systemwide initiative.[10]

Focusing specifically on the intersection of the criminal justice and behavioral health systems, Part I of this Article explains why alignment at this intersection is so important. Drawing on examples from history, it examines how deinstitutionalization of the behavioral health system—the process of emptying state psychiatric facilities—and overuse of the criminal justice system in drug offenses created increased financial pressure on states as their prison populations grew steadily. And when the country was confronted with the

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5. *Justice Reinvestment Initiative (JRI)*, U.S. DEP'T OF JUST. (Nov. 9, 2023), https://bja.ojp.gov/program/justice-reinvestment-initiative/overview [https://perma.cc/878W-8AK5] [hereinafter *JRI Overview*].

6. *Id.*

7. *Id.*

8. *How much do states spend on housing prisoners?*, USAFACTS (Oct. 31, 2025), https://usafacts.org/articles/how-much-do-states-spend-on-prisons/ [https://perma.cc/QTP4-CRUF] (concluding that state governments spent a combined $63.6 billion to incarcerate people in 2023).

9. *JRI Overview*, *supra* note 5.

10. *Id.*

opioid crisis, this financial pressure became unsustainable, leading most states to release many drug offenders into community-based supervision and treatment programs. But these programs were never adequately funded, and this created a real crisis for local justice and behavioral health professionals.

Part II explains how the financial unsustainability brought on by the opioid crisis resulted in several collaborative efforts to align state criminal justice and behavioral health systems to address the problem. Chief among these efforts has been JRI. Focusing on my state, Indiana's use of JRI has been unique in that we've created both a state-level JRI team, comprised of critical government, justice, and behavioral health stakeholders, as well as local teams, comprised of corresponding local stakeholders, in every county. And importantly, we've institutionalized these state and local teams in our state statutes, ensuring that the important collaborative work they do will remain an essential part of their job descriptions. But Indiana's efforts to align its criminal justice and behavioral health systems predate our involvement in JRI. Our problem-solving courts have also proved critical to our efforts, providing local justice and behavioral health professionals a way of aligning their agencies to effectively supervise and treat people living with behavioral health problems at the local level. In fact, Indiana's full embrace of problem-solving courts has made them our primary evidence-based alternative to imprisonment. Their use has also been fully integrated into our use of JRI.

Finally, Part III first explains how Indiana's institutionalized use of JRI's collaborative alignment process was used to successfully implement national policies to address the historical problems of deinstitutionalization and overuse of the criminal justice system that were discussed in Part I. It concludes by suggesting other ways the institutionalization of JRI's collaborative alignment process could be used to empower stakeholders, inform policy, avoid future crises, and promote ongoing system improvement.

I. WHY IS THE INTERSECTION OF CRIMINAL JUSTICE AND BEHAVIORAL HEALTH SYSTEMS SO PROBLEMATIC?

This part explores the history of deinstitutionalization of the behavioral health system and overuse of the criminal justice system to explain why alignment at the intersection of these two systems is important. National policies of deinstitutionalization, carried out over decades and in two large phases, shifted responsibility for providing behavioral health treatment and supervision from centralized state-funded institutions to local systems.[11] The first phase of deinstitutionalization involved the behavioral health system and was, in large part, a national effort to treat serious mental illness more humanely.[12] The

11. *See* Alisa Roth, *The Truth About Deinstitutionalization*, ATLANTIC (May 25, 2021), https://www.theatlantic.com/health/archive/2021/05/truth-about-deinstitutionalization/618986/ [https://perma.cc/6LGX-HDPS].

12. *See id.*

second phase involved the criminal justice system and was, in large part, a coordinated effort to help states cut costs by incarcerating fewer people in state prisons, especially people convicted of drug offenses.[13]

Historically, many people with severe mental illnesses were kept in state-run hospitals that provided therapy, medical treatment, and vocational training.[14] "Deinstitutionalization" was the process of emptying state psychiatric hospitals starting in the 1950s, driven by the belief that mental hospitals were cruel and inhumane.[15] Although deinstitutionalization saved states money by decreasing the population of state hospitals, it created other problems.[16] Deinstitutionalization removed the responsibility of addressing most behavioral health problems from a small number of institutions, wholly operated by a single state agency, and then disperse that responsibility among a variety of offices and agencies across nearly every local jurisdiction in the entire state.[17] This dispersal of responsibility made it more difficult for *state-level* policymakers to plan, fund, and deliver adequate resources to address the state's behavioral health problems.[18] But it created bigger problems for *local* justice and behavioral health stakeholders.[19]

Local behavioral health providers were never adequately resourced to address all the problems that state-funded institutions had previously addressed.[20] This lack of capacity led most communities to rely on their criminal justice systems to address many behavioral health problems.[21] Over time, financial pressure resulting from incarcerating more and more people with behavioral health problems increased.[22] And when the nation was confronted with the opioid crisis, the financial burden placed on most prison systems became unsustainable and led to significant national reform, including JRI.[23]

A. Deinstitutionalization of the Behavioral Health System

When a person experiences a mental-health crisis in America, it's nearly always law enforcement—rather than a social worker, therapist, or psychiatrist—who responds to the 911 call.[24] But most law enforcement are not adequately trained to address mental-health emergencies.[25] And while laws

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13. *See id.*

14. Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 AMA J. ETHICS 886, 887 (2013).

15. *Id.* at 886–87.

16. *See id.*

17. *Id.* at 888 (discussing changes in federal law reducing beds in state facilities and establishing community mental health centers).

18. *Id.*

19. Roth, *supra* note 11.

20. *Id.*

21. *Id.*

22. *JRI Overview*, *supra* note 5.

23. *Id.*

24. Roth, *supra* note 11.

25. *Id.*

designed to protect civil liberties make it very difficult to hospitalize people against their will, it's remarkably easy to arrest them.[26] As a result, policing and incarceration often replace emergency mental-health care.[27] So how did we get here?

In 1841, Dorothea Dix, a former school teacher, visited a jail in Massachusetts to teach a Bible class.[28] She was appalled to find people with mental illness living in the jail in horrific conditions.[29] Her observations moved her so profoundly that she started lobbying states to create asylums, eventually helping to establish or expand over thirty institutions.[30] Many more were created in the decades that followed, and by 1955, roughly half a million people were living in state-run psychiatric facilities.[31] But these facilities soon outgrew their capacity, and staff struggled to keep up with their patients' needs.[32] And when many doctors and staff were drafted during World War II, hospitals were left dangerously understaffed and the problem grew worse.[33] In the years following, the development and approval of antipsychotic drugs, marketed as capable of controlling psychosis, led many to believe inpatient psychiatric hospitals were no longer needed.[34]

Nearly a decade later, President John F. Kennedy signed the Mental Retardation Facilities and Community Health Centers Construction Act.[35] Under the 1963 law, "custodial mental institutions" would be replaced by community mental health centers, allowing patients to live and receive care in their communities.[36] And President Kennedy's motivation was sincere—his sister had been lobotomized while hospitalized due to serious mental illness.[37]

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26. *See* Addington v. Texas, 441 U.S. 418, 418 (1979) (holding that the State must prove by "clear and convincing evidence" that an individual is mentally ill and poses a danger to themselves or others in a civil commitment case); Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (holding that the standard for an arrest is "probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense'" (citation omitted)).

27. NAT'L JUD. TASK FORCE TO EXAMINE STATE CTS.' RESPONSE TO MENTAL HEALTH, STATE COURTS LEADING CHANGE: REPORT AND RECOMMENDATIONS (2022), https://www.ncsc.org/sites/default/files/media/document/MHTF-State-Courts-Leading-Change.pdf [https://perma.cc/AUP8-GCVK] [hereinafter NJTF REPORT].

28. Roth, *supra* note 11.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id*.

35. 42 U.S.C. § 6000–6083 (1963) (repealed 2000).

36. Roth, *supra* note 11.

37. *Rosemary Kennedy, The Eldest Kennedy Daughter*, NAT'L PARK SERV. (Jan. 24, 2024), https://www.nps.gov/articles/000/rosemary-kennedy-the-eldest-kennedy-daughter.htm [https://perma.cc/7KNZ-SNG7].

Sadly, this was the last bill that President Kennedy ever signed.[38] As many state hospitals were shut down, patients were discharged into a poorly funded community-based treatment system.[39] Few community mental health centers were built, creating an extreme shortage of mental-health care.[40] The creation of Medicaid also accelerated the shift from inpatient to outpatient care because Medicaid legislation stipulated that the federal government wouldn't pay for inpatient care in psychiatric hospitals.[41] And the recently developed antipsychotic drugs didn't deliver as promised.[42] Many of these patients ended up on the streets, leading to them committing crimes and getting arrested.[43] As a result, prisons and jails started to become the new asylums.[44]

This impact of deinstitutionalization is described in a theory developed by British psychiatrist Lionel Penrose in the1930s who argued there was an inverse relationship between the number of people in prisons and the number of people in asylums.[45] Today, many scholars and historians consider the "Penrose hypothesis" an oversimplification of the problem.[46] Still, Penrose's work can help justice and behavioral health stakeholders understand how deinstitutionalization impacted the way we respond to behavioral health problems.

Deinstitutionalization had occurred without providing an adequate alternative. The local agencies left to assume responsibility for behavioral health problems were neither resourced to address them individually nor aligned to address them collaboratively. This structural inadequacy illustrates that, although probably an oversimplification, Penrose's hypothesis still helps us understand why we've come to rely too heavily on the justice system to address behavioral health problems.

B. Overuse of the Criminal Justice System

Still, it's undeniable that deinstitutionalization is insufficient to explain the overuse of the justice system as a response to behavioral health problems. To fully understand our overuse of the justice system in responding to behavioral health problems, it's important to understand how we came to view one important behavioral health problem—addiction—as a crime. In 1971, President Richard Nixon declared a war on drugs after calling "drug abuse"

38. Vic DiGravio, *The Last Bill JFK Signed—And The Mental Health Work Still Undone*, WBUR (Oct. 23, 2013), https://www.wbur.org/news/2013/10/23/community-mental-health-kennedy [https://perma.cc/J4Y3-HUST].

39. Roth, *supra* note 11.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. H. Richard Lamb, *Does Deinstitutionalization Cause Criminalization? The Penrose Hypothesis*, 72 JAMA PSYCHIATRY 105, 105 (2015).

46. *Id.*

America's "public enemy number one," and set the stage for tough-on-crime policies.[47] In the wake of his declaration, laws like mandatory minimum sentences for drug possession and other drug-related crimes led to record levels of incarceration and disproportionately affected people of color.[48] Between 1972 and 2009, the prison population grew 700 percent.[49]

Although President Nixon declared America's war on drugs, another politician—then New York Governor, later Vice-President,[50] Nelson Rockefeller—is largely responsible for the way we ended up fighting it. In the 1970s, New York City was battling a heroin epidemic.[51] And the frequency of homicides exceeded modern rates by fourfold.[52] Rockefeller had supported drug rehabilitation, along with other programs for personal advancement, because he viewed drugs as a social ill rather than a criminal problem, but there was a growing demand for a tougher response.[53]

The Governor began searching for a new approach, and, after hearing about a new "zero-tolerance approach to crime" used in Japan's war on drugs, he decided to pursue a similar tactic in New York.[54] In 1973, Rockefeller launched his get-tough-on-crime campaign, advocating for mandatory sentences ranging from fifteen years to life in prison for drug dealers and addicts, even individuals caught with small amounts of marijuana, cocaine, or heroin.[55] Although drug treatment experts and some politicians highly criticized Rockefeller's proposed legislation, it easily passed through the legislature.[56] Soon after, the idea of getting tough, even on petty criminals, went national.[57]

Other states and the federal government soon adopted mandatory minimum sentences and "three-strikes laws."[58] Due in part to new Rockefeller-style laws, the national prison population grew from 330,000 in 1973 to as high as 2.3 million.[59] This required construction of hundreds of additional state and federal prisons.[60] By 2010, more than 490,000 people were employed as prison

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47. Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, AM. PRESIDENCY PROJECT (June 17, 1971), https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control [https://perma.cc/DPR3-VZPM].

48. Lamb, *supra* note 45.

49. *Id*.

50. *Gov. Nelson Aldrich Rockefeller*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/nelson-aldrich-rockefeller/ [https://perma.cc/TVF7-6QXU] (last visited Feb. 14, 2026).

51. Brian Mann, *The Drug Laws that Changed How We Punish*, NPR (Feb. 14, 2013, at 3:04 ET), https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish [https://perma.cc/9ZS6-9256].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

guards.[61] Studies put the cost of America's prison system at between $63 billion and $75 billion every year.[62]

As more people became incarcerated, more people with behavioral health problems were incarcerated too. About seventy-five percent of incarcerated people with a mental illness also have substance-use disorder, in part because substance use can serve as a form of self-medication.[63] And the problem of incarcerating people with mental illness was compounded by a related policy known as "broken windows" policing.[64] Embraced by many in the 1980s, proponents of the policy believed that to prevent bigger crimes, police needed to crack down on low-level crimes.[65] This policy led to more people with mental illness becoming enmeshed in the justice system.[66] For example, in jurisdictions embracing the policy, a person acting erratically would be more likely to be charged with disorderly conduct.[67] But by the early 2000s, it became increasingly clear that a more nuanced response to behavioral health problems was required.[68] These tough on crime policies proved unsustainable in the face of the great recession and, perhaps more importantly, the opioid crisis.[69]

For years, doctors overprescribed dangerous but legal opioids to help their patients manage pain, often based on misleading information promulgated by drug companies.[70] But it took too long for the government agencies that regulate them to discover the problem.[71] In the meantime, many people who were overprescribed opioids became addicted.[72] As their legal supply of opioids gradually dried up, many turned to illegal sources of opioids.[73] This in turn often led to involvement in the criminal justice system.[74] A resulting explosion of state prison populations led to a consensus realization that something had to change—the cost of imprisoning people because of addiction had become unsustainable.[75]

As will be discussed in Part II, the unsustainable cost of imprisoning people because of addiction led to a second phase of "deinstitutionalization." This second phase, unlike deinstitutionalization of people with mental illness, involved releasing people imprisoned due to drug offenses into community-

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61. *Id.*
62. *Id*.
63. Roth, *supra* note 11.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See generally* SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC (Bloomsbury 2016).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

based programs. And while this second phase also placed added strain on local justice and behavioral systems, it was accompanied by a coordinated, but little understood national effort to support the transition, including JRI.

II. ALIGNMENT CAN ADDRESS MANY PROBLEMS AT THE INTERSECTION OF THE CRIMINAL JUSTICE AND BEHAVIORAL HEALTH SYSTEMS, AND ONCE IT IS ACHIEVED, IT SHOULD BE INSTITUTIONALIZED TO AVOID THE TIME AND EXPENSE OF FUTURE REALIGNMENT

The economic fallout of the Great Recession, coupled with the opioid epidemic, made the dramatic expansion of the penal state described in Part I financially unsustainable. The intersection of the criminal justice system and behavioral health system reached a crisis point, and it proved sufficient to motivate change. In my home state of Indiana, the state prison population in 2010 cost Hoosier taxpayers a whopping $679 million—a seventy-six percent increase from ten years prior.[76] America's tough-on-crime policies had become unsustainable financially.[77] As this fact became clear to justice stakeholders at every level across the state, collaborative efforts were undertaken to address the problem by safely releasing many of the state's drug offenders into community-based programs.

Key to these efforts was bringing the state's non-unified statewide justice and behavioral health systems, along with its ninety-one separate county-level justice systems, and twenty-four regional behavioral health systems, into alignment.[78] As will be discussed, this process took a quarter century to complete. It involved the passage of multiple statewide legislative packages, the promulgation of statewide court rules, the engagement of multiple national policy experts, and countless parallel local initiatives that would later be folded into the statewide process.

Were it not for the financial strain brought on by the opioid crisis and the Great Recession, it's unlikely these collaborative efforts would've been possible. The fragmented structure of our systems serves as a powerful disincentive for collaboration. Therefore, we must institutionalize the alignment process we worked so hard to put in place—alleviating the time and expense of repeating the work.[79]

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76. Randall T. Shepard, *The Great Recession as a Catalyst for More Effective Sentencing*, 23 FED. SENT'G. REP. 146, 146 (2010).

77. Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 601–02 (2016).

78. *State Psychiatric Hospitals and Community Mental Health Centers*, IND. FAM. & SOC. SERV. ADMIN. MENTAL HEALTH & ADDICTION DIV. (July 24, 2025, at 13:49 ET), https://www.in.gov/fssa/dmha/files/DMHA_SOFs_and_CMHCs.pdf [https://perma.cc/CVU4-SC6H].

79. To avoid further complicating this Article's discussion of Indiana's various efforts to align its justice and behavioral health systems, I have purposely omitted any discussion of Indiana's participation in Evidence-Based Decision Making (EBDM). For a detailed discussion of that participation, see MADELINE M. CARTER, NAT'L INST. OF CORR., U.S. DEP'T OF JUST.,

A. The Emergence of the Justice Reinvestment Initiative

Faced with unsustainable financial pressures, policymakers across the country sought new strategies designed to prevent crime and recidivism, enhance community safety, reduce reliance on incarceration, and, ultimately, save taxpayer dollars. What emerged was a new theory of rehabilitation—one that relies on actuarial models of prediction and evidence-based programming, rather than principles of medical and social science.[80]

Perhaps the most far-reaching and influential effort at criminal justice reform in recent years, both in its ambition and in its degree of legislative reception nationwide, has been the Justice Reinvestment Initiative. Formed in 2001, the JRI is a public-private coalition of the U.S. Department of Justice, the Pew Charitable Trust, and the Council of State Governments, among others.[81] This coalition offers technical assistance to states by analyzing available data and developing state-specific policy solutions aimed at reducing prison populations, which in turn generate savings.[82] The idea is that as states implement these policies and realize their cost-savings, a portion should be *reinvested* in various efforts to reduce crime.[83] If a state would like to participate in JRI, it must form a bipartisan, multi-disciplinary team of stakeholders and government leaders to work with criminal justice researchers and policy experts.[84]

B. Institutionalizing JRI's Collaborative Alignment Process in Indiana

In 2010, the State of Indiana joined the bandwagon by partnering with the JRI coalition to study criminal sentencing data, to compare the state's sentencing and corrections policies with nationally recognized best practices, and to generate proposals for reducing the funds spent on incarceration—all with the goal of improving public safety.[85] In its summary report, the Council

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SUSTAINING THE EBDM MODEL: THE INDIANA STORY 1 (2022), https://s3.amazonaws.com/static.nicic.gov/info.nicic.gov/files/media/file/EBDM-Indiana-Case-Study-10-13-2022.pdf [https://perma.cc/Y6AZ-67XR].

80. Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 874–75 (2013).

81. *JRI Overview*, *supra* note 5.

82. Eaglin, *supra* note 77, at 609. *See also* JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 6 (2013); NANCY LAVIGNE ET AL., URBAN INST., THE JUSTICE REINVESTMENT INITIATIVE: EXPERIENCES FROM THE STATES 1 (2013).

83. Eaglin, *supra* note 77, at 609.

84. Christopher M. Goff, *The missing link: Justice reinvestment at national, state, and local levels*, IND. CT. TIMES (Jan. 28, 2022), https://times.courts.in.gov/2022/01/28/the-missing-link-justice-reinvestment-at-national-state-and-local-levels/ [https://perma.cc/TWX3-EVVC].

85. *See* COUNCIL OF STATE GOV'TS JUST. CTR., REDUCING SPENDING ON CORRECTIONS AND REINVESTING IN STRATEGIES TO INCREASE PUBLIC SAFETY 1 (2010). *See also* COUNCIL OF STATE GOV'TS JUST. CTR., JUSTICE REINVESTMENT IN INDIANA: SUMMARY REPORT & POLICY FRAMEWORK 2 (2010).

of State Governments found that between 2000 and 2009, while Indiana's crime rate fell, the number of incarcerated persons in Indiana grew by over forty percent—triple the rate of growth compared to other states in the region.[86] With policies left unchanged, the report concluded, Indiana's prison population would "continue to grow rapidly" with new construction and operation costs hovering at $1.2 billion.[87]

In response, the General Assembly restructured the state's criminal code in 2013—the first time since 1977.[88] This legislation overhauled the state's sentencing structure, aiming principally to divert low-level non-violent offenders, which included most offenses involving drug possession, away from state prisons and into the community with supervision.[89] The legislation also aimed to "reduce crime by promoting the use of evidence based best practices for rehabilitation of offenders in a community setting," to "keep dangerous offenders in prison by avoiding the use of scarce prison space for nonviolent offenders," to "give judges maximum discretion to impose sentences based on a consideration of all the circumstances related to the offense," and to "maintain proportionality of penalties across the criminal code."[90]

1. Indiana's State Justice Reinvestment Advisory Council.—In the years that followed, the state adopted further reforms to the criminal code. In 2015, the General Assembly created the Justice Reinvestment Advisory Council, or JRAC.[91] The purpose of the Council—which consists of stakeholders from all three branches of government, along with the public defender council, the prosecuting attorneys council, the division of mental health and addiction, the sheriffs' association, and the Department of Correction, among others—is "to review policies, promote state and local collaboration, and provide assistance for use of evidence based practices and best practices in community-based alternatives and recidivism reduction programs."[92] To that end, the JRAC statute calls upon the Council to analyze "state and local criminal justice systems and corrections programs" and to recommend "legislation and funding for criminal justice initiatives."[93]

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86. COUNCIL OF STATE GOV'TS JUST. CTR., JUSTICE REINVESTMENT IN INDIANA, *supra* note 85, at 2.

87. *Id.*

88. Greg Steuerwald, *Rewriting Indiana's outdated criminal code*, IND. H.R. REPUBLICAN CAUCUS (Jan. 22, 2013), https://www.indianahouserepublicans.com/news/press-releases/r40-rewriting-indiana-s-outdated-criminal-code-1-22-2013/ [https://perma.cc/9DDF-SNVG].

89. G. ROGER JARJOURA, NATHAN J. ZAUGG & KONRAD A. HAIGHT, AM. INST. FOR RESEARCH, ASSESSING THE LOCAL FISCAL IMPACT OF HEA 1006 2 (2014).

90. Act of Mar. 26, 2014, Pub. L. No. 168-2014, § 52, 2014 Ind. Acts 2030, 2095 (codified as amended at IND. CODE § 35-32-1-1 (2025)).

91. Act of May 5, 2015, Pub. L. No. 179-2015, § 13, 2015 Ind. Acts 1956, 1972 (codified at IND. CODE § 33-38-9.5 (2025)).

92. IND. CODE § 33-38-9.5-3 (2025).

93. *Id.* § 33-38-9.5-2. The statute allocates no specific appropriations; rather, it states that "the expenses of the advisory council shall be paid by the office of judicial administration from

As a practical matter, the creation of JRAC was a logical legislative counterpart to diverting low-level felons from prisons. The Council was designed to support and foster collaboration among local criminal justice stakeholders and, at the same time, provide the legislature with relevant information to further reform and refine criminal justice policy.[94] To that end, JRAC's work has resulted in the granting of millions of dollars to local communities so they can support evidence-based community supervision and behavioral health services.[95] It's been instrumental in reforming pretrial practices in the state and in evaluating issues related to jail overcrowding.[96] And it has fostered mutual understanding and respect among and between state-level justice stakeholders.[97]

2. Indiana's Local Justice Reinvestment Advisory Councils.—In 2021, Governor Eric Holcomb signed HEA 1068 (the Local JRAC Statutes) into law.[98] This important legislation demonstrates Indiana's commitment to the principles of Justice Reinvestment.[99] Each county's Local JRAC consists of the following members or their designees: the chief public defender, the elected prosecutor, the director of the local community mental health center, the county sheriff, the director of the county community corrections program, the chief probation officer, the president of county executive, the president of the county fiscal body, and a judge with criminal jurisdiction.[100] This statutory framework provides each of Indiana's county-based criminal justice systems the ability to convene all critical local stakeholders at the intersection of criminal justice and behavioral health. While this might not sound significant, it is because it allows all local stakeholders, even those who don't work directly in either the criminal justice or behavioral health system, to understand those systems better and to recognize problems sooner.

It also institutionalized a critical state-local partnership to help reinvest criminal justice resources where they are most needed.[101] While the purpose of the State JRAC is to review and evaluate state and local justice systems to make recommendations on best practices and funding for local communities, Local JRAC provides an important missing link between state and local stakeholders.[102] It institutionalizes alignment of state and local criminal justice systems. This allows state-level stakeholders to be more responsive to local needs and to identify emerging problems earlier. It also provides stakeholders

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funds appropriated to the office of judicial administration for the administrative costs of the advisory council." *Id.* § 33-38-9.5-2.5(d).

94. *Id.* § 33-38-9.5-3.

95. Goff, *supra* note 84.

96. *Id.*

97. *Id.*

98. Act of Apr. 8, 2021, Pub. L. No. 30-2021, 2021 Ind. Acts 150 (codified at IND. CODE § 33-38-9.5 (2025)).

99. Goff, *supra* note 84.

100. IND. CODE § 33-38-9.5-4 (2025).

101. Goff, *supra* note 84.

102. *Id.*

at all levels a permanent process for collaborative efforts to improve all parts of the justice and behavioral health ecosystem.[103]

C. Problem-Solving Courts

Indiana's tradition of institutionalizing alignment processes at the intersection of criminal justice and behavioral health systems predates JRI. And it started as a grass roots movement, initiated by judges who just wanted to ensure their local justice systems could function effectively under the strain of increased drug and alcohol cases.[104] Indiana's problem-solving courts are our original means of aligning local justice and behavioral health systems. And their widespread use has proved an effective complement to our statewide statutory framework created by State and Local JRAC.

1. The Local Origins of Indiana's Problem-Solving Courts.—In 1996, Judge Barbara Brugnaux initiated one of the first drug courts in the state.[105] Today that number has multiplied and continues to grow.[106] Judge Brugnaux's interest in drug courts began when she saw a Dateline report that focused on the Miami-Dade County, Florida, drug court.[107] She was then a deputy prosecutor in Vigo Superior Court, Division 5, which handled primarily drug and alcohol cases.[108] When Brugnaux was appointed to the bench in 1994, she applied for a drug court planning grant through the United States Department of Justice.[109] Her court was awarded the grant, and a team of criminal justice professionals from Vigo County attended the first federally sponsored drug court planning training in November 1995 in Denver, Colorado.[110]

Over the next four years, several other drug courts emerged in Allen, Marion, Monroe, St. Joseph, and Vanderburgh counties.[111] Those working in the drug court field formed the Indiana Association of Drug Court Professionals (IADCP) and began looking for ways to institutionalize the drug court movement in Indiana.[112] And enabling legislation for drug courts seemed to be the answer for institutionalizing them.[113] As IADCP began exploring legislation

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103. *Id*.

104. Mary Kay Hudson, *Problem Solving Courts in Indiana*, IND. CT. TIMES (May 5, 2010), https://times.courts.in.gov/2010/05/05/problem-solving-courts/ [https://perma.cc/W7Y3-PD8U].

105. *Id.*

106. As of April 2025, Indiana has 140 certified problem-solving courts across sixty-one counties. Loretta Rush, *A joyful milestone for the entire community: problem-solving court success*, IND. CAP. CHRON. (Apr. 21, 2025, at 7:00 ET), https://indianacapitalchronicle.com/2025/04/21/a-joyful-milestone-for-the-entire-community-problem-solving-court-success [https://perma.cc/H4ED-4B4J].

107. Hudson, *supra* note 104.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

in the area, Judge Wayne Trockman of Vanderburgh County requested that the Indiana Judicial Center (IJC) "certify" his drug court under Indiana Code chapter 12-23-14.[114] Judge Trockman's certification request became a component of proposed legislation for drug courts, later adopted by the Indiana General Assembly in 2002 in Indiana Code chapter 12-23-14.5.[115] As will be discussed further in subpart 3, Indiana's unique certification process for problem-solving courts provides local justice and behavioral health stakeholders with a simple means of aligning their systems. The process, which began at the request of a local trial judge, has been used to certify well over 100 problem-solving courts.[116]

2. Problem-Solving Courts Provided Local Stakeholders a Way to Understand Their Shared Responsibility and Flexibility to Deal More Effectively with Behavioral Health Issues.—While there are many sentencing alternatives available to judges, drug courts provide a unique alternative for non-violent offenders at a high risk to reoffend by using a non-adversarial team approach.[117] These team members include prosecutors, defense attorneys, treatment providers, case managers or probation officers, and community corrections and law enforcement personnel.[118] The drug court judge leads the team by conducting frequent meetings for team members and status hearings for participants. This frequent contact enables team members to quickly gain a thorough understanding of their role and its importance to the shared responsibility for the participant.[119] It also helps ensure participant compliance with court ordered treatment, drug testing, and other conditions.[120] And when there is a violation, it allows team members to respond quickly and appropriately. Graduated incentives and sanctions are used to promote compliance or address non-compliance with court orders.[121] The length of program participation varies from court to court but can range from twelve to thirty-six months.[122] Drug court participants often include people charged with possession of a controlled substance, theft, prescription offenses, prostitution, forgery, and operating a vehicle while intoxicated.[123]

3. Statewide Expansion and Quality Assurance Through Certification.—In 2003, the Indiana Judicial Conference (IJC) Board of Directors adopted rules for drug courts, and the Indiana Judicial Center (now the Indiana Office of Court Services) began certifying drug courts shortly thereafter.[124] Indiana was the first

114. *Id.*
115. *Id*.
116. Rush, *supra* note 106.
117. Hudson, *supra* note 104.
118. *Id.*
119. *What Are Problem-Solving Courts?*, IND. JUD. BRANCH, https://www.in.gov/courts/iocs/pscourts/about [https://perma.cc/8GT2-WB6G] (last visited Jan. 20, 2026).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

state to offer such certification.[125] Indiana's drug treatment courts are required to undergo a comprehensive certification process, first developed through our state supreme court, and now governed by state statute.[126] One requirement is the formation of a multi-disciplinary team, including a judge, a prosecutor, a public defender, and—critically—a behavioral health treatment provider.[127] This team meets weekly to discuss the progress of participants in the program, keeping the group highly aware of the needs of each participant and each agency sharing responsibility for their success (or failure).[128]

In 2010, the Indiana Judicial Conference Board of Directors sought to promote the expansion of problem-solving courts in Indiana through legislation. Effective July 1, 2010, House Enrolled Act 1271 created a framework for the establishment and certification for several problem-solving court models, including family dependency drug courts, domestic violence courts, mental health courts, community courts, and veterans' courts.[129] The measure passed unanimously in both houses of the legislature.[130]

4. An Effective Evidence-Based Intervention.—Research clearly indicates that drug courts reduce recidivism. According to the National Association of Drug Court Professionals (now known as All Rise), "The most rigorous and conservative scientific meta-analyses have all concluded that drug courts significantly reduce crime as much as 35 percent more than other sentencing options."[131] In 2007, the Indiana Judicial Center used funding provided by the Indiana Criminal Justice Institute to conduct a multi-site evaluation of five adult drug courts and three juvenile drug courts.[132] The results of the adult drug court evaluation showed that participating courts "reduced recidivism by up to 50% and can produce a return of up to $5.37 for every $1.00 invested in drug court."[133]

And these programs have continued to demonstrate their effectiveness. A recent study, conducted by Temple University, involving a number of Indiana problem-solving courts, revealed the following:

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125. *Id.*

126. IND. CODE § 12-23-14 (2025).

127. IND. PROBLEM-SOLVING CT. R. 13(a).

128. *Problem-Solving Courts*, IND. JUD. BRANCH, https://www.in.gov/courts/iocs/pscourts/ [https://perma.cc/8C3J-U4HG] (last visited Jan. 24, 2026).

129. All of Indiana's problem-solving court models and the certification process are based on the 10 Key Components of Drug Courts. For a comprehensive discussion of the 10 Key Components, see NAT'L ASS'N OF DRUG CT. PROS., DRUG CT. STANDARDS COMM., *Defining Drug Courts: The Key Components* (1997), https://allrise.org/wp-content/uploads/2022/07/Defining-Drug-Courts-The-Key-Components.pdf [https://perma.cc/L72F-ZRZH]; Act of Mar. 4, 2010, Pub. L. No. 108-2010, 2010 Ind. Acts 1256.

130. J. OF THE IND. H.R. & S., 116th Gen. Assemb., 2d Reg. Sess., at H.R. 263, S. 678 (Ind. 2010).

131. Hudson, *supra* note 104.

132. *Id.*

133. *Id.* For a summary of the adult drug court evaluation results, see NPC RSCH., INDIANA DRUG COURTS: A SUMMARY OF EVALUATION FINDINGS IN FIVE ADULT PROGRAMS 2–5 (2007), https://www.in.gov/courts/iocs/files/pscourts-eval-summary.pdf [https://perma.cc/SBH7-7BXT].

[I]ndividuals who completed treatment court programs were:

- 44% less likely to present in an emergency department for a drug-related issue
- 83% less likely to have an emergency management service call for a drug-related issue
- 83% less likely to die than individuals who were eligible to participate in treatment court programs but did not complete one.
- When comparing arrest records before entering a treatment court program and after program completion, participants who completed a treatment court program were 94% less likely to be rearrested.[134]

In the years following passage of Indiana's Problem-Solving Courts Statute, the Problem-Solving Courts Committee of the Indiana Judicial Conference developed rules for problem-solving courts, approved by the IJC Board of Directors.[135] The Indiana Office of Court Services also worked with the committee to develop training and education programs for judicial officers, probation officers, prosecutors, public defenders, treatment providers, and other team members of problem-solving courts.[136] The proliferation of Indiana's problem-solving courts has provided an important means of aligning stakeholders at the intersection of justice and behavioral health systems. This grass roots movement, now well-established in Indiana law, has also been aligned with the larger statewide alignment efforts through JRAC. Indeed, much of the money reinvested through JRAC has come in the form of grants to establish problem-solving courts.[137]

134. *Problem-Solving Courts Committee Meeting Minutes*, PROBLEM-SOLVING CTS. COMM., at 2 (Mar. 15, 2024), https://www.in.gov/courts/iocs/files/prob-solv-cts-minutes-2024.pdf [https://perma.cc/4TSZ-G9AN]; Elizabeth Van Nostrand, *Is Treatment Court Participation Associated with Better Health and Societal Outcomes?*, PROBLEM SOLVING CT. PROJECT (2024), https://sites.temple.edu/pscproject/files/2024/11/PSC-Project-Results.pdf [https://perma.cc/GXC5-AZVL].

135. Hudson, *supra* note 104; IND. PROBLEM-SOLVING CT. R. 1–28.

136. Hudson, *supra* note 104.

137. *Grants*, IND. JUST. REINVESTMENT ADVISORY COUNCIL (2025), https://www.in.gov/justice/grants/ [https://perma.cc/6J6A-ETLD].

D. An Institutionalized Structure to Recognize Emerging Threats and to Provide a Means of Continuous System Improvement— Three Gears Working Together



Indiana has integrated the grass roots alignment processes adopted by local problem-solving courts into the state and local partnership that was institutionalized through JRAC. Over time, this integrated alignment process will enable stakeholders to more quickly identify and respond to emerging threats. It will also serve as a means of continuous system improvement. To illustrate, imagine the set of three gears that appears above represents a local problem-solving court, a Local JRAC, and State JRAC.

The small gear represents a local problem-solving court. It is comprised of stakeholders who work directly at the intersection of the local justice and behavioral health systems. Their everyday experience and continuous interaction with other stakeholders provide them with the most thorough understanding of the current structure and limitations of the local justice and behavioral health ecosystem.

The middle-sized gear represents the Local JRAC. It is comprised of local stakeholders who are also critical to the local justice and behavioral health systems. However, their role is different than that of the stakeholders who work more directly in the system. To ensure the local justice and behavioral health ecosystem can meet the demands placed upon it, its members should understand both the needs of those working directly in the local systems, the local resources (or lack of resources) available to meet those needs, *and* the resources and information made available through the State JRAC.

The large gear represents the State JRAC. It's comprised of state-level stakeholders who must understand both the needs of the local justice and behavioral health ecosystems, as well as emerging threats and trends that have been identified by the federal government and national professional associations whose members are part of State JRAC.

This institutionalized alignment of state and local stakeholders allows national policy relating to the provision of behavioral health services to be better

informed by the needs of local systems. It allows state and local stakeholders to align themselves in ways that would make it more difficult to misdirect national policy and put undo strain on state and local systems. It also allows state and local stakeholders to receive and disseminate information from the national level more directly. Finally, as explained in Part III, alignment allows national policy initiatives to improve the provision of behavioral health services to be efficiently implemented at the state and local levels.

III. INSTITUTIONALIZING JRI'S COLLABORATIVE ALIGNMENT PROCESS ENABLED INDIANA TO EFFICIENTLY IMPLEMENT NATIONAL POLICY INITIATIVES ADDRESSING PROBLEMS AT THE INTERSECTION OF JUSTICE AND BEHAVIORAL HEALTH SYSTEMS WITHOUT THE NEED FOR RENEWED SYSTEM ALIGNMENT

JRI's collaborative alignment process enabled Indiana to efficiently identify national policy initiatives and address problems at the intersection of criminal justice and behavioral health. And institutionalizing the collaborative alignment process has prevented the need for renewed system realignment, saving time and money.

This part begins by describing the work of the National Judicial Task Force to Improve State Court Response to Mental Illness. The Task Force was engaged to address the problems that exist at the intersection of justice and behavioral health systems.[138] Its work produced a final report that included several recommendations that state justice and behavioral health systems can implement to improve the provision of behavioral health services.[139]

This part goes on to describe how the 2022 Indiana Mental Health Summit was used to leverage Indiana's alignment of justice and behavioral health stakeholders to efficiently implement the Task Force's recommendations. In just one day, all essential stakeholders were provided information that enabled them to understand why the justice and behavioral health ecosystem was broken, what resources could be made available to solve the problem, and how they could use their role to be an important part of the solution.

Finally, this part concludes with some suggestions for the use of JRI's collaborative alignment process in other contexts, demonstrating why the process, once put in place, should be institutionalized to better identify and respond to emerging problems and as a permanent process of ongoing system improvement.

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138. *National Judicial Task Force to Examine State Courts' Response to Mental Illness*, STATE JUST. INST. (Jan. 1, 2023), https://www.sji.gov/mental-health-task-force-mhtf/ [https://perma.cc/A5DR-F7HE].

139. NJTF REPORT, *supra* note 27, at 20–45.

A. The National Judicial Task Force to Examine State Courts' Responses to Mental Illness

In 2020, the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) recognized that nearly every local court system was struggling to cope with problems at the intersection of the criminal justice and behavioral health systems.[140] In response, they established the National Judicial Task Force to Examine State Courts' Responses to Mental Illness (Task Force).[141] The Task Force conducted research; developed resources; delivered training and technical assistance; and developed best practices and policy recommendations for courts and communities.[142] This subpart first describes the comprehensive work undertaken by the Task Force to fully understand the many problems that exist at the intersection of justice and behavioral health. It goes on to explain the recommendations that the Task Force made in its Final Report.

1. Task Force Activities to Align Criminal Justice and Behavioral Health Systems.—After the Task Force was created in 2020, its members met regularly over the next two years to collect, examine, and analyze information; discuss and debate the best responses; and develop tools and resources to lead and guide system improvements.[143] But before any of those tools and resources could be implemented, it was necessary to align the behavioral health and criminal justice systems for all critical stakeholder groups to understand how best to use them. Those efforts were significant and are discussed below.

a. CCJ-COSCA regional summits held to improve the court and community response to mental illness.—To improve court response to mental illness, the CCJ and COSCA hosted five multi-day regional summits.[144] In 2019, teams from the Western Region met in Sun Valley, Idaho, and teams from the Midwest Region met in Deadwood, South Dakota.[145] In 2022, following delays caused by the pandemic, states from the other three regions convened in Austin, Texas; Burlington, Vermont; and Brooklyn, New York.[146] At each summit, distinguished national and regional speakers addressed issues at the intersection of communities, state courts, and behavioral health.[147] States sent multi-disciplinary teams selected and led by Chief Justices and State Court Administrators.[148] These state teams were then tasked with identifying priority needs in their states.[149] The State Justice Institute funded state teams so that they

140. *Id.* at 9.
141. *Id.*
142. *Id.*
143. *Id.* at 13.
144. *Id*. at 14.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

could implement priorities.[150]

b. Collaboration and work with SAMHSA.—The Task Force also collaborated with the Substance Abuse and Mental Health Services Administration (SAMHSA) of the Department of Health and Human Services.[151] SAMHSA, CCJ, and COSCA work in partnership with state and national leaders to lead systemic change and innovation.[152] As a practical matter, SAMHSA often provides federal assistance to state governments to address behavioral health issues.[153] But that assistance usually goes directly to state executive branch agencies.[154] Critically, if those state executive branch agencies are not properly aligned with their state courts (which is where many people with behavioral health problems end up), the federal assistance can be far less effective. To mitigate such problems, the Taks Force convened a series of virtual meetings led by a member of the Task Force and a SAMHSA Regional Administrator.[155] Each meeting included all of the Chief Justices, State Court Administrators, and Behavioral Health Directors of each state within the SAMHSA Region.[156] The meetings "were designed to strengthen the connection, communication, and relationship between state judicial and executive branch leaders."[157]

These meetings discussed the common challenges court and behavioral health leaders face and confirmed the need for more effective partnerships.[158] The meetings also allowed participants to recognize that working together across mental health and criminal justice systems can improve the care and experiences of some of society's most vulnerable members and advance the cause of justice.[159]

c. Outreach with other agencies and organizations.—A commitment to identify, learn from, and collaborate with other national partners engaged in this common effort was a fundamental principle of the Task Force.[160] Meetings were held to build a network of partner organizations to identify common goals, available resources, and opportunities for collaboration to maximize resources and avoid duplicating efforts.[161] As part of its outreach activities, Members of the Task Force provided recommendations and presented information on

150. *Id*. at 14.
151. *Id.* at 16.
152. *Id.*
153. *Community Mental Health Services Block Grant*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Apr. 24, 2023), https://www.samhsa.gov/grants/block-grants/mhbg [https://perma.cc/CKC6-XYZA].
154. *Id.*
155. NJTF REPORT, *supra* note 27, at 16.
156. *Id.*
157. *Id*.
158. *Id.*
159. *Id*. at 17.
160. *Id.* at 18.
161. *Id.*

activities to multiple national organizations.[162] For example, the National Association of Counties (NACo) adopted a resolution in 2022 supporting the Task Force Recommendations.[163] The Task Force also adopted a resolution in support of several NACo initiatives.[164] Many of NACo's members are responsible for funding local justice and behavioral health systems. Therefore, committing to support of the Task Force's work was viewed as significant to efforts to improve those local systems.

2. Recommendations.—In July 2022, after almost three years of effort, the Task Force adopted its Findings and Recommendations for state and local court leaders to examine and address systemic problems at the intersection of justice and behavioral health.[165] A summary of those recommendations most relevant to our discussion is set out below.

a. State and trial courts leading change.—Coordination between justice and behavioral health systems, at both the state and local level, is often lacking and ineffective.[166] This lack of coordination can increase recidivism, reduce public safety, and harm treatment outcomes.[167] Therefore, justice and behavioral health stakeholders must examine their systems and community resources to determine the best path forward and to provide the best care and responses to individuals with mental illness. Judges are in a unique position to lead this change because they have frequent interactions with many of the critical stakeholders in each system and because they have the ability to convene these stakeholders to examine and address how to better coordinate their efforts. For this reason, the Task Force recommended the creation of state-level, multidisciplinary teams, led by courts, to improve responses to mental illness.[168]

b. Providing every community a full continuum of options for supervision and treatment.—Funding for and availability of effective behavioral health treatment is inadequate in many communities, resulting in insufficient programs, services, and alternatives other than the criminal justice system.[169] Too frequently, the criminal justice system is the first resort rather than the last resort for accessing care.[170] A continuum of behavioral health programs and alternatives must be available in every community to prevent individuals with mental illness from entering the criminal justice system when it is inappropriate.[171] And even when some criminal justice involvement is appropriate, it is often better to divert to treatment and care as soon as

162. *Id.*
163. *Id.*
164. *Id*.
165. *Id.* at 10.
166. *Id.* at 21.
167. *Id.*
168. *Id*.
169. *Id.* at 23.
170. *Id.*
171. *Id.*

possible.[172] Providing communities with this full continuum can also enhance public safety by ensuring that scarce public resources remain available for true public safety threats, rather than misallocated to respond to mental illness.[173]

c. Court and community collaboration: person-centered justice.—Most state court systems do not adequately address the behavioral health needs of individuals. This can result in people with serious mental illnesses languishing in jails from case backlogs and a lack of community-based alternatives and supports.[174] To address this concern, the Task Force recommended a new model for case flow management that is people-centered and focuses on behavioral health needs including diversion pathways, competency dockets, specialized behavioral health dockets, and treatment courts.[175]

B. The 2022 Indiana Mental Health Summit

In 2022, Indiana's collaborative efforts to align its justice and behavioral health systems culminated in the 2022 Indiana Mental Health Summit.[176] The Indiana Supreme Court, in partnership with the Indiana General Assembly, the Office of the Governor, and other Indiana justice stakeholders—State JRAC—held a one-day Mental Health Summit.[177] The Summit was attended by over 900 Local JRAC members, representing every county in the state, and every member of the State JRAC.[178] It was also attended by the Governor, legislative leaders, and all members of the Indiana Supreme Court. The attendees learned why the intersection of justice and behavioral health systems is so problematic. They learned about national policy initiatives, designed to improve provision of behavioral health services, and—most importantly—they were all engaged to help implement those initiatives at the state and local levels.

The Summit was planned over the course of a year, with assistance from the National Center for State Courts. During opening plenary sessions, attendees learned about the policy missteps, described in Part I of this Article, and current

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172. *Id.*

173. *Id*. at 23–24.

174. *Id*. at 28.

175. *Id.* 28–29.

176 . *Opioids and Behavioral Health Court Responses*, STATE JUST. INST. (2024), https://www.sji.gov/priority-investment-areas/behavioral-health-disparities/ [https://perma.cc/44AW-RPHB].

177. *Id.*

178. *Community teams from 92 counties to attend Mental Health Summit*, IND. JUD. BRANCH (Sep. 19, 2022), https://www.in.gov/courts/news/2022/0919/ [https://perma.cc/8XPK-XSHK]; Camila Fernandez, *Indiana Convention Center hosts historic 2022 Indiana Mental Health Summit*, WISHTV (Oct. 21, 2022, at 17:35 ET), https://www.wishtv.com/news/local-news/indiana-convention-center-hosts-historic-2022-indiana-mental-health-summit/ [https://perma.cc/58KX-C92T].

policy initiatives intended to address those missteps.[179] Following the opening plenary sessions, a variety of breakout sessions were offered to provide relevant information to each stakeholder group in attendance.[180] Finally, a closing plenary session featured a speaker with significant lived experience.[181] Through effective treatment, she recovered from horrible childhood trauma and severe addiction to become a statewide leader in efforts to reform the state's behavioral health system. By sharing her story, she personalized the intended message of the day: this is complex work, but it saves lives and makes our communities better, and we all have a crucial role to play.

Chief among the policy initiatives discussed at the Summit was the Final Report and Recommendations of the Task Force. But the Summit was also used as an opportunity to leverage parallel initiatives such as "988" and the Indiana Behavioral Health Task Force. These separate initiatives were wholly consistent with the work of the Task Force. By featuring them prominently in the Summit, more stakeholders were engaged in the collaborative efforts to align the work. Those initiatives are described below.

In the months that followed, the Indiana General Assembly allocated record funding to improve the state's behavioral health delivery system and expanded its capacity to provide community-based treatment.[182] Perhaps more importantly, every Local JRAC was introduced to the Sequential Intercept Model (SIM) and had the opportunity to engage in Sequential Intercept Mapping of their local justice and behavioral health ecosystem. This exercise, discussed more fully below, equips local stakeholders with a better understanding of their local system and their role in it.

1. Leveraging "988" to Align Stakeholders.—While the National Judicial Task Force was completing its work, other critical stakeholders, including SAMHSA, were helping states implement the 988 Suicide and Crisis Lifeline.[183] "988" is the three-digit, nationwide phone number to directly call the 988 Suicide and Crisis Lifeline.[184] The 988 Suicide and Crisis Lifeline, previously known as the National Suicide Prevention Lifeline, is a national network of crisis centers that help callers overcome crisis situations.[185] These centers are supported by local and state resources as well as SAMHSA.[186]

As part of its implementation efforts, SAMHSA developed a simple way to

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179. A copy of the agenda for the 2022 Mental Health Summit is available online. *Agenda 2022 Mental Health Summit*, IND. SUP. CT. (Oct. 21, 2022), https://www.in.gov/courts/files/news-2022-0919-mental-health-summit-agenda.pdf [https://perma.cc/3WL7-SRLN].

180. *Id.*

181. *Id.*

182. Brandon Smith, *Holcomb hails mental health bills as "sea change" for Indiana*, WFYI (May 16, 2023), https://www.wfyi.org/news/articles/holcomb-hails-mental-health-bills-as-sea-change-for-indiana [https://perma.cc/F5QH-CJ6Z].

183. F.C.C., *988 Suicide & Crisis Lifeline Fact Sheet*, https://www.fcc.gov/sites/default/files/988-fact-sheet.pdf [https://perma.cc/GZ7A-W8QU] (last visited Feb. 14, 2026).

184. *Id.*

185. *Id.*

186. *Id.*

summarize 988's central purpose—increasing the capacity of behavioral health systems to decrease reliance on criminal justice systems. The goal was to provide every community with: (1) someone to call, besides 911; (2) someone to respond, besides law enforcement; and (3) a safe place to go, besides jail.[187] This goal aligned with the recommendations of the National Judicial Task Force's goal of providing a full continuum of behavioral health services. It was fully embraced by our state's behavioral health commission, and it proved very helpful in communicating the purpose of reform efforts to a wide array of stakeholders.

2. Indiana Behavioral Health Commission.—The Indiana Behavioral Health Commission was established in the 2020 legislative session.[188] The Commission examined Indiana's Behavioral Health System and recommended significant changes to improve its performance.[189] Like many states, Indiana's behavioral health system had been underfunded for years.[190] Those changes most relevant to the intersection of Indiana's justice and behavioral health systems are summarized below.

First, the Commission recommended full and sustainable state funding to implement 988 and to provide every community with SAMHSA's three-part goal of someone to call, someone to respond, and a safe place to go.[191] The Commission proposed raising funds for this new comprehensive crisis response system by adopting a surcharge on phone bills.[192]

Second, recognizing that Indiana's community-based treatment system and its underlying financial structure did not allow behavioral health providers to cover their costs for providing evidence-based, integrated, and whole-person care, the Commission recommended transitioning to the federally supported Certified Community Behavioral Health Clinic (CCBHC) model.[193] The Commission recommended making the CCBHC model the primary mechanism for delivering behavioral health care.[194]

The Commission concluded both 988 and CCBHCs would significantly ease the burden of mental illness on the criminal justice system by providing coordinated and effective community-based care.[195] As a complement to those systemic changes, the Commission recommended a series of other criminal-justice-focused strategies, including increasing the number of mental health problem-solving courts and establishing a Medicaid waiver to allow federal

187. IND. BEHAV. HEALTH COMM'N, FINAL REPORT 77 (2022), https://www.in.gov/fssa/dmha/files/INBHC-Report.pdf [https://perma.cc/UR4S-NY46].

188. Act of Mar. 18, 2020, Pub. L. No. 75-2020, 2020 Ind. Acts 452 (codified at IND. CODE § 12-7-2-34, § 12-21-7 (2025)).

189. IND. BEHAV. HEALTH COMM'N, *supra* note 187, at 3.

190. *Id.* at 13.

191. *Id.*

192. *Id*.

193. *Id*.

194. *Id.*

195. *Id.* at 14.

reimbursement of some costs of behavioral health care for individuals while they are incarcerated.[196]

3. The Sequential Intercept Model (SIM).—The Sequential Intercept Model (SIM) can be used to detail how individuals with behavioral health disorders come into contact with and move through the criminal justice system.[197] The point at which a person comes in contact with the justice system is an "intercept," and the SIM helps communities identify resources and gaps in services at each intercept.[198] The SIM mapping process brings together leaders from different agencies, systems, and disciplines to collaborate and identify strategies that will divert people with mental health issues and substance use disorders away from the justice system and into treatment.[199]

Any community can seek assistance, through SAMHSA's GAINS Center, in conducting a SIM workshop.[200] This exercise can be a powerful tool in efforts to align local behavioral health and criminal justice systems. In addition to plotting resources and gaps across the SIM, stakeholders also identify local resources to support diversion from the criminal justice system, introduce community system leaders to evidence-based and emerging best practices for each intercept, enhance relationships across agencies and systems, and create customized local maps and action plans to address gaps.[201]

The SIM, as used in community workshops, appears below.[202]

196. *Id*.

197. *The Sequential Intercept Model (SIM)*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (May 24, 2024), https://www.samhsa.gov/criminal-juvenile-justice/sim-overview [https://perma.cc/FT2N-FV7D].

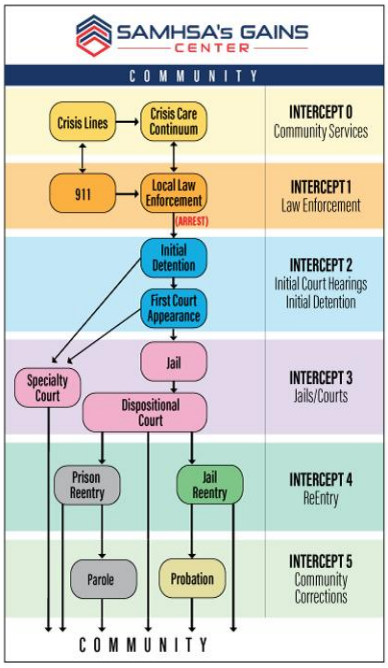
198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*



All local JRAC teams in attendance at the 2022 Indiana Mental Health Summit were introduced to the SIM and offered the opportunity to schedule SIM mapping in their county.[203] This provided local stakeholders the ability to gain a common understanding of their local system and to identify and prioritize areas in need of improvement. But it also provided all stakeholders with a way to meaningfully improve the state behavioral health system by identifying local gaps in a uniform way across the entire state.

C. JRI's Collaborative Alignment Process Should be Institutionalized to Mitigate the Risk of Future Cross-System Crises and as an Ongoing Process of System Improvement

As mentioned in the introduction to this part, in the months following the 2022 Indiana Mental Health Summit, the Indiana General Assembly allocated record funding to improve the state's behavioral health delivery system and greatly expanded its capacity to provide community-based treatment.[204] These system improvements were possible because Indiana's long push to align its justice and behavioral health systems prepared it to implement national policy initiatives to increase effective community-based treatment.

By institutionalizing JRI's collaborative alignment process, at both the state

203. IND. SUP. CT., *supra* note 179.
204. Smith, *supra* note 182.

and local levels, Indiana was prepared to receive the benefits of these national policy initiatives without engaging in a new expensive and time-consuming process of realignment. By institutionalizing the collaborative alignment process offered through JRI, Indiana was prepared and remains prepared for other challenges presented by the intersection of the justice system and other systems that are occasionally interconnected with it. Some potential benefits of institutionalizing JRI's collaborative alignment process are summarized below.

1. Preparing for Whatever Comes Next.—All the stakeholder groups that comprise Indiana's State JRAC are part of larger, nationwide professional organizations. By institutionalizing collaborative efforts among those groups, the entire criminal justice ecosystem is better positioned to recognize and respond to emerging threats.

2. Ongoing System Improvement.—Indiana has a non-unified judicial system, meaning it has no central budget or administrative structure governing the day-to-day operation of local justice systems.[205] Although each of the stakeholder groups comprising JRAC have their own state professional organizations, JRAC provides those individual organizations a space to collaborate to avoid problems in any number of areas. The SIM can help local systems facilitate ongoing discussions around any subject it might be confronting. It can also provide local stakeholders with a uniform means of communicating local needs to their state-level partners. On the other hand, it can also provide state-level stakeholders with a uniform means of ascertaining local needs to better inform policy.

3. Improving Transparency and Providing Stakeholders with the Ability to Inform Policy.—JRI's collaborative process helps diverse justice system stakeholders come to consensus. This is helpful in communicating with members of the public, or the news media, about the criminal justice system to inform policy. At times, state criminal justice policy takes a "top down" approach, allocating scarce resources for issues at the national level rather than issues at the local level that more directly impact Hoosiers.[206] And with local media largely a thing of the past, news about the criminal justice system tends to focus heavily on places like the New York subway system and the border. These stories leave consumers with an impression that the criminal justice system is broken or ineffective, even within their communities. But even assuming these news stories accurately depict the places at issue, they likely don't reflect the situation in most of the country. Aligning JRI's collaborative alignment process allows stakeholders to understand what is happening at the local level and what is needed in their own communities. The process also

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205. John G. Baker, *Now or Never: Reforming Indiana's Court System*, 41 IND. L. REV. 817, 817–20 (2008).

206. *See* Kristine Phillips, *Shrinking staff, rising violence: Problems have plagued proposed 'Speedway Slammer' for years*, INDIANAPOLIS STAR (Aug. 12, 2025, at 15:56 ET), https://www.indystar.com/story/news/investigations/2025/08/12/immigrant-advocates-speedway-slammer-mike-braun-camp-atterbury-miami-correctional-facility/85540656007/ [https://perma.cc/8EBV-BMRY].

allows local stakeholders to communicate their needs to state-level partners, thereby informing policy.

4. Providing Academia the Quality Data Needed to Study and Recommend System Improvements.—Finally, the academy could work more effectively with justice and behavioral health systems if those systems were more user friendly. Institutionalizing collaborative efforts among state and local stakeholders could allow more consistent data to be collected. The legislature could, through the regular collection of uniform data from local systems, commission studies to better inform criminal justice policy at the state and national levels. With more data, the academy can better evaluate the effectiveness of criminal justice policy and give recommendations to improve the system in the future.

CONCLUSION

The intersection of criminal justice and behavioral health systems presents many wicked problems like increased cost, jail overcrowding, and lack of access to treatment. Deinstitutionalization and overreliance on the criminal justice system put undo strain on local systems. This strain became financially unsustainable in the face of the opioid crisis. These wicked problems must be navigated by planners, policymakers, those who work in the systems, and especially those who become enmeshed in the systems.

Most states could not maintain high rates of incarceration in state-funded prison systems. As a result, they searched for ways to imprison fewer people safely. My state, and most other states, used JRI's collaborative alignment process to build consensus among state-level stakeholders and to safely release low-level non-violent offenders (mostly people convicted of drug offenses) into community-based programs. But deinstitutionalization distributed responsibility for treatment and supervision among local stakeholders. To meet the challenges presented by deinstitutionalization, local stakeholders must be aligned to recognize and respond to challenges before they become a crisis. Many resources are now available to ensure local stakeholders can meet these challenges.

Still, their long-term success depends on their ability to react and respond to challenges that cannot always be anticipated. Institutionalizing JRI's collaborative alignment process can provide stakeholders the ability to recognize potential problems early, to engage in constant system improvement, and to inform public policy by communicating local needs more efficiently through the system.

TOWNS OR COUNTIES

DANIEL FARBMAN*

The United States is a nation of counties with a latent romance for towns. The development of American local government law from the arrival of the first Europeans was defined by two opposing visions of settlement and local governance. On the one hand was the county, with its roots in the dispersed settlements and plantations of the South. On the other hand, was the town, with its roots in the communitarian congregational theocracies of New England. These models contrasted and competed in the on-the-ground progress of settler colonialism, and they contrasted and competed in the theoretical debates over how Americans should define themselves and the project of a growing continental nation/empire. On the ground, it was the dispersed settlement, protection of property rights, and minimal government of counties that spread and shaped most local government development from first arrival to 1800. But in the eyes of elites, political theorists, and the founders of the 1780s, the orderly and collective idea of the town remained a figure of political imagination and aspiration. This idealism was written into the Land Ordinance of 1785 and the Northwest Ordinance of 1787. This Article tells the history of these competing modes of settlement and imagination and how they have shaped local government law in the United States from the colonial project and into the imperial project of westward expansion. In so doing, it describes and unsettles the shape of our present local government law. Everyone who lives in the United States lives within the boundaries of at least one local government. Almost all of us live within a county boundary, and many of us live within a separate municipal boundary—in a town or a city. The structure of these governments and the differences between them not only shape the legal landscape of the most sprawling and diverse area of American public law (local government law); they also shape residents' lived experiences and civic imaginations. It matters where people live and how they are governed there. Because it matters, the formation and adjustment of local government systems and their boundaries have been subjects of contestation, theorizing, and political imagination from the beginning of the colonization of North America. Not only has that contestation shaped the world we live in today, but it shapes the ongoing process of local government change, development, and administration.

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* Assistant Professor, Boston College Law School. For help with research and brilliant editing, I would like to thank Jayna Robotham and Scott Sheltra. For comments and feedback on earlier drafts of this work, I would like to thank Greg Ablavsky, Mary Bilder, Anya Bernstein, Niko Bowie, Felipe Cole, Nestor Davidson, Brian Highsmith, Rick Hills, Benjamin Levin, K-Sue Park, Aziz Rana, Nadav Shoked, and David Schwartz. I would also like to thank the participants in the Boston College Law School Summer Workshop Series, the participants at the annual Local Government Works in Progress gathering, the participants in the University of Chicago Public Law Workshop, the participants in the University of Connecticut Faculty Workshop, and the participants in the International and Comparative Urban Law Conference. Nothing I write would be possible without Brook Hopkins.

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PROLOGUE—KEYSTONE

In the spring of 2023, the newest town in Colorado was born when the resort area of Keystone voted to incorporate.[1] Municipal incorporation can mean many things in many contexts, but in general, "incorporation" refers to the birth of a general purpose local government, such as a city or a town.[2] By incorporating, Keystone emerged from its status as unincorporated land within Summit County and became an independent municipality with its own borders, powers, and responsibilities.[3] In choosing to incorporate, Keystone voters claimed to choose

1. *See* Robert Tann, *Keystone will become Colorado's newest town following incorporation approval*, SUMMITDAILY (Mar. 29, 2023), https://www.summitdaily.com/news/keystone-will-become-colorados-newest-town-following-incorporation-approval-tuesday/ [https://perma.cc/77M7-Y9ZD].

2. *See Municipal*, BLACK'S LAW DICTIONARY (12th ed. 2024).

3. *See* Memorandum from Jennifer Madsen, Town Att'y, Town of Keystone, Colo., to Mayor & Town Councilmembers, Town of Keystone, Colo., exhibit A (Feb. 13, 2024) (on file with the Town of Keystone, Colo.), https://keystone.colorado.gov/sites/keystone/files/documents/24-02-13%20Regular%20Meeting%20Packet.pdf [https://perma.cc/X6FP-AHAE].

local "self-governance" over the status quo of county governance.[4] In the face of what residents complained was "literally no voice or power," incorporation was sold as a means for local control over the tax base, which was "[t]he only way that [they were] going to get [their] needs met . . . ."[5]

In Colorado, as in many states, the barrier to incorporation for Keystone residents was relatively low. All that was required was that residents of an unincorporated area gather at least 150 signatures from landowners and residents of the proposed incorporated place.[6] The petition needed only to describe and map the proposed town, offer a name, and prove that there were enough residents in the proposed new town to make it financially solvent.[7] Once this petition was submitted to the district court for approval, the court set up the mechanism for holding an election of the residents within the boundaries of the proposed new town.[8] If a majority of those residents voted in favor of incorporation, the new town would be incorporated and a new town government formed.[9]

This process was followed in Keystone, and under it, the pathway to incorporation ran entirely through the internal politics of the proposed new town. Some residents were in favor of the new town, arguing that it gave them the tools to protect public safety (controlling street traffic) and to control local tax revenue (Keystone has a lot of high value vacation properties within its putative new borders).[10] A minority of dissenting voices argued that creating a new municipality was unnecessary and would only raise taxes without providing any new benefits or local control.[11] In the end, by a two-to-one majority, the residents of the proposed town of Keystone voted to incorporate, and on March 28, 2023, Keystone emerged as a new town with a new town government and the coveted capacity for "local control."[12]

All throughout this process, as it was designed under Colorado law and as it was pursued through local politics, the Keystone incorporation project was animated by an unspoken pair of core political principles. First, it was assumed

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4. *See* Robert Tann, *Keystone residents pitch their vision for a new town with weeks to go before incorporation vote*, SUMMITDAILY (Mar. 6, 2023), https://www.summitdaily.com/news/keystone-residents-pitch-their-vision-for-a-new-town-with-weeks-to-go-before-incorporation-vote/ [https://perma.cc/H69R-L8FW].

5. *Id.*

6. *See* COLO. REV. STAT. § 31-2-101(1) (2025). In counties where there are fewer than 25,000 residents, the petition requirement is even lower—only forty signatures are required. *See id.*

7. *See id.*

8. *See id.* § 31-2-102.

9. *See id.* § 31-2-103.

10. *See* Tim Huiting, Opinion, *Keystone Incorporation Committee: Becoming a town brings benefits*, SUMMITDAILY (Mar. 25, 2023), https://www.summitdaily.com/opinion/opinion-keystone-incorporation-committee-becoming-a-town-brings-benefits/ [https://perma.cc/R48U-BV3K].

11. *See* Roman Kowalewicz, Opinion, *Letter to the Editor: There are too many negatives to making Keystone its own town; vote no*, SUMMITDAILY (Mar. 23, 2023), https://www.summitdaily.com/opinion/letter-to-the-editor-there-are-too-many-negatives-to-making-keystone-its-own-town-vote-no/ [https://perma.cc/L4JU-YZ2Z].

12. Tann, *supra* note 1.

that the status quo of Summit County government was somehow vestigial, minimal, or basic. County government was *less* government—taxes were lower, services were fewer, and government was simply less robust. Against this backdrop, creating a town government was an act of choosing a more active form of local democratic control in opposition to a minimal and less participatory county government. Second, and related, Colorado law incentivized this choice of local self-government over county government by making it very easy to form a new town.[13] Unlike in some other states, the county and the existing county government had no say at all in whether Keystone would incorporate.[14] Nor were the residents of the county who would be drawn outside of the new boundaries of Keystone given a say in whether those new boundaries would be drawn.[15] Under Colorado law, Keystone was not seceding from its existing local government formation (Summit County); it was emerging into self-governance from the primordial soup of under-governed, "unincorporated" status.[16] By distinguishing virtuous incorporation from secession, Colorado establishes a clear preference for "incorporated" towns and cities over the base-level governance of counties.[17]

In making this distinction and preference in its law, Colorado (like many other states) draws a clear, if implicit, distinction between the two archetypal, base-level forms of local government in the United States. On the one hand, there is the county—a backstop of basic and sometimes minimal services. In most of the country, counties are large and cartographically inclusive. Where one county ends, another begins. On the other hand, there is the town or the city. If counties represent the minimal amount of democratic governance required to maintain a society, towns and cities represent an aspiration towards something more. They represent local control, self-determination, or even participatory democracy. Many states, like Colorado, explicitly prefer towns to counties and make it easy for residents to incorporate new towns out of the base material of the county. In drawing this distinction—and in preferring towns to counties—state laws replicate an underlying tension in political theory that has animated local formation in the United States since the first Europeans began the colonial project of imposing their political imagination on the continent.

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13. *See* COLO. REV. STAT. §§ 31-2-101, -103 (2025).

14. In California, for example, counties are given at least some say in whether new towns and cities can be incorporated through the Local Agency Formation Commission ("LAFCO") process. *See* Bob Brownne, *Mountain House CSD approves application for incorporation*, TRACY PRESS (Jan. 14, 2021), https://www.ttownmedia.com/tracy_press/news/mountain-house-csd-approves-application-for-incorporation/article_40e7e042-56c6-11eb-a8f3-3f3ebeabeaf9.html [https://perma.cc/D2S7-T22B]. For example, when the recently-formed city of Mountain House was incorporated in San Joaquin County, residents had to submit a petition to the "San Joaquin Local Agency Formation Commission," which could review the new boundaries and evaluate the costs and benefits to the county of incorporation. *Id.* Although the county LAFCO ultimately approved the application, the process included much more county voice and was much less deferential to the voters of the new town. *Id.*

15. § 31-2-101(2.5) (describing to whom notice of the petition to incorporate must be sent).

16. §§ 31-2-101, -103.

17. *Id.*

From nearly the first moment that European colonizers set foot in North America, there have been two primary models for local government in the colonized lands that they controlled. In Massachusetts and across New England, the land was settled collectively, and the dominant form of social, religious, and political organization was the town (or, when a town grew sufficiently large, the city).[18] In Virginia, and across the South, land was settled in a far more individualized and dispersed way.[19] The plantation was the center of daily life and the county emerged as a form of local government designed to protect the power of planters and landowners.[20]

This Article is about the origins of these two ways of imagining local government and about the underlying ideals of government and political imagination that they represent. For as long as towns and counties have been counterposed as alternatives, American "founders" and political imaginers have been using them to litigate their aspirations and preferences for local government. From the earliest moments of American political imagination, a consistent dynamic has emerged: statesmen and idealists have preferred the political order and participatory structure of the town, while the organic structure of chaotic frontier settlement and underlying property-based libertarianism has led to the proliferation of counties.

In other words, for the last four centuries, local government in North America has been characterized in much the same way that the incorporation movement in Keystone described itself. Planners and framers have sought to build a nation of towns where self-determination and self-government would be the bedrock of civic participation. Meanwhile, settlers and citizens pursuing their own interests and protecting their property have largely built a nation of counties.

As a result, the towns, cities, and counties that make up the foundation of modern American local government law are the complex product of this contestation. While there are some (even many) towns that are obstacles to participatory civic life,[21] and while there are some counties where a more robust form of participatory civic life seems possible,[22] in most of the country, the underlying dynamic remains familiar. Towns and cities represent (or at least represent the aspiration towards) "more" government—more participation, more regulation, more local voice, and a thicker civic life. And counties represent "less" government—fewer services, less regulation, less democratic

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18. Carl Bridenbaugh, *The New England Town: A Way of Life*, AM. ANTIQUARIAN SOC'Y, Apr. 1946, at 19.

19. *See id.* at 47.

20. *See* Daniel Farbman, *Plantation Localism*, 50 FORDHAM URB. L.J. 771, 774 (2023).

21. An example of this is the town of St. James in North Carolina, which was formed to protect the planned development of St. James Plantation. *See id.* at 788–95.

22. A number of urban counties have created consolidated city/county governments, where the county represents the promise of a thick regional government where suburban and urban resources and political problems are dealt with across parochial boundaries. Unigov in Indianapolis and Miami-Dade are classic examples. *See* IND. CODE § 36-3 (2025); FLA. CONST. art. VIII, § 6 (1968).

participation, and a thinner civic life.

Laws like Colorado's incorporation statute are built on this framework. And this framework itself is built on a long history of imagining and settling, projection, and pragmatism. Because this history has shaped the present of American local government law, understanding it is vital to understanding how we can (or should) navigate the ongoing tensions between a desire for civic participation and a deep-rooted desire to be left alone as we continue to shape and reshape, imagine and re-imagine our local political geography.

The contrast between the town and county shaped the project of colonial settlement and the imagination of localism in the newly formed independent republic. This Article tells the story of planners in New England, Pennsylvania, Georgia, and beyond, who looked to the town as a vector for political order, civic virtue, and collective prosperity. It also tells the story of settlers and colonists in Virginia (and Pennsylvania, Georgia, and beyond), who rejected collective civic projects in favor of individual property claims. Again and again, it is a story of political theory foundering on the shoals of political and economic reality. Again and again, it is a reminder that local government is the place in our public law where political theory and the reality of our lived politics and culture collide.

I. INTRODUCTION—1783 AND THE NORTHWEST

In 1783, the United States was faced with new questions of westward imperial imagination. The Colonies that had been part of the British Empire were now, according to the terms of the Treaty of Paris, an independent nation.[23] This transformation was tricky enough,[24] but along with independence came the problem of "new" land.[25] Before independence, the colonies were largely bound between the Atlantic coast and the Appalachian Mountains, but the land claimed by the British Empire stretched west to the Mississippi River.[26] In an act of optimistic cartographic speculation, the colonies projected their borders westward.[27] A map of the colonial land claims looks like a child drew westward lines extending colonial borders to the Mississippi River.[28] Virginia claimed most of the land north of its southern border while Massachusetts, Connecticut, and New York disputed the land stretching west from their borders.[29] North Carolina, South Carolina, and Georgia each claimed a slice of westward land (though South Carolina's claim was little more than a miniscule strip).[30]

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23. *See* GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 33–36 (2017).

24. The new states' unsteady settlement of their relationships to each other in the Articles of Confederation was never stable and would lead, through a series of crises, to the drafting and ratification of the new Constitution in 1787. *See generally id.*

25. *See infra* Figure 1.

26. *Id.*

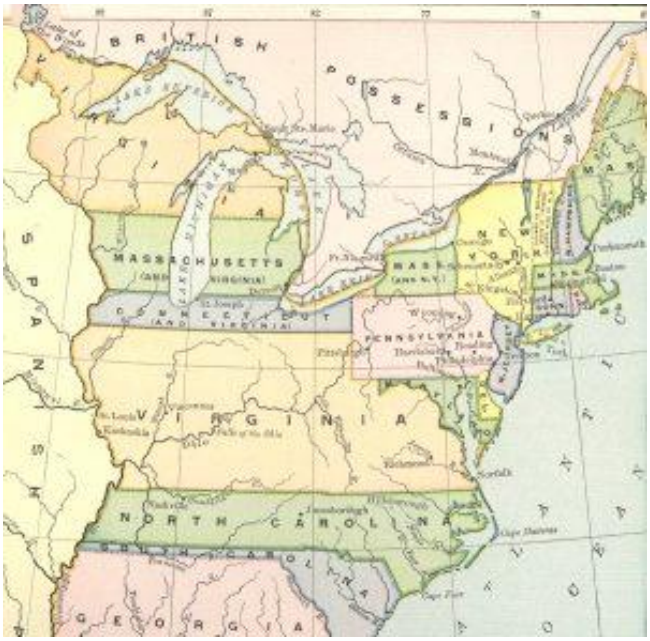
27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

Figure 1[31]



These land claims were contested and complex. For the most part, the land west of the mountains had not been seized and colonized by Europeans, which meant that it was the home of hundreds of thousands of Indigenous People[32] who had either been living there for generations or who had been pushed westward by earlier European colonization. In the eyes of the colonists and the newly minted states, this land was "unoccupied" but under the jurisdiction of

31. Richard J. Werther, *The Articles of Confederation and Western Expansion*, J. OF THE AM. REVOLUTION, fig. 1 (June 14, 2022), https://allthingsliberty.com/2022/06/the-articles-of-confederation-and-western-expansion/ [https://perma.cc/2EE2-UDBF].

32. The question of terminology, in referring to the people living in North America before the arrival of Europeans, is complex—and there is no single settled scholarly or political convention. *See generally* Brooke Bauer & Elizabeth Ellis, *Indigenous, Native American, or American Indian? The Limitations of Broad Terms*, 43 J. EARLY REPUBLIC 61 (2023). Indigenous People in the United States represent a huge diversity of language, culture, and experience. *See generally id.* Some people prefer the use of "Native" or "Native American," others prefer "Indigenous," and still others prefer "American Indian." *Id.* at 62. I am conscious that I am writing about this topic and these people as an outsider (and as a descendent myself of European settlers). With that said, I am persuaded by scholars wiser than myself that all of "these labels foreground peoples' relationships to the settler governments, and so they are primarily useful for talking about colonization and settler political and legal ideologies." *Id.* at 74. For this reason, where talking about individual tribal nations, I will use names or the term "tribal nation." And where talking about the broader group of Indigenous People generally, I will use that term. Words matter, and terminology matters. This is not a perfect solution, but it is a considered one. That is, in the end, the best that those of us writing about the past can do.

the newly formed nation.[33] Decisions had to be made: would the land be part of existing states or ceded to the national government? Who would sell the land? On what terms? Who would settle the land? Under whose authority? How would government function amongst the settlers?

These were questions of foundational political theory, but they were also essentially pragmatic questions. The words of an anonymous editorialist summed up the underlying contingency of the situation in the eyes of many of the newly minted Americans: "We live at the origin of things."[34] The same people who were fighting over the terms of the new national order projected their imaginations westward over the "unsettled" land. They imagined the westward expansion of the best parts of the new nation and sought to use what they saw as the blank slate of the West as a buffer against what they saw as the worst predilections of their neighbors.[35]

In all of this imagining, their pictures of settlement were specific and local. The blank slate would be filled with order, virtue, and self-government. To make that happen, there would have to be not only territorial government, but local government.

Since the first years of the European settler colonialist project, the questions of how land was owned, sold, and held were entwined with the problem of how the owners and inhabitants of the land would be governed. Across the colonies, starkly different ideas about land distribution were both the cause and product of starkly different ideas of local government.[36] In New England (and in other parts of the North influenced by Yankee migration), land was generally sold in large grants to be resold and developed according to a centralized plan.[37] In other words, settlement was largely collective and towns were generally imagined and formed before the land was sold and divided up.[38] By contrast, in

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33. *See* Michael Witgen, *A Nation of Settlers: The Early American Republic and the Colonization of the Northwest Territory*, 76 WM. & MARY Q. 391, 392 (2019).

34. *See* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 38 (Univ. of Notre Dame Press 2019) (1987).

35. *See* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 4 (2021). Ablavsky emphasizes orderly treaty relations with Native nations and clear property rules. *See id.* His masterful book dives deep into the weeds (and failures) of these aspirations. *See generally id.* This Article adds a missing layer to that story—the layer of the local government emerging from and then governing the distributed property.

36. Here, and throughout the Article, I will refer to a somewhat simplistic binary opposition between the New England vision of local government and the Virginian vision. As I will discuss below, it is of course true that there were many variations of these systems within states and regionally across New England and the South. It is also true that the story of the Mid-Atlantic states is muddled and complex with states like Pennsylvania, New York, and New Jersey adopting elements of both systems and perhaps creating altogether separate models. With that said, the binary between New England and Virginia was largely understood as an operative binary by the framers of the new nation in the 1780s. Moreover, this binary reflects a still-existing rough binary in operation today between town-like places (incorporated, more government) and county-like places (unincorporated, less government). Like everything in Local Government Law, things are much messier and more nuanced below the surface—but there is value in resisting the gravity of chaos and contingency in order to see the patterns that emerge at higher levels of generality.

37. Bridenbaugh, *supra* note 18, at 19–20.

38. *See infra* Part II.A.

Virginia and most of the rest of the South, land was sold to individuals and settlement was haphazard and guided by individual choice.[39] Dispersed population was the rule, and towns and cities were rare.[40] The center of political, economic, and private life was the plantation.[41] County government was largely formed as an *ex poste* solution to collective problems faced by these individual owners.[42] Local government at the county level was intended not to serve the goals of communitarian self-government, but rather to protect the interests of property owners.[43]

All of this was relatively well understood in 1783, when the leaders of the newly-independent United States were faced with the question of what to do at "the origin of things." They understood the costs and benefits of communitarian, pre-planned, town-based settlement versus individualized, free-range, plantation and county organization. Understanding these differences, led by both Virginians (including Thomas Jefferson) and Yankees, they chose to endorse the township model when they laid out the framework for the distribution and settlement of the "new" land in the Land Ordinance of 1785 and the subsequent Northwest Ordinance in 1787.[44]

But this township plan went off-track almost immediately—in fact, initially, the Northwest was settled in a haphazard, individualized way. Instead of a system of well-ordered towns, what emerged was a quilt of dispersed settlements organized into counties loosely governing (and protecting the property holdings) of individual owners and speculators.[45] The Founders had tried to choose towns, but they got counties instead. It was not until after 1830, when the volume of settlement increased and more Yankees found their way west, that something like the aspiration of a town-based system of local government would gain a foothold in the Northwest.

This was not the first time that this dance had happened in the story of local formation in the North American colonies. The original proprietors of Georgia initially imagined that their new colony would be settled as towns rather than counties (and without slavery), only to be overrun by dispersed plantations exploiting enslaved labor and governed by county courts.[46] Likewise, William Penn first imagined that Pennsylvania would be divided into orderly towns, only to find that settlement was haphazard and dispersed into a Mid-Atlantic patchwork of towns, counties, and variations in between.[47]

This misalignment between the elites' political imaginings of the town and the reality of chaotic, dispersed settlement underlies the theoretical contribution of this Article. The relationship between political imagination and the formation

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39. *See infra* Part II.B.
40. *See infra* Part II.B.2.
41. *See* Farbman, *supra* note 20, at 775–76.
42. *See id.* at 778.
43. *See id*. at 778–79.
44. *See infra* Part III.B.
45. *See infra* Part III.C.
46. *See infra* Part II.B.3–4.
47. *See infra* Part II.C.2

of local government in the United States is older than 1776; it is a foundation to the project of settler colonialism in North America. It is also not merely historical; local governments remain vibrant (and sometimes stubborn) sites of contestation about the most basic questions of pragmatic political theory.

This history of the development of local government in the United States, this story, has not been told before in this way. Pieces of it have been hiding in plain sight, but nobody has fully explained the fundamental political and economic differences between towns and counties and the stakes of those differences in the shaping of our political geography. This Article thus fills a gap in the legal historiography of local government in the United States—and as any gap filler is, it is both necessary and perhaps, upon reflection, obvious.

But, as always, behind the history lies a normative goal as well. Every year when I teach Local Government Law, I observe the extent to which most residents of local places do not fully grapple with or understand the differences between how those places are governed. A resident of Bethesda, Maryland (an unincorporated place in Montgomery County, Maryland—governed entirely by county government) is unlikely to see how different the structure of their local government is from that of a resident of Brookline, Massachusetts (an incorporated and wealthy inner-ring suburb of Boston which still preserves vestiges of town-meeting government).

On the one hand, the fact that "normal folks" do not immediately see a difference in how these places are governed suggests that perhaps those differences do not really matter. Maybe there really is no difference (apart from scale) between town and county government. But the history in this Article, and in my other prior work,[48] suggests that we should take a deeper look. From the very beginning of local government in the United States, towns and counties have represented deeply divergent ways of understanding how land should be owned and how we should govern ourselves. The ramifications of these divergent conceptions of political economy still haunt our politics (the urban/rural political divide, the dynamics of state preemption of municipal laws) and our civic imaginations (the contrast between social democratic redistribution and libertarian small-government individualism).

Let me be clear that, in describing the history this way, I do not mean to lionize towns or denigrate counties. I freely admit that, as a matter of intellectual history, *the idea of the town* represents an aspiration towards a collective civic project, which seems to me normatively preferable to the individualist libertarian civic project that dominates the idea of the county. But one of the central themes here, and in the rest of my work, is that the idea of the town has always existed as more of an aspiration than a practice. In colonial New England, towns were theocratic collectives which were also engines of war,

48. *See generally* Farbman, *supra* note 20; *see also* Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413 (2017).

inequality, and genocide.[49] In modern suburban America, towns are often enclaves of preserved wealth that exclude outsiders and protect the status quo.[50] To the extent that there is a normative argument latent in the story I am telling here, it is not that towns or cities are inherently good or politically virtuous. Rather, it is that the idea of the town has been and can be a vector for civic aspiration in ways that the idea of the county has not been and cannot be.

One further disclaimer is necessary before I proceed further. In establishing the binary between towns and counties, I am intentionally leaving cities out of the narrative. There are three reasons for this—two substantive and one pragmatic. The first substantive reason is that cities simply did not play a large role in the story of land distribution and local government formation in the colonial era and the antebellum era.[51] The fact is that there were very few cities in the United States before 1780. When the colonies were founded, of course, there were no European cities at all. After nearly a century of settlement, in 1700 the largest cities in the United States were tiny. Boston and Charleston each had around 7,000 inhabitants,[52] New York had less than 5,000 inhabitants,[53] and Philadelphia around 2,000.[54] All in all, fewer than five percent of all the colonial population lived in cities in 1700.[55] While the overall population grew, cities remained a tiny portion of the American population—less than four percent of the total population of the colonies lived in cities in 1776.[56] Today, of course, cities are the center of our political, social, and economic lives—the most recent estimates indicate that eighty-three percent of Americans live in urban areas.[57]

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49. *See* 10 STEVEN C. EAMES, RUSTIC WARRIORS: WARFARE AND THE PROVINCIAL SOLDIER ON THE NEW ENGLAND FRONTIER, 1689–1748, at 25–29 (2011). Town militias were the core of New England military strength as the colonists pushed westward in their series of brutal wars against the indigenous population. *Id.*

50. *See* Brian Highsmith, *The Structural Violence of Municipal Hoarding*, THE AM. PROSPECT (July 6, 2020), https://prospect.org/civil-rights/the-structural-violence-of-municipal-hoarding/ [https://perma.cc/45MH-KUFV].

51. *See generally infra* Part II.

52. *See Population Trends in Boston 1640-1990*, BOS. HIST. & ARCHITECTURE, https://www.iboston.org/mcp.php?pid=popFig [https://perma.cc/TET4-WHPF] (last visited Jan. 24, 2026); Charles F. Kovacik, *Population*, S.C. ENCYC. (Aug. 22, 2022), https://www.scencyclopedia.org/sce/entries/population/ [https://perma.cc/APU3-J4QE].

53. *Exhibition Text—New York at Its Core: Port City*, MUSEUM OF THE CITY OF N.Y., https://www.mcny.org/nyaic-portcity-online [https://perma.cc/JFF2-2US3] (last visited Feb. 14, 2026).

54. *See* Marie Basile McDaniel, *Immigration and Migration (Colonial Era)*, THE ENCYC. OF GREATER PHILA. (2014), https://philadelphiaencyclopedia.org/essays/immigration-and-migration-colonial-era/ [https://perma.cc/4Y45-4TJ2].

55. *See Cities and Towns*, NAT'L HUMAN. CTR. TOOLBOX LIBR. (Sep. 2009), https://nationalhumanitiescenter.org/pds/becomingamer/growth/text2/text2read.htm#_ednref1 [https://perma.cc/R7VQ-T55S].

56. *See Reading List: The Role of Cities in the American Revolution*, MUSEUM OF THE AM. REVOLUTION (June 17, 2020), https://www.amrevmuseum.org/read-the-revolution/reading-list-the-role-of-cities-in-the-american-revolution [https://perma.cc/SL45-Y5XH].

57. *See U.S. Cities Factsheet*, UNIV. OF MICH. CTR. FOR SUSTAINABLE SYS. (Sep. 2025), https://css.umich.edu/publications/factsheets/built-environment/us-cities-factsheet [https://perma.cc/D9AU-QA52].

While it is nearly impossible to think about American local government *without* cities today, cities were simply not the center of land distribution or government during the colonial period.

This leads me to the second substantive point: because cities were small, they were not readily distinguishable from towns as forms of government. Boston may have been the largest town in Massachusetts, but it was run in much the same way as any other town in the state—it had a town meeting and understood itself to be a part of a coalition of Massachusetts "towns" rather than a city in contrast to towns.[58] New York and Philadelphia were slightly different cases, less because they were bigger or more urban, and more because they were cities in states where towns were not so established as the locus of political power. Charleston was yet another case as it was one of very few large settlements in the entire American South. All in all, however, for these reasons it makes more sense to think of what cities did exist in North America as large towns rather than as a separate category of local government.

This leads me finally to my third pragmatic point. Cities were not central to the local government imagination of the founders in the 1780s and so they are not central to the story that I am telling here. At its origins, the story of American local government development is *not* an urban story. Rather, it is a story of competing ideas of communal settlement (towns) and dispersed settlement (counties). In many ways, the ideology that animated the preference for communal settlement is now lodged in thinking about cities and urban life. But since this was not how the characters in this history saw it, it would be anachronistic and unnecessarily messy to muddle the binary between towns and counties with cities.

I will proceed in three further parts. Part II offers a description of the modes of local government that had developed in the colonies by 1776. The most simplistic description is that in New England, the town or township system dominated.[59] Colonists settled in groups (usually congregations) and conceived of settlement as a collective activity. Land was bought and developed under the expectation that a new town was being created. And the classic trappings of town government followed—town hall meetings, town militias, town schools, and town churches. In contrast to the New England system, the Southern system was rooted in the county and governed by the county court. This system existed

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58. *See* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1660 (2021).

59. A note on terminology. At first glance, it may seem as though the terms "town" and "township" are distinct and carry different meanings. This matters because the term used in both the Land Ordinance of 1785 and the Northwest Ordinance of 1787 is "township," not town. That said, in my research I have found no evidence that these two terms were used differently during the colonial era or in the first years of the independent United States. When William Penn's advisor and friend William Petty advised Penn to adopt the New England system at the founding of Pennsylvania, he called it the "township system." *See infra* notes 186–89 and accompanying text. This terminological muddle persisted into the nineteenth century. Perhaps the most famous champion of the New England town, Alexis de Tocqueville, in the original English translation of *Democracy in America*, referred to "New England Township System." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 68 (Henry Reeve trans., Lawbook Exch. Ltd. 2019) (1847).

in some form from Virginia to Georgia, and it was characterized by scattered individual settlements orbiting around a more distant center of gravity defined by the county court. Individual landowners were linked through churches and some common enterprises, but collective settlements like towns were far rarer. The most common form of dense settlement was the plantation, where owners of land and human beings ruled largely unfettered by the relatively weak constraints of the county court. Between these two models there existed a complex myriad of variations in the Mid-Atlantic region, where the trappings of large feudal holdings were seasoned by reforms instituting more town-like forms of local government.

In Part III, this Article develops this backstory in the founding moment of the 1780s. Faced with a vast expanse of unsettled land west of the Appalachian Mountains, the chief imaginers of the new government drew on the existing forms of local organization to structure their imaginations about what the West could and should look like. Specifically, in a series of negotiations leading to and through the Northwest Ordinance, a tacit national policy developed: the new government imagined the land northwest of the Ohio River as divided into "townships" with a clear, though abstract, desire that settlement resemble the New England plan. At the same time, the land southwest of the Ohio River was left to the South and the southern pattern of settlement.

Following this, I briefly describe the ways in which these clear imaginations began to break down as people started moving west in large numbers. Except for limited exceptions (most famously in the northeastern corner of Ohio), settlers did not arrive in the west in orderly, pre-organized towns. Rather, the pattern of settlement was more haphazard, more individualized, and less orderly. As a consequence, in the first decades of territorial government and statehood, nearly all of the newly settled land was governed by some form of county system, with more formalized and structured towns being much rarer. I close Part III with a gesture toward future work, teeing up the story of an influx of New Englanders who came to the Northwest in the 1830s and brought with them a revitalized ideology about town-based local government.

Finally, in Part IV, I pivot to suggest ways in which this history might change the way we think about the present. The gap between aspirations toward civic participation and the on-the-ground reality of minimal local government remains a central fact of our localism today. We continue to invest local politics with aspiration, and local government remains a place where pragmatic political theory is practiced in law and policy. Design matters, and I argue that we should take the question of local government design as seriously as the drafters of the 1780s ordinances did. Northerners who grew up in towns with town meetings had a fundamentally different relationship to the state and the apparatus of government than Southerners who grew up amid plantations and counties. The same is true today—we are formed by our political geography—and that political geography is determined (if not caused) by its history.

If this is true, then we have more choices in the present about how we design and experience local government than we might think. Towns and counties often

feel like natural phenomena, unchanging and unchangeable. But they were contingent creations and the products of ideological, economic, and political contestation. Even if the solution to our political malaise(s) are not as simple as "towns not counties,"[60] the very fact that there was and remains a real and substantive difference between towns and counties is a reminder that we can and must choose how we govern ourselves in the present. And when we do, we should be thinking not only about local questions, but about the big questions that have haunted local government law forever: what kind of a political project are we engaged in, and how should we relate to each other where we live?

II. TOWNS OR COUNTIES IN THE COLONIES

From the very beginning of the English colonial project in North America, different patterns of settlement dictated different modes of self-government which, in turn, matured into profound differences in politics, culture, and national identity. The story of the way that patterns of settlement shaped the development of local government is at once a story of a slow evolutionary process over time and a story of how lasting political differences were born and nourished. People were and are shaped by their local political environment, and so observing the way that local political environments evolved to be different is a way of understanding how political division is born and grows. Throughout this story in both New England and Virginia, it is striking how local formation is at once haphazard and determinative—how ideas of self-government are both actively constructed and passively retained. The parallel developments of the town and county shaped colonial politics in profound, but subtle ways.

The political geography of the first European settlements in North America reflected both precarity and dependence. In Massachusetts and Virginia, Europeans clustered along the Atlantic Coast with an eye toward home.[61] When they moved inland, it was along navigable waterways that linked the colonists with the coast and with the ships that might bring them back to Europe.[62] When you look at maps of Massachusetts and Virginia drawn in the seventeenth century, this orientation is very clear. In a 1677 map of New England,[63] the towns are clustered along the coast and along the navigable portions of the major rivers, while the named settlements become sparser and sparser the further inland you look. In the spaces on the map between towns are the names of the nations who had been living on the land before the New Englanders arrived: Narragansett, Pequod, and Nipmuc. In the ocean, lying at the bottom of the map, are depicted the ships that connected the colonists with home.

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60. This was the simplistic goal of the carpetbaggers who sought to transform the post-Civil War South by replacing counties with towns. *See generally* Farbman, *Reconstructing Local Government*, *supra* note 48.

61. *See infra* Figure 2.

62. *See id.*

63. *See id*.

Figure 2[64]



In Virginia, another map from 1677 shows much the same thing.[65] The ocean is depicted at the bottom of the map while the settlement that existed is depicted snaking up and along the tendrils of the Chesapeake Bay and James River. As in Massachusetts, large swaths of the map are attributed to the nations of people who had been living there before the Europeans arrived. And, as in Massachusetts, ships stand off the coast ready to take colonists home. (Though unlike the Massachusetts map, those ships are joined by a vivid variety of sea monsters.)[66]

64. Michael Buehler, *Mapping Massachusetts, Part I (1600–1720)*, BOS. RARE MAPS, fig. 4 (Feb. 8, 2019), https://bostonraremaps.com/mapping-massachusetts-part-i-1600-1720/ [https://perma.cc/VHK3-ABAV].

65. *See infra* Figure 3.

66. While the Massachusetts map makes no predictions or assumptions about what lies beyond the westward border (the top of the map), the Virginia map confidently predicts that the "Sea of China and the Indies" lies just across the spine of the Appalachian Mountains. *See id*.

Figure 3[67]



While these two seventeenth century maps reflect a similar sense that the new colonists were perched on the edge of an uncharted, uncertain, and dangerous world, there is one striking difference. In New England, the path of settlement and colonization was clearly marked by little icons that showed concentrated and clear towns—each with a name that is still familiar to us: Cambridge, Watertown, Concord, Hartford, and New London.[68] But in Virginia, a close look at the map reveals only two formal "towns" (Jamestown and Henrico City), while other markers of European occupation are labeled as "plantations."[69] In other words, in the earliest depictions of the political geography of these two colonies, a pattern was evident that would grow over time. In New England, settlement was accomplished in the shape of the collective, congregational (and theocratic) project of towns. In Virginia, by contrast, settlement happened by way of individual acquisition of land and the establishment of largely independent plantations.

If the seventeenth century maps were suggestive, maps from the mid-eighteenth century make this pattern all the more clear. A map of Massachusetts

67. *A Mapp of Virginia Discovered to Ye Hills, and in Its Latt. from 35 Deg. & 1/2 Neer Florida to 41 Deg. Bounds of New England*, LIBR. OF CONG. (1667), https://www.loc.gov/resource/g3880.ct000903/?r=0.466,0.085,0.64,0.34,0 [https://perma.cc/B5PT-Y855].

68. *See supra* Figure 2.

69. *See supra* Figure 3. Maryland is noted as "The Lord Baltimore's Plantation" and Accomack, or the eastern shore of Virginia and Maryland, is noted as "Col. Littleton's Plantation" and "Squire Yearly's Plantation." *See id.*

from 1780 shows a proliferation of towns radiating out from Boston.[70] While rivers and roads are marked, the entire logic of the map depends upon the relationship between the towns. Towns are the inflection points and focal points that mark the colonists' understanding of political space.

Figure 4[71]



Compare this map with a roughly contemporaneous map of Virginia.[72] Unlike the earlier Virginia map, the eighteenth century map is thick with notations indicating settlement.[73] All along the rivers and inlets are the detailed markings of names and places.[74] But almost all of the marked place names are not towns, but rather the names of plantations.[75] This map prominently notes the different counties in the colony and occasionally delineates the location of a courthouse among the plantation names.[76] But the thickest and most detailed notations are not local governments at all, but private place names, either noting owners (Eppes, Powels, Kennon), or the estate names of the plantation (Bullhill, The Row, Mount Pleasant).[77]

70. *See infra* Figure 4.

71. *A New and Accurate Map of the Colony of Massachusets [i.e. Massachusetts] Bay, in North America, from a Late Survey*, LIBR. OF CONG. (1780), https://www.loc.gov/resource/g3760.ar088100/?r=0.272,0.229,0.431,0.229,0 [https://perma.cc/4NSL-MED8].

72. *See infra* Figure 5.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.*

Figure 5[78]



Altogether, and across time, these maps trace the outline of a simple but important story at the root of the history of American local government. From the very beginnings of the colonial project, Europeans arranged themselves in different ways on the North American landscape. In New England, they congregated around churches, town greens, and schools. In Virginia, they spread out on pieces of property over which they claimed dominion. In New England, the governments that emerged were town governments, which over time became empowered sites of self-government (even if they began as locations of theocratic control). In Virginia, no such town governments emerged, which meant that local government was organized in a looser and more diffuse way in the form of the county (and in the accompanying church designation of the parish).

As the rest of this Part discusses, these differences were the product of a complex system of cultural, religious, and economic differences. Rarely was local government the central organizing idea of settlement. Still, the local government institutions that emerged were concrete manifestations of real differences that would only become more entrenched and salient over time. The differences between town and county were not superficial—they were fundamental and would determine the shape of other, deeper differences at independence and into the first century of the new nation.

A. New England: Congregations and Towns

The men and women who came from England to New England arrived from different places, with different backgrounds and different ideas of how to

78. *A Map of the Most Inhabited Part of Virginia Containing the Whole Province of Maryland with Part of Pensilvania, New Jersey and North Carolina*, LIBR. OF CONG. (1755), https://www.loc.gov/resource/g3880.ct000370/?r=0.57,0.362,0.164,0.087,0 [https://perma.cc/E3JP-E43U].

organize themselves. Although the colonizers knew that the land they were travelling to was occupied by indigenous nations, they also saw it as "open" in the sense that it represented opportunity for a fresh start, both socially and economically. But, although both New England colonists and Southern colonists were committed to the acquisition of land,[79] what distinguished the New Englanders was "a concern for community integrity."[80] In broad strokes, New Englanders were more interested in finding and forming communities than Virginians were. Having landed on the other side of the Atlantic Ocean, they found themselves organized into congregations and towns which, in turn, formed the foundation of both religious and political life.

In a thin sense, it is sufficient for the purposes of this Article to observe and affirm that, in New England, from the 1630s onwards, towns stood at the center of the life of the colony. They structured the way that Europeans experienced the economy, politics, culture, and religion. They also formed the center of the military apparatus—a fact that was brutally salient during the nearly constant bloody skirmishes of conquest and expropriation with the Indian nations who were being displaced.[81] But if this thin observation lays a foundation, it does not do enough to explain how and why New England became a land of towns. To do that, one must look at culture in both its secular economic and religious aspects.

1. Congregationalism and Community.—Most tend to look back on the settlers of New England as a unitary group of "Puritans" who shared a common zeal for religious independence and freedom from the feudal and ecclesiastical hierarchies of England. In fact, it was by no means true that every emigrant was a Puritan or that their reasons for coming to North America were religious.[82] Even so, anyone looking at New England from across the Atlantic could hardly have been blind to the Puritan identity of the new colony. Those who described New England to old England argued that unlike Virginia colonists, who sought only profit, New England colonists "went upon two other designs . . . to satisfy their own curiosity in point of conscience [or] to transport the Gospel to the heathen that never heard thereof."[83] Whether or not all those who came to New England were Puritans, they came understanding that they were coming to a place where Puritanism dictated the shape of colonial life.[84] At the same time, it

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79. And, horribly, to the expropriation of land and violent expulsion of the Indigenous People who had been living there for centuries.

80. VIRGINIA DEJOHN ANDERSON, NEW ENGLAND'S GENERATION: THE GREAT MIGRATION AND THE FORMATION OF SOCIETY AND CULTURE IN THE SEVENTEENTH CENTURY 90 (1991).

81. The New Englanders fought their wars through the mechanisms of town militias. Despite a veneer of control at the colony level, it was the town militia that structured and prosecuted military action from King Phillip's War in the 1670s to the Seven Years War in the 1750s and 60s. *See* KYLE F. ZELNER, A RABBLE IN ARMS: MASSACHUSETTS TOWNS AND MILITIAMEN DURING KING PHILIP'S WAR 8–11 (2009).

82. *See* ANDERSON, *supra* note 80, at 89–90.

83. *Id.* at 38. In Anderson's words, "New England, then, promised its settlers *spiritual* advantages; men merely seeking wealth would be better advised to seek their fortunes elsewhere . . . ." *Id.* at 37–38.

84. *See id.* at 39.

would be wise to be somewhat skeptical of the Yankee claims of piety over profit—while some colonists were drawn by spiritual betterment, others were drawn by the prospect of getting rich.[85]

Puritanism, or nonconformism, or congregationalism, are broad terms for a set of religious attitudes.[86] In its simplest terms, the Puritans' attitude toward worship centered the congregation and the "community" of the godly.[87] Perhaps the most famous iteration of this was the Mayflower Compact, in which the congregation of Puritans who took ship on the Mayflower from their exile in Leiden agreed to "covenant and combine our selves togeather into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid . . . ."[88]

While the Mayflower Compact has been vigorously overused as a rhetorical precursor for American democracy, what it does indicate is the broad inclination toward collective self-government as consistent with and necessary to the religious identity of the new settlements.[89] For the first seventeenth century colonists, the distinction between congregation and town was not clearly delineated. But both sides of the community coin indicated a draw towards collective settlement and ordered government.[90] What this meant was that the medium of settlement was not the scattered farm or manorial estate. Rather, it was the town.

It would be a mistake to overromanticize the self-government and democracy that English settlers exercised within their towns. In the colonial center of Boston, the hierarchy of church and magistrates still exercised strong central control over both religious and civil life.[91] But despite the ecclesiastical and economic micromanagement from Boston, the fact was that towns (and their attendant congregations) were established as the center of public life.[92] When towns grew too big, or when congregations splintered, new towns (and new

85. Virginia DeJohn Anderson, reviewing both the historiography and contemporary tracts and advertisements seeking migration, concludes that profit was not the primary motive for most migration. *See* Virginia DeJohn Anderson, *Migrants and Motives: Religion and the Settlement of New England, 1630-1640*, 58 NEW ENG. Q. 339, 370–83 (1985). But other scholars have noted that dreams of wealth and colonial expansion found their way quickly into the New England consciousness. *See* STEPHEN INNES, CREATING THE COMMONWEALTH: THE ECONOMIC CULTURE OF PURITAN NEW ENGLAND 39–45 (1995). Max Weber and Perry Miller are the most famous of these voices, but there is a deep scholarly tradition linking puritanism with capitalism and the accumulation of wealth. *See id.*

86. *See generally* PERRY MILLER, ERRAND INTO THE WILDERNESS (1956); DAVID D. HALL, THE PURITANS: A TRANSATLANTIC HISTORY (2019).

87. *See* DAVID D. HALL, A REFORMING PEOPLE: PURITANISM & THE TRANSFORMATION OF PUBLIC LIFE IN NEW ENGLAND 163 (2011).

88. 1 WILLIAM BRADFORD, HISTORY OF PLYMOUTH PLANTATION 1620–1647, at 191 (1912).

89. *See* 10 JEREMY DUPERTUIS BANGS, A NEW LIGHT ON THE OLD COLONY: PLYMOUTH, THE DUTCH CONTEXT OF TOLERATION, AND PATTERNS OF PILGRIM COMMEMORATION 11 (2020).

90. *See* ANDERSON, *supra* note 80, at 89. "Settlement would be a corporate enterprise as groups of colonists voluntarily gathered together to establish towns, each with its church, where the spiritual and secular communities would be coterminous." *Id.*

91. *See* MICHAEL ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY 11–12 (1970).

92. *See id.*

churches) were born.[93] When exiles (Roger Williams) or dissenters (Thomas Hooker) left the Massachusetts Bay Colony, they did not abandon the town as a form of settlement. They brought the Puritan idea of congregation, town, and community with them and established towns—in Hooker's case, the towns that hugged the Connecticut River Valley from Northampton and Hadley south to New London.[94]

Even as the first generation of religious purity and colonial exigency wore off, the town and town government had become central to the public cultural identity of New England. Across the region, this cultural underpinning became more politically exigent at the end of the Glorious Revolution in England when William and Mary moved to assert royal control over the heretofore self-determining New England colonies.[95] As Michael Zuckerman so persuasively argues, once the central authority of the Boston clerics and magistrates was supplanted by the Crown, the heart of New England puritan self-determination was forced into retreat at the level of the town.[96] Where congregations had been willing to be subordinate institutions in a centralized system with a centralized base of power, they became independent bases of religious identity and cultural identity when the centralized system was displaced. In Zuckerman's terms, in the eighteenth century in New England, "the public peace could not be entrusted to Boston, but would have to be separately secured in each town in the province . . . From that time forward to the era of the American Revolution, the locus of power and influence over the lives of the people lay primarily in the towns . . . ."[97]

In this way, the Puritan impulse towards communal and congregational settlement established an infrastructure of town government which, over time and under pressure from oppositional royal rule, became increasingly invested with civic and political meaning.

2. Buying and Owning Land.—If religion and culture were part of why New Englanders organized themselves into congregations and towns, it was the raw economic reality of buying and selling land that guided those forces into practice. Having laid claim to the "unoccupied" land in Massachusetts, the colonizing authorities had to determine how that land would be distributed to the colonists who were coming. The various colonial projects in Massachusetts initially offered different answers to this question. In Plymouth, the land was held collectively by a joint stock corporation which meant, in effect, that the

93. *See* BANGS, *supra* note 89, at 31–32. Among the most famous splinterings occurred within the first decades of the Europeans' arrival, when Thomas Hooker broke with the Boston hierarchy (John Winthrop and John Cotton) over who should be allowed to participate in government. *See* HALL, *supra* note 87, at 41. Winthrop believed in limiting participation to the few and godly, while Hooker wanted to distribute participation and the franchise more broadly. *See id.*

94. *See* Clarence Deming, *Town Rule in Connecticut*, 4 POL. SCI. Q. 408, 408–09 (1889).

95. *See* ZUCKERMAN, *supra* note 91, at 17.

96. *See id.* at 17–18.

97. *Id.* at 18.

property of the colony was held in common with no individual land owners.[98]By contrast, in the Massachusetts Bay colony based out of Boston, land was initially granted through the same kind of individualized, head right system that was used in Virginia.[99] These initial experiments were short-lived, and by the end of the 1630s, as more colonists began to flow into Massachusetts, both Plymouth and Massachusetts Bay had transitioned to a "town grant" system of land distribution.[100] This meant that land was granted and sold not to individuals, but rather to towns as corporations.[101]

The town grant system did not mean that individuals were not profiting from land sales or purchasing property. Rather, it meant that if and when an individual wanted to buy or occupy land outside of an established town, that land would be sold or granted as a large collective with the understanding that it would, itself, be established as a new town.[102] Once granted by the colony, the land was transferred to "proprietors" who, in turn, managed the sale and distribution of land to individual inhabitants.[103] The town grant system of land distribution meant that as the colonists moved inland and westward, the spread of settlement would retain the fundamental communal form that the first coastal settlements had adopted.

In practice, this system balanced an underlying commitment to communal settlement (and the order and implication of self-government that it entailed) with the project of distributing the colonized land to individual landowners. The colonial leaders sought to constrain settlement and population growth through the vehicle of towns, while the property created in the ever-growing roster of New England towns represented the opportunity for colonists to buy an individual stake in the colonial project.

The specific terms of this system of land distribution were not a direct import from "the old country;" rather, they developed under the pressures and

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98. *See* BANGS, *supra* note 89, at 25. Some historians have suggested that the land in Plymouth was held in true communal ownership. *See, e.g.*, Tom Bethell, *How Private Property Saved the Pilgrims*, HOOVER DIG. (Jan. 30, 1999), https://www.hoover.org/research/how-private-property-saved-pilgrims [https://perma.cc/5NJU-JJS6]. This has been an especially popular claim for conservative and anti-communist commentators, who are eager to point to the fact that Plymouth abandoned the communal project for individual land ownership as proof that communism is bad, unworkable, or unamerican. *Id.* More recent and nuanced accounts suggest that Plymouth was never a true commune, but rather a relatively common (and capitalist) joint stock company, which held the land for the common benefit of all the stockholders (including the colonists). *See* BANGS, *supra* note 89, at 25–26.

99. *See* ANDERSON, *supra* note 80, at 90–91.

100. *See id.* at 91.

101. *See id.*

102. In practice, the entrepreneurial colonists who set out to occupy land that was vacant (in their eyes) after expropriation, acted much like modern day developers. *See* ROY H. AKAGI, THE TOWN PROPRIETORS OF THE NEW ENGLAND COLONIES 3–5 (1924) These town "proprietors" secured the permission to establish a town and then managed the sale and distribution of the property within that town grant. *See id.* For a rich and deep investigation of the town proprietors of a single town—the town of Sudbury, Massachusetts—see generally SUMNER CHILTON POWELL, PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN (1963).

103. *See* EDWARD T. PRICE, DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC 29 (1995).

contingencies of the colonial project. The land-ownership systems that the settlers brought with them from England were not all the same. As Sumner Chilton Powell's rich account of the formation of Sudbury, Massachusetts demonstrates, English colonists drew on at least three distinct ways of thinking about land ownership from their homes: "[T]he open-field manorial village, the incorporated borough; and the enclosed-farm East Anglian village."[104] Open-field villagers operated in the remnants of a feudal regime where the "Lord of the Manor" owned the land and administered the farming and grazing on common fields.[105] In caricature, this was a system of feudal aristocratic rule, where the lord owned land and the peasants worked that land. In practice, it was a thick and complex web of informal but deeply-held relationships, whereby the residents of the village understood themselves to have quasi-ownership rights to the land they worked.[106] That said, open-field villagers were not accustomed to the absolute rights of individual property ownership and instead understood their uses of property to be more collective and collaborative.[107]

In contrast to the open-field emigrants, those who came from incorporated boroughs in England had the experience of living outside of a feudal system and within something more familiar to town government. Like New England towns, English boroughs were composed of individual property owners who were governed (and taxed) by a complex interweaving of civil and church authorities.[108] Burgesses (the residents of boroughs) were accustomed to the more overt project of governing a complex community with concerns that went beyond the common agricultural enterprise of the open-field manor.[109]

Third, last, and perhaps most familiar, were the East Anglian villagers. These emigrants came from communities in East Anglia (an area to the northeast of London) where the land had been "enclosed," meaning that each farmer claimed ownership of his land to the exclusion of his neighbors on the other side of the fence.[110] Enclosed villages had much less common land and farmers owned and worked their land themselves, seeking both to increase their holdings and to compete with their neighbors.[111]

The form of land distribution in New England towns was a refraction of the various systems that the emigrants brought with them, but a copy of none. Towns were formed and laid out as communal projects, but there was no lordly manorial ownership, nor was there widespread commonly held land. Instead, the town committed some common land for school, church, and town green while translating the need for collective organization through mechanisms of self-government that drew on borough government.

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104. POWELL, *supra* note 102, at xvii.

105. *Id.* at 3.

106. *See id.* at 8.

107. *See* WILLIAM SEARLE HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 39 (1927).

108. *See* POWELL, *supra* note 102, at 28–31.

109. *See id.* at 26.

110. *See id.* at 60.

111. *See id.* at 61.

In this sense, the town was a vehicle for land distribution and for civil and spiritual self-government. As such, the town was also a vehicle for colonialism and empire. As the leaders of the New England colonies managed the expansion of European conquest and settlement westward, they proliferated towns as outposts of godliness and government. Not only did each new town help to organize the expansion of population and the economic exploitation of the land, each town also operated its own militia.[112] These militias became a central element of town identity and governance—and they were the roots of the military power of the colonizers when war broke out (as it frequently did) with the indigenous nations, the French, and ultimately the Crown.[113]

And so, between religion, economy, culture, conquest, and self-preservation, the town emerged in New England as the focal point of the public sphere. Towns were local governments and they were influential voices in colonial government as well.[114] But they were, more fundamentally, the base unit of political imagination and the building block of political geography. Towns and town governments were coextensive with the religious and political cultural identity of New England.

B. The South: Parishes and Counties

The men and women that came from England to Virginia in the seventeenth century were not so very different from the colonists who arrived in Massachusetts. As was true in New England, the people who came to Virginia came from all corners of English life: the country, towns, and the city. But, where emigrants to New England were sold the ideology of a godly settlement, the emigrants to Virginia were largely unencumbered by anything more than the dream of profit. The cliché version of the story goes: those in power in New England acted explicitly to maintain and protect the congregations that were coextensive with towns, while those in Virginia acted to protect property rights and profit.

As with most clichés, this distinction between the individual profit motive and the communal Puritans obscures as much as it reveals. Still, it is useful to rehearse for at least two reasons. First, this sense of the difference between the origins of Virginia and the origins of New England was salient the first decade after the Declaration of Independence when the "founders" set about the project of framing the outlines of the new republic. It mattered that influential voices, from John Adams to Thomas Jefferson, thought about the history of settlement in these terms. Second, while the cliché overstates the case, it does point in the direction of some real and meaningful differences that help to explain how the local institutions of Virginia developed so differently from those of New

112. *See* EAMES, *supra* note 49, at 26.

113. *See* ZELNER, *supra* note 81, at 8.

114. *See* Bowie, *supra* note 58, at 1663. Bowie tells the story of how New England towns came to dominate the politics of New England and how the towns' resistance to the Crown was fundamental to the public imagination of what government was and should be during the writing of the new constitution. *See generally id.*

England.

1. Gentry and Class.—By one measure, more than thirty percent of the "free" (i.e., non-indentured) immigrants to Virginia in the seventeenth century identified as "gentry."[115] Despite the fact that they were coming across the ocean to cultivate the North American land and produce cash crops, only three percent of free immigrants identified as farmers or agricultural workers.[116] Behind the "gentry," the next most prominent identified occupation was "merchant."[117] The gentry and the merchants had come to grow and sell tobacco—they had not come as farmers to work the land, but rather as planters to manage workers on their farms.

In the years before the widespread adoption of the system of plantation slavery,[118] the entrepreneurial project of cultivating cash crops in Virginia required that the new colonists find people to work the land for them. This explains why so many indentured servants came to Virginia during the 1600s—and why so many of them were agricultural or unskilled laborers.[119] This is not to say that there were no gentry who immigrated to New England, nor (by any means) that there was no indentured labor in New England.[120] But the raw numbers suggest not only that the system of indentured servitude was more predominant in Virginia, but also match with the economic reality that, in Virginia, there were fortunes to be made on tobacco plantations, while the same was simply not true in New England.[121]

This dynamic matters because it helps explain why, even before the advent of the horrific and brutally profitable system of plantation slavery, the initial settlement patterns of Virginia were sparser. The people who were migrating were not coming to live in congregations or communities. They were coming to make money from the land and to build a ruling social and economic elite.

Where the elite of New England had sought to establish congregational freedom distinct from the Episcopalian oppression at home, the Virginian project was to establish an aristocracy of land, power, and wealth that was

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115. JAMES HORN, ADAPTING TO A NEW WORLD: ENGLISH SOCIETY IN THE SEVENTEENTH CENTURY CHESAPEAKE 26–27 (1994).

116. *See id.* at 27.

117. *See id.*

118. It is important to distinguish between a period where Africans (and Indigenous People) were enslaved and forced into labor on small farms (and the economic, political, and cultural reality of plantation slavery, where enslavement was a tool of mass agriculture and a foundational social structure). Ira Berlin distinguishes between "societies with slaves" and "slave societies." *See* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 8–12 (1998). The rise of the mass plantation did not happen until the end of the seventeenth century, and it was not until the rise of the plantation that the oppressive foundation of mass enslavement and exploitation developed. *See id.*

119. *See* HORN, *supra* note 115, at 34. Nearly half of all the indentured servants who traveled from England to the Chesapeake region in the seventeenth century identified as "agricultural" laborers while roughly another quarter identified as "semiskilled or unskilled labor." *Id.*

120. Indentured servitude, like slavery, was a practice that spanned all of the North American English colonies. *See* JOHN WAREING, INDENTURED MIGRATION AND THE SERVANT TRADE FROM LONDON TO AMERICA, 1618–1718, at 78–79 (2017).

121. *See id.*

unavailable at home.[122] This fantasy of lordship (which quickly transformed into reality for many) meant that in the absence of any cultural, religious, or coercive directive to establish communal settlements, many new Virginians actively sought to establish independent plantations at a distance from each other to maintain independence on their private property.[123] That meant that settlement was dispersed with many independent plantations and very few towns.[124]

Just as the towns had emerged as the base-unit of Puritan life in New England, the Cavaliers in Virginia had imposed the self-sufficient and dispersed plantation as the base unit of life on the Chesapeake.[125] Would-be (and actual) lords ruled over the unfree labor of other humans to cultivate cash crops and make their fortunes.

It was against this cultural backdrop that local government in Virginia emerged as an exigent response to two intertwined problems. First, as was true everywhere for the colonial project in North America, settler colonialism was an act of violence that provoked violent response from the people who had been living in Virginia before the English arrived.[126] Under threat from attack from the people whose land they sought to take, dispersed settlement presented problems both of self-defense and coordination.[127] Second, the dispersal of settlement and commitment to property autonomy meant that, on the occasions where collective action was required (roads, taxation, etc.), it was difficult to coordinate.[128] This led to economic chaos and political unrest and incentivized the new gentry of Virginia to organize themselves to rule.[129] They did so not by condensing their settlement into towns or adopting collective ideas of self-government. Rather, they did so by establishing a county court system that empowered the emergent economic and cultural elite to exercise control over a limited public sphere in order to preserve public peace and maintain the economic and cultural status quo.[130]

2. Buying Land and Population Dispersal.—Alongside the cultural strands that pushed Virginians into dispersed settlement ran a system of land ownership and distribution that facilitated that dispersal. In its simplest form, land was

122. *See generally* DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989). David Hackett Fischer observes that "[n]early all of Virginia's ruling families were founded by younger sons of eminent English families . . . with no hope of inheriting an estate in England." *Id.* at 162. By emigrating to Virginia, these younger sons hoped to establish themselves as lords in their own right in the new world. *See id.* It is worth saying that these colonists were very much sons and not daughters. *See id.* Unlike New England, only one in four immigrants to Virginia were women. *See id.* at 229.

123. *See* Kevin P. Kelly, *"In dispers'd Country Plantations": Settlement Patterns in Seventeenth-Century Surry County, Virginia*, *in* THE CHESAPEAKE IN THE SEVENTEENTH CENTURY: ESSAYS ON ANGLO-AMERICAN SOCIETY 183 (Thad W. Tate & David L. Ammerman eds., 1979).

124. *See id.*

125. *Id.* at 183.

126. *See* Warren M. Billings, *The Growth of Political Institutions in Virginia, 1634 to 1676*, 31 WM. & MARY Q. 225, 225–26 (1974).

127. *See id.* at 226.

128. *Id.* at 225–26.

129. *See id.*

130. *See id.*

distributed to Virginian colonists through direct grants to individuals from the Virginia Company.[131] Under Virginia's original "headright" system, each colonist was granted a large tract of land whose size corresponded to the number of people he was bringing over to work that land.[132] In practice, this meant that a rich and ambitious prospective planter who brought over his family and a number of indentured servants could claim thousands of acres.[133] These grants created huge tracts of land controlled by relatively few individuals, and those grants were not required to be concentrated.[134] Rather, colonists were free to spread out in search of the land that suited them best. Not only did this dispersal serve the desires of colonists who wanted the best land (and to live out their manorial imaginings), but it also served the imperial needs of the new colony by spreading the English population more broadly to claim dominion in the face of tribal nations and other European political powers.[135]

To put the situation differently, in Virginia land was distributed to colonists with no requirement of prior planning and without regard to a broader regional plan for distributing and organizing the population. In the absence of religious or cultural pressures that would press colonists into condensed settlements, and with the latent fantasy of lordship and individual domain in the new world, land was settled in a dispersed way, with large parcels of land being held by individual proprietors to control as they saw fit.

3. Slavery and Plantations.—African slavery came to Virginia at nearly the same time as the English colonists. Enslaved people lived and worked in North America across the length of the seventeenth century. That said, for most of the 1600s, Virginia planters relied on the indentured labor of their fellow Englishmen to a much greater extent than on enslaved Africans.[136]

The combination of chivalric aspiration, large-scale individual landownership, and dispersed population rendered the individual plantation the center of colonial power and public life. Landowning elite owned land and controlled a subjugated workforce to produce large scale cash crops for export. That meant that in Virginia, as in most of the Southern colonies, a plantation system had developed as part of a pattern of settlement before the racialized system of chattel slavery became embedded in the political, economic, and cultural fabric of Southern life.

To put it another way, just as towns developed as the base unit of cultural, political, and economic organization in New England in the first decades of the colonial project, plantations emerged as the base unit of local life in the South during that time.[137] But the plantation as a form of social organization was not initially constituted by its relationship to slavery (a relationship that would

131. PRICE, *supra* note 103, at 35.

132. *See id.* at 14.

133. *See id.*

134. *Id.*; *See also* WARREN R. HOFSTRA, THE PLANTING OF NEW VIRGINIA: SETTLEMENT AND LANDSCAPE IN THE SHENANDOAH VALLEY 176 (2004).

135. *See* HOFSTRA, *supra* note 134, at 176.

136. *See* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 306–09 (2003).

137. *See* Farbman, *supra* note 20, at 775.

deepen into the horrific system of plantation slavery that has hung like a pall over American life for three centuries); rather, the plantation emerged as a system of settlement and social organization in the South as a product of how land was distributed and local identity was organized.[138] Plantations were the heart of Southern local government, and their constitutive local character was as essential to Southern life and culture as the town was to New England.[139]

As slavery quickly metastasized and came to dominate the cultural, economic, and political culture of much of the South, the centrality of the plantation as the focal point of local life deepened.[140] Where planters had previously acted as small-scale proprietors on the edge of subsistence and profit, by the beginning of the eighteenth century, large plantations began to emerge where the planter elite ruled as local despots over sometimes hundreds of enslaved people.[141] As slavery and the economic power of the plantation economy grew together, the logic of local plantation power within a weak county system was reinforced. With slavery at the center of life, most of the people living within the system orbited around the power of the plantation. Enslaved humans were subject to direct despotic oppression by the planter elite who claimed ownership over their bodies. Poor whites worked on the periphery of the plantation system, sometimes as direct employees, other times as freelancers and intermediaries.[142]

Where the plantations had begun as dispersed in a kind of neo-feudal dream of would-be gentry, they became a neo-feudal reality as slavery spread. As a result, this reinforced the dispersed settlement patterns in Virginia and southward, and it also made it unlikely that anything like township settlement would take hold. When counties emerged, they promised a tool to allow the planter elite to solve collective action problems at a regional level, but they were never imagined to structure the daily lives of the people living there—that was the role of the plantation.[143]

4. The County Court.—Having founded plantations and settled sparsely across the tidewater of Virginia, a problem emerged: collective governance of this dispersed population of small-scale lords was hard to manage. The classic picture of seventeenth century Virginia is one of social unrest and political disorder—in opposition to the comparatively orderly and stable Northern

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138. *Id.* at 775–76.

139. *See id.*

140. *See id.* at 781–84.

141. It was not until after 1700 that Virginia's tobacco plantations transitioned en-masse to the use of enslaved labor. *See* TREVOR BURNARD, PLANTERS, MERCHANTS, AND SLAVES: PLANTATION SOCIETIES IN BRITISH AMERICA, 1650–1820, at 9 (2015). As Trevor Burnard notes, "As late as 1700, blacks were only a sixth of the population of the Chesapeake, and just 10 percent of slaves lived in units of twenty-one or more individuals." *Id.* at 9. But by 1774, enslaved people made up more than one-third of the "Tobacco Coast," and their labor and value was the dominant source of wealth in the area. *Id.* at 9–10.

142. *See* JEFF FORRET, RACE RELATIONS AT THE MARGINS: SLAVES AND POOR WHITES IN THE ANTEBELLUM SOUTHERN COUNTRYSIDE 14 (2006).

143. *See* Farbman, *supra* note 20, at 775.

colonies.[144] However nuanced this story is in real life, it points to a deeper reality. Between the fiefdoms of the plantations and the distant colonial government, there was a vacuum of government power.

Virginians filled that vacuum with the innovation of the county and the county court. In broad strokes, the county court emerged as a mechanism of local government that spread across the Southern states that were dominated by the plantation system of settlement.[145] The judges, justices of the peace, and magistrates (all terms that were used in some contexts—and sometimes interchangeably) who ran the county court were not chosen democratically, nor were they imagined to be representatives of the whole population living within a given county.[146] Rather, they were chosen from among the richest and most powerful landholding elite in a given county.[147] Their purpose was to maintain the peace and preserve order and the social and economic status quo by providing a forum for airing disagreement and structuring decision-making about whether and how the elite of a county should collaborate on collective goods (roads) or collective needs (public safety).[148]

The boundaries and institutions of counties in Virginia emerged as an adaptation to the dispersed, plantation-based settlement in the tidewater region. Counties emerged first as eight "shires" whose boundaries were drawn around somewhat amorphous centers of population.[149] These boundaries were necessary both to preserve order within the colonists and to protect the colonists from external threats.[150] Within the boundaries, the planter elite established a government centering around a "county court" where a group of magistrates, led usually by a singular judge, heard and resolved disputes among planters while also exercising the role of executive.[151]

The county courts were composed of the landed elite who were chosen by the colonial authorities and reappointed year to year by the central government.[152] These "justices" convened periodically to hear complaints and cases.[153] These meetings often took place at the property of an individual plantation owner, at least before the construction of official county

144. HORN, *supra* note 115, at 334.

145. *See* Farbman, *Reconstructing Local Government*, *supra* note 48, at 419.

146. Farbman, *supra* note 20, at 786 ("The county court system of government was weak and largely delegated power to wealthy landowners.").

147. *Id.*

148. *See id.* at 777–80.

149. *See* Edward Ingle, *Local Institutions of Virginia*, *in* 2–3 JOHNS HOPKINS UNIV. STUD. IN HIST. & POL. SCI. 109, 183 (Herbert B. Adams ed., 1885). A few of the first counties were named after "cities" that represented the original first settlement. *See id.* James City, Charles City, and Elizabeth City all made reference to a former town-like center of population that had been the beachhead of English settlement. *See id.* But by the time the first counties were established in 1634, these "towns" had largely ceased to exist amid the dispersed plantation pattern of settlement. *See id.*

150. *See id.* at 185.

151. *See* HORN, *supra* note 115, at 338–39.

152. *See id.* at 339.

153. *Id.*

courthouses.[154] Justices were not elected, nor were they chosen in consideration of the extent to which they were representative of the county populous.[155] Rather, they were "recruited from among the gentry, prominent mercantile families, and large landowners."[156] While being chosen as a justice was a sign of distinction, the duties were light (and not remunerated). Court days were infrequent, and often only a small proportion of the justices showed up to participate.[157] The purpose of the county court was not to act as an active and continuously engaged local government, but rather to provide a backstop of dispute resolution, criminal law enforcement, and community welfare sufficient to allow the otherwise individualist plantation system to thrive.[158]

The court was most familiarly court-like when it heard private disputes and was empowered to enforce criminal laws.[159] But, as the only government at the county level, the court's duties covered more than just resolving disputes and enforcing the law. The courts were involved in regulating the economy by supervising markets, granting licenses, and establishing local taxation systems.[160] The courts appointed highway surveyors and raised (through taxes) and spent money to build and maintain roads and bridges.[161] The courts were where the poor were cared for (to the extent they were), where inheritance disputes were resolved, and more broadly, where the business of local government took place.[162]

County courts emerged to fill the gap between the proprietary fiefdoms of plantation governance and the need for some measure of collective local authority. Unlike towns, counties were not imagined as thick forms of communal organization. In fact, the first counties in Virginia were not formed until 1636, decades after the first English colonists arrived.[163] When counties and county governments did emerge, they reflected their origins in sparse settlement and the maintenance of the plantation system. County governments were comparatively thin, prioritizing the exigency of protecting private property

154. *See id.*

155. *Id.* at 340.

156. *See id.*

157. CARL R. LOUNSBURY, THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY 19 (2005).

158. *Id.* at 22.

159. *See id.* at 22–25.

160. *See id.* at 25–26.

161. *See id.*

162. *See id.* at 26–28.

163. *See* Emily Jones Salmon, *Early Years and Progress toward County Courts*, ENCYC. VA. (Dec. 7, 2020), https://encyclopediavirginia.org/entries/county-formation-during-the-colonial-period/ [https://perma.cc/C8A2-DFVG]. In South Carolina, counties were not established until well after independence. *See* B. James Ramage, *Local Government and Free Schools in South Carolina*, *in* 12 JOHNS HOPKINS UNIV. STUD. IN HIST. & POL. SCI. 5, 24–28 (Herbert B. Adams ed., 1883). Instead, during the colonial period, what local government there was conducted itself through the Episcopal boundaries of the parish. *Id.* at 5–17. When this was transmuted to lay control, the boundaries of local government were denominated as "districts" rather than counties. *Id.* at 17–24.

and protecting the autonomy of the plantation elite who ran the counties.[164]

C. Feudalism, Freeholders, and Other Middle Ways

In the preceding two sections, I have presented a caricature of two regimes of settlement and land distribution: New England and Virginia. Like any binary, this caricature leaves out much and elides a good deal of nuance. As is true with all corners of local government law—historical and present—the closer you look at the details of local governance, the more it becomes clear how different those details are from place to place.[165] In this vein, in telling the story of the development of the New England town, there are real differences between the first coastal towns, the early inland towns, the towns in the Connecticut River Valley, the towns in New Hampshire, etc. Likewise, the way in which the plantation system established itself in the tidewater of Virginia was different in subtle but important ways from how it became established in the Carolinas and Georgia.[166] These differences matter! But a full accounting of them would occupy more room than I have in this Article.[167] Moreover, too close a focus on these differences threatens to obscure the most important fundamental point for my purposes: that at the moment of independence, New England and Virginia represented the two competing visions of local government in the eyes of the newly empowered Americans looking west.

With this broad apologia, I will very briefly canvas the puzzling middle way of land distribution and government represented by the Mid-Atlantic colonies, from New York to Delaware.

The most honest way of summarizing the way that land was distributed in the Mid-Atlantic is that it was a hodgepodge that ranged from sporadic pockets of New England towns, to large feudal estates (both Dutch and English), to aspirationally planned but chaotically and sparsely settled vastness. Neither the New England model of township settlement nor the Virginia model of scattered plantations were dominant, but both stood in the background. Most importantly for this Article, because land distribution and local government was such a hodgepodge, there was no "Mid-Atlantic" model to compete with New England

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164. This does not mean that county government was "weak." As I have previously argued, counties frequently operated as a kind of pass-through shell of local government, where planters protected the space of the plantation as their realm of local domination through the means of a thin local sphere. *See* Farbman, *supra* note 20, at 780.

165. For just one salient example, the neighboring inner ring Boston suburbs of Cambridge and Somerville appear quite similar in many ways, and yet a close look at their local governments reveals that Cambridge is governed by a strong city manager, backed by a city council elected in at-large elections through ranked choice voting. Somerville, by contrast, has a strong mayor and a city council that is partially elected through a geographical ward system. These differences have salient local consequences! But they are not evident until you begin to look closely.

166. For example, in both the Carolinas and in Georgia, the original planners hoped that settlement would proceed under the township model, rather than the dispersed model of Virginia. *See* PRICE, *supra* note 103, at 336. These aspirations towards organized settlement quickly succumbed to the reality of the more chaotic and organic dispersed plantation model.

167. I hope to expand on these details in future work.

and Virginia in the 1780s. That said, in Pennsylvania in particular, the New England model represented an aspirational standard that would founder on the realities of dispersed settlement. This would turn out to be a consistent pattern in the first half-century of the new republic.

1. New York—Patroons, Manors, and Yankees.—New York was, of course, at first New Amsterdam,[168] and the settlement and local government patterns of the state have their roots partially in the Dutch West India Company.[169] The most salient form of land distribution and local control (beyond the city of New Amsterdam itself) was the quasi-feudal "patroon" system, whereby the company would grant a large tract of land to anyone willing to start a colony of fifty or more people.[170] Patroons operated as feudal lords, having first claim to the ownership of the land in the colony and being empowered to set up a governance system (setting up courts, etc.).[171] The settlements that developed under the patroonship system were compact on the model of European feudal villages, with tenants working the land and doing the commerce of the colony.[172]

While the manorial system of patroonships was a prominent mechanism for governing the colony outside of the cities, the Dutch West India Company also provided for independent farmers to purchase individual plots of land and for towns to incorporate when enough settlers gathered in one place.[173]

While the Dutch were still in control of the colony, New Englanders began to encroach westward, bringing their ideas of town planning and settlement with them. The beachhead of the New England model of settlement was Long Island, where emigrants from New Haven founded Southold and emigrants from Lynn founded Southampton in 1640.[174] Some of these towns represented colonial claims from the English colonies (especially New Haven), but other towns were formed within Dutch governance.[175] Gravesend (what is now Coney Island) was formed in 1643 by Deborah Moody, who had been driven out of Massachusetts for her "heretical" opposition to infant baptism.[176] The town was planned and laid out in the New England style, with land reserved for school and church and with the explicit intention of communal settlement.[177] The Dutch government welcomed Moody and her settlers and folded the New England town into their

168. THEY MIGHT BE GIANTS, *Istanbul (Not Constantinople)*, *on* FLOOD, at 00:48-00:53 (CD, Elektra Records, Jan. 15, 1990); *see also* RHINO, *They Might Be Giants - Istanbul (Not Constantinople) (Official Music Video)*, at 00:51-00:56 (YouTube, Nov. 19, 2021), https://www.youtube.com/watch?v=0XlO39kCQ-8 [https://perma.cc/64JV-4EEZ].

169. PRICE, *supra* note 103, at 213.

170. *See id.*

171. *See id.*

172. *See* JANNY VENEMA, BEVERWIJCK: A DUTCH VILLAGE ON THE AMERICAN FRONTIER, 1652–1664, at 23 (2003).

173. *See* PRICE, *supra* note 103, at 214.

174. *See id.* at 218.

175. *See id.* at 217–20.

176. *See* Anna Minster, *Gravesend*, ATLAS OBSCURA (July 1, 2020),https://www.atlasobscura.com/places/gravesend [https://perma.cc/2YFL-4SFV].

177. *See id.*

colony.[178]

As a result, when Dutch rule ended in 1644 and the colony became New York, the hodgepodge of settlement and local government was already there in a mix of quasi-feudal villages, independent towns, and individual scattered farms.[179] Under English rule, that hodgepodge continued.[180] Large portions of the colony were granted as aristocratic estates by the early governors of the state, which led to huge, consolidated land-holdings under the control of wealthy speculators.[181] These large estates could be run as feudal manors or could be further subdivided by the owners for subsequent sale and settlement.[182] This mechanism of land sale and settlement persisted through and after independence in 1776.[183] New York's colonial (and later state) claims were so vast, the indigenous population so widespread, and European settlement so sparse that ownership and colonization were speculative projects.[184]

Thus, although New York was one of the original thirteen colonies, much of its western lands were in largely the same position as the other land west of the Appalachian Mountains that would be the subject of the Northwest Ordinance. In short, what local government and settlement patterns in New York that existed were a combination of feudal manors, scattered farms, New England towns, and the city of New York.

2. Pennsylvania—Quakers, Speculators, and Dispersion.—The story of Pennsylvania is similar in many ways to that of New York. By 1776, much of Pennsylvania's land had not yet been colonized by Europeans and what land had been distributed and settled was also a mixture of dispersed settlement, towns on the New England model, and the city of Philadelphia.[185] What distinguished Pennsylvania from New York, however, was that where New York was a hodgepodge by (the absence of) design, Pennsylvania's hodgepodge was the result of a design that never came to be.

When William Penn was granted the land that would become Pennsylvania, he set out to survey and map the territory in advance of sale and settlement.[186] Penn's colonization project began more than a half century after the first English people had landed in Massachusetts and Virginia. As such, he had the benefit of comparison and past experience. His friend William Petty explicitly advised him against adopting the Virginia model. Petty urged him to "Avoyd Stragling plantations" and the indiscriminate location that led to dispersed and inefficient

178. *See id.*

179. PRICE, *supra* note 103, at 220–22.

180. *Id.* at 222–26.

181. *See id.*

182. *Id.*

183. *See id.*

184. *Id.* at 232.

185. *See* COMMONW. OF PA., THE PENNSYLVANIA MANUAL 1-12 (2009), https://www.lincolninst.edu/app/uploads/legacy-files/gwipp/upload/sources/Pennsylvania/2010/PAmanual2009.pdf [https://perma.cc/TS5C-Y9SL].

186. *See* PRICE, *supra* note 103, at 258.

settlement.[187] Instead, Petty urged Penn to adopt a township system that would lend itself to urban centers and prevent the chaos and inefficiency of scattered pockets of settlers all across the vast expanse of the colony.[188]

Penn largely took this advice, directing that the colony be mapped and surveyed and that the land be broken up into townships in anticipation that the whole township would be sold and then settled communally on the model of New England.[189] The map that emerged of the pre-surveyed colony in 1687 showed the extent to which Penn imagined that settlement would be ordered, rational, and rooted in the township.

Figure 6[190]



For all this planning, only a few portions of Pennsylvania were actually settled according to the township plan. Penn's careful surveying met up against a few realities. First, in addition to the surveyed townships, Penn had also granted large swathes of land (most of his own ten percent of the land) as estates to be held by speculators and sold in individual lots.[191] Second, the nature of

187. Marcus Gallo, *William Penn, William Petty, and Surveying: The Irish Connection*, *in* THE WORLDS OF WILLIAM PENN 111 (Andrew R. Murphy & John Smolenski eds., 2019).

188. *See id.*

189. *See id.* at 114. In fact, Penn imagined two different models of town settlement. *See* PRICE, *supra* note 103, at 262. The first imagined a town center with a crossroads in the middle and houses radiating outwards. *See id.* The second imagined a central village with houses and farms radiating outwards from a central square. *See id.*

190. *A mapp of ye improved part of Pensilvania in America, divided into countyes, townships, and lotts*, LIBR. OF CONG. (1687), https://www.loc.gov/item/81692881/ [https://perma.cc/R4NP-HFQ5].

191. *See* PRICE, *supra* note 103, at 266.

immigration to the new colony militated against the tight-knit township culture of New England.[192] Quakers, who made up many of the colony's settlers and elites, were not nearly so bound to their congregations as the Puritans were, and the many immigrants from other parts of Europe and around the colonies were heterogenous in ways that did not lead to deep community ties.[193] More than that, the forces pushing people west and north into the "unsettled" lands were individualized and haphazard in ways that pushed dispersed and individualized farmsteading such that squatters and frontier people made up a large portion of the actual settlers—making the actual settlement of Pennsylvania look much more like Virginia's indiscriminate location than New England.

One of the few exceptions to this rule was not a product of Penn's planning, but rather a result of direct New England cultural and political transference. Remember that prior to independence, some of the original colonies claimed to possess vast tracts of land extending westward from their borders. In the case of Connecticut, that meant that while the colony had ceded their claim to the Hudson Valley in New York, the colony leaders claimed portions of what would become Pennsylvania and westward into Ohio.[194] So in the 1750s, a group of Connecticut speculators sought and were granted claims of land in the Wyoming Valley along the Susquehanna River.[195] Pennsylvania (predictably) resisted Connecticut's claims and a complex land dispute blossomed—the result of which was that in 1762, a group of New Englanders arrived in northeastern Pennsylvania and began the process of establishing a new outpost of Connecticut there.[196] After a series of disputes (sometimes violent), in 1774 five towns had been settled and the Connecticut General Assembly had recognized them collectively as "the Town of Westmoreland" and incorporated them into Litchfield County.[197] In short, Connecticut was claiming power to govern the outpost.

Connecticut's westward claim did not survive the chaos of the war, independence, and the forming of the new union.[198] Over and above the drama of the competing claims, however, were the clear ways in which the Connecticut settlers' political and cultural ideology shaped the local government in this corner of the colony. Unlike Penn's planned townships, and very much unlike the hodgepodge that had developed over time, the settlers in the Wyoming Valley brought a clearly articulated New England plan of land distribution and local government. They formed towns on the New England model with town

192. *Id.* at 268.

193. *See id.*

194. *See* Donna Bingham Munger, *America's First Great Land Controversy: A Precedent for MABO? Connecticut Settlers vs Pennsylvania*, 4.2 TASMANIAN HIST. STUD. 42, 42–43 (1994).

195. *See id.* at 43. The Wyoming Valley is the region where Wilkes-Barre and Scranton are located.

196. *Id.* at 44.

197. *See id.* at 45.

198. *See id.* at 49–50. There were really violent skirmishes over the competing claims to the land, but in the end, even though the Yankees were no longer part of Connecticut, they were allowed to stay and own the land that they had laid claim to. *See id.*

centers, allowances for church and school, and compact communal settlement patterns.[199] The echoes of this mode of planning and settlement are still visible in Wilkes-Barre and surrounding towns.[200]

D. The Ideology of Local Government

The story of Pennsylvania is an encapsulation of the way that patterns of settlement and the resulting patterns of local government developed from the accidental contingency of importation (culture, politics, environment, religion, necessity) into concrete expressions of ideology, economics, and democratic theory. In conquering and colonizing the eastern seaboard of North America in the seventeenth and eighteenth centuries, colonial leaders had to figure out how to distribute land to new colonizers and how those new colonizers would be governed (or would govern themselves). The political, economic, and cultural realities that developed from these experiments manifested in the form of a widely divergent set of local government systems across the colonies.

As these divergent systems crystallized, they also became visible to the people who were puzzling over the ongoing question of westward migration and colonization. So, when later colonizers sought to plan how land would be distributed and government would be established, they could look to Virginia and Massachusetts as competing models. Notably, faced with this choice, most of the planners chose the New England model in some way, shape, or form. Not only did William Penn seek to emulate New England in the 1680s, but the proprietors of the Carolinas and Georgia also began by imagining that settlement would proceed in collective, orderly ways.[201]

But, if Pennsylvania shows the growing sense that settlement *should* be structured by a township system, it also shows the ways in which this kind of orderly planning was easily subverted by the chaos of settlement in real life. Without the cultural and religious imperatives of New England, and in the face of vast expanses of apparently available land, it was far too easy for even the best planning to transmute into indiscriminate settlement and dispersal. In the South, this meant that any planned townships quickly dissolved into a version of Virginia's county system where plantations and planter elites dominated a weak local sphere in service of their own despotisms of private property. In the Mid-Atlantic, the story was more complex—with some town governments developing communal coherence, while other forms of dispersed settlement reverted to something more like county government.[202]

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199. *See* PRICE, *supra* note 103, at 274.

200. *See id.* The city of Wilkes-Barre has sprung up from an archetypal New England downtown. *See Downtown's History*, DOWNTOWN WILKES-BARRE, https://downtownwilkesbarre.org/post/history [https://perma.cc/3ULY-VGRE] (last visited Dec. 18, 2024).

201. *See supra* note 166.

202. What is complex about this is that, even today, in New York, New Jersey, and Pennsylvania, "town" government is the form of weak, background local government that governs dispersed settlements and unincorporated land. Thus, it would be too simple to distinguish

In places like Pennsylvania and New York, it was not until actual New Englanders migrated outwards and formed towns that town government really proliferated. In this, we see the history of what would follow in microcosm. In 1780, looking at the land between the Appalachians and the Mississippi River, the leaders of the newly independent nation set themselves to the task of planning how that land would be conquered, distributed, settled, and governed. They drew on the models they had to project an image of government emerging from ordered land distribution. Despite their aspirations, those plans would not materially shape the actual course of migration and local government formation. It would not be until the New Englanders themselves moved west that the idea of the town would become a part of the actual firmament of local government.

III. TOWNS OR COUNTIES IN THE NEW REPUBLIC

A. Land and Imagination

From the beginnings of the American colonial project, the distribution and government of people across the "unoccupied" (conquered and depopulated) land of North America has been at the heart of public imagination. As a matter of aspiration, the elite actors who sought to plan the colonization of North America saw the distribution of land as a project of creating and ordering a society that would yield profits and be susceptible to government. These aspirational imaginations cut against the more chaotic reality of settlement by individual Europeans who came to the colonies for divergent reasons: community, profit, and escape.

The dissonance between aspiration and actuality is the most consistent story underlying both land distribution and local government formation in the colonial and antebellum eras. To put it too bluntly: the elite planners imagined a nation of orderly settlements (much like towns) and the settlers themselves dispersed themselves into a nation of counties. To put it more precisely: settlement and local formation were in a feedback loop where settlement drove local government formation and then, where ongoing elite aspiration looked at the settlement patterns and local governments that had been established, built their subsequent imagination on that foundation.

This is how, in 1780, the leaders of the newly independent United States came to frame the choice of how the western lands would be organized and sold as a choice between New England and Virginia—between communal, compact, and pre-planned towns and scattered, indiscriminately-located plantations and counties. Faced with this choice, like most other elites before them, they chose towns.[203]

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between towns and counties—rather, there, the distinction is between incorporated places and unincorporated "town" land.

203. I should emphasize here, again, that the picture that I am drawing is necessarily simplified. The story of how land was disposed of, and how that process was imagined is

1. Colonial Township Aspirations.—The idea that the town was the ideal form of land distribution and local government was a part of the colonial imagination beyond the boundaries of New England. As mentioned above, in 1680, as he imagined the settlement of Pennsylvania, William Penn pictured his new colony to be organized as agrarian townships, both to maximize his profits from land sale and to best organize the growing population.[204] Penn's advisor, William Petty, explicitly advised in favor of towns and *against* the Southern plantation model of more haphazard and dispersed settlement.[205] Even though Penn and Petty's aspirations were frustrated by the eventual haphazard settlement of many parts of Pennsylvania, their imagination of settlement was clearly ordered around towns—not counties.

If the story of Pennsylvania is instructive, it is not singular. Some of the other later-formed Southern colonies were also imagined as towns rather than scattered plantations. In 1730, the first governor of South Carolina, Robert Johnson, offered a plan to settle the western portions of the new colony *not* as a land of scattered plantations, but rather as "towns . . . to be settled by poorer whites instead of planters and slaves; with diversified farm-and-market economies . . . ."[206] The Carolina townships were designed in explicit contradistinction to scattered plantations and the county system of Virginia. The hope was that "townships would resist the advance of plantation agriculture" and act as "[e]conomically diversified settlements free of slavery . . . ."[207]

The story of the South Carolina frontier echoed even more loudly a few years later, when the colony of Georgia was born in 1732.[208] The crown-appointed Trustees imagined a new colony on the southern frontier of Spanish-held Florida that would be militarily useful and morally upright.[209] They rejected the plantation monocultures of the West Indies (sugar), South Carolina (rice), and Virginia (tobacco) as both economically and morally harmful.[210] In place of the plantation, they imagined "a town-oriented society of tradesmen

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immensely complex. *See generally*, ABLAVSKY, *supra* note 35. Greg Ablavsky's *Federal Ground* explores the nuances of this process in great detail, brilliantly showing how elites on the Eastern Seaboard and in Washington, D.C. aspired to an orderly (and federally controlled) process of settlement—and how in practice that settlement became entangled with the localized complexities of encounters with native nations, financial precarity, and the question of self-government. *See generally id.* Others like K-Sue Park have traced the way in which land claims (and expropriation) took place through localized title registries—showing the violence and contingency running underneath the process of buying and claiming land. *See generally* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries and Jurisdictional Power*, 133 YALE L.J. 1487 (2024). My purpose in this Article is to build on the excellent work done by other historians by layering a focus on local government on top of the story of land distribution.

204. *See* Gallo, *supra* note 187, at 111–12.

205. *See id.* at 111.

206. *See* JOYCE E. CHAPLIN, AN ANXIOUS PURSUIT: AGRICULTURAL INNOVATION & MODERNITY IN THE LOWER SOUTH, 1730–1815, at 38 (1993).

207. *See id.*

208. NUMAN V. BARTLEY, THE CREATION OF MODERN GEORGIA 1 (2d ed. 1990).

209. *Id.* at 2.

210. *Id.*

and small farmers."[211] Slavery would be banned (as would free blacks, Roman Catholics, and lawyers!) and the land would be divided into towns to promote public equality, public order, and to attract the "right sort" of British immigrants.[212] The trustees of Georgia shared similar agrarian utopian ideals to William Penn. As they laid out their ideal towns of Savannah and Augusta, they sought to escape the taint of slavery and materialism and to create an "'American Zion' where the sins of materialism and the dissipation of alcoholism would be purged" from the middle-class emigrants who came from across the ocean.[213] In this, the town and town design were crucial, with individual lots arranged around a public square to promote community, air circulation, and exercise.[214]

In the end, neither the townships of South Carolina nor Georgia survived the increasing pressure of the growing economy of plantation slavery. Almost immediately settlers sought the expansion of slavery—and with it the expansion of the plantation system of settlement and government. For the elites who imagined these places, town settlement was a means to stop the spread of slavery and the inefficient and hard to govern indiscriminate location of settlement.[215] But their best intentions were swamped by the economic imperatives of the booming slave economy. By 1750, Georgia had lifted its ban on slavery and soon after most of the initial township settlements were swamped by scattered plantations, where growing numbers of enslaved people labored and lived.[216] By 1780, Virginia's plantation system and its companion county court system had spread across the Carolinas and Georgia.[217] But that reality should not obscure the fact that, even if the county had become dominant, it had done so against the will and imagination of those who had initially imagined and directed the colonization project. The county followed plantations and plantation slavery and the town receded under that pressure.

This dynamic, cyclically repeated from Pennsylvania, to South Carolina, to Georgia, would be destined to continue to loop over the course of the nineteenth century. Towns and the promise of orderly, compact, and efficient town government would continue to enchant the people who were imagining the project of building a government and a legal system.[218] Those who imagined the new map of the Northwest committed themselves to the idea of the town. So too would reformers who sought to renovate Southern political culture after the Civil War,[219] and so too would utopians who sought to structure the cataclysmic

211. *Id.*

212. *See id.* at 2–3.

213. ROBERT PAULETT, AN EMPIRE OF SMALL PLACES: MAPPING THE SOUTHEASTERN ANGLO-INDIAN TRADE, 1732–1795, at 80 (2012).

214. *See id.*

215. *See* Gallo, *supra* note 187, at 111.

216. *See* BARTLEY, *supra* note 208, at 4–5.

217. *See id.* at 3–4; *see also* Ramage, *supra* note 163, at 7.

218. *See* Gallo, *supra* note 187, at 111.

219. *See generally* Farbman, *Reconstructing Local Government*, *supra* note 48.

forces of the Industrial Revolution.[220] But these aspirations would be consistently met by the more chaotic reality of individualism and dispersion. On the planners' page, towns and order marched westward. In practice, people dispersed themselves and resisted communal governance. In many ways, the story of American local government is an aspiration of towns fading into a chaos of counties.

B. Land Ordinances

1. Land Cession and the "Blank Slate."—The colonial history of Pennsylvania, Georgia, and South Carolina would repeat itself in 1783, after the end of the war and with the ratification of the Treaty of Paris. The leaders of the new republic found themselves facing a new colonial project and its associated questions: how should the land between the Appalachian Mountains and the Mississippi River be distributed, settled, and governed? The shape of these questions was parallel to the original colonial question that the first European colonizers faced in the seventeenth century. The land west of the mountains was vast and populated by many Indigenous People who had either been living there for generations or who had been pushed west by the first wave of colonization.[221] To the eyes of Europeans, the land was "unclaimed" and ungoverned.[222] Westward expansion represented a huge economic opportunity to resolve war debts as well as an imperial necessity.[223] If the United States was to maintain its territorial gains, it had to find a way to settle and govern its western territories.

The first problem in 1783 was that there was no agreement amongst the new states as to who owned the land west of the mountains. At the time of the Revolutionary War, some of the new states claimed wide swaths of land stretching westward from their borders—Connecticut (as mentioned above), Massachusetts, New York, Virginia, North and South Carolina, and Georgia all claimed lands roughly stretching westward from their boundaries.[224] There were at least three problems with these westward claims. First, many of them overlapped with each other and with lands claimed by other states. Virginia, for example, claimed ownership of *all* the land north of the Ohio River—a claim directly in conflict with the claims of New York, Connecticut, and Massachusetts.[225] Connecticut's claim, as we've seen, conflicted with the claims of Pennsylvania and New York (and later the new state of Ohio).[226] In addition

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220. *See generally* MARGARET CRAWFORD, BUILDING THE WORKINGMAN'S PARADISE: THE DESIGN OF AMERICAN COMPANY TOWNS (1995).

221. *See* ELLIOTT WEST, THE WAY TO THE WEST: ESSAYS ON THE CENTRAL PLAINS 9 (1995).

222. KRISTOPHER MAULDEN, THE FEDERALIST FRONTIER: SETTLER POLITICS IN THE OLD NORTHWEST, 1783–1840, at 17–18 (2019).

223. *See* JOHN R. VAN ATTA, SECURING THE WEST: POLITICS, PUBLIC LANDS, AND THE FATE OF THE OLD REPUBLIC, 1785–1850, at 17–18 (2014).

224. *See id.* at 29.

225. *Id.* at 32.

226. *See id.* at 24, 32.

to these competing claims, others of the original thirteen states argued that it was unfair for some states to have westward claims while others did not. States like Maryland argued that the western lands should belong to everyone in the new nation, not to only a select few of the former colonies.[227] Finally, and related to the second problem, was the raw reality that after the war, the new nation was impoverished and everyone understood that its path to solvency ran through selling its newly acquired western lands.[228]

In addition to nationalist reasoning pushing states towards ceding land, there was the reality that there was no effective way for the new states to manage and govern these vast tracts of land. Much of the land was occupied by Indigenous People who were not uniformly eager to sell their land.[229] Moreover, frontier settlement was often haphazard, chaotic, and violent—leading both to internal unrest and sometimes risking war with tribal nations or even with the other imperial powers still active in North America.

For these reasons, the land north of the Ohio River was all-but entirely ceded to the federal government to be governed as a federal territory by 1786.[230] By contrast, the land south of the Ohio River was not ceded so easily.[231] Although Virginia ceded its claims north of the Ohio River, it never ceded its claims to what would become Kentucky—Kentucky was never federal territory, it moved directly from being a part of Virginia to statehood.[232] North Carolina did not cede its western claims until 1790 when, in doing so, it created the short-lived "Southwest Territory" that would become Tennessee six years later, in 1796.[233] In Georgia, cession took even longer—it was not until 1802 that Georgia ceded the territory that would quickly become Alabama and Mississippi.[234]

All of this meant that, in 1785, the new nation's westward gaze was divided. To the north of the Ohio River, there was a swath of land to be sold, settled, and governed according to centralized national policy. To the south, there was a morass of more complex and still-contested land claims. This dichotomy would matter for the future of slavery in the new nation, but it also mattered for the future of local government and the westward dispersal of towns and counties.

2. The Land Ordinance of 1785.—One of the first problems facing the new

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227. *See* Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 34 (1936).

228. *See* VAN ATTA, *supra* note 223, at 30.

229. *See id.* at 32.

230. *See id.* The exceptions to this were the "Western Reserve" of Connecticut, in the northeast corner of what would become Ohio, and, slightly more complicatedly, the military land grant of Virginia, in what would become south-central Ohio. *See id.* at 57. In the first instance, Connecticut refused to cede the land to the federal government, only finally relinquishing its claim after Ohio became a state. In the second instance, Virginia conditioned its cession of land in part on holding a swath of land in reserve that the colony had promised as compensation to soldiers for their service in the recent war. *See id.* at 56.

231. *See* Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353, 370–73 (1977).

232. *See id.* at 373.

233. *See* JOHN R. FINGER, TENNESSEE FRONTIERS: THREE REGIONS IN TRANSITION 127 (2001).

234. *See* BARTLEY, *supra* note 208, at 13.

national leaders as they looked west in 1783 was the fact that although the land was "unsettled" and thus ripe for imposing imperial imagination, it was also affirmatively populated. It was populated, of course, by Indigenous Peoples, whose land claims had not been purchased or expropriated (and who were not inclined to allow westward settlement to progress unhindered). It was also increasingly being populated by opportunistic pioneers who were finding and occupying land on the frontier on their own terms.

The first order of business, before even dealing with the problem of securing title to lands from the Indigenous People who claimed ownership, was to clear the land of the squatters who were settling on the western lands. State governments individually, and the new national government collectively, made edicts and sent forces westward to clear away people occupying "vacant and unappropriated lands."[235] Squatters were a problem not only because they occupied land that was supposed to be vacant and ready for sale, but also because they were disorderly and difficult to govern.[236] They settled where they pleased and felt entitled to their land, either by right of violence or improvement.[237] In some cases, they settled on lands that were disputed with Indigenous Peoples, causing their frontier neighbors with more legitimate land claims to argue that they posed "great imminent & manifest danger of involving the Country in a Bloody, ruinous, and destructive War with the Indians."[238] In the eyes of the new national government, they were not the sort of settlers that were wanted or needed for the imperial project. They were an "infestation," not settlers and citizens, and if action were not taken, the whole West would "soon be inhabited by a banditti whose actions are a disgrace to human nature."[239] As Secretary of War Henry Knox worried, if they were not cleared away, "a precedent will be established, to wrest all the immense property of the western territory out of the hands of the public."[240]

Anxiety about squatters and their unruly and violent relationship to the state and public order cast a shadow over how the new national government set about imagining what was to be done with the land in the northwest. To many elites in the new government, the squatters represented chaos, ungovernable dispersed settlement, and the possibility that profiting off of the vast new lands for sale would be squandered. The answer to this chaos was order—both in the distribution of land and in the imagined local government on that land. As

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235. VAN ATTA, *supra* note 223, at 39. Pennsylvania and Connecticut each ordered crackdowns on squatters in 1783, while the Continental Congress sent a small military force, into what would become Ohio in 1785, to clear away people occupying the land that would soon be surveyed for legitimate settlement. *See id.* at 39, 41.

236. *See id.* at 41.

237. *See id.* In the words of Lieutenant Colonel Josiah Harmer, the officer who led the troops that the Congress had sent to clear Ohio: "These men upon the frontiers . . . have hitherto been accustomed to seat themselves on the best of lands, making a tomahawk right or Improvement, as they term it, supposing that to be sufficient Title." *Id.*

238. *See* R. DOUGLAS HURT, THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1729–1830, at 145 (1998).

239. *See* MAULDEN, *supra* note 222, at 32–33 (quoting John Armstrong).

240. *Id.* at 33.

Congress turned its attention to the question, two models for ordering settlement emerged as possibilities. On the one hand, some Southern and Mid-Atlantic representatives favored settlement on the Virginia model—warrants would be granted by a central land office and settlers could go and find a parcel of land wherever they wanted to be surveyed after it was settled.[241] This plan would mirror the indiscriminate location of Virginia and likely replicate scattered settlement.[242] Still, it would be more rationalized than the chaos of squatting because, according to its original proponents, settler's choice of land would be subject to a pre-mapped grid of land claims.[243]

On the other hand, New Englanders in Congress pushed back against replicating the Virginia model in the Northwest. Worried about dispersed settlements being inefficient and hard to govern, they argued for settlement on the New England township model.[244] Massachusetts brahmin Timothy Pickering wrote that dispersed settlement would be "impossible to govern."[245] Instead, New Englanders argued that carefully planned, coordinated, and compact settlement would ensure not only that the empire expanded, but that it expanded in an orderly, law-abiding, and economically efficient way.[246] In Pelatiah Webster's words, "we can *extend our laws, customs*, and *civil police as fast* and as *far* as we extend our *settlements.*"[247]

These were the ideas on the table as Congress set to work drafting a land ordinance to govern the distribution of land in the Northwest. On the one hand was the model of Virginia: dispersed, individualized settlement. On the other was New England: compact, pre-planned, collective settlement. Behind these models were the already well-established systems of local government associated with them. Where the Virginia pattern of settlement had spread, the county court had spread with it.[248] With the county court came weak local government, the empowerment of propertied elites, and a strong thumb on the scale toward individual property-owners' control over their land. This system flourished in the South where the plantation was the predominant location of power, wealth, and local control in many places.[249] In contrast to this model was the totem of New England settlement: the town. The town stood for a more communal and civic-minded model of local government. In the eyes of many of the nation's new leaders, the ideal of the town represented order, virtue, and the

241. *See* ONUF, *supra* note 34, at 25.
242. *See id.*
243. *See id.*
244. *See id.*
245. *See id.* at 39.
246. *See id.* at 38.
247. *See id.*
248. *See* ROBERT M. IRELAND, THE COUNTY COURTS IN ANTEBELLUM KENTUCKY 10 (1972).
249. *See* Farbman, *supra* note 20, at 774–75. Even in places in the South where plantation slavery was not as dominant, the image of the plantation remained a powerful model for how power and property should be organized. *See* EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM xxvi (2014).

possibility of control.[250]

Given these choices, it turned out that it was not just Yankees who preferred the model of the town. Beginning with Thomas Jefferson, a series of influential Virginians came to agree that compact and deliberate town-based settlement was the best way forward for the northwest.[251] Jefferson was one of the first men tasked with imagining distributing the newly federal lands.[252] Briefly in Congress, between 1783–1784, Jefferson chaired the committee tasked with organizing the impending Virginia land cession for division and sale.[253] Working with Hugh Williamson, Jefferson proposed a system where the entirety of the Northwest would be divided into ten-mile units, which would, in turn, each be divided into a hundred mile-square lots.[254] While Jefferson's original plan said nothing about townships, its commitment to systematic pre-settlement surveying was clearly drawn from the model of New England, rather than the Virginia model of settlement first, surveying later. That said, Jefferson's plan did not require that each ten-mile square "hundred" be settled collectively as a township, nor did it reserve land (and money) for schools and churches, as was customary with township settlement.[255] Though Jefferson never went so far as to advocate explicitly for the New England plan, he did argue that a virtue of his plan was that it would promote a more egalitarian distribution of property—which would militate against the entrenched power of planter elites.[256] In this, his plan was consistent with Jefferson's long-standing critique of planter aristocracy in the South—a critique that he would later develop into an explicit argument against the county court system and for a "ward republic" system modeled on the New England town.[257]

The draft that Jefferson and Williamson's committee generated never came before Congress.[258] Instead, when Jefferson left Congress to serve as minister to France, he passed the draft along to another Virginian, William Grayson.[259] Grayson was no Yankee, but he was also inclined toward the New England plan. Grayson had been an aide to George Washington during the war, and he wrote to him after submitting the draft ordinance to Congress, arguing for "the idea of a township with the temptation of a support for religion & education holds forth an inducement for neighbourhoods of the same religious sentiments to

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250. While I'll admit that my own biases run against counties and toward the aspiration that towns represent, for normative reasons that I will return to in Part IV, I don't intend to defend that normative claim here. Rather, I'm describing what the governing elites came to see in the 1780s, as they considered these questions.

251. *See* VAN ATTA, *supra* note 223, at 34.

252. *Id.*

253. *Id.*

254. *See* BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 35 (Richard T. Ely ed. 1924); VAN ATTA, *supra* note 223, at 34.

255. *See id.* at 37–38.

256. *See* VAN ATTA, *supra* note 223, at 34.

257. *See* Farbman, *Reconstructing Local Government*, *supra* note 48, at 430–33.

258. HIBBARD, *supra* note 254, at 38.

259. *See id.*; *see also* VAN ATTA, *supra* note 223, at 35.

confederate for the purpose of purchasing and settling together."[260] This was in contrast to the "Southern mode" of "indiscriminate locations & settlements, which would have a tendency to destroy all those inducemts [sic] to emigration which are derived from friendships religion and relative connections."[261]

Washington, it turned out, agreed. Of course, Washington was no Yankee himself, but he also supported compact settlement. "Compact and progressive Seating . . . will give strength to the Union; admit law & good government" and prevent the evils of "land jobbers and speculators."[262] With New Englanders in support and enough Virginians on board, Grayson and his committee presented a draft ordinance for the distribution of the northwestern lands that drew heavily on the New England model.[263] The land would be surveyed in advance and divided into rectilinear "townships" that would be divided again into square "lots."[264] Grayson's proposal explicitly adapted the New England model where one township lot was reserved to support building public schools and another was preserved to support religious institutions.[265] Grayson's idea was that every township would be sold whole and then be subdivided by the owner—much like the old idea of the town proprietor in Massachusetts.[266]

When Congress received Grayson's proposal, it provoked a drawn-out debate.[267] Southerners objected to the idea that townships would be sold whole and not by individual lots. They objected to the size of the townships. They objected to reserving lots for schools and religion. Tellingly, however, they did not object to the rectangular surveys or advocate strongly for indiscriminate location.[268] In other words, although Southern critics attacked features of the New England plan, they did not propose to supplant it with the full-fledged Virginia plan. They agreed, at least in principle, that some form of condensed and planned settlement was preferrable to indiscriminate location and dispersed settlement.

What emerged in the spring of 1785 was a compromise that mediated Grayson's whole-hearted embrace of the New England model, but which kept the model largely intact. The townships were made smaller than Grayson had

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260. VAN ATTA, *supra* note 223, at 35; Letter from William Grayson to George Washington (Apr. 15, 1785), *available at* https://founders.archives.gov/documents/Washington/04-02-02-0359 [https://perma.cc/RJ77-LEWK].

261. Letter from William Grayson to George Washington, *supra* note 260.

262. TOM CUTTERHAM, GENTLEMEN REVOLUTIONARIES: POWER AND JUSTICE IN THE NEW AMERICAN REPUBLIC 102 (2017).

263. HIBBARD, *supra* note 254, at 38.

264. *Id.*

265. *See id.*

266. *See* PAYSON JACKSON TREAT, THE NATIONAL LAND SYSTEM, 1785–1820, at 37–38 (1910). New Englanders agreed that the Grayson proposal largely adopted the New England plan. *See id.* at 38. Timothy Pickering had earlier written to Eldridge Gerry and Rufus King recommending that the western lands be settled explicitly on the New England model. *Id.* at 38–39. When Grayson's report was brought to Congress, King wrote to Pickering noting that his ideas had been influential on the proposed plan. *Id.* at 39.

267. *See The Creation of the National Land Policy*, 3 BULL. OF THE CHI. HIST. SOC'Y 72, 73–74 (1926).

268. *Id.* at 74.

proposed, and alternating townships were to be sold by individual lot, rather than sold whole as townships.[269] This meant that the barrier to sale was lower both for potential communal settlers (with fewer lots to buy as a whole) and that there would be room for individual settlers to buy in without going through the mediating mechanism of a township. But if the compromise was not a full embrace of the New England town, it still preserved the scaffolding of the system. It also preserved Grayson's proposal that one lot of each township be reserved to provide for public schools (although the final compromise removed the reservation for the support of religious institutions).[270] Rufus King, the Massachusetts delegate to the drafting committee, confirmed what he saw as the victory of the New England plan when he wrote to Eldridge Gerry that "[Y]ou will find it bears strong features of an eastern System."[271]

When Congress passed the ordinance, it set in motion the first division for sale of the northwestern lands. And it did so with the explicit imagination that these lands would be settled as townships on the model of the New England town. In this, Congress chose towns over counties as it first imagined the settlement of the northwest. And it did so with intention, arguing that counties and dispersed population were less conducive to good government and more conducive to speculation while towns were engines of civic virtue and republican government.

But Congress could not project townships westward by sheer force of imagination. If the idea of compact New England towns spreading across the northwest was behind the Land Ordinance of 1785, the reality was far more chaotic. In the end, at least for the first half century of settlement, it would be the Virginia plan and the county that shaped the political landscape.

C. The Northwest Ordinance

After the land ordinance was settled, Congress had a further task in projecting its imagination westward. Although the land ordinance imagined the microstructure of land sales, local settlement, and local government, Congress still had to devise a mechanism for bringing these settlers under a rationalized system of national control. With the states having ceded their land claims, some mechanism had to be devised whereby newly settled territories could be organized, governed, and eventually admitted to the Union as states.

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269. *See* VAN ATTA, *supra* note 223, at 35–36.

270. *See id.*

271. *Id.* at 36 (alteration in original). One might argue that a victory for the "eastern system" refers only to the system of land distribution and not any kind of statement about the form of local government. There is some truth in this—the land ordinance was explicitly about how land would be subdivided and distributed and it said nothing about local government. And yet, the central premise of this Article is that local government and land distribution are interconnected. Condensed settlement was part and parcel with a township system of government while dispersed settlement was part and parcel with counties. It was the orderly governance and communal spirit of the towns (orbiting around schools and churches) that was the key attraction of the township system in the ordinance. In short, political geography is entwined with and inseparable from forms of public law.

In fact, the process of imagining territorial governance and new states began at the same time and operated in parallel to the land ordinance process. In 1784, Thomas Jefferson chaired a committee that proposed that the western lands be divided into sixteen new states—ten north of the Ohio River and six south of it.[272] Jefferson's idea was that the states be immediately created and that settlers be allowed to adopt the constitutions of other states, until the new states were sufficiently populated to adopt their own constitutions.[273]

Figure 7[274]



Like Jefferson's first draft of the land ordinance, this plan was never adopted in full.[275] Still, it matched with Jefferson's idealized vision of westward settlement in that it promised a form of egalitarian self-government to those free yeomen who would move west.[276] As consideration of the question progressed, the same aspiration that the northwest would be settled in the New England style came to inflect the way that Congress thought about the process of moving from settlement to territory to state.[277]

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272. *See* ONUF, *supra* note 34, at 46.

273. *See id.*

274. *Ordinance of 1784*, NW. ORDINANCE, https://www.northwestordinance.org/p/ordinance-of-1784.html [https://perma.cc/2FYB-9Q45] (last visited Jan. 18, 2024).

275. ONUF, *supra* note 34, at 46.

276. *Id.* at 46–49 (full text of the ordinance)

277. *Id.* at 49.

In order for orderly township settlement to occur, there had to be a matching commitment to territorial government and to a prospective process for political self-determination. The virtuous citizens that men like Grayson and King were imagining would settle the northwest would need a foundational legal framework to articulate their relationship to the nation.[278]

The ordinance did a number of things in service of this larger purpose. As a matter of structure, the Northwest Ordinance created a single district out of territorial lands and provided that each territory should be governed by Congress through the intermediary of a governor, a secretary, and three judges, all of whom would be appointed by Congress.[279] These officers would rule with the power to make laws and appoint local officials (including "civil officers in each county or township") until there were "five thousand free male inhabitants of full age" living in the district, at which point the territory would form a general assembly made up of representatives from the territory.[280] Once the assembly formed, it would supplant the congressionally appointed territorial government for all local purposes and it would send a non-voting delegate to Congress.[281] The idea behind all this was to create an orderly path from unsettled western frontier toward becoming a state on equal footing in the union.[282]

In addition to this structural background, the Ordinance famously laid out a background compact of guaranteed rights: freedom of worship, the right to habeas corpus, trial by jury, and other forms of judicial due process, and an endorsement of public education.[283] In addition to these guarantees to potential settlers, the Ordinance laid out markedly egalitarian ground rules for social order: native nations should be treated with "good faith" and land should only be taken with "consent."[284] More famously, slavery would be banned in the territory (apart from the punishment of crimes)—but the claims of people claiming to own slaves in other parts of the nation would be honored by the mechanism of a fugitive slave clause.[285]

These provisions of the Northwest Ordinance are familiar in large part because they have been rightly understood to be precursors to (and a bedrock for) the Constitution that would emerge from Philadelphia in 1787. But in the context of the Land Ordinance of 1785 and in the analytical frame of this Article, the provisions of the ordinance lay out a framework for orderly settlement.

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278. Manasseh Cutler, the impresario of the fledgling Ohio Company that had been founded to speculate on western lands, was one of the primary lobbyists for the Northwest Ordinance. *See id.* at 58. He thought that it was necessary to attract "'robust and industrious' settlers from New England." *See id.*

279. *See id.* at 60–61.

280. *See id.*

281. *See id.* at 61–62.

282. *See id.* at 62. The ordinance seeks to lay the foundations of republican government "to provide also for the establishment of States and permanent government therein, and for their admission to share in the federal Councils on equal footing with the original States, at as early periods as may be consistent with the general interest." *Id.* at 62.

283. *See id.* at 63.

284. *See id.*

285. *See id.* at 64.

Specifically, the explicit preference for settlement on the New England and northeastern model shows that the Ordinance was a founding structural vision not only for federal law, but for local government law. The Ordinance explicitly imagines that "townships" will exist—and that they will exist as more than administrative surveying abstractions.[286] The Ordinance imagines that at some townships will be independent governments in that the governor is empowered to appoint township officials.[287] Perhaps more telling, the Ordinance imagines that once territorial assemblies are formed, the representatives to those assemblies will be elected "from their counties or townships."[288] This seems to hearken back to the Massachusetts system where the state legislature was made up of representatives from the various towns in the state.[289]

It would be easy to overstate this point. The Ordinance clearly contemplates *both* county and town governments. Moreover, in the same passage that it suggests that representatives might be chosen from their local governments, it also mandates that there should be one representative for every five hundred voting residents.[290] My argument is not that the Northwest Ordinance effectively chooses towns over counties in its text. Rather, the Ordinance was consistent with the ideas running behind the Land Ordinance of 1785 which *did* explicitly prefer condensed settlement and towns over dispersed settlement and counties. The settlers that the framers of both ordinances were imagining were those that would seek ordered settlement, the rule of law, and stability. When people from Jefferson to Grayson to Washington imagined these people, they looked like town residents much more than plantation owners or frontier subsistence farmers.

These substantive points fold into an important semantic observation. People discussing the Northwest Ordinance and the land system of the northwest often take the term "township" for granted. Because of the way that settlement ultimately transpired in the Midwest, townships were generally understood as administrative surveying units. As I discuss below, it was quite rare for any of the square townships surveyed under the model laid out by the Land Ordinance of 1785 to be settled as "towns" on the New England model. As a result, the word "township" has drifted away from its association with the idealized New England town. But a close look at the Northwest Ordinance in the context of the 1785 Ordinance reveals that the framers of both ordinances clearly held a thicker understanding of what township meant. Where the Northwest Ordinance refers explicitly to "townships" it refers to them as units of government, not units of land measure. Townships would be political communities with civil governments and have interests to be protected in the representative elected assemblies. Refracted back through the Land Ordinance—and indeed even further back through the history of Pennsylvania and Georgia—it becomes clear

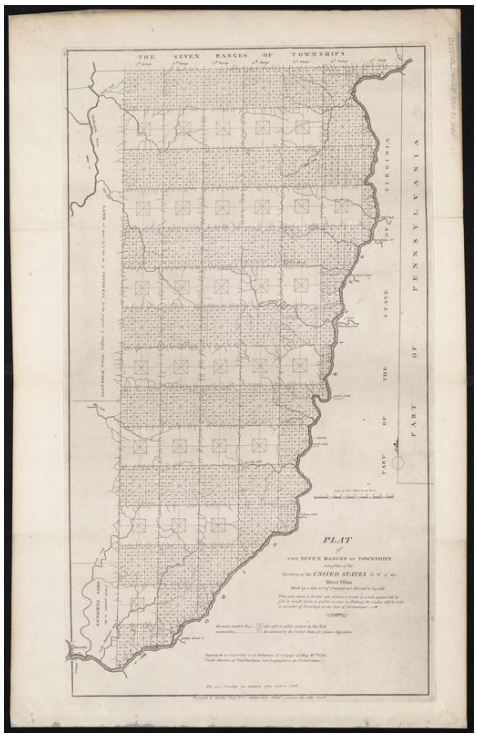
286. *See id.* at 61.
287. *See id.*
288. See *id.*
289. *See* ZUCKERMAN, *supra* note 91, at 23.
290. ONUF, *supra* note 34, at 61.

that the term "township" was *meant* to carry with it a normative commitment to a form of settlement and government that was distinct from dispersal, plantation, and the county.

D. The Settlement of Ohio and the Failure of the Township

In the immediate aftermath of the Land Ordinance of 1785, surveyors were dispatched to the eastern portion of what would become Ohio to begin the process of dividing the land up into townships.[291] The ordinance had provided that seven "ranges" of townships would be surveyed and broken into townships as a dry run for the surveying and then distribution of the rest of the townships across the northwest.[292] The idea was that once the ranges were surveyed, land sales would begin in the checkerboard pattern of township/individual lots that the 1785 Ordinance envisioned.[293]

Figure 8[294]



291. *See* VAN ATTA, *supra* note 223, at 35. It is worth restating here that the full story of the migration of Europeans westward in the first decades of the republic is far too rich and nuanced to tell in full here. Part I of Greg Ablavsky's *Federal Ground* tells the story that I canvas briefly here in much more detail than I have space for. See ABLAVSKY, *supra* note 35, at 19–106.

292. *See* VAN ATTA, *supra* note 223, at 37.

293. *See id.*

294. Thomas Hutchins, William Barker & Matthew Carey, *Plat of the seven ranges of townships being part of the territory of the United States, N.W. of the River Ohio*, LIBR. OF CONG. (1796), https://www.loc.gov/item/99441743/ [https://perma.cc/Q766-JBGZ].

The process of surveying the land was slow going, and only the eastern four ranges were surveyed by early 1787.[295] A complete survey of all seven ranges was not completed until 1801.[296] While Congress did try to open up the ranges for sale as soon as possible, it quickly became clear that the 1785 Ordinance was not matched to the actual pattern of settlement that was playing out on the ground. When the first townships came up for sale in 1787, only a tiny portion of the land was purchased—and all of it was purchased by individual settlers, not as whole townships.[297] One major problem was that although the land was being surveyed, it was not unoccupied or unclaimed. The Indigenous People living in the northwest fought back against colonization and dispossession, and they made it feel unsafe for many would-be settlers.[298] Compounding this problem was that, while there were some people who sought out the freedom of frontier life, the massive westward push that people had imagined would flow from the eastern seaboard was slow to materialize.

Congress had been counting on the windfall of the land sales to help stabilize the young nation's financial situation, and as the years passed without the robust, hoped-for sales, there was increasing pressure to change the terms of the 1785 Ordinance. In 1786 and 1787, Southern representatives twice tried to undo the township system and implement Virginia's system of indiscriminate location.[299] While these efforts failed, by 1787, it had become clear that the imagined townships would not fill in the idealized, orderly way that Grayson and his colleagues had hoped for. In frustration, Congress increasingly turned to the prospect of selling large swathes of the northwest not to individuals or townships—but rather to land speculators.[300] In a series of deals, Ohio was divided up between companies who agreed to take on the work of surveying and distributing the land.[301] The Ohio Company was organized by a group of Massachusetts-based speculators in 1786, and in 1787 it purchased a large swath of land to the west of the original seven ranges.[302] As part of the purchase agreement, the company agreed to survey the land according to the rules of the 1785 Ordinance.[303] In fact, reflecting the New England origins of the founders of the Ohio Company, the township system that the company developed was closer to Grayson's original plan with one lot reserved for schools and another reserved for religion.[304]

Around the same time, a New Jersey land speculator purchased one million acres along the Ohio River, surrounding what would become Cincinnati.[305] Just

295. *See* HIBBARD, *supra* note 254, at 41.
296. *See* TREAT, *supra* note 266, at 43.
297. *See id.* at 45.
298. *See* VAN ATTA, *supra* note 223, at 49.
299. *See* TREAT, *supra* note 266, at 43–44.
300. *See* HIBBARD, *supra* note 254, at 43–44.
301. *See id.*
302. *See id.* at 46, 49.
303. *See id.* at 47.
304. *See id.* at 49. Two townships were also reserved to establish a university. *Id.*
305. *See id.* at 50–51.

a few years later, a group of Connecticut speculators would purchase the Western Reserve land still claimed by Connecticut.[306] While none of these large purchases explicitly rejected the township system, collectively they created a patchwork of surveying systems and settlement strategies that militated against the ideas that had been laid out in 1785.[307] Adding in the swath of land north of the Ohio River that Virginia had held in reserve to be distributed to its war veterans,[308] and then the land that the federal government had additionally held in reserve for war veterans in the center of the territory, by 1800 what was emerging looked like a chaotic patchwork rather than the orderly system of towns marching westward.

Figure 9[309]



306. *See* VAN ATTA, *supra* note 223, at 50.

307. *Id.*

308. *See* ABLAVSKY, *supra* note 35, at 31–32. This land had always been exempted from the surveying plan of the 1785 Ordinance and would instead be distributed in the Virginia style, according to indiscriminate location. *See id.*

309. Jerome S. Higgins, *The Seven Ranges Survey*, *in* SUBDIVISIONS OF THE PUBLIC LANDS, ILLUSTRATED 93 (1887).

This patchwork would match and help define the haphazard pattern of settlement of Ohio over the next two decades. While the territory that would become the state was slowly surveyed into townships (as the whole northwest would eventually be), the townships did not provide the outlines for the towns that did emerge. Where New Englanders came to settle, as in the Western Reserve and within parts of the Ohio Company's grant and Symme's Purchase, some collective settlement did take place and some towns did emerge.[310] But in much of the rest of the territory, the population was dispersed and relatively few towns were established.[311] A map of the state from 1814 illustrates the story well. It reads like a mashup between the maps of Virginia and Massachusetts from the eighteenth century.

Figure 10[312]



310. *See infra* Figure 10

311. *See id.*

312. Matthew Carey, *The State of Ohio, with part of Upper Canada, &c.*, LIBR. OF CONG. (1814), https://www.loc.gov/resource/g4080.ct011775/ [https://perma.cc/JUN3-RYL3].

The new state is already divided into counties, which are the baseline level of local government, and there are some places where town dots are thick (frequently with New England names: Litchfield, Salem, and Deerfield in the Western Reserve and Roxbury, Wooster, Adams, and Salem (again!) in the Ohio Company grant near Marietta).[313] The history of the township in Ohio is not so much a narrative of the town being *rejected* despite the 1785 Ordinance. Rather, it is a story of settlement driving local government formation. It demonstrates the recurring pattern of aspirational plans and civic imagination of collective local settlement and the way that those plans were supplanted and disregarded by the preferences and actions of colonizers and settlers on the ground.

E. The Antebellum Period

The purpose of this Article is to set up the dichotomy between towns and counties and to show how these competing ideas of settlement and local government shaped the imagination of the United States in its imperial westward meditations. The story goes: two distinct systems of local government developed during the colonial period, and the first designers of the nation (for the most part) chose the town over the county when projecting their imagination westward. They did so because they thought towns were a better way of fostering civic identity, law and order, and economic efficiency. But despite their best laid plans, towns did not emerge where they were imagined. As had happened in Pennsylvania, South Carolina, and Georgia, the aspiration of condensed town settlement yielded to the entropic pressures of frontier migration. The people who came to settle in the west brought very different ideas of community and local government with them. Where those people were New Englanders or northeasterners, they brought towns. Where they were Southerners, they brought dispersed settlement, the fantasy of the plantation, and counties.

It is beyond the scope of this Article to fully catalog the shape of this over years between 1800 and 1860. There are too many moving pieces to tell the story cleanly. From the brutal genocide of Indian Removal which opened swathes of land up to mass migration in the 1830s to infrastructure improvements like early railroads, steamboats, and the Erie Canal, there are simply too many factors to describe within the boundaries of a (somewhat!) constrained law review article.

With that said, it may help to offer a precis of this history to contextualize the founding narrative and to offer a glimpse of what I plan to develop in future work. For the first decades of the nineteenth century, most settlement in the northwest came from the south and southwest.[314] As this map of the population density in 1810 shows, the bulk of settlement in Ohio, Indiana, and Illinois was concentrated along the southern-facing Ohio and Mississippi Rivers.

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313. *See supra* Figure 10.

314. *See infra* Figure 11.

Figure 11[315]



Most of the Northwest Territory remained dominated by the populous native nations living there, and most of the migration was from the Virginia and Carolina diasporas travelling along the rivers.[316] This means that for all the surveyed townships in the Northwest, what European settlement there was largely dispersed and organized against the backdrop of weak county government. Thus, the original constitutions of Ohio, Indiana, and Illinois provided for county government and largely ignored town government.[317]

Starting in the 1830s, however, this would change. Between 1830 and 1860, a combination of factors including economic shock, infrastructure improvement, and Indian Removal paved the way for a flood of Yankees to move west.[318] These Yankees came not as individual pioneers, but frequently in large groups—congregations, families, and whole towns.[319] They poured in through the Great Lakes, populating northern Indiana and Illinois, southern

315. Francis Amasa Walker, *Statistical atlas of the United States based on the results on the ninth census 1870 with contributions from many eminent men of science and several departments of the government*, LIBR. OF CONG. (1874) (depicting 1810 data), https://www.loc.gov/resource/g3701gm.gct00008/?sp=65&r=0.05,0.817,0.418,0.236,0 [https://perma.cc/NQ2D-MK7J].

316. John D. Barnhart, *Sources of Southern Migration into the Old Northwest*, MISS. VALLEY HIST. REV. 49, 49–53 (1935).

317. *See generally* OHIO CONST. (1802); IND. CONST. (1816); ILL. CONST. (1818).

318. *See* THE AMERICAN YAWP, 200–05 (Joseph L. Locke & Ben Wright eds., Stan. Univ. Press 2019).

319. Albert J. Larson, *Northern Illinois as New England Extended: A Preliminary Report*, 7 PIONEER AM. 45, 45 (1975); SUSAN E. GRAY, COMMUNITY LIFE ON THE MICHIGAN FRONTIER 9–11 (1996).

Michigan, and Wisconsin.[320] By 1840, population across the northwest was dispersed much more evenly, and a huge proportion of those new residents were from the New England diaspora.

Figure 12[321]



These New Englanders brought their local government ideology with them. The original constitutions of Michigan and Wisconsin made explicit provisions for town government and imagined that local government would be conducted in town halls using the old town meeting format.[322] In Illinois, the New Englanders advocated for a constitutional change in 1848 that gave counties the choice to break apart and adopt town government or to remain governed on the Southern model.[323] Only a handful of southern Illinois counties chose not to adopt the town model.[324] Similar stories could be told about the neighboring states of Indiana and Iowa.[325]

So, even though the northwestern township never took hold in the way that the framers of the ordinance of 1785 imagined, by 1860 a large portion of what had been the Northwest Territory was dominated by town government rather

320. Larson, *supra* note 319, at 45; GRAY, *supra* note 319, at 9–11; *The Yankee Empire, 1820-1890*, LIBR. OF CONG., https://www.loc.gov/collections/pioneering-the-upper-midwest/articles-and-essays/history-of-the-upper-midwest-overview/yankee-empire/ (last visited Mar. 17, 2026).

321. Francis Amasa Walker, *Statistical atlas of the United States based on the results on the ninth census 1870 with contributions from many eminent men of science and several departments of the government*, LIBR. OF CONG. (1874) (depicting 1840 data), https://www.loc.gov/resource/g3701gm.gct00008/?sp=66&r=0.526,0.16,0.307,0.174,0 [https://perma.cc/W3P8-U37S].

322. *See* MICH. CONST. (1850); WIS. CONST. (1848).

323. *See* MICHAEL D. SUBLETT, TOWNSHIP: DIFFUSION AND PERSISTENCE OF GRASSROOTS GOVERNMENT IN ILLINOIS, 1850–2000, at 24–29 (2004).

324. *Id.*

325. Clyde F. Snider, *Indiana Counties and Townships*, 33 IND. MAG. HIST. 119, 134 (1937); CLARENCE RAY AURNER, HISTORY OF TOWNSHIP GOVERNMENT IN IOWA 25–32 (1914).

than county government. As my future work will argue, the sectional differences between forms of local government contributed to and echoed widening sectional differences between North and South in ways that would contribute to the coming Civil War.

IV. TOWNS OR COUNTIES NOW

Local government structure has shaped the political geography of the United States, and it continues to matter. For those of us who live in Massachusetts, our daily lives are circumscribed, shaped, and governed by boundaries that were drawn centuries ago. Towns not only provide government and services, but they also shape cultural identity and community. By contrast, for people who live in the South (and much of the west), counties remain the dominant form of government. In many states, the most important local executive officer is still the County Judge.[326] By-and-large, in these places, counties are the base-layer of local government. They tax, police, and provide schools and other services.

It is still broadly true that places with more compact communal settlement are organized as cities and towns while places where population is more dispersed are more likely to be governed as counties. While there are urban county governments[327] and rural town governments,[328] it remains broadly true that towns represent compact communal settlement while counties represent dispersed, individualized settlement. There are some counties that are muscular local governments that provide robust services[329] and there are some towns that are minimalist and do little more than protect property rights.[330] Even so, as a rule, county governments are weak and tax and govern less while town governments are stronger, taxing and governing more. Within these caricatures

326. *See, e.g.*, KY. REV. STAT. ANN § 67.710 (West 2025); ARK. CODE ANN. § 14-14-1101 (West 2025). And in other states, the county governance system still bears plenty of resemblance to the old Virginia model.

327. For example, Montgomery County in Maryland is home to quasi-urban but unincorporated places like Bethesda and Silver Spring. *See Community Links*, MONTGOMERY CNTY., MD., https://www.montgomerycountymd.gov/resident/community.html [https://perma.cc/R7TB-H26X] (last visited Feb. 17, 2026). Moreover, a handful of county governments have merged with big city government to create unified urban county governance. This is the case with Unigov in Indianapolis and Miami-Dade County in Florida. *See supra* note 22.

328. There are many of these in New England, of course, but my favorite example is Neponset, Illinois. Neponset is a tiny town in central Illinois that was named after the Neponset River, which runs through Dorchester in Boston, Massachusetts. *See* Opinion, *Early pioneer struggles include building their own place to live*, STAR COURIER (Jan. 8, 2021, at 14:07 CST), https://www.starcourier.com/story/opinion/2021/01/08/early-pioneer-struggles-include-building-their-own-place-live/6600048002/ [https://perma.cc/5766-FQ4V].

329. Los Angeles County, for example, has a budget of over forty-five billion dollars and provides services ranging from schools to fire protection to water to electrical power to millions of people. *See* Makenna Sievertson, *LA County's New Budget*, LAIST (Oct. 4, 2023), https://laist.com/brief/news/politics/la-countys-new-budget-adds-billions-in-spending [https://perma.cc/EY6B-BKJU].

330. For example, in my prior work I tell the story of St. James, North Carolina, which exists for the sole purpose of sheltering a housing development (St. James *Plantation*) from being annexed by other nearby incorporated places. *See* Farbman, *supra* note 20, at 788–96.

there are a million variations—and the nature of local government law makes it easy to get entangled in them. Still, when you zoom out far enough, I think it's fair to say that we *still* live in a nation of towns and counties and that there are real and salient differences between the two.[331]

If this is true in the present—and if it is a banality to say so—then one obvious takeaway from this Article is simply that the difference between towns and counties has a history that runs through ideology, colonial imagination, economy, and plantation slavery. In the colonial and antebellum South, the county evolved into a form of local government that protected the power of elite property owners, many of whom claimed significant property ownership in human beings.[332] Counties were not designed to provide robust services or to offer thick democratic self-government. In the heart of slavery, they were tools of a planter elite to protect their own individual freedom. And elsewhere, they remained a tool for relatively scattered residents to govern themselves as much as necessary—which is often to say, not very much.

In this, most counties are different from what we would call "towns."[333] Towns developed around congregations and the idea of communal settlement. The town itself was imagined as an interlocking network of residents whose interests converged in the town identity. This meant that towns were collective ideas. They were filled in points on a map while counties were empty squares ready to be filled in. Although counties represented individualism and limited government intrusion, the idea of the town suggested a more robust and participatory model of civic life.

These past differences help to explain present differences. One concrete way of seeing this is by returning to Keystone and the structure of local government incorporation laws. In many parts of the country (including much of the South) where county government dominates, large swaths of county land is "unincorporated."[334] This means that people living on this land are governed "only" by the county government. This is in contrast to "incorporated" land which is governed by town or city government.[335] There is no land in any state

331. In this dichotomy, I lump cities in with towns. If towns are characterized by thicker settlement and a thicker civic sphere, cities go further down this spectrum.

332. *See* Farbman, *supra* note 20, at 774–75.

333. What we mean by a "town" is a relatively simple question in the context of the history in this Article, but a substantially more complex question in the present. One definition of a town would simply be any place that is "incorporated" such that it is no longer "just" part of a county, but rather is an independent, self-governing municipal government. There is something to this, but perhaps not enough. For my purposes, when I think of a "town," I think of a place with a relatively compact settlement pattern and a cohesive sense of community identity. That is to say, to this New Englander, a "town" means, functionally, a New England Town.

334. *See* Amel Toukabri & Lauren Medina, *America: A Nation of Small Towns*, U.S. CENSUS BUREAU (May 21, 2020), https://www.census.gov/library/stories/2020/05/america-a-nation-of-small-towns.html [https://perma.cc/X8JZ-DDPJ].

335. The precise balance between the powers of incorporated places and the latent county governance is very different from place to place. As a general rule, people living in incorporated towns and cities have their own police and fire departments and a whole suite of other locally provided municipal services. This often, but not always, includes schools. That said, the county will generally still tax incorporated places and provide some subset of services.

that is *not* part of a county—it is the minimal backstop for local government. But when a group of people living on unincorporated land in a county want to form themselves into a community to be recognized under state law, they vote to incorporate. In doing so, they emerge out of the base-level of county governance and level up to the status of town or city. In practice, of course, this means that they are seceding from the county and establishing themselves as a new and distinct form of government. Usually, they are removing some portion of their taxes from the county coffers and restructuring the ways in which the county polices, educates, and provides services. In other words, incorporation has a significant effect on the political and fiscal reality of county government.

And yet, nearly every state makes it easy for places to incorporate like this.[336] As a matter of structural local government law, states understand counties to be weak and basic and they imagine incorporated towns and cities to be more robust.[337] As between the two, in making it easy to incorporate, states explicitly prefer town government to county government. The residents who choose to incorporate are understood as exercising civic virtue and committing to communal self-government. The counties that they leave behind have little say in the matter because they are *not* such a cohesive political entity. They are "unincorporated" and inert—doing the bare minimum of governance, but not in any kind of thick, participatory-democratic sense self-governing.

We tend to take this dynamic for granted. When I teach these issues in Local Government Law, my students almost uniformly share the intuition that it *should* be easy for communities to form in unincorporated counties and to incorporate themselves into a more robust and intentional political community. But why should we prefer towns to counties in this way? Why do we see incorporation as emerging into a "higher" plane of government rather than a secession from the existing county order? Through the lens of this history, the preference for towns baked into most state legal regimes emerges as a reflection of the preference for compact settlement, social cohesion, and self-government that drove the framers of the 1785 Ordinance to prefer townships to dispersed settlement. At least for the first two centuries of American local government, the elite planners who wrote the laws aspired towards towns and the collective governance they represented.

One way of understanding this is that counties have *always* suggested a form of local governance that was skeptical of governance itself. Planters sought to retreat from the state and protect their own despotic power, and the county served as both vessel for government and shield from further intervention. From the beginning, this was a threat to social cohesion, public safety, and democracy; it was also a threat to political and social equality because planters sought to use

336. The canonical authority for this proposition is Richard Briffault, who outlined in detail how relatively easy it is in most states for a community to vote to incorporate. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73–77 (1990).

337. In Briffault's words, state laws and courts "often treat the formation of a local government as a healthy development, reflecting the area's growth and the democratic desires of its residents." *Id.* at 77.

counties to protect the existing distributions of power, wealth, and privilege. It is not surprising for state constitutions—themselves aspirational charters of fundamental law—to prefer more government to less and to prefer a more robust structure of self-government to individual and dispersed power.

Even if the deep structures of structural local government law echo the old planners' preference for towns over counties, it would be a mistake to hear the echo without engaging with its complexity. In many instances, by making it easy for communities to incorporate, state law has made it possible for groups of privileged property owners to wall themselves off from their neighbors, hoard their resources, and perpetuate exclusionary structures. Incorporation laws have allowed gated communities to incorporate to remain exclusive,[338] white suburbs to incorporate to preserve school segregation,[339] and rich enclaves to incorporate to keep taxes low.[340] In many of these contexts, it had been county governments that were providing services and redistributing resources—and it was town government that created exclusion and inequality. Indeed, I'm on record as arguing that many incorporated "towns" today actually replicate "plantation localism" by protecting individual property owners' power to do what they like against the threat of regulation and redistribution.[341]

The point, then, is not that towns are (or ever were) actually "better" local government than counties either as a matter of democracy, good government, or redistribution. Rather, the point is that the old *idea* that towns were more virtuous and more democratic remains alive and well in the underlying structures of American local government law—and this idea is a mirror of many people's persistent intuitions. We live in a nation of counties, but we subscribe to a national ideology of towns. Even if the towns that we have do not meet our aspirations, we can see the shadows of that aspiration lurking in the background.

This leads me to the other, more concrete presentist takeaway from this

338. In addition to St. James, which I already mentioned, the most famous example of this is Rolling Hills, on the Palos Verdes Peninsula, south of Los Angeles. Rolling Hills is an incorporated, gated community with no public land—outsiders are not allowed to enter the city without an invitation from a resident. *See* GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 90–91 (1981).

339. Perhaps the most striking example of this can be found in Shelby County, Tennessee, where, after the Memphis City school district dissolved into the county school district, in an attempt to desegregate the city's predominantly black schools, Tennessee subsequently allowed suburban areas of Shelby County to incorporate into new cities and new school districts to "protect" those richer and whiter places from the force of county-wide desegregation. *See generally* Genevieve Siegel-Hawley, Sarah Diem & Erica Frankenberg, *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RSCH. J. 651 (2018).

340. One of the focal points for this movement is suburban Atlanta, where a number of rich, suburban enclaves are seeking either to secede from Atlanta or to incorporate from unincorporated county land to keep taxes low and protect against redistribution to poorer areas. *See* Brentin Mock, *The Future of Cityhood*, BLOOMBERG (Feb. 11, 2022, at 22:35 EDT), https://www.bloomberg.com/news/features/2022-02-11/atlanta-s-wealthy-white-suburbs-want-their-own-cities [https://perma.cc/48DW-7FCP].

341. *See* Farbman, *supra* note 20, at 795.

history.[342] If I am right that the choice between towns and counties remains latent and weighted in our ideology, it runs up against a countervailing baseline reality, namely that we usually understand the structure of our local government to be static rather than dynamic. We think of towns and counties and cities more as fixtures of our political landscape than products of negotiation. This may be because here in the twenty-first century, the frontier appears to have closed. Unlike William Grayson looking west in 1785, there are no "open" questions of local government formation for us to answer in the present. Everywhere in the United States seems to be *already somewhere*. In this stasis, it can become hard to imagine how things might be different.

In a static world where local government is, but is not being designed, the historical struggle between the ideology of the town and the creeping reality of the county seems like old news. Whatever large-scale ideas of political theory that might have been motivating local government formation are now baked into the ossified structure. In a world of stasis, we are no longer authorized to try to choose how to organize ourselves; we are simply subject to the fossils of choices made long ago.

But this stasis is a misdirection in two directions. First, it is simply not true that the frontier of local government formation has closed. According to the Census Bureau, more than 700 new local government units were registered between 2017 and 2022—that's more than 100 new local government entities being born every year.[343] The borders of existing local governments are constantly expanding through annexation, new school districts are emerging through secession,[344] and new municipalities are incorporated. In fact, in most parts of the country, apart from New England (where local boundaries have been settled for centuries), the location of local boundaries and how they should be drawn remains an active and open conversation.

Because the local design frontier is not truly closed, the big theoretical and imaginative questions that animate whether and how local boundaries should be drawn are not dead either. Every time a subdivision is annexed or a school district is split in two, echoes of the biggest and most basic questions become live again: how should we organize and govern ourselves? Who should be within and without the jurisdictional boundaries that we draw? What should those boundaries mean? These are the questions that have animated questions about local formation from the seventeenth century onwards, and they are the

342. I make no apologies for turning my historical work toward the present and engaging with the consequences that it may have for present political or theoretical debates. I remain aligned with my former self when I wrote that I was "sympathetic with the cadre of new critical legal historians who argue that legal history is an essential tool for interrogating the present." *See* Farbman, *Reconstructing Local Government*, *supra* note 48, at 482.

343. *See Table 1, 2022 Census of Governments—Organization Tables*, U.S. CENSUS BUREAU (Sep. 23, 2025), https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html [https://perma.cc/8E56-R74Q].

344. *See* P.R. Lockhart, *Smaller communities are "seceding" from larger school districts. It's accelerating school segregation*, VOX (Sep. 6, 2019, at 17:30 EDT), https://www.vox.com/2019/9/6/20853091/school-secession-racial-segregation-louisiana-alabama [https://perma.cc/GJ3V-NV4B].

questions that have animated the stakes of the choice between town and county for that long as well.

The conclusion to this Article is hardly the place to resolve these questions, but if the big questions of how we should organize ourselves are more alive than we think—and if the history here suggests that these are old and constitutive questions—then it seems worth closing by saying briefly what *I* think the stakes are. I am convinced that our experience of local government shapes our relationship to each other and to the state.[345] Towns and counties are different, and the experience of daily life is different in ways that structure civic identity and imagination. I grew up in a Connecticut town that leveraged local power in ways that seemed natural to me but were comparatively robust and invasive in the broader national context. The town bussed students from across town to maintain socioeconomic diversity in its elementary schools. The town collected trash, mandated recycling, and plowed the roads. The town provided (limited) public housing, paid its firefighters, and maintained its roads well. When you got to the border of the more-rural neighboring town, the roads got worse and the fire department became volunteer. Growing up in this town context inculcated in me a relationship to government and the state that shapes my civic imagination. It is hard to imagine living in a place where I would have to plow my own street or where I would have to drive my children to school. When I have lived in places without robust downtowns or where the urban geography is sprawl, I have felt alienated and disoriented—not so much because I "don't like it," but because I experience a dissonance between my understanding of local political geography and what I'm experiencing.

Extrapolating outward from my own experience is, of course, speculative and anecdotal. Yet, it seems unavoidably true to me that our local political structures matter to how our relationship to the world is shaped. Whether that shaping is sympathetic (i.e., I grew up in a city and I liked it) or oppositional (i.e., I grew up in a city and I hated it), the structural baseline matters. If there are differences between towns and counties (and cities and villages and hamlets and census-designated places), then those differences matter not only as a matter of description, but as a matter of politics and political formation. If this is true—and I think it is—and if it is true that the boundaries of local government are constantly changing and are *always* subject to change even where they feel permanent, then the subsequent normative question is unavoidable. We have no choice but to ask: what kind of local government will shape a good society?

This is the colonists' question that has been asked, answered, and asked again since the beginning of the colonial project. In both the past and the present, framers have preferred the order, structure, and coherence of the town to the spread and abstraction of the county. But in practice, the county has tended to spread where the commitment to the town was not explicit, intentional, and ideological. For my part, I am a communitarian. I am drawn to the promise of

345. In Richard Thompson Ford's words, "[t]erritorial jurisdiction produces political and social identities. Jurisdictions define the identity of the people that occupy them." *See* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 844 (1999).

participatory democracy, community identity, collective endeavor, and possible redistribution that the town and city represent. But this is not the place to advance an argument for my own view. Rather, I want to close with the admonition that this fundamental normative question has always been and remains at the center of how we think about local government. We get the local government we design—and we are always designing it. Just as the colonists in Virginia and Massachusetts built competing systems of local governance and then promulgated the ideology of those systems across time and space, we are still empowered to make big theoretical choices about who we are together and why.

This power seems obvious to me, but if it is obvious, it is also destabilizing. And if it is destabilizing, it is also optimistic. If we are living within a local government system heavily in debt to plantation ideology that allows for the hoarding of wealth and racial segregation, then it matters whether these are structures that we chose or that we are stuck with. If we chose them, then we deserve blame, but we also have the power to choose again, and to choose differently.

THE FUTURE WAS THEN: THE RECURRENT HISTORY OF AI AUTHORSHIP

ZVI S. ROSEN*

INTRODUCTION: THE SHAPE OF COPYRIGHT TO COME

What is the shape of copyright to come in the era of generative AI?[1] The question was big news in 2025. The Copyright Office published its report on the copyrightability of works created by or with the assistance of generative artificial intelligence in January,[2] and in October a petition for certiorari was filed with the Supreme Court on the subject.[3] Although infringement lawsuits regarding the use of copyrighted works generated more litigation, there's a particular fascination with AI authorship. If copyright is closest to "the metaphysics of the law," issues of authorship are the point "where the distinctions are . . . very subtle and refined, and, sometimes, almost evanescent."[4] The question of nonhuman authorship is then the razor-thin strand of a legal distinction where questions of law and metaphysics are bound together like almost nowhere else.

That said, although the pace has accelerated dramatically in recent years,[5] computers and other systems of mediated authorship have been used far longer than one might think. Instead of being understood as something new, AI

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* Associate Professor, University of New Hampshire Franklin Pierce School of Law, and Faculty Director of the Franklin Pierce Center for Intellectual Property. Dillon Ruzich provided invaluable research assistance on this project. This project has gone by several names as it developed over the past few years, including *The Groundhog Day of Copyright and AI* and *AI and its Antecedents at the Frontiers of Authorship*. I'd like to thank the many individuals who shared their comments and thoughts, including the participants in the IP Scholars Conference, the Works in Progress in IP Conference, the IP Scholars Roundtable, the Boston University IP Workshop, the New England IP Works in Progress Conference, and the Chicagoland IP Works in Progress Conference. Special thanks to those who shared their memories of some of the incidents discussed in this paper, including Arthur Levine, Steven Schragis, and Jeffrey Squires. Finally, special thanks to A. Michael Noll, who created the first computer-generated art for copyright.

1. In the early 1950s, Donald F. Reines of the Examining Division of the Copyright Office penned a humorous short piece, "The Shape of Copyright to Come," looking at the challenges that might befall the Examining Division in the rocket age. Donald F. Reines, *The Shape of Copyright to Come*, *in* EXAMINING DIV., U.S. COPYRIGHT OFF., ANNUAL REPORT FOR THE FISCAL YEAR ENDING JUNE 30, 1952 app. A at 1 (1952). This was apparently written following the request to register "the sun, the moon, and the stars" for copyright. *Id.* at 9. The title refers to the H.G. Wells "The Shape of Things to Come." It was subsequently republished under the title "Intergalactic Copyright." *Interplanetary Copyright (1952)*, ORPHAN FILM SYMPOSIUM (Feb. 19, 2021), https://wp.nyu.edu/orphanfilm/2021/02/19/interplanetary-copyright-1952/ [https://perma.cc/4MPH-YLWN].

2. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf [https://perma.cc/Y233-L4KR].

3. Petition for Writ of Certiorari, Thaler v. Perlmutter, No. 25-449 (Oct. 9, 2025), 2025 WL 2954208. As discussed *infra*, the petition was denied in March of 2026, but this surely is not the end of the issue.

4. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (spelled "subtile" in original).

5. Gary Myers, *The Future Is Now: Copyright Protection for Works Created by Artificial Intelligence*, 102 TEX. L. REV. ONLINE 8, 9 (2023).

authorship is best understood as the latest iteration of a long line of systems of mediated authorship, which have a long legal tradition to match. Mediated authorship exists when an intermediary is interposed between the author's expression and the work of authorship in a way where this mediator materially contributes authorial content.[6] This insight yields substantial contributions by allowing us to mine that rich legal heritage of mediated authorship for solutions to contemporary legal problems.

Substantially speaking, the rule for mediated authorship was most famously stated by the Supreme Court, quoting a then-recent English case, that the author was the one "making, producing, as the inventive or master mind, the thing which is to be protected."[7] And indeed, while there can be quibbles about the applications of this term, it has been the central inquiry of the United States Copyright Office in questions of mediated authorship for as far back as I can identify. The Copyright Office's approach to AI authorship, stated in its 1965 annual report and substantially unchanged since, essentially tracks this analysis with a continuity which is frankly rather surprising given what a revolutionary technology generative AI is proving to be.[8]

The very fact that that "[t]he same analysis" that the Copyright Office provided in 1965 equally "applies in the context of AI technology" in 2025 itself raises more questions.[9] On the one hand, it seems vital to understand what exactly the Copyright Office was considering in 1965 to understand what led to a conclusion which the Copyright Office still stands by, and this piece attempts to answer that question. On the other hand, it seems a bit bizarre that a technology seen as revolutionary in current times was conclusively handled as a policy framework sixty years ago.[10]

The interface of the law and technology isn't a one-time thing but rather happens repeatedly, and often much earlier than one might expect, but each time certain hard legal questions not yet forced by the state of the art are pushed down the road to a potentially distant future where the issues are unavoidable. One learns from a review of the history of mediated authorship that AI authorship was being done far earlier than we tend to assume. In the 1950s computers

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6. Daniel Plate & James Hutson, *The Pastor as Romantic Author: AI, Preaching, and the Unacknowledged Inheritance of Authenticity*, 1 IDEAS SPREAD 14, 17 (2025), https://j.ideasspread.org/mct/article/view/1773/1796 [https://perma.cc/6SFK-GU3G].

7. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (quoting Nottage v. Jackson, 11 Q. B. Div. 627 (1883) (U.K.)). Put another way, authorship involves both the act of writing down the work "as well as a type of mental effort or creative activity to originate the expression that is fixed." Dan L. Burk, *Thirty-Six Views of Copyright Authorship, by Jackson Pollock*, 58 HOUS. L. REV. 263, 268 (2020).

8. U.S. COPYRIGHT OFF., *supra* note 2, at 2.

9. *Id.*

10. *See, e.g.*, Catherine Clifford, *Google CEO: A.I. is more important than fire or electricity*, CNBC (Feb. 1, 2018, at 13:56 ET), https://www.cnbc.com/2018/02/01/google-ceo-sundar-pichai-ai-is-more-important-than-fire-electricity.html [https://perma.cc/DLV3-QWG7].

generating expressive works was not just the stuff of science fiction,[11] it would be reality. As this was happening, encounters with the copyright registration system likewise happened far earlier than we tend to assume and discussions of the issue in legal discourse also came up. And the expectation was that one day in the future the harder legal questions would be reached where computer authorship went from being a curio to commonplace.

The Constitution empowers Congress to "secur[e]" to "Authors" their "Writings."[12] There are some situations that may go beyond this, either federally under the commerce clause[13] or potentially under state law for unfixed works.[14] The latter is strongly limited by the preemption provisions of federal copyright law, while the limits of the former are vague but presumably exist.[15] Generally speaking, to be protected by some form of copyright law, a copyrightable work must be by an "author." But who or what is an author?

The question of computer authorship has been raised repeatedly over the span of the past seven decades. The names have changed, from stochastic authorship to algorithmic authorship to computational authorship to AI authorship, and the question has repeatedly been asked as technology evolves. And yet the answers, at least from the Copyright Office, have not changed all that much. Nonhuman authorship is not copyrightable, but selection and arrangement by a person is, and the test is generally whether the mental conception of the fixed expression belonged to the author or not.[16] There are some well-known parallels—works by animals are an immediate one, as are works mediated by a machine like a camera. One of the contributions of this piece is to bring other examples to the fore, most notably the case of aleatory music and other indeterminate works, where a substantial record of Copyright Office activity offers additional insight into how to approach the question of disintermediated authorship.

Copyright registration is a particularly useful area to study, in that the Copyright Office handles a more diverse and extensive docket of copyrightability questions than the courts. Although registrations are far less studied than court decisions, their greater variety provides a richer history of copyright law in America, and they do not suffer from as much of the anecdote

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11. *See generally* ARTHUR C. CLARKE, *The Nine Billion Names of God*, *in* THE NINE BILLION NAMES OF GOD: THE BEST SHORT STORIES OF ARTHUR C. CLARKE 3 (1967) (short story from 1953 about computers enumerating and printing all possible names with no more than three repeating characters). Whether such a work would be copyrightable in 1953 is plausible. *See once again very generally infra* Part III.G.

12. U.S. CONST. art. 1, § 8, cl. 8.

13. 17 U.S.C. § 1101; United States v. Moghadam, 175 F.3d 1269, 1282 (11th Cir. 1999).

14. Paul S. Bilker, *The Showdown Continues at the Circle C Ranch: Non-Preemption of State Copyright Protection for Unfixed Improvisational Works*, 18 SW. U. L. REV. 415 (1989).

15. 17 U.S.C. § 301. There are some limits, for instance the Supreme Court's holding that an expired copyright cannot be revived by creative use of trademark law. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 38 (2003). This decision, though, does not frame itself in constitutional terms.

16. Lucas S. Osborn, *Copyright, Creativity, and Skill: Authorship and AI-Assisted Works*, 12 BELMONT L. REV. 594, 598 (2025).

problem which plagues studying the fairly small number of reported cases.[17] Given how frequently the same position on AI authorship has been repeated, looking back to understand this repetition gives insight as we attempt to move copyright forward in the age of AI.

As this issue has been come up repeatedly in the past three-quarters of a century, many of the episodes and ideas here are not new to the literature, although I've tried to provide a more complete picture where I'm not the first to document them.[18] However, a substantial portion here is new and provides a more complete picture of the long history of copyright in computer and indeterminate authorship.

Beyond that though, understanding the past of copyright protection mediated authorship affords a perspective to consider why we protect expressive works for a term measured by the life of the author, a metric which is inextricably intertwined to the humanity of the author. To use a bit of an analogy, to the naked eye a pair of binary stars locked in orbit with each other will seem as one unless something happens to disturb the orbit. In almost all situations the act of authorship and the production of the work of authorship are similarly locked into an orbit with each other so tight that no separation is visible. Works of mediated authorship—especially those using a computer—allow us to see a work bereft of authorship and the question of why it should be protected by copyright, which more sharply indicates just how vital human authorship is.

One measure of this vitality is simply financial. Reddit's massively successful IPO in 2024 was a reminder that even as AI-generated content proliferates, human-generated content is more valuable than ever.[19] It is more than that, though. In the judgment of the Constitution—and the world—copyright is worth its costs to preserve something beautifully human.

I. COPYRIGHT REGISTRATION AT A CROSSROADS

Today the United States Copyright Office, a division of the Library of

17. David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 683 (2007) (making the same point about dockets).

18. Pamela Samuelson's article from 1986 is surely among the most important ones. Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185 (1986). Other important work on the subject has been done bringing some of the episodes mentioned below to light. *See, e.g.*, Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 5 (2012).

19. "Reddit's vast and unmatched archive of real, timely, and relevant human conversation on literally any topic is an invaluable dataset for a variety of purposes, including search, AI training, and research. Reddit is one of the internet's largest corpuses of authentic and constantly updated human-generated experience." Reddit, Inc., Registration Statement (Form S-1) at i (Feb. 22, 2024), https://www.sec.gov/Archives/edgar/data/1713445/000162828024006294/reddits-1q423.htm [https://perma.cc/A83A-DKXD] (letter from co-founder Steve Huffman); Ryan Deffenbaugh, *How Reddit Surprised Wall Street With 185% Post-IPO Surge*, INV.'S BUS. DAILY (Nov. 15, 2024, at 8:00 ET), https://www.investors.com/news/technology/reddit-stock-ipo-digital-advertising-ai/ [https://perma.cc/29KS-2YEU].

Congress and headed by the Register of Copyrights, has responsibility for copyright registration.[20] Registration is not required for copyright protection but is required to commence an infringement lawsuit, among other benefits. To register, the copyright owner will file an application containing the relevant information about the work, including a statement of the nature of authorship of each contributor to the work. Under the 1976 Copyright Act, the Register of Copyrights shall deny registration if the work is not copyrightable, or is otherwise invalid.[21] The Office of Registration Policy and Procedure has a staff of Registration specialists who examine the application, including the claims of authorship and whether the work meets the low bar for originality set by *Feist*, who may either allow or deny the application.[22] If denied, a series of appeals are allowed, culminating in the copyright review board (established in 1995).[23] Further appeal is possible to the federal courts under the Administrative Procedure Act (APA).

A. Current Controversies at the Copyright Office

On January 29, 2025, the Copyright Office released their report, *Copyright and Artificial Intelligence Part 2: Copyrightability*.[24] Largely restating the Office's stated positions since 1965 and applying them to the new complexities of generative of AI, the report represents a culmination of a process preceded by several controversial registration denials, while other works with AI content are being registered without controversy. Generally speaking, the Copyright Office will accept an application to register a copyright for a work containing AI content if that AI content is disclaimed.[25]

1. Stephen Thaler and the Creativity Machine.—Stephen Thaler, a Missouri inventor and artificial intelligence researcher, developed an AI system capable of autonomously producing original works of visual art, which according to Thaler resembles that of art created by a human.[26] The program, named the "Creativity Machine," generated a visual piece of art titled *A Recent Entrance*

20. Zvi S. Rosen, *Examining Copyright*, 69 J. COPYRIGHT SOC'Y U.S.A. 481 (2023).

21. 17 U.S.C. § 410(b).

22. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021), https://www.copyright.gov/comp3/docs/compendium.pdf [https://perma.cc/4YPM-UNJE].

23. *Review Board Opinions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/rulings-filings/review-board/ [https://perma.cc/QH8G-KHLY] (last visited Feb. 21, 2026).

24. U.S. COPYRIGHT OFF., *supra* note 2.

25. *See* Defendant's Response to Motion for Summary Judgment and Memorandum in support thereof and Cross-Motion for Summary Judgment at 13–16, 37–40, Allen v. Perlmutter, No. 24-cv-2665 (D. Colo. Jan. 16, 2026), Dkt. No. 57.

26. Will Bedingfield, *The Inventor Behind a Rush of AI Copyright Suits Is Trying to Show His Bot Is Sentient*, WIRED (Aug. 31, 2023, at 7:00 ET), https://www.wired.com/story/the-inventor-behind-a-rush-of-ai-copyright-suits-is-trying-to-show-his-bot-is-sentient/ [https://perma.cc/CY2X-RYKJ]; Thaler v. Perlmutter, 687 F. Supp. 3d 140, 142 (D.D.C. 2023), *aff'd*, 130 F.4th 1039 (D.C. Cir. 2025). Thaler has also claimed patents based on the work of the Creativity Machine, which has also been denied. Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 1783 (2023).

to Paradise.[27] Thaler's attempt to register the work with the Copyright Office took him all the way to the U.S. Supreme Court.

The initial denial of copyright protection for the Creativity Machine's art resulted from Thaler identifying the computer program as the author of the art rather than himself.[28] Thaler listed the program as the author because the work had been "autonomously created by a computer algorithm running on a machine."[29] Thaler, therefore, attempted to claim the copyright of the art as "a work-for-hire to the owner" of the program.[30] Following an initial denial and requests for reconsideration, the Copyright Office affirmed their denial of his application and reiterated the established precedent that works lacking human authorship will be refused by the Copyright Office for copyright registration as these works are not reflective of copyrightable subject matter.[31]

Thaler then proceeded to challenge the Copyright Office's decision in the United States District Court for the District of Columbia.[32] Before a decision was made by the District Court, however, Thaler attempted to change direction and began to insist instead that the Creative Machine's artwork was generated based on his inputted instructions.[33] The Copyright Office argued that this conflicted with Thaler's prior representations and that the administrative record had already been made.[34] The Court agreed and declined to consider this alternate theory of authorship.[35]

The District Court, hearing cross-motions for summary judgment in 2023, reasoned that "authorship" in relation to copyright law is "synonymous" with "human creation."[36] The Court further explained that this is an understanding that has accompanied copyright law from its creation and has been recognized by the United States Supreme Court on numerous occasions.[37] The Court,

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27. *Thaler*, 687 F. Supp. 3d at 142.

28. *Id.* at 143.

29. *Id.* (citations omitted).

30. *Id.* This raises unsettling questions which Judge Wilkins would give voice to at oral argument at the D.C. Circuit. At a minimum, how the factors for determining whether a computer program is an employee under the factors the Supreme Court has identified in the work-for-hire context may be challenging. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

31. Letter from Shira Perlmutter, Reg. of Copyrights, Suzanne Wilson, Gen. Couns. & Assoc. Reg. of Copyrights, & Kimberley Isbell, Deputy Dir. of Pol'y & Int'l Affs., U.S. Copyright Off. Review Bd., to Ryan Abbott, Brown, Neri, Smith & Khan, LLP (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [https://perma.cc/TWA2-BZGV].

32. *Thaler*, 687 F. Supp. 3d at 142.

33. Matt Goldberg, *Using the Machine: Evolving Notions of Originality in Copyright Law and AI–assisted Art*, HARRIS SLIWOSKI (Aug. 27, 2024), https://harris-sliwoski.com/blog/using-the-machine-evolving-notions-of-originality-in-copyright-law-and-ai-assisted-art/ [https://perma.cc/3YS7-UG7X].

34. *Id.* Technically speaking the Department of Justice is typically doing the actual litigation on behalf of the Copyright Office, but I refer to the Copyright Office here and going forward for purposes of simplicity.

35. *Id.*

36. *Thaler*, 687 F. Supp. 3d at 147.

37. *Id.* at 148.

therefore, found that that the Register did not err in denying Thaler's copyright application for *A Recent Entrance to Paradise* lacking the requisite amount of human authorship.[38]

Thaler appealed the District Court's decision to the United States Court of Appeals for the D.C. Circuit in October of 2023.[39] The appeal, in asking the Court of Appeals to compel the Copyright Office to register the Creative Machine's work, effectively suggests that the Court should abandon the strict requirement of human authorship for copyrightable materials.[40] The author attended the oral argument in September of 2024, and Thaler's counsel had a rough go of it—the Court was clearly disinterested in the attempt to shift the question to whether Thaler was actually the author and instead pressed the difficult questions of authorship.[41] Judge Robert Wilkins asked the question of how the writings of slaves were treated under copyright law, a question counsel seemed unprepared for.[42]

The Court's decision in March of 2025 affirmed the District Court's

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38. *Id.* at 150.

39. John Hugo & Michael Robertson, *Can AI Create Copyright? DC Circuit Weighs Human Authorship in* Thaler v. Perlmutter, JD SUPRA (Oct. 1, 2024), https://www.jdsupra.com/legalnews/can-ai-create-copyright-dc-circuit-3037711/ [https://perma.cc/RB44-JQAF].

40. Ron N. Dreben, *Dueling Briefs Filed Over Human Authorship Requirement for US Copyright Registration*, MORGAN LEWIS (May 2, 2024), https://www.morganlewis.com/pubs/2024/05/dueling-briefs-filed-over-human-authorship-requirement-for-us-copyright-registration [https://perma.cc/J9A7-C6XW].

41. *See generally* Oral Argument, Thaler v. Perlmutter, 130 F.4th 1039 (D.C. Cir. 2025) (No. 23-5233), https://www.courtlistener.com/audio/94557/stephen-thaler-v-shira-perlmutter/ [https://perma.cc/9K8B-QLKW] (of course impressions from being there are my own).

42. Tragically, it is difficult to know if the works of enslaved people were registered for copyright by the person in a position of dominion over them. Of the some 140,000 works registered for copyright in the United States prior to 1870, I count under 1,500 known registrations from states which joined the Confederacy, although I suspect a small but nonzero number of registrations have not been identified—likely under 200. Of course, that figure goes to 1870 and the Thirteenth Amendment was ratified in 1865—over 45,000 works were registered for copyright 1866–1870, suggesting under 100,000 registrations were made prior to the ratification of the Thirteenth Amendment. Zvi S. Rosen & Richard Schwinn, *An Empirical Study of 225 Years of Copyright Registrations*, 94 TUL. L. REV. 1003 (2020). Works could have also been registered by publishers in northern states as proprietors on assignment from the person holding themselves out as the author, which would be even more difficult to trace. There are further questions of authorship where someone might transcribe a story told to them. Timothy J. McFarlin, *A Copyright Ignored: Mark Twain, Mary Ann Cord, and the Meaning of Authorship*, 69 J. COPYRIGHT SOC'Y U.S.A. 421 (2022).

I have been able to identify that Frederick Douglass was able to register a copyright when he was still legally a fugitive slave. Zvi S. Rosen, *Were Works by Slaves Eligible for Copyright? A Case Study of Frederick Douglass*, (MOSTLY) IP HISTORY (Dec. 30, 2024), https://mostlyiphistory.com/2024/12/30/were-works-by-slaves-eligible-for-copyright-a-case-study-of-frederick-douglass/ [https://perma.cc/3ZWW-4UJA]. David Newhoff has criticized the question, saying "the comparison is as ugly as it is unfounded" and arguing that The Creativity Machine "is neither slave nor employee any more than Dr. Thaler's coffee maker." David Newhoff, *The Human Condition is Inherent to Copyright Law*, THE ILLUSION OF MORE (Sep. 23, 2024), https://illusionofmore.com/the-human-condition-is-inherent-to-copyright-law/ [https://perma.cc/A5LE-2ABM].

decision.[43] The Court's decision avoided a discussion of the constitutional requirement of authorship and instead focused on various statutory provisions of the copyright law which specifically contemplate human authorship to conclude that federal copyright law requires human authorship.[44] Thaler's request for en banc review was denied.[45] In October of 2025, Thaler filed a petition for Writ of Certiorari with the U.S. Supreme Court asking "[w]hether works outputted by an AI system without a direct, traditional authorial contribution by a natural person can be copyrighted."[46] However, in March of 2026 the Court denied the petition.[47]

2. Kashtanova's Zarya *and* Rose Enigma.—The graphic novel *Zarya of the Dawn* was written by computer scientist and software developer Kris Kashtanova, with the use of AI tools.[48] With the help of Midjourney, an AI image generator, Kashtanova created an eighteen-page graphic novel that follows the story of a girl who wanders through a futuristic and abandoned Manhattan.[49]

Although they wrote the text, Kashtanova provided the AI program with instructions to generate certain images to depict the story of Zara and complete the graphic novel.[50] Kashtanova applied for and was granted copyright registration number VAu001480196 on September 15, 2022, by the Copyright Office, not mentioning at the time the use generative AI.[51]

Shortly after the graphic novel became copyrighted, Kashtanova took to social media and shared that the Copyright Office's decision suggests that artists using artificial intelligence in their work can be protected through copyright laws.[52] The Copyright Office was made aware of these statements online and asked Kashtanova to provide the Office with arguments as to why the registration should not be rescinded.[53]

In November of 2022, Kashtanova asserted their claim of authorship over *Zarya of the Dawn* and argued that they had authored every aspect of the graphic

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43. *Thaler*, 130 F.4th at 1052.

44. *Id.* at 1050.

45. Thaler v. Perlmutter, No. 23-5233, 2025 WL 1373093 (D.C. Cir. May 12, 2025).

46. Petition for Writ of Certiorari, *supra* note 3, at i.

47. Thaler v. Perlmutter, No. 25-449, 2026 WL 568327 (U.S. Mar. 2, 2026).

48. Kris Kashtanova, *Zarya of the Dawn*, KRIS KASHTANOVA ART, https://www.kris.art/portfolio-2/project-one-ephnc-jamy8 [https://perma.cc/2FMA-SJRA] (last visited Jan. 26, 2025).

49. *See* Codecademy Team, *How to Use Midjourney*, CODECADEMY, https://www.codecademy.com/article/getting-started-with-midjourney [https://perma.cc/7QJ8-EWZ7] (last visited Jan. 26, 2025); Tom Hals & Blake Brittain, *Insight: Humans vs. machines: the fight to copyright AI art*, REUTERS (Apr. 1, 2023, at 9:21 ET), https://www.reuters.com/default/humans-vs-machines-fight-copyright-ai-art-2023-04-01/ [https://perma.cc/H2AR-T38F].

50. Hals & Brittain, *supra* note 49; *US Copyright Office Grants Limited Registration for AI–Generated Graphic Novel*, COOLEY (Feb. 28, 2023), https://www.cooley.com/news/insight/2023/2023-02-28-us-copyright-office-grants-limited-registration-for-ai-generated-graphic-novel [https://perma.cc/SR4H-7AUY] (Kashtanova uses they/them pronouns).

51. ZARYA OF THE DAWN, Registration No. VAu001480196 (cancelled registration); COOLEY, *supra* note 50.

52. Hals & Brittain, *supra* note 49.

53. *Id.*

novel "with Midjourney serving merely as an assistive tool."[54] In the alternative, Kashtanova also argued that portions of the graphic novel are registerable because the text of the novel was authored by Kashtanova and that the work "is a copyrightable compilation due to her creative selection, coordination, and arrangement of the text and images."[55] The Copyright Office was not persuaded, and rescinded its grant of copyright to the images that were created by Kashtanova with the assistance of the Midjourney program.[56] The Copyright Office reasoned that "Midjourney users are not the 'authors' for copyright purposes of the images the technology generates" because Midjourney generates images in a manner that is not fully controlled by human authors.[57] Accordingly, the Copyright Office *sua sponte* cancelled the registration of *Zarya* as a work of visual art and issued a new registration as a textual work.[58]

Although the images of the graphic novel cannot be copyrighted, the text of *Zarya of the Dawn*, on the other hand, can be.[59] This is because the text of the novel constitutes "expressive material" that was wholly created by Kashtanova in contrast to the images used in the novel.[60] Therefore, since they did not appeal the Copyright Office's final decision, Kashtanova maintains copyright protection for the original text in *Zarya of the Dawn* and in the graphic novel as a whole due to it being a compilation, but not in the individual images that were generated using the Midjourney program.[61]

Learning from the mistakes that they made with attempting to copyright *Zarya of the Dawn*, Kashtanova, created *Rose Enigma*, adding "more human input" than they had done with the graphic novel.[62] The program Kashtanova used this time was Stable Diffusion rather than Midjourney.[63] According to Kashtanova, they used their own drawing and showed control over the input while using parameters and a predefined seed.[64] Therefore, as Kashtanova has explained, the work may be copyrightable subject matter because they had met the "traditional elements of authorship" without the assistance of artificial intelligence.[65]

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54. Letter from Robert J. Kasunic, Assoc. Reg. of Copyrights & Dir. of the Off. of Reg. Pol'y & Prac., U.S. Copyright Off., to Van Lindberg, Taylor English Duma LLP 3 (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [https://perma.cc/YST5-FK45].

55. *Id.*

56. *Id.* at 12; Goldberg, *supra* note 33.

57. Letter from Robert J. Kasunic to Van Lindberg, *supra* note 54, at 9; Goldberg, *supra* note 33.

58. The new registration number is TXu002356581. ZARYA OF THE DAWN, Registration No. TXu002356581.

59. Letter from Robert J. Kasunic to Van Lindberg, *supra* note 54, at 1.

60. *Id.*

61. *Id.* at 12; Goldberg, *supra* note 33.

62. *See* Kris Kashtanova, *Rose Enigma*, KRIS KASHTANOVA ART, https://www.kris.art/portfolio-2/rose-enigma [https://perma.cc/H6FM-Q68M] (last visited Jan. 26, 2025).

63. Tiffany Hu, *Artist Seeks Copyright of AI Artwork That Uses Own Drawing*, MORRISON FOERSTER (Mar. 24, 2023), https://www.mofo.com/resources/news/230324-artist-seeks-copyright-of-ai [https://perma.cc/ZA3V-A3FF].

64. *Id.*

65. *Id.*

As explained in the cover letter of their application to the Copyright Office, *Rose Enigma* was created using generative artificial intelligence as a tool, similar to the way that a photographer uses a camera as a tool to capture an image.[66] Kashtanova chose a cyborg to be the subject of the artwork and guided Stable Diffusion in the generation of the art with specific text prompts to achieve the image of a human woman, resembling that of a cyborg, with flowers growing from her head.[67] Thus, Kashtanova chose the subject matter of *Rose Enigma*, not the artificial intelligence program; they also chose how to render that subject in addition to maintaining control over the Stable Diffusion program to ensure that the executed work realized their mental conception.[68]

The "goal" of creating *Rose Enigma*, according to Kashtanova, was to "educate the Copyright Office in the US about different ways A.I. can be used."[69] Because intentional decisions regarding the work were made by Kashtanova, they argue that *Rose Enigma* is not a "random creation," which makes Kashtanova the author of the work and thus satisfies the Copyright Office's human authorship requirement.[70] The Copyright Office registered *Rose Enigma*, but the registration has a significant caveat: it is "limited to unaltered human pictorial authorship that is clearly perceptible in the deposit and separable from the non-human expression that is excluded from the claim."[71]

3. Allen's Théâtre D'opéra Spatial.—In 2022, Colorado artist Jason M. Allen created the image *Théâtre D'opéra Spatial* using the artificial intelligence program Midjourney.[72] Allen entered "at least 624" inputs until he achieved the image that he wanted: an ethereal operatic scene.[73] Allen entered *Théâtre D'opéra Spatial* into the 2022 Colorado State Fair fine arts competition in the digital arts category, where it won first place.[74] The other artists in the competition, as well as those on social media and the Internet, quickly expressed concern that Allen and *Théâtre D'opéra Spatial* had won the contest despite not using traditional elements of human authorship.[75] It is unclear whether the

66. Letter from Heather M. Whitney, Assoc., & Joseph C. Gratz, Partner, Morrison & Foerster LLP, to Robert J. Kasunic, Copyright Off. (Mar. 21, 2023), https://drive.google.com/file/d/1cnbU-6jdZwzr6Q1gbsLVVuUuyZwTw-oJ/view [https://perma.cc/YL4V-HRUP].

67. Atreya Mathur, *A Rose Enigma: Pending (Right) Protection*, CTR. FOR ART L. (Dec. 8, 2023), https://itsartlaw.org/2023/12/08/rose-enigma/ [https://perma.cc/28Z5-SZ4A].

68. *Id.*

69. Kashtanova, *supra* note 62.

70. Mathur, *supra* note 67.

71. ROSE ENIGMA, Registration No. VAu001528922.

72. Matt Growcoot, *AI-Generated Artwork Wins First Place at State Fair, Enraging Artists*, PETAPIXEL (Sep. 1, 2022), https://petapixel.com/2022/09/01/ai-generated-artwork-wins-first-place-at-state-fair-enraging-artists/ [https://perma.cc/MT7K-GCFW]; Andrew Kenney, *Jason Allen's AI art won the Colorado fair—but now the feds say it can't get a copyright*, CPR NEWS (Sep. 6, 2023, at 8:02 ET), https://www.cpr.org/2023/09/06/jason-allens-ai-art-won-colorado-fair-feds-deny-copyright-protection/ [https://perma.cc/DQL3-RFF5].

73. Growcoot, *supra* note 72; Kenney, *supra* note 72.

74. Growcoot, *supra* note 72; Kenney, *supra* note 72.

75. Drew Harwell, *He used AI to win a fine-arts competition. Was it cheating?*, WASH. POST (Sep. 2, 2022), https://www.washingtonpost.com/technology/2022/09/02/midjourney-artificial-intelligence-state-fair-colorado/ [https://perma.cc/87ZP-LQU7].

judges of the contest understood that the image was generated by AI.[76]

Shortly after winning the competition, Allen applied for copyright registration for the work with the Copyright Office.[77] Allen did not initially disclose in his application that *Théâtre D'opéra Spatial* was generated using Midjourney, but the Copyright Office became aware that AI had been used in developing Allen's image, and the examiner assigned to Allen's application requested additional information about how the image was created.[78] Allen explained that he had prompted Midjourney to create an image and then "used Adobe Photoshop to remove flaws and create new visual content," in addition to using Gigapixel AI to enlarge it.[79] Despite Allen's further explanation, the Copyright Office was not convinced, and the examiner asked Allen if the components of the image created using Midjourney could be excluded from the application.[80] Allen declined to alter the application.[81]

As a result, the Copyright Office refused to register *Théâtre D'opéra Spatial* for not satisfying the human authorship requirement for copyrightable subject matter because the work "included inextricably merged, inseparable contributions from both Mr. Allen and Midjourney."[82] Subsequently, Allen requested that the Copyright Office reconsider its decision twice, arguing that the human authorship requirement was "misapplied" and that "public policy favored" the registration of *Théâtre D'opéra Spatial*.[83] After considering both requests, the Copyright Office reaffirmed their decision.[84]

Allen then brought an action against the Copyright Office in September of 2024 for refusing to register *Théâtre D'opéra Spatial*.[85] Allen asked the Colorado federal court for a reversal of the Copyright Office's refusal to register his image and asserted that the work is "an expression of his creativity."[86] At the time of this writing, Allen's summary judgment motion and the Copyright Office's cross-motion for summary judgment are before the court.[87]

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76. *Id.*

77. Letter from Suzanne V. Wilson, Gen. Couns. & Assoc. Reg. of Copyrights, Maria Strong, Assoc. Reg. of Copyrights & Dir. of Pol'y & Int'l Affs. & Jordana Rubel, Assistant Gen. Couns., U.S. Copyright Off. Rev. Bd., to Tamara Pester, Tamara S. Pester, LLC 2 (Sep. 5, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf [https://perma.cc/BE76-DTUT].

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* (internal quotation marks omitted).

83. *Id.*

84. *Id.*

85. Complaint, Allen v. Perlmutter, No. 1:24-cv-2665 (D. Colo. Sep. 26, 2024), Dkt. No. 1.

86. Blake Brittain, *Artist sues after US rejects copyright for AI-generated image*, REUTERS (Sep. 26, 2024, at 13:41 ET), https://www.reuters.com/legal/litigation/artist-sues-after-us-rejects-copyright-ai-generated-image-2024-09-26/ [https://perma.cc/3NGP-SKEV]; Complaint, *supra* note 84, at 24.

87. Plaintiff's Motion for Summary Judgment, Allen v. Perlmutter, No. 24-cv-2665 (D. Colo. Aug. 25, 2025), Dkt. No. 41; Defendant's Response to Plaintiff's Motion for Summary Judgment

4. Other Examples, Not Litigated.—The above examples have been in the news, but it's worth noting that these are not the only AI registrations considered at the Copyright Office in recent years. For example, Aerospace IT integrator SITA registered five works for copyright in 2021, where "[s]ome non-human authorship" was disclaimed.[88] Likewise, in 2019, Human Mode Robotics put out an anthology of poems written by "Robot Newman," accurately entitled *The Art of Artificial Poetry: I Wrote This in Three Hours*.[89] Only the foreword and acknowledgements were edited at all by humans.[90] Registration was nonetheless granted as a collective work, with the caveat that "[r]egistration does not extend to non-human authorship."[91]

From 2022 to 2024 Noah Lukeman and his Lukeman Literary Agency received by far the majority of registrations which acknowledge and exclude from the claim "text generated by artificial intelligence."[92] As of December 31, 2024, Lukeman Literary, Ltd. received 319 copyright registrations.[93] Taking one work, *Absolute Damage (A Jake Mercer Political Thriller—Book 2)*, as an example, it received registration TX0009387546 in April of 2024,[94] apparently without any correspondence from the Copyright Office. The Amazon reviews are oddly normal, and there is no indication it is partially AI-generated anywhere but in the copyright registration.[95]

In a supplemental registration, Lukeman stated that a

> computer was also used in a finite capacity as merely an assisting instrument in contributing portions of generative-AI material. The

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and Cross-Motion for Summary Judgment, *supra* note 25; Plaintiff's Reply to Defendant's Response to Motion for Summary Judgment, *Allen*, No. 24-cv-2665 (D. Colo. Feb. 27, 2026), Dkt. No. 60.

88. FLEX CORE, Registration No. TXu002297823; MOBILIZE CLIENT, Registration No. TXu002294583; AMS DATA WAREHOUSE CLIENT, Registration No. TXu002294599; AMS SEASONAL CLIENT, Registration No. TXu002294594; AMS CORE–AMS OPERATIONAL CLIENT, Registration No. TXu002272414.

89. Human Mode (@HumanModeTech), X (July 15, 2019, at 10:19 ET), https://x.com/HumanModeTech/status/1150771897740775424 [https://perma.cc/ME8R-Q2J8].

90. *See* ROBOT NEWMAN, THE ART OF ARTIFICIAL POETRY: I WROTE THIS IN THREE HOURS (2019).

91. THE ART OF ARTIFICIAL POETRY: I WROTE THIS IN THREE HOURS, Registration No. TX0008768878 (preceded by a registration as an unpublished work); ROBOT NEWMAN–THE ART OF ARTIFICIAL POETRY, Registration No. TXu002156337.

92. U.S. COPYRIGHT OFF. PUB. RECS. SYS., https://publicrecords.copyright.gov/ (search in search bar for "text AND generated AND by AND artificial AND intelligence AND Lukeman"; then filter the search results for between "01/01/2022" and "12/31/2024") (last visited Feb. 22, 2026).

93. *Id.* (search in search bar for "text AND generated AND by AND artificial AND intelligence AND Lukeman"; then filter the search results for before "12/31/2024").

94. ABSOLUTE DAMAGE (A JAKE MERCER POLITICAL THRILLER—BOOK 2), Registration No. TX0009387546.

95. *Absolute Damage (A Jake Mercer Political Thriller–Book 2)*, AMAZON, https://www.amazon.com/Absolute-Damage-Mercer-Political-Thriller-Book-ebook/dp/B0CSVTZBYH [https://perma.cc/F8KK-NZCJ] (last visited Jan. 26, 2025); ABSOLUTE DAMAGE (A JAKE MERCER POLITICAL THRILLER—BOOK 2), Registration No. TX9387546.

> entire creative conceptualization of the plot, including how to execute it step by step, was done by a human. Approximately 60 to 80% of the writing is original and human-written . . . . The final product contains very little content that is untouched AI-generated content.[96]

The contrast between this situation and *Théâtre D'opéra Spatial* seems interesting and suggests a more uniform approach is needed. One wonders if the text and visual arts sections of the Registration Policy and Practice Division of the Copyright Office are approaching this issue differently.[97] Either way, the numbers are increasing—the Copyright Office granted one registration claiming "text generated by artificial intelligence" as preexisting matter in 2022, 145 in 2023, and 318 in 2024.[98] 2025 has had more than 600,[99] with Lukeman having a substantial but non-majority percentage in 2025.[100]

On January 30, 2025, the Copyright Office approved registration of *A Single Piece of American Cheese* by InvokeAI, with the initial rejection being overcome by additional information about human input in the work's creation.[101] This illustrates what seems to be something of a trend, both in the past and present—an insistence on human input, coupled with general persistence and a disclaimer of computer authorship, is generally sufficient to receive a registration from the Copyright Office.[102]

During the first nine months of 2025, there were 4,375 registrations that list "AI" or "artificial intelligence" in the material excluded.[103] Almost 3,400 of these were text registrations, with 291 music registrations, 171 computer-file registrations, and double digits of most other categories.[104] In fact, although the

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96. BEYOND REASON (A REESE LINK MYSTERY—BOOK ONE), Registration No. TX0009315600 (supplement to BEYOND REASON (A REESE LINK MYSTERY—BOOK ONE), Registration No. TX0009235931).

97. *See* Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, *supra* note 25.

98. U.S. COPYRIGHT OFF. PUB. RECS. SYS., *supra* note 92 (search in advanced search bar for "text generated by artificial intelligence"; then filter the search results for between "01/01/2022" and "12/31/2022"; filter the search results for between "01/01/2023" and "12/31/2023"; filter the search results for between "01/01/2024" and "12/31/2024").

99. *Id.* (search in advanced search bar for "text generated by artificial intelligence"; then filter the search results for between "01/01/2025" and "12/31/2025") (684 results).

100. *Id.* (search in advanced search bar for "text generated by artificial intelligence"; then add a row with "Operator" "AND"; input "Lukeman Literary Management"; filter the search results for between "01/01/2025" and "12/31/2025") (161 results).

101. Katelyn Chedraoui, *This Company Got a Copyright for an Image Made Entirely With AI. Here's How*, CNET (Feb. 10, 2025, at 6:00 PT), https://www.cnet.com/tech/services-and-software/this-company-got-a-copyright-for-an-image-made-entirely-with-ai-heres-how/ [https://perma.cc/LP6N-YDLN]; A SINGLE PIECE OF AMERICAN CHEESE, Registration No. VAu001543942.

102. Chedraoui, *supra* note 101.

103. U.S. COPYRIGHT OFF. PUB. RECS. SYS., *supra* note 92 (search in advanced search bar for "AI" with a "Field Heading" of "Material Excluded"; add a row and search for "artificial intelligence" with the "Operator" of "OR" and "Field Heading" of "Material Excluded"; filter the search results for between "01/01/2025" and "09/30/2025").

104. *Id.*

A Single Piece of American Cheese registration, with its disclaimer of "AI-generated image components" got a fair bit of attention,[105] it was neither particularly exceptional nor precedential. There were over 2,600 registrations with effective dates prior to that registration's approval date that disclaim AI content.[106] What records are being kept of these registrations, and the status of the presumption of the validity when it is unclear what exactly was registered, is a question for a future project.[107]

5. Going Beyond the USA.—Although the framing varies a bit, most other countries have adopted a fairly similar approach to the United States for copyright protection, requiring at least some element of human authorship. For instance, in India the Copyright Act of 1957 defines an "author" as the person who "causes the work to be created," even if a computer is involved.[108] After Ankit Sahni registered a work listing his AI tool "Raghav" as a co-author, the Indian Copyright Office issued a withdrawal notice.[109] The Court of Justice of the European Union has required that a work reflecting "the expression of the intellectual creation of their author" be protected by copyright, but the details of what that means are left to member states.[110] Under Japanese law, a copyrightable work must express "human thoughts and emotions."[111] It may be possible for a work created using AI to be protected under this standard if it reflects substantial human input.[112]

One outlier may be China, where the Beijing Internet Court found that detailed prompting could create a copyrightable work, noting that there had been "a certain amount of intellectual input, such as designing the presentation of the character, selecting the prompts, arranging the order of the prompts, setting the

105. Chedraoui, *supra* note 101.

106. U.S. COPYRIGHT OFF. PUB. RECS. SYS., *supra* note 92 (search in advanced search bar for "AI" with a "Field Heading" of "Material Excluded"; add a row and search for "artificial intelligence" with the "Operator" of "OR" and "Field Heading" of "Material Excluded"; filter the search results for an "End Date" of "01/30/2025").

107. 17 USC § 410(c).

108. The Copyright Act, 1957, § 2(d)(vi) (India).

109. Sukanya Sarkar, *Exclusive: Indian Copyright Office issues withdrawal notice to AI co-author*, MANAGING IP (Dec. 13, 2021), https://www.managingip.com/article/2a5bqtj8ume32iwlaoy5y/exclusive-indian-copyright-office-issues-withdrawal-notice-to-ai-co-author [https://perma.cc/5G4F-DTKP]. *See also* Letter from Suzanne V. Wilson, Gen. Couns. & Assoc. Reg. of Copyrights, Maria Strong, Assoc. Reg. of Copyrights & Dir. of Pol'y & Int'l Affs. & Mark T. Gray, Assistant Gen. Couns., U.S. Copyright Off. Rev. Bd., to Alex P. Garens, Day Pitney, LLP (Dec. 11, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf [https://perma.cc/ZAW6-DRAT] (U.S. Copyright Office also refused to register the work.).

110. Case C-5/08, Infopaq Int'l A/S v. Danske Dagblades Forening 2009 E.C.R I-6569, ¶ 51.

111. Scott Warren, *Japan's New Draft Guidelines on AI and Copyright: Is It Really Ok to Train AI Using Pirated Materials?*, SQUIRE PATTON BOGGS (Mar. 12, 2024), https://www.privacyworld.blog/2024/03/japans-new-draft-guidelines-on-ai-and-copyright-is-it-really-ok-to-train-ai-using-pirated-materials/ [https://perma.cc/2QCW-3H4Q].

112. *Id.*

relevant parameters, selecting which picture meets their expectations."[113] Although this approach is somewhat discordant with the United States, it is more in rule than doctrine—declining a per se rule against registration while still requiring some human authorship for AI creations. Interestingly, in another case, the Court found that the company behind the AI product, Tencent, owned the copyright in a textual work output by its AI product.[114]

Another interesting outlier is the United Kingdom, which established protections for computer-generated works in the 1988 Copyright, Designs and Patents Act.[115] Under these provisions, "the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[116] New Zealand, Hong Kong, and Ireland have similar provisions.[117]

B. The 1965 Copyright Office Annual Report

The issue of AI authorship and copyright is significant and is becoming more so. As such, it is not surprising that the initially obscure 1965 Annual Report of the Copyright Office keeps coming up as the original authority on the subject.[118] In the section on administrative developments at the Copyright Office, alongside issues such as searching Mexican copyrights and the percentage of registrations renewed by subject matter, is a section in the Report with the heading "Problems Arising From Computer Technology."[119] After discussing copyright registration for computer programs, the Report turns to

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113. Li Mou Su Liu Mou Qinhai Zuopin Xinxiwangluo Chuanbo Quan Jiufen An (李某某诉刘某某侵害作品署名权、信息网络传播权纠纷案) [Li v. Liu, The Dispute over Copyright Infringement on the Right of Authorship and Right of Communication through Information Network], Jing 0491 Min Chu No. 11279, at 13 (Beijing Internet Ct. Nov. 27, 2023) (China), *translated at* https://patentlyo.com/media/2023/12/Li-v-Liu-Beijing-Internet-Court-20231127-with-English-Translation.pdf [https://perma.cc/E56G-5HHK]; Danny Friedmann, *Creation and Generation Copyright Standards*, 14 N.Y.U. J. INTELL. PROP. & ENT. L. 51, 84 (2025).

114. *Copyright Ownership of Generative AI Outputs Varies Around the World*, COOLEY (Jan. 29, 2024), https://www.cooley.com/news/insight/2024/2024-01-29-copyright-ownership-of-generative-ai-outputs-varies-around-the-world [https://perma.cc/J2NE-CX6T].

115. Copyright, Designs and Patents Act 1988, c. 48 (UK), https://www.legislation.gov.uk/ukpga/1988/48/data.pdf.

116. *Id.* § 9(3).

117. Hafiz Gaffar & Saleh Albarashdi, *Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape*, 15 ASIAN J. INT'L L. 23, 36 (2024).

118. Westlaw indicates that the 1965 Annual Report has been cited twenty-seven times by law reviews and journals articles, almost one third of the total of ninety-two citations to all annual reports of the Register of Copyrights. WESTLAW, "Annual Report" /s "Register of Copyrights" /s 1965, 27 results (Feb. 26, 2026) (on file with the Indiana Law Review) (filtered by "Secondary Sources", "Law Reviews & Journals"); WESTLAW, "Annual Report of the Register of Copyrights", 92 results (Feb. 26, 2026) (on file with the Indiana Law Review) (filtered by "Secondary Sources", "Law Reviews & Journals").

119. U.S. COPYRIGHT OFF., SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 4 (1966), https://www.copyright.gov/reports/annual/archive/ar-1965.pdf [https://perma.cc/L75A-XU94].

copyrightability of what was then called computer-generated works and what we'd now call AI authored works.[120]

> As computer technology develops and becomes more sophisticated, difficult questions of authorship are emerging. The Copyright Office had previously received an application for registration of a musical composition created by computer. This year, copyright was claimed for an abstract drawing, and for compilations of various kinds, which were at least partly the "work" of computers. It is certain that both the number of works proximately produced or "written" by computers and the problems of the Copyright Office in this area will increase. The crucial question appears to be whether the "work" is basically one of human authorship, with the computer merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.[121]

This section is the subject of some fascination because it was so far ahead of its time.[122] However, in addition to the reports to Congress, the various divisions of the U.S. Copyright Office have, since 1947, produced reports to the Register of Copyrights and Librarian of Congress.[123] The annual report of the Examining Division goes into greater detail than the public report on the issue and makes additional observations which are not included in the Office's Report, noting that:

> In many cases the application may not reflect the true nature of the authorship, and registrations will be made that would not be if the actual facts had been known by the Examining Division. The problem is complicated by the fact that we cannot take the categorical position that registration will be denied merely because a computer may have been used in some manner in creating the work. After all, a typewriter is a machine that is used in the creation of a manuscript but this does not result in the manuscript being uncopyrightable.[124]

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120. *Id.* at 4–5.

121. *Id.* at 5.

122. *See, e.g.*, Robert C. Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works*, 69 RUTGERS L. REV. 251, 264 (2016).

123. Rosen & Schwinn, *supra* note 42, at 1022–23. I've shared all the Examining Division reports I could find here: U.S. Copyright Off., *U.S. Copyright Office Examining Division Annual Reports*, INTERNET ARCHIVE (Aug. 9, 2021), https://archive.org/details/USCO_Examining_Reports/1948/ [https://perma.cc/B2YV-8TPB].

124. U.S. COPYRIGHT OFF., ANNUAL REPORT OF THE EXAMINING DIVISION, COPYRIGHT OFFICE FOR THE FISCAL YEAR 1965, at 4 (1966), https://copyright.gov/reports/annual/archive/ar-examining1965.pdf [https://perma.cc/9W7Y-BE25]. When I shared this on Twitter in March of 2022, the Copyright Office asked me where it was from and subsequently scanned the report for

Barbara Ringer was the head of the Examining Division at the time and would have written this language, and former Examining Division employee Art Levine, subsequently of Finnegan, informs me that she worked on the question of AI authorship herself rather than delegating it.[125] She clearly did good work, because the Copyright Office's 2021 Compendium essentially restates this:

> [T]he Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author. The crucial question is "whether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine."[126]

Shortly after the Library's annual report came out, Richard Glasgow of the Copyright Office spoke to *The Washington Post* and offered additional insight, noting:

> If it can be shown that the work was programmed under human direction or the output edited by human hand, then copyrights will be granted, Glasgow said. But when computers get to the stage where they are fed raw material and "out comes a musical composition," then nothing doing. The touchy problem will be to determine at what point human direction lets off and computers take over. Guidelines for this have yet to be worked out.[127]

All of this sounds remarkably similar to current policy. If we are still using the analysis from 1965, we should know what works were actually at issue when this analysis was developed, both for context and to understand the degree to which it is equally applicable to modern works of large language models and other generative AI creations. Accordingly, we need to go further back in time and consider other situations where authorship was tendentious.

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placement on their site. Image posted by Zvi S. Rosen (@zvisrosen), X, (Mar. 29, 2022, at 13:38 ET), https://x.com/zvisrosen/status/1508861171616653316 [https://perma.cc/LD84-UM8P].

125. It is worth noting that in 1965 Barbara Ringer would have been near the end of the nearly decade-long process where she served as the primary drafter of what would become the 1976 Copyright Act, even though it would not become law for more than another decade.

126. U.S. COPYRIGHT OFF., *supra* note 22, § 313.2 (quoting U.S. COPYRIGHT OFF., *supra* note 119, at 5).

127. Leroy F. Aarons, *Poser: Is Computer a Citizen?*, WASH. POST, Apr. 20, 1966, at C7 (paragraph breaks omitted) (stating that citizenship was required for registration, but this would have been an error).

II. MEDIATED AUTHORSHIP

Before dealing with computer-generated works, it is necessary to consider the long history of controversies involving copyright protection and mediated authorship. Mediated authorship goes back thousands of years with, for instance, the use of scribes in ancient times.[128] This includes works of a religious nature, works in new media with a different quantum of authorship, and works involving randomness and chance.[129] Properly conceiving of AI works as a type of mediated authorship allows us to better understand how AI authorship fits into existing precedents and practices.[130]

A. Early Authorship Problems

Prior to the 1976 Act, the practicalities of registration were slightly different, and controversies over authorship long predate the current law. The origins of the system of copyright registration in the United States lie in England, where the Stationers' Company maintained a system of registration of works for printing.[131] Individual states had registration systems in the 1780s, typically with their secretary of state. In 1790, Congress passed a copyright law providing for federal copyright protection for books, maps, and navigational charts, with registration to be made with the clerk of the local federal district court in the registrant's district. Until 1909, copyright registration was made before publication by depositing a printed title page and paying a fee, although, as noted above, the registration venue moved to the Library of Congress in 1870.[132]

Among the first works that claimed at least partially non-human authorship to be registered for copyright was the Book of Mormon, registered for copyright

128. James Hutson & Travis McMaken, *Dictating the Divine: Revisiting Authorship, Intention, and Authority from Sacred Texts to Generative AI*, 3 ISAR J. ARTS, HUMANITIES & SOC. SCIS. 21, 21 (2025). The work made for hire doctrine is a descendant of this, although only some cases—more analogous to this historical analogue—are clearly mediated authorship, while in other cases, authorship isn't being mediated so much as shifted to the employer when the employee was in fact the author. *See* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 14–15 (2001) (discussing how adaptations of ancient texts also raise some of the same issues).

129. There is also an interesting discourse of how student work is mediated by their professors and their peers. This is a somewhat different usage but nonetheless interesting. PAUL A. PRIOR, WRITING/DISCIPLINARITY: A SOCIOHISTORIC ACCOUNT OF LITERATE ACTIVITY IN THE ACADEMY 140–43 (1998).

130. Although I've attempted to survey some of the major instances of mediated authorship, this section is not meant to be fully exhaustive. Another example would be video games, where the courts ultimately resolved that the elements of the game were sufficiently fixed even if their final expression was dependent on the gamer. *See* Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870 (3d Cir. 1982). Likewise, the work made for hire doctrine could be a paper in and of itself in its relation to mediated authorship.

131. In 1710, this was made much closer to modern copyright, but registration remained with the Stationers.

132. Additional formalities such as notice and deposit also existed, although those are mostly tangential to us here.

with the clerk for the Northern District of New York in June of 1829 by Joseph Smith, Jr.[133] Smith described that he had found tablets in an unknown language of divine inspiration, which he translated himself and which were, in turn, transcribed by others.[134] On the title page, Smith listed himself as the author and proprietor, and the registration was made listing Smith as the author.[135] The Book of Mormon is forthright about its authorship but, as a translation, it may have been validly registered anyway—and it is unlikely the clerk would have put up a fuss because the fees went directly into his pocket.[136] In 1835, the Church's *Doctrine and Covenants* was published, which is described as "carefully selected from the revelations of God, and compiled by" the presiding elders.[137] This work was also registered for copyright in Ohio in 1835.[138] The question of authorship in works that claim a higher authorship continues to be a difficult one to this day.[139] Speaking at the end of the nineteenth century, Librarian of Congress Ainsworth Spofford mentioned that he had registered the Bible for copyright several times, although he knew it was likely invalid.[140]

The same considerations of clerks being willing to accept almost anything that was given to them for registration, so long as the fee was paid, also applied to photographs. There is good evidence of registrations for photographs being made well before photographs were officially added to the copyright law in 1865,[141] but they raise somewhat unique legal issues as to who the "author" is. Was the author the person posing, the person operating the camera, the person giving them directions for posing, the owner of the photography studio, or no

133. *Title page for The Book of Mormon: an account written by then hand or Mormon upon plates taken from the plates of Nephi . . . by Joseph Smith, Junior, author and proprietor*, LIBR. OF CONG., https://www.loc.gov/item/2016660778/ [https://perma.cc/CWG9-R8WQ] (last visited Jan. 27, 2025).

134. *Book of Mormon Translation*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics-essays/book-of-mormon-translation?lang=eng [https://perma.cc/VK6S-DYJQ] (last visited Jan. 27, 2025).

135. Nathanial Hinckley Wadsworth, *Copyright Laws and the 1830 Book of Mormon*, 45 BYU STUD. 77, 83 (2006).

136. Translations of works by others were registered for copyright as early as 1794. *See* GEORG FRIEDRICH VON MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE; WITH A LIST OF THE PRINCIPAL TREATIES, CONCLUDED SINCE THE YEAR 1748 DOWN TO THE PRESENT TIME, INDICATING THE WORKS IN WHICH THEY ARE TO BE FOUND (William Cobbett trans., 1795).

137. JOSEPH SMITH, JR. ET AL., DOCTRINE AND COVENANTS OF THE CHURCH OF THE LATTER-DAY SAINTS (1835), https://archive.org/details/GR_711/page/n5/mode/2up [https://perma.cc/XX6L-ZJQR].

138. *Copyright Records Ohio*, LIBR. OF CONG. (1831–1848), https://www.loc.gov/resource/rbccopyledger.copy0560/?sp=27&r=-0.911,-0.112,2.823,1.749,0 [https://perma.cc/24X2-GSD2] (last visited Mar. 16, 2026).

139. *See* Urantia Found. v. Maaherra, 114 F.3d 955, 958–59 (9th Cir. 1997); ANDREW VENTIMIGLIA, COPYRIGHTING GOD: OWNERSHIP OF THE SACRED IN AMERICAN RELIGION 24–27 (2019).

140. *SPOFFORD IS ON THE RACK; Accounts of the Librarian of Congress are Questioned. UNBUSINESSLIKE METHODS CHARGED Copyrights Obtained Without a Full Compliance with the Law—Fees Retained for an Undue Length of Time*, N.Y. TIMES, July 10, 1895, at 4.

141. Wendi A. Maloney, *Lincoln Authorized 1865 Copyright Legislation*, COPYRIGHT NOTICES, Feb. 2009, at 16.

one at all?[142] Because a camera simply captures whatever is put in front of it, and the Constitution only empowers Congress to protect "Writings" of an "Author," does copyright law extend to works that use mechanical mediation to produce the work?[143]

The issue was finally raised when famed photographer Napoleon Sarony's depiction of Oscar Wilde, taken while Wilde was on a tour of America, was widely used without Sarony's permission, including in advertisements for department stores in New York and Chicago.[144] The resulting suit against the Burrow-Giles Lithographic Company would arrive at the Supreme Court, which finally addressed what "author" means under the Constitution.[145]

Recognizing that "[t]he constitutional question is not free from difficulty," the Court held that Sarony's copyright was valid.[146] The Court noted that the 1790 statute had included maps and navigational charts, where the only authorship is in representational choices of natural objects.[147] Further, the Court reasoned that "[t]he construction placed upon the constitution by the first act of 1790 . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight."[148] Holding that the words "author" and "writing" are "susceptible of a more enlarged definition than" simply someone writing a book, the Court held that "the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author."[149] The Court further found that there was sufficient original authorship from Sarony's "posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression," even though he did not actually operate the camera.[150]

The Court's decision in *Burrow-Giles v. Sarony* continues to be a touchstone of what authorship means under the Constitution—a nineteenth-century connection between the framing of the Constitution a century earlier and today. When the Copyright Office denied Stephen Thaler's attempt to register a work authored by his "Creativity Machine," they discussed *Burrow-Giles* extensively.[151] The district court, in affirming that decision, also discussed *Burrow-Giles*, noting that "[h]uman involvement in, and ultimate creative control over, the work at issue was key to the conclusion that the new type of

142. *See generally* DAVID NEWHOFF, WHO INVENTED OSCAR WILDE? (2020).

143. U.S. CONST. art. 1, § 8, cl. 8.

144. Megan Richardson, *Oscar Wilde Portrait*, *in* A HISTORY OF INTELLECTUAL PROPERTY IN 50 OBJECTS 113, 117 (Claudy Op den Kamp & Dan Hunter eds. 2019).

145. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

146. *Id.* at 56, 61.

147. *Id.* at 57–58.

148. *Id.* at 57.

149. *Id.* at 57–58.

150. *Id.* at 55.

151. Letter from Shira Perlmutter to Ryan Abbott, *supra* note 31.

work fell within the bounds of copyright."[152]

The other major case from this period to explore the nature of authorship involved the question of whether the name used by a business was a writing of an author. In a series of consolidated cases regarding counterfeit labels for alcoholic beverages, the Supreme Court held that an unadorned trademark was not the writing of an author.[153] The Court explained that in addition to the requirement of originality for authorship,

> while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.[154]

The Court then proceeds to explain that a simple trademark is none of these things, as it is founded on priority of use and need not be the writing of an author.[155] As these doctrines have rarely been addressed by the Supreme Court since, these two decisions exist in something of a counterpoint to each other as the fundamentals of what authorship of a writing means under the Constitution.[156]

Copyright registration had been moved to the Library of Congress in 1870 with the goal of increasing the Library's collection through deposit. It quickly became clear that Librarian of Congress Ainsworth Spofford had in some ways bitten off more than he could chew, and the Library (still within the Capitol building at this point) was flooded with many questionable registrations, particularly product labels.[157] Spofford was still administering copyright registration when, in the final decades of the nineteenth century, technologies for capturing more and more of the world were developed, with both audio and video recording arriving before the turn of the century. These would follow very different legal paths, as motion pictures would be registered for copyright almost immediately, while sound recordings would not be registrable for copyright under federal law until ninety-five years after Thomas Edison

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152. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.D.C. 2023), *aff'd*, 130 F.4th 1039 (D.C. Cir. 2025).

153. Trade-Mark Cases, 100 U.S. 82 (1879); Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN'S L. REV. 827, 869 (2010).

154. *Trade-Mark Cases*, 100 U.S. at 94.

155. *Id.*

156. The Supreme Court would later qualify that courts should not engage in aesthetic discrimination, and that original works of authorship are copyrightable "outside of the narrowest and most obvious limits." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

157. Zvi S. Rosen, *Reimagining Bleistein: Copyright for Advertisements in Historical Perspective*, 59 J. COPYRIGHT SOC'Y U.S.A. 347, 350–52 (2012).

invented the phonogram in 1877.[158]

The first motion pictures were registered for copyright within a few years of when Thomas Edison and W.K.L. Dickson invented the Kinetoscope.[159] The first registration was generally thought to be *The Sneeze*, registered in January of 1894, but research by Claudy Op den Kamp has shown it was actually a scene of blacksmiths working, which was registered in October of 1893.[160] There was initially some confusion about how these were to be registered, but the Librarian of Congress allowed registration if the film was deposited as a series of still images printed on paper.[161] This gave rise to the "paper prints," which were the entire motion picture or the beginning of the motion picture printed to a reel of paper and then sent to the Library of Congress.[162] In 1911, the Supreme Court cast doubt on what exactly was protected through deposit of the motion picture as a photograph, and, in 1912, Congress formally added motion pictures to copyright law.[163] Republic Pictures would register "Black Sheep's Wool" for copyright only a few weeks after the bill passed.[164]

The ability to capture music and sound and reproduce via mechanical means, both as perforated rolls and recordings, came in the last quarter of the nineteenth century.[165] Most early legal activity in the late nineteenth century was regarding the question of whether a piano roll or recorded cylinder infringed the copyright on the musical composition being recorded.[166] In the early years of the twentieth century, RCA Victor attempted to register a phonographic record

158. *Copyright Theory and History*, U. OF OR. LIBRS., https://opentext.uoregon.edu/payforplay/chapter/chapter-23-copyright-theory-and-history [https://perma.cc/296P-CWFB] (last visited Jan. 27, 2026).

159. Claudy Op den Kamp, *Paper Print*, *in* A HISTORY OF INTELLECTUAL PROPERTY IN 50 OBJECTS, *supra* note 144, at 145, 147–49.

160 . *Scholar at the Library of Congress Identifies the First Motion Picture Ever Copyrighted*, LIBR. OF CONG. (Oct. 13, 2022), https://newsroom.loc.gov/news/scholar-at-the-library-of-congress-identifies-the-first-motion-picture--ever-copyrighted/s/6b6eaee5-b504-4776-82f7-f6c2fc114c18.

161. *Edison Receives Patent for Kinetographic Camera*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/august-31 [https://perma.cc/CLU4-7EH5] (last visited Jan. 27, 2026).

162. *Id.* Interestingly, this practice saved many of the earliest silent films from oblivion, as paper is much (much) more stable than the cellulose nitrate film stock in use at the time. *Film-Based Negatives and Positives*, NAT'L ARCHIVES, https://www.archives.gov/preservation/holdings-maintenance/film-based [https://perma.cc/RF6B-BVU4] (last visited Jan. 27, 2026) (discussing the instability of cellulose nitrate film).

163. Kalem Co. v. Harper Bros., 222 U.S. 55, 61–62 (1911) (discussing the infringement of a copyrighted book by a "moving picture" film); Townshend Act, Pub. L. No. 62-303, 37 Stat. 488 (1912); Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co. of Holyoke, 3 F. Supp. 66, 72 (D. Mass. 1933) (considering a constitutional challenge to the Townshend Act on the grounds that a motion picture was not the writing of an author and rejecting it).

164. *Black Sheep's Wool. Motion picture copyright descriptions collection. Class L, 1912-1977*, LIBR. OF CONG., https://www.loc.gov/item/s1229l00001 [https://perma.cc/6R7G-4MMV] (last visited Jan. 27, 2026).

165. Zvi S. Rosen, *Common-Law Copyright*, 85 U. CIN. L. REV. 1055, 1077 (2018).

166. Kennedy v. McTammany, 33 F. 584, 584 (C.C.D. Mass. 1888) (rolls); Stern v. Rosey, 17 App. D.C. 562, 564 (App. D.C. 1901) (No. 1005) (cylinders).

for copyright, and it was rejected as not being copyrightable subject matter.[167] By contrast, the Aeolian company had registered over 2,000 perforated rolls for copyright by early 1908.[168] The key difference seems to have been that the rolls were (in some awkward sense) readable by a person and, thus, could be considered arrangements.[169] A draft bill was proposed to include sound recordings in what would become the 1909 Copyright Act, but a decision of the Supreme Court put those plans on ice.[170]

In early 1908, a test case about whether a piano roll infringed the copyright in the underlying musical composition led to a Supreme Court decision in the negative, holding that something is only a copy if it is "in intelligible notation."[171] That decision did not mention the Constitution (and indeed specifically indicated that Congress could change this situation), but it nonetheless cast a pall over attempts to protect phonorecords through copyright. At a hearing a month later, a representative of RCA Victor indicated that the decision "very strongly indicates that the Court does not consider the subjection of [sound recordings] to a copyright act to be constitutional."[172]

By this point, copyright registration was no longer directly administered by the Librarian of Congress. In 1897, the office of the Register of Copyrights was created within the Library, and what is now the Jefferson Building of the Library of Congress was completed, giving the new Register of Copyrights, Thorvald Solberg, space to administer copyright.[173] Solberg developed extensive regulations and procedures for the Copyright Office, which would set the tone

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167. *Hearings Before the S. Comm. on Patents and the H. Comm. on Patents*, 16th Cong. (1908) (statement of Horace Pettit, Victor Talking Mach. Co.) [hereinafter *Hearings on Patents*], *in* S. COMM. ON PATENTS & H. COMM. ON PATENTS, REVISION OF COPYRIGHT LAWS: HEARINGS BEFORE THE COMMITTEES ON PATENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES ON PENDING BILLS TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT 265 (1908). There was some litigation during this period, most notably where the Circuit Court in New York held that copying a record label was actionable but avoided the question of copying the record's contents. Victor Talking Mach. Co. v. Armstrong, 132 F. 711, 712 (C.C.S.D.N.Y. 1904). It also seems likely that the lengthy litigation regarding the various patents in sound reproduction made moot questions of reproducing records. *See* Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 YALE L.J. 848, 848 (2016).

168. *Hearings on Patents*, *in* S. COMM. ON PATENTS & H. COMM. ON PATENTS, *supra* note 167, at 345–46 (statement of George W. Pound, General Counsel, DeKleist Musical Instrument Mfg. Co.).

169. Barbara A. Ringer, *Study No. 26: The Unauthorized Duplication of Sound Recordings*, *in* STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE EIGHTY-SIXTH CONGRESS, SECOND SESSION PURSUANT TO S. RES. 240, at 3 (1961).

170. *Id.* at 3–4.

171. White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 17 (1908); Gerardo Con Díaz, *Encoding Music: Perforated Paper, Copyright Law, and the Legibility of Code, 1880–1908*, 71 CASE W. RSRV. L. REV. 627, 653 (2020).

172. *Hearings on Patents*, *in* S. COMM. ON PATENTS & H. COMM. ON PATENTS, *supra* note 167, at 265 (statement of Horace Pettit, Victor Talking Mach. Co.).

173. Wendi A. Maloney, *"Copyright Department" Headed by Register Opens Doors in 1897*, COPYRIGHT NOTICES, Mar.–Apr. 2013, at 24.

for the twentieth century.[174]

During the early years of the twentieth century, the Copyright Office did not register sound recordings for copyright, although it was at various times unclear if the issue was constitutional or statutory.[175] During the 1930s, a number of major bandleaders attempted to change this, and after the Copyright Office was unpersuaded, they (sometimes successfully) turned to the argument that there was a common-law right in the recording as reflecting the artist's performance, unbound from the requirement of authorship of a writing.[176] In 1945, Zechariah Chaffee argued that there was no constitutional impediment to construing "writings" broadly, just as "commerce" was to be construed broadly, and that argument was generally accepted![177] Chafee also acknowledged that determining who exactly was the "author" of the sound recording might be difficult and urged a resolution at the coming comprehensive revision of the copyright law—not realizing it would take another thirty-one years to become law.[178] After all, who is the "author" of the recording—the person operating the tape machine, the producer in the control room, the conductor of the orchestra, the person singing, the members of the orchestra, or all of the above? Does someone singing into a microphone constitute authorship? Although a solution was eventually devised, it is anything but simple.[179]

Over the course of the early twentieth century, copyright issues came and went, but constitutional issues were usually not on the forefront, with Congress focused on questions mostly of international copyright, and the Copyright Office going through a period of modernization under Register of Copyrights Clement Bouvé in the latter 1930s. World War II of course delayed modernization, but with the end of the war and the return of staff, the Copyright Office reorganized into divisions and was prepared to handle the new era with America as a cultural superpower. With that came unlikely questions about music and art, which presaged the question of computer-generated works.

B. Randomness in Art

The idea of art reflecting randomness was particularly in vogue in the mid-

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174. *Id.*

175. *See, e.g.*, Waring v. WDAS Broad. Station, Inc., 194 A. 631, 634 n.2 (Pa. 1937) (quoting the Register of Copyrights stating that "There is not and never has been any provision in the Act for the protection of an artist's personal interpretation or rendition of a musical work not expressible by musical notation in the form of 'legible' copies although the subject has been extensively discussed both here and abroad."). Strangely, the Copyright Office had registrations of piano rolls as arrangements of music, and courts would also find them protectible under copyright law. Aeolian Co. v. Royal Music Roll Co., 196 F. 926, 927 (W.D.N.Y. 1912).

176. *Aeolian Co.*, 196 F. at 927; Rosen, *supra* note 165, at 1086–92.

177. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 735–36 (1945).

178. *Id.* at 736–37.

179. *Author(s) of the Sound Recordings*, U.S. COPYRIGHT OFF., https://www.copyright.gov/eco/gram-sr/author.html [https://perma.cc/9RD8-PTL2] (last visited Jan 27, 2025).

twentieth century.[180] One example was the experiments in art and randomness being done by Jean Arp and Marcel Duchamp in the Dada movement.[181] Robert Rauschenberg's *Erased de Kooning Drawing* was influential in further exploring how an absence of expression was itself expression.[182]

A much more prosaic example would find its way to litigation when the Copyright Office declined to register the *Montina* flooring design of the Armstrong Cork Co., where each tile was different and the result of randomly dropping vinyl chips into a solution that would harden.[183] The Copyright Office denied registration because "no two segments of the flooring can be identical since there is no fixed design."[184] A suit was brought to challenge this denial, but it was dropped when it became clear that Armstrong Cork would need to reveal secrets of the process of making the tiles in litigation.[185]

C. Aleatory Music

The work being done by Rauschenberg and others would find expression musically in the development of indeterminate and aleatory music. This music led naturally to the introduction of computers and what we would now call AI composition.

Randomness in music is nothing new—musical dice games go back centuries, with Mozart's being among the most famous.[186] But while Mozart is clearly the author of the game system, is he the composer of all possible outcomes of the game? Typically speaking, copyright law protects the text and visual elements of a game, but "copyright does not protect the idea for a game,

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180. *See* Alan R. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569 (2002) (giving a more theoretical discussion of these issues).

181. *Id.* at 597–99.

182. Sarah Roberts, *Rauschenberg Research Project*, SFMOMA (July 2013), https://www.sfmoma.org/artwork/98.298/essay/erased-de-kooning-drawing/ [https://perma.cc/76SG-9TSR].

183. U.S. COPYRIGHT OFF., SIXTY-SEVENTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1964, at 7 (1965), https://www.copyright.gov/reports/annual/archive/ar-1964.pdf [https://perma.cc/B5QT-3766]. Armstrong Cork already had a patent for making such material, and questions of overlap may have been an issue. *Patents Assigned to Armstrong Cork Company*, JUSTIA PATENTS, https://patents.justia.com/assignee/armstrong-cork-company (last visited Jan. 30, 2026).

184. U.S. COPYRIGHT OFF., *supra* note 183, at 7. This is something of a reminder that for some works, problems of fixation are inevitably tied to problems of authorship. This is in some ways along the lines of the decision of the Copyright Office not to accept registration for prompts to cover the AI output in its January 2025 Report. U.S. COPYRIGHT OFF., *supra* note 2.

185. Complaint, Armstrong Cork Co. v. Kaminstein, No. 119-64 (D.D.C. Jan. 16, 1964); U.S. COPYRIGHT OFF., *supra* note 119, at 8.

186. DAVID COPE, VIRTUAL MUSIC 4 (2001). An interactive version of this game can be played online. *Mozart Dice Game Online*, PLAY ONLINE DICE GAMES https://www.playonlinedicegames.com/mozart (last visited Jan. 30, 2026). The credit of the game to Mozart is questionable, but that is not per se relevant here. Paul Griffiths, *Aleatory*, GROVE MUSIC ONLINE (2001), https://www.oxfordmusiconline.com/grovemusic/display/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000000509#omo-9781561592630-e-0000000509 [https://doi.org/10.1093/gmo/9781561592630.article.00509]. Other examples go back even farther. *See* Joel Lester, *Composition Made Easy: Bontempi's Nova methodus of 1660*, 7 THEORIA 87 (1993).

the name or title of a game, or the procedure, process, or method of operation for playing a game."[187] Accordingly, while the game's textual rules are copyrightable, the system for playing the game is not.

Following antecedents in the 1930s, John Cage's *Music of Changes* from 1951 was a milestone in the development of aleatory music, "which allows the players to assemble the music from fragments provided . . . [using] 'elastic' . . . notations to introduce chance or choice into the performance."[188] Cage's central "idea was to remove from music any reference to tradition or any trace of subjectivity, and chance, not choice, was the obvious means."[189] This reached "an extreme point" with *4'33"* the following year, where the performer is instructed to remain silent for the duration of the piece, thereby allowing ambient sounds to become the focus of the musical experience.[190] European composers would be more cautious in adopting aleatory methods, where, for instance, Karlheinz Stockhausen's *Klavierstück XI* introduced elements of indeterminacy, providing limited freedom but only in the ordering of composed sections.[191] Following an "explosion of interest in the late 1960s . . . aleatory music became a dead or at least dormant issue" in the serious music world.[192]

Cage did not immediately register the copyright in these early aleatory works, waiting almost a decade for Henmar Press to publish a facsimile of his score for *Music of Changes* and register the copyright in 1961, which the Copyright Office accepted and registered as a published musical work.[193] However, the Copyright Office also refused to accept some of Cage's works for registration, at least as music. Two works—*4'33"* and *Forever and Sunsmell*—were published on April 25, 1960, and applications were received by the Copyright Office in November of 1965.[194] *Forever and Sunsmell* was registered as a published musical work shortly thereafter and appears in the Catalog of Copyright Entries for Music registered July–December 1965.[195] However, *4'33"* was not. Instead, it was registered as a textual work much later.[196] The same was done for some of Cage's other works, such as his *Music for amplified toy pianos* and *0'00"*.[197] The fact that *0'00"* was given a registration number consecutive with the one given to *4'33"* even though *0'00"* was applied for over two years later is a clue that these registrations were not processed immediately. These registrations appear on pages 181 to182 of the Catalog of Copyright

187. U.S. COPYRIGHT OFF., *supra* note 22, § 714.

188. Griffiths, *supra* note 186.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. MUSIC OF CHANGES, Registration No. EP177020.

194. *Forever and Sunsmell* is described as a song with a percussion duet, with words from a poem by E.E. Cummings.

195. FOREVER AND SUNSMELL, Registration No. EP210210; U.S. COPYRIGHT OFF., CATALOG OF COPYRIGHT ENTRIES: THIRD SERIES: MUSIC: JULY–DECEMBER 1965, at 1598 (1967).

196. 4'33", Registration No. A1074.

197. MUSIC FOR AMPLIED TOY PIANOS, Registration No. A1065; 0'0", Registration No. A1073.

Entries for the first half of 1968, indicating that they were not approved for registration until then.[198] Looking at the applications for registration, which have recently been digitized, shows that these applications were filed June 10, 1968, but the fee and deposit of two copies was made three years earlier—on November 24, 1965.[199] This is a bit of a mystery: the applications received almost three years after the deposit, and an application to register *4'33"* would have been required in 1965 with the deposit.

In a stroke of luck, the longtime head of the Music Section of the Copyright Office Examining Division, Dorothy Pennington Keziah, gave us a full account of the decision to register such music that did not have full human authorship, noting that

> since it is the sound and not the notations themselves that constitute the subject matter of a musical copyright, and since indeterminate works such as these do not contain fixed sounds that are the result of original creative thought, it does not appear that such works would qualify for registration in Class E as musical compositions, either in unpublished or published form. Granted, compositional techniques merge and overlap, even in a single composition; and, with the scores as complex and technical as some are, an examination to distinguish textual scores that sufficiently fix the musical sounds from those that do not would involve some difficulties. Certainly, any borderline cases should be resolved in favor of registration in Class E. However, it seems clear that where the textual description does not sufficiently fix at least a minimal amount of the original sounds in the work, registration would more appropriately be made, if the work were published with notice, in Class A as a "book."[200]

Keziah explains this is no different from the longstanding practice of refusing to register nondramatic choreographic works as dramatic works.[201] As Keziah notes, the registration of these works as textual, rather than musical, works

198. U.S. COPYRIGHT OFF., CATALOG OF COPYRIGHT ENTRIES: THIRD SERIES: BOOKS AND PAMPHLETS INCLUDING SERIALS AND CONTRIBUTIONS TO PERIODICALS CURRENT AND RENEWAL REGISTRATIONS JANUARY–JUNE 1968, at 181 (1971). The oldest other work on these pages is from the summer of 1967, while the vast majority are from December of 1967 or from early 1968.

199. *Image 135 of Copyright Record Book Class A Vol 1999; Registration Numbers 1000-1499; 1968*, LIBR. OF CONG. https://www.loc.gov/resource/coprecbooks.00501282248/?sp=135&st=image [https://perma.cc/84CH-B6R3] (last visited Jan. 27, 2025). Pages 135 to 160 are the John Cage applications for registration as textual works; the dates are on the second page of each application.

200. Dorothy Pennington Keziah, *Copyright Registration for Aleatory and Indeterminate Musical Compositions*, 17 BULL. COPYRIGHT SOC'Y U.S.A. 311, 354 (1970).

201. *Id.* at 354 n.129; Zvi S. Rosen, *Fuller v. Bemis and the Failed Prehistory of Choreographic Copyright*, MOSTLY IP HIST. (Mar. 30, 2023), https://mostlyiphistory.com/2023/03/30/fuller-v-bemis-and-the-failed-prehistory-of-choreographic-copyright/ [https://perma.cc/968F-F6FK].

impacts the ability to recover for public performances of the work.[202] Keziah's article came out in 1970 but was presumably written earlier, and as she was the one who made the decision not to register these works as musical compositions, it represents the best account we are likely to have of this debate—although it is a shame that more insight into the Copyright Office's internal discussions and history is not given.[203] Similarly, Ralph Oman, the Register of Copyrights, asserted that Samuel Beckett's play *Breath*, written in 1970, was not copyrightable:

> It is only 30 seconds long, and has no words and no actors. Normally Beckett wrote in [F]rench, but whether he did so in Breath is unclear. As that renowned copyright lawyer, Fulton Brylawski Senior, said many years ago, "I didn't say it wasn't art; I just said it wasn't copyrightable."[204]

From all this, it seems clear that the Copyright Office had denied the registration of *4'33"* as music but had allowed them to reapply to register it as a textual work, which was then accepted. However, if *4'33"* had been unpublished, copyright registration would not have been available.

In addition to experiments with using computers, Cage continued to produce aleatory works in his more traditional vein, and, in 1977, the Copyright Office contacted his publisher regarding the application to register the work *Renga*.[205] *Renga* was composed by Cage for a combination of seventy-eight instruments or voices and premiered in Boston in September of 1976.[206] Although a score typically involves musical notations, *Renga*'s score is comprised of 361 images

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202. Keziah, *supra* note 200, at 354–56. It is interesting that the Cage Trust has threatened litigation over 4'33"; it would have been interesting if it would have gone through. Jeremy Phillips, *The price of silence and the myth of the Batt Cage*, THE IPKAT (Apr. 19, 2012), https://ipkitten.blogspot.com/2012/04/price-of-silence-and-myth-of-batt-cage.html [https://perma.cc/A4Q7-F4AT]. An ongoing lawsuit regarding the work of stand-up comedians on Spotify might actually raise similar legal issues since it involves performance of textual works via a music streaming system. Johnathon Bailey, *Why Spotify Removed So Many Comedy Albums*, PLAGIARISM TODAY (Dec. 8, 2021), https://www.plagiarismtoday.com/2021/12/08/why-spotify-removed-so-many-comedy-albums/ [https://perma.cc/C6DN-LCQA].

203. Interestingly, Keziah's article has barely been cited up to this point, and the copyrightability of aleatory music has largely not been considered in this context. There has been some scholarship on the copyrightability of 4'33" under the copyright laws of the United Kingdom. Cheng Lim Saw, *Protecting the Sound of Silence in 4'33"–A Timely Revisit of Basic Principles in Copyright Law*, 27 EUR. INTELL. PROP. REV. 467 (2005); David M. Seymour, *This is the Piece that Everyone Here Has Come to Experience: The Challenges to Copyright of John Cage's 4'33"*, 33 LEGAL STUD. 532 (2013).

204. Ralph Oman, *The Copyright Clause: "A Character for Living People"*, 17 U. BALT. L. REV. 99, 106–07 (1987).

205. Letter from Mildred Henninger, Acting Head, Music Section, Examining Div., U.S. Copyright Off., to Gertrud Mathys, C.F. Peters Corp. (Aug. 3, 1977) (on file with the John Cage Collection at Northwestern University and on file with author).

206. *Renga*, JOHN CAGE, https://www.data-johncage.org/pp/John-Cage-Work-Detail.cfm?work_ID=162 [https://perma.cc/E9Y7-FCZX] (last visited Jan. 27, 2025).

drawn by Henry David Thoreau.[207] These images were "distributed in systems using the 5-7-5-7-7 structure of Japanese Renga poetry," and when performing *Renga*, the images are to be "interpreted by the performers."[208] Cage created *Renga*'s score while using the *I Ching* chance operation process to determine the placement of the images in a space.[209]

From his early conception of *Renga*, Cage intended the piece to be performed at the same time as *Apartment House 1776*, which is another composition of his.[210] With the two pieces being performed simultaneously, Cage was encouraged to produce a score for *Renga* that used "graphic notation rather than conventional musical notion" as a means to avoid traditional elements of music in contrast to *Apartment House 1776*.[211]

The Copyright Office noted that on subsequent review, it "still [found] it hard to determine the extent of Cage's authorship."[212] They asked for an explanation of the score and noted that they had heard a performance of the work on the radio, but although "[t]here certainly was musical authorship, . . . how much was Cage's and how much the orchestra's was hard to tell."[213]

The letter from the Copyright Office was referred to Cage, and he responded directly, noting that

> Should the orchestra play without the materials that I have made, they would not produce the sounds they produce when they have these materials. Furthermore, when these materials go to another orchestra, the work remains, though changed with respect to details, clearly itself, recognizable, and not sounding like music by some other composer.[214]

This apparently satisfied the copyright office, and the work was registered with an effective date of December 19, 1977.[215]

Another work that Keziah spends a substantial amount of time discussing is *Opera Sextronique* by Nam June Paik. The work, which involved Paik and a variously clothed Charlotte Moorman playing, inter alia, the cello, was well known for Moorman's arrest during a performance in 1967.[216] Paik's aleatory piano work at the "happening" was never registered for copyright, and I was unable to find any evidence of a registration application, but seeing as all rejected applications have been discarded from this period, that proves little.

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207. *Id.*

208. *Id.*

209. Letter from John Cage to Mildred Henninger (Nov. 14, 1977) (on file with the John Cage Collection at Northwestern University).

210. *Id.*

211. *Id.*

212. Letter from Mildred Henninger to Gertrud Mathys, *supra* note 205.

213. *Id.*

214. Letter from John Cage to Mildred Henniger, *supra* note 209, at 2.

215. This would be the application date of the copyright application, so it is possible Cage's publisher was asked to file a revised application.

216. JOAN ROTHFUSS, TOPLESS CELLIST: THE IMPROBABLE LIFE OF CHARLOTTE MOORMAN 177 (2014).

The fact that Keziah dwells on Paik's work at length whets curiosity that this was one of the unpublished works for which registration as text was denied, and that will have to suffice.[217] For himself, Paik simply commented, "Is it music? Well, it is not not music."[218]

For purposes of copyright law, the protectability of the work would be inversely proportional to the amount of choice given to the performer, and a work with no music but simply general instructions for improvisation would not be registrable. The stage was set for the next phase of questions of authorship.[219]

D. Animal Authors

Unlike the above, the issue of animal authors has been written about many times before, but it still should be mentioned. The case people generally talk about is the famous "Monkey Selfie" case, although the actual decision had more to do with federal civil procedure than copyright.

In 2011, wildlife photographer David Slater visited a reserve located on the island of Sulawesi, Indonesia, to photograph wildlife on the island.[220] While following a troop of crested macaque monkeys, Slater attempted to capture close-up shots of the monkeys' faces.[221] The monkeys, however, refused to allow him to get close enough.[222]

Despite their shyness, the monkeys expressed an interest in Slater's camera and equipment.[223] Recognizing this, Slater placed his camera on a tripod and left it unattended.[224] Naruto, one of the crested macaque monkeys in the troop that Slater was trying to photograph, then went up to Slater's camera and took numerous "selfies" of himself.[225]

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217. Paik's papers at the Smithsonian and Moorman's papers at Northwestern both were equally unavailing, and the Smithsonian noted that "Nam June Paik did not keep organized or detailed project files." E-mail from Hannah Pacious, Paik Archive Collection Coordinator, Rsch. and Scholars Ctr., Smithsonian Am. Art Museum, to author (May 21, 2025) (on file with author).

218. David Sodi, *It's Not* Not *Art: An Interview with the Curators of Nam June Paik*, SFMOMA (Mar. 2021), https://www.sfmoma.org/read/its-not-not-art/ [https://perma.cc/MJ3R-NPJQ]

219. Also involved may be questions of conceptual artists like Sol Lewitt, which have typically more involved contract law but raise similar questions of authorship. Richard Chused, *"Temporary" Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 1 (2019); Peter J. Karol, *Permissive Certificates: Collectors of Art as Collectors of Permissions*, 94 WASH. L. REV. 1175 (2019).

220. Andres Guadamuz, *Can the monkey selfie case teach us anything about copyright law?*, WIPO (Feb. 21, 2018), https://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html [https://perma.cc/F5AP-64CJ].

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*; Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

225. *Naruto*, 888 F.3d at 420. ("Naruto allegedly took several photographs of himself . . . with Slater's camera.").

Slater licensed the photos to Caters News Agency Ltd. for licensing.[226] He also self-published Naruto's selfies in the book *Wildlife Personalities* in December 2014.[227] The book lists Slater and his company Wildlife Personalities, Ltd. as the copyright holders of Naruto's selfies.[228] Throughout the book, however, Slater explains that Naruto took the photographs himself while smiling and pressing the camera's shutter button.[229]

In 2011, the image was shared on Wikimedia Commons, and Slater requested that the website take down the image.[230] It was further shared on the website Techdirt, along with some commentary on the copyrightability of the image because it was putatively taken by a monkey.[231] Caters asked Techdirt to take down the photos shortly thereafter, bringing attention to the copyright issue.[232] In 2014, the Copyright Office's draft revision to the Compendium made clear that a photo taken by a monkey was not copyrightable, choosing this situation as a specific example.[233]

Following this, People for the Ethical Treatment of Animals (PETA) and Dr. Antje Engelhardt filed a complaint for copyright infringement against Slater, Wildlife Personalities, Ltd., and Blurb, Inc., as next of friends—which allows a suit to be brought for someone who does not maintain the capacity to sue—on behalf of Naruto.[234] Further, the complaint also alleges that Slater's infringements on Naruto's copyrights caused him to suffer "concrete and particularized economic harms," which can be redressed by "declaring Naruto

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226. Mike Masnick, *Monkey Business: Can A Monkey License Its Copyrights to A News Agency?*, TECHDIRT (July 7, 2011, at 7:32 ET), https://www.techdirt.com/2011/07/07/monkey-business-can-monkey-license-its-copyrights-to-news-agency/ [https://perma.cc/BGR2-G2AE].

227. Zachary Toliver, *Settlement Reached: 'Monkey Selfie' Case Broke New Ground for Animal Rights*, PETA (Sep. 15, 2017), https://www.peta.org/blog/settlement-reached-monkey-selfie-case-broke-new-ground-animal-rights/ [https://perma.cc/8UG6-TGZ7]; *see* Guadamuz, *supra* note 220.

228. *Naruto*, 888 F.3d at 420.

229. Paulia Julia Perkal, *Monkey business finally settled: the 'monkey selfie' disputes*, KLUWER COPYRIGHT BLOG (Feb. 5, 2018), https://legalblogs.wolterskluwer.com/copyright-blog/monkey-business-finally-settled-the-monkey-selfie-disputes/ [https://perma.cc/YKW5-9DV6].

230. *Photographer 'lost £10,000' in Wikipedia monkey 'selfie' row*, BBC (Aug. 7, 2014), https://www.bbc.com/news/uk-england-gloucestershire-28674167 [https://perma.cc/AE3T-UCZZ].

231. *Id.*

232. Mike Masnick, *Monkeys Don't Do Fair Use; News Agency Tells Techdirt To Remove Photos*, TECHDIRT (July 12, 2011, at 11:08 ET), https://www.techdirt.com/2011/07/12/monkeys-dont-do-fair-use-news-agency-tells-techdirt-to-remove-photos/ [https://perma.cc/F3D9-4DFH].

233. Maria A. Pallante, *From Monkey Selfies to Open Source: The Essential Interplay of Creative Culture, Technology, Copyright Office Practice, and the Law*, 12 WASH. J. L. TECH. & ARTS 123, 127 (2017).

234. *See Naruto*, 888 F.3d at 420–22; Ashley Cullins, *'Monkey Selfie' Heads to Appeals Court Amid Legal Circus Between PETA and Primate Expert*, THE HOLLYWOOD REP. (July 12, 2017, at 8:00 ET), https://www.hollywoodreporter.com/business/business-news/monkey-selfie-heads-appeals-court-legal-circus-between-peta-primate-expert-1020220/ [https://perma.cc/QU56-8EKY] (explaining that Antje Engelhardt is a U.K.-based primatologist who was "familiar" with Naruto and has studied macaques since the 1990s. She joined the suit after being approached by PETA).

as the author and owner of" the photographs.[235] The district court, however, found that Naruto did not adequately establish standing under the Copyright Act.[236]

On appeal, the Ninth Circuit was tasked with determining "whether a monkey may sue humans, corporations, and companies for damages and injunctive relief" for copyright infringement; the Ninth Circuit Court of Appeals declined to find in favor of Naruto.[237] The Court adhered to the precedent established in *Cetacean Community v. Bush*, where the Court held that if an Act of Congress does not "plainly state" that animals have statutory standing, "then animals do not have statutory standing."[238] The Court reasoned that, while some congressional acts may give rights to animals, Congress used language in the Copyright Act that implies that there is a human aspect to copyright ownership.[239] Thus, animals are excluded from the Copyright Act.[240]

Applying this logic and the text of the Copyright Act, the Ninth Circuit affirmed that animals do not have standing to sue under the Copyright Act nor the ability to maintain ownership over a work of authorship.[241]

III. COPYRIGHT AND THE EARLIEST COMPUTER WORKS

As can be imagined, the techniques of aleatory music could be coupled with a computer to generate creative works without human involvement. All that was needed was a programmable computer capable of handling the complexity of the requisite algorithms and someone to program it. As computer output technology developed, abstract visual art proved fertile ground for the first generation of artists to experiment with programming computers to make art.

A. The Origins of Modern Computing

The birth of modern computing can be traced back to the Electronic Numerical Integrator and Computer (ENIAC), developed during World War II. ENIAC, completed in 1945, was the world's "first electronic, general purpose, large scale" digital computer.[242] Commissioned by the United States Army for artillery calculations, ENIAC was a massive machine comprised of thousands of vacuum tubes and occupied an entire room. Despite its size and complexity, ENIAC demonstrated the potential of electronic computing and set the stage for further advancements in the field.

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235. *Naruto*, 888 F.3d at 424.

236. *Id.* at 421.

237. *Id.* at 420, 426.

238. *Id.* at 425–26 (citing Cetacean Cmty. v. Bush, 386 F.3d 1169, 1179 (9th Cir. 2004)) (finding that animals do not have standing to sue if Congress did not explicitly grant it to them).

239. *See id.* at 426.

240. *Id.*

241. *Id.* ("Naruto lacks statutory standing to sue under the Copyright Act.").

242. THOMAS HAIGH, MARK PRIESTLEY & CRISPIN ROPE, ENIAC IN ACTION: MAKING AND REMAKING THE MODERN COMPUTER 7 (2016).

Following the success of ENIAC, researchers began to explore new avenues for improving computational efficiency and versatility. This led to the development of stored program computers, which allowed instructions and data to be stored in the computer's memory. The 1950s saw the emergence of transistors as a viable alternative to vacuum tubes in computing technology. Transistors, which were smaller, more reliable, and consumed less power than vacuum tubes, revolutionized the design of electronic computers.

Completed in 1952 and using 2,800 vacuum tubes, ILLIAC was primarily used for numerical calculations, including weather prediction, nuclear physics research, and fluid dynamics simulations at the University of Illinois.[243] As demonstrated below, the first ILLIAC Computer was also used to create what is almost certainly the first computer-generated work registered for copyright.

The development of transistors paved the way for the development of smaller, faster, and more efficient computers.[244] Companies like IBM dominated the mainframe market during this period, and the IBM 7090—launched in 1959—was one of IBM's flagship mainframe computers and its first with transistorized logic. Although it is remembered more for its role in the space program, the 7090 was also among the most important early computers to AI copyright.

The 7090 featured transistorized components and core memory, making it faster and more reliable than its vacuum tube-based predecessors. Its architecture also supported a wide range of scientific and engineering applications, positioning it as a versatile solution for computational tasks. The IBM 7090 quickly gained traction in the marketplace, attracting customers from academia, government, and industry sectors. Its high performance, reliability, and compatibility with existing software systems made it a popular choice for organizations seeking to leverage computing technology for various applications. The 7090's success helped solidify IBM's position as a leading provider of mainframe computers and paved the way for subsequent advancements in the company's product lineup.[245]

As this was ongoing, technological developments also occurred in printing, allowing for more complex expression of computer outputs beyond punch cards or teletype. For instance, the Stromberg-Carlson SC4020 was a microfilm printer and plotter that was integral to the development of computer art, which allowed for much greater expression of what was visualized by the machine than would otherwise be possible.[246]

The 1960s witnessed the widespread adoption of mainframe computers by businesses, higher education, and government agencies. These powerful machines—capable of processing large volumes of data and running complex

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243. *Illiac I*, UNIV. OF ILL. URBANA-CHAMPAIGN, https://physics.illinois.edu/people/history/ILLIAC-I [https://perma.cc/AZ9E-S5UD] (last accessed Feb. 24, 2026).

244. *See generally* MARTIN CAMPBELL-KELLY & WILLIAM ASPRAY, COMPUTER: A HISTORY OF THE INFORMATION MACHINE (3d ed. 2013).

245. CHARLES J. BASHE ET AL, IBM'S EARLY COMPUTERS 448–49 (1986).

246. *See generally* ZABET PATTERSON, PERIPHERAL VISION: BELL LABS, THE S-C 4020, AND THE ORIGINS OF COMPUTER ART (2015).

applications—revolutionized the way organizations conducted their operations. As this was happening, the bar began to realize that these computers could be trained to produce new copyrighted works; in 1964, copyright lawyer George Schiffer noted that "the utilization of portions of material fed into a computer for the creation of other works must be anticipated on a very large scale."[247]

B. Computer Software

As these innovations continued, questions arose as to whether the programs being written for these machines were copyrightable.[248] The first known attempt to register a computer program for copyright was in 1961, when North American Aviation filed a registration for a program written for the Autonetics Recomp II on magnetic tape.[249] That work was not registered immediately, and the Copyright Office began an investigation of whether software was copyrightable in response.[250] While the issue was being considered, other attempts to register came in, and in April of 1964, John Banzhaf, then a law student at Columbia, filed two short programs with the Copyright Office, one of which had been published in the Columbia Law School News.[251] This was recognizable as an existing form of copyrightable work (a textual contribution to a periodical), and it provided some clarity to the Copyright Office.[252] In May of 1964, the Copyright Office put out the first version of what is now Circular 61 for copyright registration of computer programs.[253]

In these guidelines, the Copyright Office noted that the question of "[w]hether a program as such is the 'writing of an author' and thus copyrightable" was a "doubtful question[]."[254] Nonetheless, "in accordance with its policy of resolving doubtful issues in favor of registration wherever possible," the Copyright Office agreed to consider registrations where there was "sufficient original authorship."[255] Although there were misgivings about the quantum of authorship in a computer program, the Copyright Office was "keeping with its policy of giving the applicant the benefit of the doubt wherever possible."[256]

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247. George Schiffer, *Computers and Copyright Law Revision*, 11 BULL. COPYRIGHT SOC'Y U.S.A. 404, 407 (1964).

248. U.S. COPYRIGHT OFF., *Copyright Registration for Computer Programs – Announcement from the Copyright Office*, 11 BULL. COPYRIGHT SOC'Y U.S.A. 361, 361 (1964). This section is partially adapted from my blog post. Zvi S. Rosen, *Fifty–Five Years of Software Copyright*, MOSTLY IP HIST. (May. 19, 2019), https://mostlyiphistory.com/2019/05/19/fifty-five-years-of-software-copyright/ [https://perma.cc/5PHQ-DYRM].

249. George D. Cary, *Copyright Registration and Computer Programs*, 11 BULL. COPYRIGHT SOC'Y U.S.A. 362, 363 (1964).

250. *Id.* at 363–64.

251. *Id.* at 363.

252. *Computer Program Copyrighted for First Time; Columbia Law Student Gets Approval for Plans—Sees Wide Industry Impact*, N.Y. TIMES, May 8, 1964, at 51.

253. Rosen, *supra* note 248.

254. *Id.*

255. *Id.*

256. Cary, *supra* note 249, at 365.

Copyright registration for computer programs has continued since then, although not without controversy. In 1970 then-Professor Stephen Breyer published *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*,[257] and one can see echoes of it in one his final opinions as a Supreme Court Justice, *Google v. Oracle*, holding that it was fair use to copy significant parts of a computer programming language.[258] In 1978, the Commission on New Technological Uses of Copyrighted Works (CONTU) issued its final report recommending that computer programs receive copyright protection; this report was implemented into law in 1980, establishing previous copyright office practices into law.[259] Computer software registrations continue to this day, although that grant may be subject to the "rule of doubt" if the Copyright Office is unable to properly examine the work in full.[260]

One area where questions of authorship persisted is computer games. Since the user controls the experience, the perceived experience of the user is not fully within the control of the game's creators. Before 1978, Atari had the practice of registering the circuit boards for its games as technical drawings or registering the manuals as text.[261] Years later, Atari attempted to register the game Breakout for copyright as an audiovisual work, but registration was denied on the grounds that the "images . . . created by playing the video game . . . are also not registrable since they are created randomly by the player and not by the author of the video game."[262] Although the district court upheld the denial of registration, the circuit court reversed, finding there was sufficient authorship even if the player can "choose one of the limited number of sequences the game allows him to choose."[263]

It is significant that many of the discussions about registration of computer programs were happening at the same time as conversations about registration of computer-generated works. While the issues are not quite co-extensive, they are certainly overlapping.

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257. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

258. Google LLC v. Oracle Am. Inc., 593 U.S. 1, 40 (2021).

259. NAT'L COMM'N NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT (1978), https://bpb-us-e2.wpmucdn.com/websites.umass.edu/dist/f/25833/files/2018/05/CONTU-compiled.pdf [https://perma.cc/QM9Q-RQJH]; Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028; GERARDO CON DÍAZ, SOFTWARE RIGHTS: HOW PATENT LAW TRANSFORMED SOFTWARE DEVELOPMENT IN AMERICA 122 (2019).

260. U.S. COPYRIGHT OFF., *supra* note 22, § 607.

261. Atari Corporation, *Atari Copyright Registrations 1975–1977*, INTERNET ARCHIVE (May 12, 2020, at 17:30 ET), https://archive.org/details/atari-copyright-registrations [https://perma.cc/S977-N78Q].

262. Atari Games Corp. v. Oman, 888 F.2d 878, 879–80 (D.C. Cir. 1989) (discussing the letter dated February 13, 1987, from Copyright Examiner Carmen Martorana to Atari). The Copyright Office noted that the game could be registered as a textual work, but presumably Atari wanted protection on a visual basis.

263. *Id.* at 884 (quoting Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982)).

C. Computer Music

Among the first music played by computer was in 1951, when Alan Turing's student Christopher Strachey programmed a computer to play the British National Anthem.[264] In the early 1950s, two researchers at RCA developed "The Music Composing Machine," which was trained on eleven of Stephen Foster's compositions and could generate "Fosterlike tunes."[265] In 1957, songwriter Jack Owens wrote the words to a song *Pushbutton Bertha*, which was set to the tune of a melody written by the Datatron Computer.[266] One article at the time mentions that the "Library of Congress refuse[d] to issue a copyright" for the song because the music was written by computer, although records of rejected registrations from this period are sadly lost.[267] However, the innovator who most prominently combined the methods of aleatory music with the power of programmable computers was Lejaren Hiller.[268] By translating musical patterns into mathematics, Hiller sought to determine whether digital computers possess the ability to create music when following the "rules" of musical composition.[269]

Born in 1924 in New York City, Hiller showed an affinity towards music and studied piano and composition from an early age.[270] Despite his apparent aptitude for music, Hiller also maintained an interest in chemistry and pursued an education at Princeton University, where he earned his bachelor's, master's, and doctorate degree in chemistry, while also continuing to study composition under Milton Babbitt and Roger Sessions.[271] Upon completion of his Ph.D. in 1947, Hiller then conducted research as a chemist for DuPont in Waynesboro, Virginia, before joining the University of Illinois's faculty in the chemistry department.[272] Simultaneously, Hiller pursued a master's degree in music from the University of Illinois.[273]

Hiller's experiments with electronic music began during his time in the chemistry department at the University of Illinois which led to his 1957

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264. B. JACK COPELAND & JASON LONG, *Turing and the History of Computer Music*, *in* PHILOSOPHICAL EXPLORATIONS OF THE LEGACY OF ALAN TURING: TURING 100, at 189, 189–218 (Juliet Floyd & Alisa Bokulich eds., 2017).

265. J.R. Pierce, *Portrait of the Machine as a Young Artist*, PLAYBOY, June 1965, at 182; Eric Drott, *Copyright*, *Compensation, and Commons in the Music AI Industry*, CREATIVE INDUSTS. J., Oct. 29, 2020, at 6.

266. Pierce, *supra* note 265, at 150.

267. Martin L. Klein, *Syncopation by Automation*, RADIO-ELECS., June 1957, at 36.

268. Ananya Sen, *Lejaren Hiller*, ILL. DISTRIBUTED MUSEUM, https://distributedmuseum.illinois.edu/exhibit/lejaren-hiller/ [https://perma.cc/4B9P-6UT8] (last visited Jan. 28, 2025).

269. *See* LEJAREN A. HILLER, JR. & LEONARD M. ISAACSON, EXPERIMENTAL MUSIC: COMPOSITION WITH AN ELECTRONIC COMPUTER 3–4 (1959); DOUGLAS DAVIS, ART AND THE FUTURE: A HISTORY/PROPHECY OF THE COLLABORATION BETWEEN SCIENCE, TECHNOLOGY AND ART 97 (1973).

270. Sen, *supra* note 268.

271. *Id.*; *See generally* JAMES M. BOHN, AN OVERVIEW OF THE MUSIC OF LEJAREN HILLER AND AN EXAMINATION OF HIS EARLY WORKS INVOLVING TECHNOLOGY (1997).

272. Sen, *supra* note 268.

273. *Id.*

collaboration with chemist and composer Leonard Isaacson.[274] Together, Hiller and Isaacson's research cumulated in the ILLIAC I computer composing its own musical score. Conducting four experiments utilizing the ILLIAC I—the University of Illinois's super-computer that weighed five tons and consisted of 2,800 vacuum tubes—Hiller and Issacson produced a four-movement string quartet titled the *Illiac Suite for String Quartet*.[275]

Employing the Monte Carlo method they both encountered when coding in previous research, Hiller and Issacson accomplished the demonstration of the ILLIAC I's compositional abilities through programming that, as explained in Hiller and Issacson's *Experimental Music*, simply allowed for "the control of the musical output [to] be limited solely by the input instructions," which reflected "various specified 'rules' of composition," while "leaving factors not specifically accounted for in the input instructions entirely to chance."[276] The computer organized "[t]he characteristics of sound," such as "pitch, timbre, dynamics, [and]rhythm," into a numerical computer code.[277] Resulting from this organization was the creation of relationships between sound characteristics and mathematical operations.[278] This organization allowed the ILLIAC I computer to respond to the Hiller's musical instructions.[279] According to Hiller, the ILLAC I's operational abilities were comparable to the functions of an ordinary desk calculator but without the calculator having a "*computing program*" nor a "*conditional transfer* process," which is the "yes-or-no" choice operation that allows for a computer to make its own decisions.[280]

When conducting their four experiments with the ILLIAC I, Hiller and Issacson first sought a product that contained different voices resembling that of a musical composition.[281] To achieve this, they developed "a technique for the composition of a simple but recognizable type of melody," which was used to generate a polyphonic writing.[282] Then, with the intent of proving that "standard musical techniques could be handled by computer programming,"[283] Hiller and Issacson used the ILLIAC I computer to produce "*cantus firmi*," whole melodies that do not exceed twelve notes, which followed the basic rules of music composition while exploring the computer's ability to interact with various chords, harmonies and dissonances, octaves, and even parallels.[284]

After achieving these melodies, Hiller and Issacson's third experiment explored the ILLIAC I computer's interactions with a contemporary style of

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274. *Id.*

275. HILLER & ISAACSON, *supra* note 269, at 5; UNIV. OF ILL. URBANA-CHAMPAIGN, *supra* note 243.

276. HILLER & ISAACSON, *supra* note 269, at 2.

277. Peter Westergaard, *Book Reviews*, 3 J. OF MUSIC THEORY 302, 302 (1959) (reviewing HILLER & ISAACSON, *supra* note 269).

278. *Id.*

279. *Id.*

280. HILLER & ISAACSON, *supra* note 269, at 2–3.

281. *Id.* at 79.

282. *Id.*

283. *Id.* at 4.

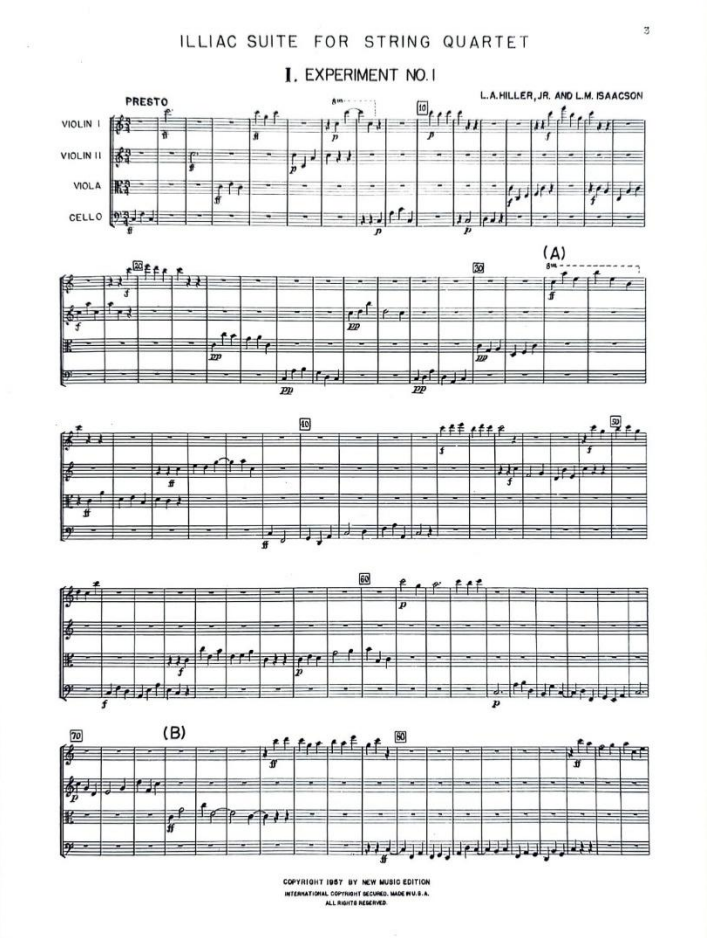
284. *Id.* at 83.

music as a means to develop a composition comprised of more elaborate and complex characteristics of musical expression with dynamics and rhythms.[285] In their last experiment with the ILLIAC I, Hiller and Issacson programmed the computer to venture away from the traditional practices of composition in order to demonstrate a computer's ability to compose a musical composition embodying a "radically different species of music" based on newer and developing "techniques of musical analysis."[286] The August 9, 1956, public performance of the first three movements of the *Illiac Suite for String Quartet* marked a groundbreaking advancement in the possibilities of music composition.[287]

Although the threat of Russia remained the greatest fear of the American public in the 1950s, Hiller notes in *Experimental Music* that the "fear of automation" was comparable.[288] Despite the *Illiac Suite*'s success, Hiller became notorious overnight and, in his own words, went from a "total obscurity as a composer to really being on the front page of newspapers all over the country."[289]

The first public performance of the *Illiac Suite* was met with hostility from the audience and from those in the music profession.[290] Hiller said that after the performance, it was difficult to lose the perception that he was an "ex-chemist who had meddled in something in which he was a bumbling amateur."[291] The negative reaction to the *Illiac Suite* was not because of the performance of the piece itself but rather is attributed to it solely having been composed by a computer and proving the possibility of electric composition.[292]

285. *Id.* at 4.
286. *Id.* at 4–5.
287. *Id.* at 5–6.
288. *Id.* at 8 (citing L. L. GOODMAN, MAN AND AUTOMATION 169 (1957)).
289. John Bewley, *Lejaren A. Hiller: Computer Music Pioneer, Music Library Exhibit: May 24–Sept. 7, 2004*, UNIV. OF BUFFALO (2004), https://library.buffalo.edu/content/dam/library/pdf/music/ubmu-pdf-hiller2004.pdf [https://perma.cc/2TVK-QBEX].
290. *Id*.
291. *Id*.
292. *Id.*



The *Illiac Suite* was published in the 1957 issue of *New Music: A Quarterly of Modern Compositions*.[293] *New Music* was a periodical founded by Henry Cowell in 1927 with the purpose of providing a platform for contemporary composers to publish their works and ideas. The periodical featured scores, articles, and reviews of new compositions, offering readers insight into the latest developments in contemporary music. The compositions featured in *New Music* were registered for copyright by New Music Edition, the publisher of the magazine, and the *Illiac Suite* was no exception—it received registration EP110997 effective August 1957 and was published in the July-December 1957 volume of the Catalog of Copyright Entries.[294]

It is impossible to know for sure if the examiner understood what they were looking at. Hiller and Isaacson's foreword makes very clear that these were generated by computer, and they had purposely attempted *not* to select those outputs most aesthetically appealing but had rather attempted to be as

293. HILLER & ISAACSON, *supra* note 269, at 5.

294. U.S. COPYRIGHT OFF., CATALOG OF COPYRIGHT ENTRIES: THIRD SERIES: MUSIC JULY–DECEMBER 1957, at 1236 (1958).

representative as possible. Indeed, the movements are labelled "Experiments" one through four.[295] Hiller and Isaacson made clear that the only "arranging" they did was selecting the formal structures for the four movements, selecting the tempi, and transposing the cello down an octave and the violins up an octave.[296]However, it is entirely possible that the examiner saw music from a music publisher they would recognize and did not look too closely.

Interestingly, the Copyright Card Catalog indicates that the registration was revised September 16, 1965.[297] The Catalog of Copyright Entries scanned at the Copyright Office indicates that this was to add New Music Edition as the claimant.[298] In theory this could be unrelated to broader questions, but the timing is unusual. The Copyright Office Annual Report discussing registration of computer-generated works was published November 29, 1965, and it stands to reason the Copyright Office took another look at the *Illiac Suite* once they were faced with the questions raised by the following work from Hiller: the *Computer Cantata*.

D. The "Computer Cantata"

Following the *Illiac Suite*, Hiller began work on his next experiment in his Experimental Music Studio at the University of Illinois: the *Computer Cantata*.[299] The *Computer Cantata* was made possible through MUSICOMP, a software that Hiller developed in 1963 to aid in electronic composition upon retirement of the ILLIAC I computer and was the first product of the program.[300]

A distinct difference between this experiment and the *Illiac Suite*, however, is that the *Computer Cantata* was not created by a computer but rather was composed by Hiller with the help of the computer's compositional software, MUSICOMP.[301] MUSICOMP revealed a composer's ability to write with the aid of a computer as the software allowed composers to input musical parameters into the computer following instructions for the generation of a composition.[302] According to Hiller, MUSICOMP became "advantageous" because it ran on a "standard computer that is widely used."[303] This meant that the MUSICOMP software became "immediately available to many potential users" which would not have been possible with the ILLIAC I computer.[304]

Assisted by physicist Robert M. Baker, Hiller's *Computer Cantata* departed

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295. HILLER & ISAACSON, *supra* note 269, at 83.

296. *Id.* at 152–54.

297. U.S. COPYRIGHT OFF. VIRTUAL CARD CATALOG, https://vcc.copyright.gov/browse (select "1955-1970" index; search for "illiac suite") (last visited Feb. 26, 2026).

298. *Id.*

299. Sen, *supra* note 268.

300. Lejaren A. Hiller & Robert A. Baker, *Computer Cantata: A Study in Compositional Method*, 3 PERSP. OF NEW MUSIC 62, 62 (1965).

301. *Id.* ("MUSICOMP . . . [is] a completely generalized programming scheme for musical composition[.]").

302. *Id.* at 63.

303. *Id*.

304. *Id.*

from the *Illiac Suite* in its more complex exploration of a computer's compositional abilities.[305] The experiment's "primary purpose" was to "to demonstrate the flexibility and generality of MUSICOMP."[306] The *Computer Cantata* therefore "present[ed] a rather wide variety of compositional procedures" in addition to a more "concrete demonstration of the broadening of the research area of experimental composition techniques" when compared to the *Illiac Suite*.[307]

The composition "employed direct computer synthesis using an IBM 7094 mainframe computer"[308] and is comprised of eleven distinct sections in a five movement piece.[309] Each individual movement contained a strophe, which is a "mathematical representation of a system which evolves probabilistically," that is "preceded by a prolog or followed by an epilog."[310] In *Computer Cantata: A Study in Compositional Method*, Hiller explains that "the complete structure is at once symmetrically organized in terms of prologs and epilogs and yet encompasses a progressively unfolding plan of composition in the strophes themselves" and that the piece represents "the widest selection of instrumental types, timbres, and performance techniques possible."[311]

The *Computer Cantata* was submitted for registration as an unpublished work, and the registration was received by the Copyright Office on December 30, 1963.[312] The work was ultimately registered and is almost certainly the musical work referred to in the 1965 annual report.[313]

D. Hiller and Cage Collaborate: HPSCHD

With Hiller's assistance, experimental composer John Cage joined Hiller in his Experimental Music Studio at the University of Illinois.[314] During his time in Urbana, Illinois, as an Associate of the Center for Advanced Studies and Visiting Professor of Music, Cage significantly contributed to Hiller's advancements in electronic music generation and computer composition.[315]

Beginning in the fall of 1967, Hiller and Cage commenced work on a "large

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305. *Id.* at 62–63.

306. *Id.* at 62.

307. *Id.*

308. Thom Holmes, *When Computer Music was Experimental, 1951-1971*, NOISE AND NOTATIONS (Dec. 4, 2020), https://www.thomholmes.com/post/when-computer-music-was-experimental-1951-1971 [https://perma.cc/LY3G-JYPP].

309. Hiller & Baker, *supra* note 300, at 63–64.

310. Maria F. Carfora, *Stochastic Processes*, *in* ENCYCLOPEDIA OF BIOINFORMATICS AND COMPUTATIONAL BIOLOGY 747, 747 (2019); Hiller & Baker, *supra* note 298, at 64.

311. Hiller & Baker, *supra* note 300, at 65.

312. U.S. COPYRIGHT OFF., CATALOG OF COPYRIGHT ENTRIES: THIRD SERIES: MUSIC JULY–DECEMBER 1963, at 1275 (1963); COMPUTER CANTATA, Registration No. EU0000804754 (renewed in 1991 as Registration No. RE0000565048).

313. U.S. COPYRIGHT OFF., *supra* note 119, at 5.

314. Letter from Lejaren A. Hiller, Univ. of Ill. Urbana-Champaign, to John Cage, Univ. of Ill. Urbana-Champaign (Mar. 7, 1966) (on file with the University of Illinois School of Music).

315. Megan Galbreath, *HPSCHD*, ILL. DISTRIBUTED MUSEUM, https://distributedmuseum.illinois.edu/exhibit/hpschd/ [https://perma.cc/WPR7-F7JT] (last visited Jan. 28, 2025).

compositional project" commissioned by Swiss harpsichordist Antoinette Vischer, *HPSCHD*, which embodied the "totality of existence."[316] In drastic contrast to Cage's *4'33"*, *HPSCHD* is a "major multimedia performance" accomplished with "1 to 7 harpsicords and 1 to 51 tapes of computer produced sound" in addition to thousands of projected and physical images.[317]

Hiller, in continuing his experimentations with a computer's aid in the generation of compositions, employed a "subroutine called ICHING" to recreate *I Ching* or *The Book of Changes* and Mozart's Musical Dice Game.[318] Employed by Cage in his compositions, *The Book of Changes* is an ancient Chinese philosophical text and oracle book, which is a "system of ideas and precepts from which a person needing information could, upon putting a precisely worded question, obtain the desired answer and guidance."[319] Cage used the *I Ching*'s process in his compositions by allowing a coin toss to "select musical parameters according to various limitations imposed by him."[320]

In the abstract to his *Programming the I-Ching Oracle*, Hiller explains that this oracle "is activated by means of tossing coins" which is precisely the "process [that] was programmed in SCATRE assembly language for an IBM-7094 computer in order to apply the results to certain specialized techniques of music composition."[321] Hiller further details in *Composing with Computers: A Progress Report* that "[t]he results . . . were based on a polynomial distribution" and "much of the programming was concerned with melodic constructions that Cage hoped would express his admiration for the melodic writing of Mozart."[322] Correspondingly, *HPSCHD*'s compositional computer programming simply resembled a dice throw.[323]

The auditory components of the project were accompanied by the theatrics of Cage's performances.[324] Cage's vision for HPSCHD was to place the audience in between the microscopic and macroscopic realms.[325] This was accomplished through experiencing the past with "microtonal investigations of the tape music" generated by Hiller and the future through macroscopic visuals of outer space while simultaneously existing in the present.[326] Thousands of "telescopic" image slides and dozens of motion picture films such as George Méliès's *A Trip to the Moon*, footage from NASA, and images from

316. Lejaren Hiller, *Programming the I-Ching Oracle*, *in* 3 COMPUTER STUDIES IN THE HUMANITIES & VERBAL BEHAVIOR 130, 130; Galbreath, *supra* note 315; Branden W. Joseph, *HPSCHD–Ghost or Monster?*, *in* MAINFRAME EXPERIMENTALISM: EARLY COMPUTING AND THE FOUNDATIONS OF THE DIGITAL ARTS 147, 152 (Hanna B. Higgins & Douglas Kahn eds., 2012).

317. Galbreath, *supra* note 315; Hiller, *supra* note 316, at 130.

318. Lejaren Hiller, *Composing with Computers: A Progress Report*, 5 COMPUT. MUSIC J. 7, 11 (1981); Joseph, *supra* note 316, at 148.

319. HELLMUT WILHELM, CHANGE: EIGHT LECTURES ON THE I CHING 92 (1960).

320. Hiller, *supra* note 316, at 142.

321. *Id.* at 130.

322. Hiller, *supra* note 318, at 11.

323. Galbreath, *supra* note 315.

324. Joseph, *supra* note 316, at 151–52.

325. *Id.* at 152.

326. *Id.* at 151.

observatories and planetariums were shown through eighty-four projectors and "submitted to the same order of chance procedures as the music."[327]

After Hiller and Cage's dedication of two years spent on the project, *HPSCHD* premiered at the Assembly Hall (now the State Farm Center) at the University of Illinois on May 16, 1969, to an audience of 7,000 who wandered about the hall in awe while experiencing the chaos of Hiller and Cage's creation.[328] What resulted from Hiller and Cage's collaboration was an "unexpected conflation of old and new" with the uniting of the harpsichord, an advanced computer, and a chilling experience of New Age philosophy fittingly right as man prepared to take the next big step and visit the moon.[329] The work was premiered in 1969 and registered for copyright the next year.[330] In one anecdote refreshingly far from current practices, Cage wrote to Hiller to indicate that he had found a public domain dice game and public domain editions of Mozart to ensure that the material used fed into the computer raised no copyright concerns.[331]

E. Making Art

During the summer of 1962, a junior engineer at Bell Labs named A. Michael Noll was given an internship in their research department.[332] He was studying the fundamental frequency of speech—an important question for a telephone provider, obviously.[333] But this would unexpectedly lead to developments in computer art, and the first AI art registration.[334]

Working with an IBM 7090 and a SC-4020 plotter, Noll and his colleagues noticed that they were inadvertently creating abstract art.[335] Emboldened, Noll began to use this equipment to create computer art deliberately, experimenting with programs to generate angles for lines randomly using different random distributions and other variations.[336] At the end of the summer these were published in a Bell Labs technical Memorandum entitled "Patterns of 7090," after the name of the computer.[337] One of these patterns was named *Gaussian-*

327. *Id.* at 151, 159.

328. Galbreath, *supra* note 315; *HPSCHD Event Poster*, UNIV. OF ILL. ARCHIVES, https://archon.library.illinois.edu/archives/index.php?p=digitallibrary/digitalcontent&id=4415 [https://perma.cc/55B7-8LJ8] (last visited Jan. 28, 2025); *Composers: Of Dice and Din*, TIME (May 30, 1969), https://time.com/archive/6634245/composers-of-dice-and-din/.

329. Galbreath, *supra* note 315; Joseph, *supra* note 316, at 159–60.

330. HPSCHD, Registration No. EU200764. Class EU is for unpublished music since it was performed but not published.

331. Letter from John Cage, Univ. of Ill. Urbana-Champaign, to Lejaren Hiller, Univ. of Ill. Urbana-Champaign (Sep. 29, 1968) (on file with the John Cage Collection at Northwestern University).

332. A. Michael Noll, *The Beginnings of Computer Art in the United States: A Memoir*, 27 LEONARDO 39, 39 (1994).

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

Quadratic, which Noll found particularly pleasing and would later realize was redolent of Picasso's *Ma Jolie*.[338]

In 1964, Noll was contacted by the Howard Wise Gallery in New York, which was interested in showing computer-generated art.[339] The resulting show in April of 1965, "Computer-Generated Pictures," would show the *Gaussian-Quadratic*, alongside sixteen other works by Noll and eleven by Noll's Bell Labs colleague Bela Julesz.[340] The review by Stuart Preston in the *New York Times* was positive but equivocal, noting that "[s]o far the means are of greater interest than the end."[341] Preston's brief review ends in a way which now seems something of a warning, observing that

> [n]o matter what the future holds—and scientists predict a time when almost any kind of painting can be computer-generated—the actual touch of the artist will no longer play any part in the making of a work of art. When that day comes the artist's role will consist of mathematically formulating, by arranging an array of points in groups, a desired pattern. From then on, all will be entrusted to the deus ex machina. Freed from the tedium of technique and the mechanics of picture-making, the artist will simply "create."[342]

Bell Labs wanted to distance themselves from the show, concerned it would look insufficiently serious, and accordingly gave Noll permission to register his artwork made at Bell Labs under his own name.[343] As such, Noll decided to register the *Gaussian-Quadratic* for copyright.[344] Interestingly, although many of his other works from the period bear copyright notices they were not registered at the time—at least according to the copyright card catalog.[345] As Noll tells it, the Copyright Office

> [a]t first . . . refused [to register *Gaussian-Quadratic*] since a machine had generated the work. I explained that a human being had written the program that incorporated randomness and order. They again refused to register the work, stating that randomness was not acceptable. I finally explained that although the numbers generated by the program appeared "random" to humans, the algorithm generating them was perfectly

338. *Id.*

339. *Id.* at 40.

340. *Id.* at 41; *Howard Wise Gallery records, 1943-1989*, SMITHSONIAN, https://www.aaa.si.edu/collections/howard-wise-gallery-records-9357/series-3 [https://perma.cc/ECG9-8K8X] (last visited Jan. 28, 2025); A. Michael Noll, *The Howard Wise Gallery Show Computer-Generated Pictures (1965) A 50th-Anniversary Memoir*, 49 LEONARDO 232 (2016).

341. Stuart Preston, *Reputations Made and in Making*, N.Y. TIMES, Apr. 18, 1965, at 366.

342. *Id.*

343. Noll, *supra* note 332, at 41.

344. *Id.*

345. *See, e.g.*, A. Michael Noll, *Computer composition with lines* (photograph 1964), https://collections.vam.ac.uk/item/O1193787/computer-composition-with-lines-photograph-a-michael-noll [https://perma.cc/8QG4-U972].

> mathematical and not random at all. The copyright was finally accepted, thereby giving Gaussian-Quadratic the distinction of being perhaps the first registered piece of copyrighted art produced with a digital computer.[346]

Gaussian-Quadratic received registration number GP 51165 in 1965, after it had been "published" by being shown as part of "Computer-Generated Pictures" earlier that year. It is fairly clearly the abstract artwork described in the 1965 Copyright Office Annual Report.[347]

F. Compilations

In addition to musical works and visual art, the 1965 report mentions computer-generated compilations.[348] It does not expand on this and in lieu of finding additional archival material, I cannot say for certain what it is referring to. However, looking at what was being registered for copyright in 1965 and subsequent years, a few works emerge of note.

The earliest registration which on its face suggests being a computer compilation was from 1965, so it could be one of the compilations mentioned, but it is difficult to confirm. National Auto Parts Computer Services Inc. registered its *Parts Identification Catalog* with the Copyright Office, receiving registration number A775752.[349] In registering this work, they noted that "[t]he new matter is basically formed by a compilation of a variety of data gleaned from many sources and uniquely arranged to be useful to vehicle parts dealers."[350] Admittedly all we really have to go on there is the name, and the only trace of this entity's existence in Google is for this copyright registration. Given that litigation over parts catalogs and cases doubting their protectability has been a recurrent theme in copyright law, it is interesting to see just how early computers were to the genre.[351]

In subsequent years until 1970, a number of other compilations made by computer were registered for copyright. All of them feature an introduction, followed by fairly obviously computer-generated and arranged content. Carl Beck and J. Thomas McKechnie produced *Political Elites: A Select Computerized Bibliography*, for which MIT Press received registration number A4275 in 1968, and the claim was for the compilation and introduction.[352] That

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346. Noll, *supra* note 332, at 41.

347. U.S. COPYRIGHT OFF., *supra* note 119, at 5.

348. *Id.*

349. Application for Registration of a Claim to Copyright, PARTS IDENTIFICATION CATALOG, Registration No. A775752, Reg. of Copyrights, Libr. of Cong. (filed July 8, 1965) (on file with author).

350. *Id.*

351. *See, e.g.*, Southco, Inc. v. Kanebridge Corp., 258 F.3d 148 (3d Cir. 2001); ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700 (6th Cir. 2005).

352. Application for Registration of a Claim to Copyright, POLITICAL ELITES: A SELECT COMPUTERIZED BIBLIOGRAPHY, Registration No. A4275, Reg. of Copyrights, Libr. Of Cong. (filed June 20, 1968) (on file with author).

work was assembled by converting "mounds of cards" into a keyword bibliography by use of a computer, with content beyond the introduction merely being alphabetical.[353] Pergamon Press received registration number AF29319 in 1969 for *Computer Compilation of Molecular Weights and Percentage Compositions for Organic Compounds*.[354] Aside from the one-page introduction, the volume simply consists of the "computer output from a program" which has been "stored on tape and printed."[355] In 1970, registration number A141191 was given for a *Russian-English Plastics Dictionary* edited by Harry H. Josselson, which was "[a] new compilation using computer reversal method."[356] This process involved editing of English-Russian technical dictionaries from the Soviet Union, punching them into the computer, and "a listing of the dictionary is produced by computer in a format suitable for its publication."[357]

One tantalizing possibility given subsequent caselaw is that these compilations may have been telephone directories. After all, phone books were a massive amount of work, including the cumbersome task of hand-checking the accuracy of every name and number.[358] Using a computer would obviate this concern, and the first such trial, under the name "Computer-PHOTAC," began in 1962.[359] This trial

> demonstrated that computers and PHOTAC equipment could accurately maintain and update records of customers listings; abbreviate, alphabetize, position indents, justify lines, and compose columns and pages according to specifications; and activate a phototypesetter and composer to produce films and plates of pages from which directories and information records could be printed.[360]

The first published directory from the Computer-PHOTAC trial was

353. CARL BECK & J. THOMAS MCKECHNIE, POLITICAL ELITES: A SELECT COMPUTERIZED BIBLIOGRAPHY, at v–vi (1968). This came out of a project of the Special Operations Research Office to identify whether "patterns vary according to different types of political systems," with the problems "presently being faced in" Vietnam constituting "a dramatic demonstration of" the need to better understand them. CARL BECK ET AL., A SURVEY OF ELITE STUDIES, at ii–iii (1965).

354. Application for Registration of a Claim to Copyright, COMPUTER COMPILATION OF MOLECULAR WEGIHTS AND PERCENTAGE COMPOSITIONS FOR ORGANIC COMPOUNDS, Registration No. AF29319, Reg. of Copyrights, Libr. of Cong. (filed Aug. 7, 1969) (on file with author). This is AF rather than just A because it was a work first published in Great Britain.

355. MICHAEL J. S. DEWAR & RICHARD JONES, COMPUTER COMPILATION OF MOLECULAR WEIGHTS AND PERCENTAGE COMPOSITIONS FOR ORGANIC COMPOUNDS, at xi (1969).

356. Application for Registration of a Claim to Copyright, RUSSIAN-ENGLISH PLASTICS DICTIONARY, Registration No. A141191, Reg. of Copyrights, Libr. of Cong. (filed Feb. 27, 1970) (on file with author).

357. RUSSIAN-ENGLISH PLASTICS DICTIONARY Preface (Harry H. Josselson, ed., 1970). This was originally meant to be only the first in a series of AUTOLEX dictionaries produced by this method, but it does not seem any others in the series were published.

358. Henry F. Pringle & Katharine Pringle, *Sixty Million Headaches Every Year*, SATURDAY EVENING POST, Apr. 3, 1954, at 27.

359. *In the News . . .* , 45 BELL TEL. MAG., Spring 1966, at 52–53.

360. *Id.* at 52.

produced for Staten Island, and Staten Island phone directories were consistently registered for copyright through the 1960s.[361] This led to a more widespread DIR/ECT project telephone directory production system produced by Bell Labs in 1969.[362] In 1970, Illinois Bell began putting the DIR/ECT system into action to produce their directories and directory assistance service.[363] As Illinois Bell explained,

> The introduction of DIR/ECT at Illinois Bell will mark the first permanent BISPA (Business Information Systems Programs Area) use in the Bell System. Trials of computer-set directory type will be held at New York Telephone and Pacific Northwest Bell. Following the IBT introduction, Southwestern Bell, Bell of Pa., New England Bell and Michigan Bell also are scheduled for early adoption of DIR/ECT.
>
> As these Bell operating companies switch to DIR/ ECT, the Directory people's dream of universality in telephone books will be feasible. Computer-set directories can maintain the same high quality and appearance throughout the country. They'll better serve the customer because of standardized printing specifications, alphabetizing, abbreviation, indentation and bold type rules.[364]

As early as 1973, questions as to whether computer-produced telephone directories were properly the subject of copyright law were being asked.[365] At the time, the "landmark case on copyright infringement of a telephone directory" was *Leon v. Pacific Telephone & Telegraph Co.*[366] *Leon* applied the holding from *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.* to telephone directories, which stated that

> The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires

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361. AT&T, Bell Labs Designing New system, Computers to Be Used to Cut Directory Production Time, 195 Management Report No. 54 (Nov. 19, 1969) (on file with the author, courtesy of AT&T Archives and History Center in Warren, NJ).

362. *Id.*

363. *We've Got a Best Seller*, 60 ILL. BELL MAG., No. 4, July–Aug. 1970, at 12, 15.

364. *Id.* at 16.

365. Michael S. Oberman, *Copyright Protection for Computer-Produced Directories*, 41 FORDHAM L. REV. 767 (1973). This article is cited in the CONTU report but not commented on.

366. Sw. Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc., 371 F. Supp. 900, 905 (W.D. Ark. 1974) (citing Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937)).

> material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.[367]

That decision and its application to telephone books had subsequently been adopted by many other courts, even if some commentators were skeptical.[368] However, what effort is required to simply print a directory from a preexisting database used for other purposes such as directory assistance?

Feist Publications entered about sixty-four percent of the listings of Rural Telephone Service Co., Inc. into a computer to help generate their 1983 Northwest AREA-WIDE Telephone Directory for Kansas.[369] Rural itself did not do a canvas of their subscribers, but rather received the "information automatically from subscribers," which Rural would keep "in computer data base form" and use to generate its telephone directory.[370] This would be the precipitating incident whereby eight years later the Supreme Court would overrule these earlier cases, holding that "sweat of the brow" was not enough, and copyrightable work must "possess some creative spark, 'no matter how crude, humble or obvious' it might be."[371] The listings from Rural's telephone directory did not meet this requirement.[372]

The *Feist* decision does not mention computer authorship as a rationale—in fact the world "computer" does not appear in the decision. However, I would argue it necessarily hangs over the decision as the process of making phone books had changed dramatically in the previous quarter century. What had once been a process which involved extensive human involvement was essentially a push button exercise in computer authorship by 1991. Without human authorship, copyright does not apply.

IV. AI AUTHORSHIP AFTER 1965

In 1967, the Copyright Office first made available to the public its Compendium of Procedures, but the first versions did not include a particular

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367. *Leon*, 91 F.2d at 486 (quoting Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83, 88 (2d Cir. 1922)).

368. *See Sw. Bell Tel. Co.*, 371 F. Supp. at 905 (collecting cases); Jeffrey Squires, *Copyright and Compilations in the Computer Era: Old Wine in New Bottles*, 24 BULL. COPYRIGHT SOC'Y U.S.A. 18, 30 (1976) (quoting NIMMER ON COPYRIGHT § 41, at 171–72 (1975)). Mr. Squires was at the time a Staff Attorney for CONTU, and assisted Commissioner Hersey in drafting his dissent, discussed *infra*.

369. Brief for the Respondent, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) (No. 89-1909), 1990 WL 513113, at *3.

370. Brief for the Petitioner, *Feist Publ'ns*, 499 U.S. 340 (No. 89-1909), 1990 WL 513112, at *11.

371. *Feist Publ'ns*, 499 U.S. at 345–53 (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT § 1.08 [C] [1] (1990)).

372. *Id.* at 362. Interestingly, Rural's copyright registration has remained on the record without an indication it has been invalidated. *See* Barbara Lauriat & Robert Brauneis, *Cancelling Copyrights*, 49 COLUM. J.L. & ARTS (forthcoming 2026).

discussion of non-human authorship by computer.[373] That would not appear until the early 1980s, when the Second Compendium made clear that "[w]orks produced by mechanical processes or random selection without any contribution by a human author are not registrable."[374] Of course, this is simply another statement of the Copyright Office's position from 1965.

A. The 1976 Act and CONTU

As the Copyright bill, which began study and drafting in the mid-1950s and was introduced in the early 1960s, continued its long trajectory to enactment in 1976 and effectiveness in 1978, computers were improving in leaps and bounds. It became increasingly clear during this time that computer copyright was a question that needed to be addressed, but the troubled bill could not bear another controversy, and the question was put to a commission instead. The resulting Commission on New Technological Uses for Copyright Works (CONTU) was charged with studying uses of existing copyrighted works, but its second charge was specifically to study "[t]he creation of new works by the application or intervention of such automatic systems or machine reproduction."[375] A CONTU memorandum considered whether authorship could be attributed to the computer itself or to the author of the program which created the work, rejecting both.[376] The memorandum instead argued for awarding protection to the operator of the computer, depending on whether there was "sufficient human intervention or discretionary involvement in the process to justify awarding copyright in the output."[377]

The Commission's 1978 report, though, largely demurred beyond a general concurrence with the Copyright Office's position from 1965. The report notes the issue of AI authorship stems from a "concern that computers either had or were likely to soon achieve powers that would enable them independently to create."[378] However, as of 1978 "development of this capacity for 'artificial intelligence' has not yet come to pass, and . . . such a development is too speculative to consider."[379] Given that, CONTU recommended that Congress and the Copyright Office "continuously monitor the impact of computer applications on the creation of works of authorship" should the situation

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373. Edward Lee, *Prompting Progress: Authorship in the Age of AI*, 76 FLA. L. REV. 1445, 1464 (2024). Section 2.8.3.I.a.1.(b) of the Compendium includes a requirement of human authorship but not in the computer context. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 2.8.3, at 2-290 (1st ed. 1973).

374. U.S. COPYRIGHT OFF., COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 503.03(a), at 500-8 (1984).

375. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201(B)(2), 88 Stat. 1873.

376. Memorandum CONTU Staff to "New Works" Committee from CONTU Staff, (Dec. 16, 1977) (on file with author).

377. *Id*. at 9. The memorandum noted that protection in these works might "be rather thin." *Id.*

378. NAT'L COMM'N NEW TECH. USES OF COPYRIGHTED WORKS, *supra* note 259, at 44.

379. *Id.*

change.[380] Until that point, CONTU concluded "that no special problem exists with respect to the [computer generated works]; that existing . . . law adequately cover any questions involved; and that no action by Congress is necessary at this time."[381]

Commissioner Hersey went further in his dissent and strongly urged for a rejection of AI authorship, noting that

> something that Professor Weizenbaum keeps emphasizing over and over again is the extent to which [many] have come to accept the propositions "that men and computers are merely two different species or a more abstract genus called 'information processing systems,'" that reason is nothing more than logic, and "that life is what is computable and only that."
>
> A society that accepts in any degree such equivalences of human beings and machines must become impoverished in the long run in those aspects of the human spirit which can never be fully quantified and which machines may be able in some distant future to linguistically "understand" but will never be able to experience, never be able to bring to life, never be able therefore to communicate. Those aspects include courage, love, integrity, trust, the touch of flesh, the fire of intuition, the yearning and aspirations of what poets so vaguely but so persistently call the soul—that bundle of qualities we think of as being embraced by the word humanity.[382]

Although there are extensive transcripts of the CONTU meetings, the issue of AI authorship is not really discussed.[383] There were consultations, with composers like Milton Babbit, who would have been very aware of Hiller's experiments and subsequent work in the field along like computer scientists like Weizenbaum, but records have not survived of those consultations so far as I can tell.

IV. AI AUTHORSHIP AFTER CONTU

In 1991, the World Intellectual Property Organization (WIPO) held a Worldwide Symposium on the Intellectual Property Aspects of Artificial Intelligence at Stanford University, leading to a volume of papers presented there. In his contribution, Arthur R. Miller noted that some might believe that

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380. *Id.* at 46.

381. *Id.*

382. *Id.* at 36–37. Although this dissent is more focused on copyright protection for computer programs, AI authorship is specifically invoked.

383. *See* Zvi S. Rosen, *Transcribed Proceedings of CONTU*, MOSTLY IP HIST. (Jan. 10, 2018), https://mostlyiphistory.com/2017/01/10/transcribed-proceedings-of-contu/ [https://perma.cc/GB8A-PKHR]. Note that some discussion by Melville Nimmer, mostly conclusory, is *infra* at Part II.A.

the issue of AI authorship was new, but in reality the issue had already been considered for some twenty-five years already, and many major legal questions had already been resolved.[384] At the same time, although computer technology had evolved in leaps and bounds from 1965 to 1991, it was prepared for a series of massive further evolutions leading to today and something approaching the sort of artificial intelligence considered to be a game-changer in the past is now a reality.

In the early 1980s, the RACTER text generation system received a fair bit of attention,[385] culminating in the publication of *The Policeman's Beard is Half Constructed* in 1984 by Warner Books. Proclaiming on its cover that it is "The First Book Ever Written by a Computer,"[386] the Copyright Office registered it in 1984, somewhat surprisingly.[387] The application lists two authors: Joan Hall, who created the illustrations, and William Chamberlain on the basis of having "programmed computer to create entire text."[388] Apparently this was sufficient to accept the registration, and "Racter" is listed as being the author in the Copyright Office Public Catalog.[389] Given both past and present rejection of such claims by the Copyright Office, this feels like an unusual oversight. As for the work itself, it suffers from certain incongruities, including "a predilection for vegetables of different varieties, invoking unlikely images of lettuce, tomatoes, and potatoes amid the bantering of its characters."[390]

In the early 1990s, following a decade of effort, Scott French programmed a Macintosh computer to imitate the style of Jacqueline Susann, best known for "Valley of the Dolls."[391] The result was 1993's *Just This Once*, and one reviewer favorably comparing it to an oeuvre by Jackie Collins with the comment that that "[i]f you do like this stuff, you'd be much, much better off with the one written by the computer."[392] The book was published by Carol Publishing

384. Arthur R. Miller, *Computers and Authorship: The Copyrightability of Computer-Generated Works*, *in* WORLD INTELL. PROP. ORG., WIPO WORLDWIDE SYMPOSIUM ON THE INTELLECTUAL PROPERTY ASPECTS OF ARTIFICIAL INTELLIGENCE 241, 243 (1991). This was substantially reprinted as part of Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 1042 (1993).

385. Christine L. Kane, *Computing Fiction*, BOSTON PHOENIX, Oct. 13, 1981, at 2 (discussing how OMNI magazine had paid several thousand dollars for the first outing of RACTER, a short story entitled "Soft Ions").

386. *The First Book Written by a Computer*, HISTORYOFINFORMATION.COM, https://www.historyofinformation.com/detail.php?entryid=3806 [https://perma.cc/72EV-AB2V] (last visited Feb. 27, 2026).

387. THE POLICEMAN'S BEARD IS HALF CONSTRUCTED, Registration No. TX0001454063.

388. Application Form TX, THE POLICEMAN'S BEARD IS HALF CONSTRUCTED, Registration No. TX 1-454-063, U.S. Copyright Off. (filed Nov. 6, 1984) (on file with author).

389. THE POLICEMAN'S BEARD IS HALF CONSTRUCTED, Registration No. TX0001454063.

390. Terry Nasta, *Thief of Arts*, PC MAG., Dec. 25, 1984, at 62.

391. Steve Lohr, *THE MEDIA BUSINESS: Encountering The Digital Age – An occasional look at computers in everyday life. Potboiler Springs From Computer's Loins*, N.Y. TIMES, July 2, 1993, at 1.

392. *Id.*

Group, which figured the computer authorship would be a useful device for getting attention and sales.[393] The Copyright Office received an application for registration for on June 21, 1993.[394] However, the work's path to registration was not quick, as the Copyright Office "wasn't sure Scott French should be listed as 'author' of the entire text of Just This Once, seeing as how it's being promoted as computer-written."[395] The application was amended in mid-December of 1993 following an exchange between the publisher and the examiner, where the original claim of "entire text" was replaced by a claim for "some original text, some computer-aided text," and implicitly that the computer-aided text was not original.[396]

The authorship of *Just This Once* led to another novel legal issue when the Jacqueline Susann estate threatened suit against French and the book's publisher.[397] In response, French argued that the final product "does not duplicate Susann's writing. It is simply and magically reminiscent of America's most popular novelist."[398] Reportedly, the Susann Estate "settled out of court for half of French's profits and control over the publicity for the book."[399] So far as I can tell, this marks the first legal scuffle involving an AI operator for using copyrighted materials for AI training.[400]

Composer David Cope produced many works using his EMI system for algorithmic composition, but to my knowledge none of them were registered for copyright. However, he did register his book *Experiments in Musical Intelligence*. Although the application for registration was received in mid-July of 1996, it was only registered following a conversation between the publisher and examiner, where the original explanation of the nature of authorship, which had been "Monograph on a computer system for emulating musical styles and composing," was amended to "entire text of Monograph."[401]

One other example from the turn of the millennium involved litigation over the organization of the Hebrew Bible into matrices. Rabbi Dr. Yochanan

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393. Telephone Interview with Steven Schragis, Publisher, Carol Publ'g (July 31, 2004).

394. Application Form TX, JUST THIS ONCE, Registration No. TX 3-633-395, U.S. Copyright Off. (filed June 21, 1993) (on file with author).

395. David Streitfeld, *Book Report*, WASH. POST, Sep. 26, 1993, at X-15.

396. *Id.*

397. Lohr, *supra* note 391.

398. Peter Laufer, *MotherJones MJ93: Hacking in the valley of the dolls*, MOTHER JONES (May 1993), https://www.motherjones.com/politics/1993/05/motherjones-mj93-hacking-valley-dolls/ [https://perma.cc/MF2D-QUFQ].

399. John Boudreau, *A Romance Novel With Byte: Author Teams Ups With Computer to Write Book in Steamy Style of Jacqueline Susann*, L.A. TIMES (Aug. 11, 1993), https://www.latimes.com/archives/la-xpm-1993-08-11-vw-22645-story.html [https://perma.cc/R5YH-PARU]. The legal questions raised were discussed in a student note at the time. Tal Vigderson, Note, *Hamlet II: The Sequel: The Rights of Authors vs. Computer-Generated Read-Alike Works*, 28 LOY. L.A. L. REV. 401 (1994).

400. Gabriel Karger, *AI-Generated Images: The First Lawsuit*, SCI. & TECH. L. REV. (Jan. 25, 2023), https://journals.library.columbia.edu/index.php/stlr/blog/view/479 [https://perma.cc/2S5B-FRHW].

401. Application Form TX, EXPERIMENTS IN MUSICAL INTELLIGENCE, Registration No. TX 4-382-776, U.S. Copyright Off. (filed Oct. 18, 1996) (on file with author).

Spielberg developed software for searching and encoding the Hebrew texts and outputting matrices of the codes which he argued were therein by algorithm.[402] Michael Drosnin used this software, including a large number of these matrix outputs, in his bestselling book *The Bible Code*.[403] Spielberg registered the software and (through his company) brought suit, arguing that the use of these matrix outputs constituted copyright infringement.[404] However, the Court disagreed and found that plaintiff "failed to satisfy its burden of proving that the Software's outputs of Bible code finds, as displayed in the matrixes, contain protectable expression."[405] The case is a bit challenging, though, because technically Spielberg was suing Drosnin for infringing his copyright in the software and had not registered the matrices the software generated.[406]

The recent era, the era of generative AI, has already been discussed thoroughly *infra*. But having gone through this history, what can we learn from it?

V. SIX LESSONS

As I have documented here, the issue of computer authorship of copyrightable works has come up repeatedly before the Copyright Office and always seems to reach the same conclusion. But can we do better? In understanding how we got here, I believe there are six possible lessons—not mutually exclusive—to take away.

A. An Interesting Question, but Not a Terribly Difficult One?

At the eighteenth CONTU meeting in 1977, Vice-Chairman Melville Nimmer of treatise fame commented that

> What I'm trying to do is focus on the extent to which this brave new world presents new copyright problems, to discover the extent to which they are simply the same copyright problems in somewhat different packages, and really no more difficult than the existing copyright problems.
>
> One question raised had to do, I think, at least by implication, with the copyrightability of works created in part by the machine. That is an interesting question, but one that I don't think is a terribly difficult one. I may be wrong.[407]

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402. Torah Soft Ltd. v. Drosnin, 136 F. Supp. 2d 276, 280 (S.D.N.Y. 2001).

403. *Id.*

404. *Id.* at 276–78.

405. *Id.* at 292.

406. *Id.* at 281–82. Nor could it be, because Drosnin had purchased the software and generated the matrices himself. *Id.* at 281.

407. NAT'L COMM'N ON NEW TECH. USE OF COPYRIGHTED WORKS (CONTU), TRANSCRIPT OF THE 18TH MEETING, PB 278329, at 66 (1977), https://archive.org/details/PB27832918th CONTUMeeting/page/n71/mode/2up [https://perma.cc/DK6H-SCTM].

And perhaps it wasn't difficult. Indeed, the question was not further discussed in the meeting, where discussion instead turned to questions of infringement.[408] It is a bit anticlimactic, but that does not mean it is wrong.

As of the writing, 1965 was sixty years ago, and the people at the Copyright Office then who were engaged with the issue when it came up were immersed in the ideas of copyright law and its revision more than almost anyone else. Register of Copyrights Abraham L. Kaminstein and Head of Examining Barbara Ringer had together been working on the revision to the copyright law which would become the 1976 Copyright Act for about a decade at that point, with Ringer taking the lead on drafting and Kaminstein providing the interface to Congress and industry.

At this point in the revision process, detailed reports had been produced on the meaning of "Writings" in the Constitution, the history of copyright law and its revisions, copyright registration, copyright in architectural works as well as in choreographic works and in sound recordings, and much more.[409] Hearings had been held, the draft bill which would become the 1976 Act had gone through numerous revisions and the Register had produced reports on these revisions, and consultations with stakeholders were ongoing. As such, Ringer and Kaminstein were in an ideal position to approach the issue conceptually—and may have just seen it clearly gotten it right.

B. Protect the Prompts

The precedent set by registration of aleatory music as text suggests that in cases where protectability of the AI output might be questionable, registration of the textual prompts sent to the AI engine might be possible. There is the additional analogy of computer programs, where the source code is protectible as a literary work. Similar doctrines about thin copyright and abstraction-filtration-comparison could then be used for protection of AI works.[410]

Somewhat surprisingly, the issue has not been discussed extensively, perhaps in part because this option is less attractive to registrants, just as audiovisual registration was more attractive than textual registration in the Atari case.[411] For instance, in the *Théâtre D'opéra Spatial* review board letter, it was noted that

> Allen declined to disclose any specific prompt on the grounds that

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408. *Id.*

409. *Copyright Law Revision Studies*, U.S COPYRIGHT OFF., https://copyright.gov/history/studies.html [https://perma.cc/K3GQ-QQ4C] (last visited Jan. 28, 2025) (thirty-four revision studies were produced overall).

410. *See* Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

411. *But see* Francesca Mazzi, *Authorship in Artificial Intelligence-Generated Works: Exploring Originality in Text Prompts and Artificial Intelligence Outputs Through Philosophical Foundations of Copyright and Collage Protection*, 27 J. WORLD INTELL. PROP. 410 (2024) (discussing whether prompts are original work of authorship).

> "specific string of prompts and inputs are confidential." Mr. Allen has not sought copyright protection for his prompts and inputs. Nor could the Board consider whether the prompts themselves were sufficiently creative to be independently protected by copyright since Mr. Allen has not disclosed them.[412]

In other words, the possibility of protecting prompts is on the table for the Copyright Office, but it would depend on whether they are original works of authorship. On a review of the Copyright Office online catalog in January of 2025, there are a few suggestions of prompt registrations but nothing I could confirm.[413]

Generally speaking, the rule for the quantum of original authorship which must exist is extremely low, but not zero. This was seen in the registration of *4'33"* and other aleatory works, and prompts would likely be no less registrable than "a computer program, whether in object code or source code."[414] It is difficult to know whether registration of prompts is desirable to creators, but it may minimize certain concerns about registration of AI works being used against independent AI creations.

In its report at the end of January 2025, the Copyright Office concluded that "given current generally available technology, prompts alone do not provide sufficient human control to make users of an AI system the authors of the output."[415] Looking at cases about authorship of a commissioning party of software and artwork, the Copyright Office argued that "provision of detailed directions, without influence over how those directions are executed, is insufficient."[416] The rationale for this is that "prompts may reflect a user's mental conception or idea, but they do not control the way that idea is expressed."[417]

This strikes me as a difficult standard—many works have been created on which the artist was the mastermind but elements of chance of outside influence were present. Some have been discussed above but of course many more exist in art galleries and many other places around the world. With apologies to Justice Holmes, I suggest that a rule cannot be laid down which would excommunicate the work of such artists as Jackson Pollock from copyright protection.[418] The Copyright Office defends against this argument in its report, arguing that Pollock's "process of creation did not end with his vision of a work"

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412. Letter from Suzanne V. Wilson to Tamara Pester, *supra* note 77, at 6 n.8.

413. For instance, I checked Registration No. TX0009377726 / 2024-03-01 for "AI Prompt: World Peace Engineering #EliteEng #EliteOps #ITE" by Matthew Daniel Sacks. However, the author told me it is a blog post, not a set of prompts.

414. Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240, 1249 (3d Cir. 1983).

415. U.S. COPYRIGHT OFF., *supra* note 2, at 18.

416. *Id.* (citing S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989)) (software created for bank by third party developer); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (sculpture created by independent contractor was not a "work for hire").

417. *Id.* at 19.

418. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("A rule cannot be laid down that would excommunicate the paintings of Degas.").

but included the physicality of execution and "choice of colors, number of layers, depth of texture, placement of each addition to the overall composition."[419] Because many of these easily can be included in the prompts, drawing such a distinction may prove difficult.

Regardless, although the Copyright Office has asserted that the output of an AI system cannot be protected through registration of its prompts, that should have no impact on whether the prompts themselves are registerable as textual works. The main challenge would likely be on the grounds that they are a "procedure, process, system, [or] method of operation."[420]

C. Register Under the Rule of Doubt

As discussed above, in the early days of computer software being registered for copyright, the Copyright Office had its doubts but ultimately accepted those registrations under the Rule of Doubt.[421] The Rule of Doubt is both an examination doctrine and a registration caveat of substantial vintage. As the name suggests, the rule of doubt is essentially a registration with a cloud over it—the Copyright Office accepts the registration, but the caveat of the rule of doubt robs it of the presumption of validity which generally attaches to a registration. Probably the best statement of the vintage rule of doubt comes from a 1969 article, which describes it as a "rule of reasonable doubt," whereby

> a claim should not be disapproved if there is a reasonable doubt as to its validity (as may ultimately be determined by a court), even though the Office itself may consider the claim invalid-hence the policy of refusing only those claims which are defective on their face.[422]

Although sources trace it to the 1940s, the Rule of Doubt actually goes back even earlier. In 1911, the Copyright Office accepted registrations of piano rolls as musical arrangements under an early version of the rule of doubt, even though Congress had declined to extend copyright protection to piano rolls only two years earlier.[423] Presumably the examiners would be unable to confirm what the arrangements were without a player piano in the office. *Patry on Copyright* traces the first appearance of the rule to 1942, in Assistant Register

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419. U.S. COPYRIGHT OFF., *supra* note 2, at 20.

420. 17 U.S.C. § 102(b).

421. *See infra* at Part III.B. This section is adapted from my blog post: Zvi S. Rosen, *Registering Generative AI Works for Copyright Under the Rule of Doubt* (Apr. 19, 2024), https://mostlyiphistory.com/2024/04/19/registering-generative-ai-works-for-copyright-under-the-rule-of-doubt/ [https://perma.cc/5QR3-3GNC].

422. Morton David Goldberg & Richard Dannay, *Fraud on the Copyright Office: Its Use and Misuse as a Defense in Copyright Infringement Actions*, 44 N.Y.U. L. REV. 540, 557 (1969).

423. Rosen, *supra* note 20, at 514.

of Copyrights Herbert A. Howell's work *The Copyright Law*.[424] According to the Copyright Office's 1950 Manual, they would "register material which we feel a court might reasonably hold to be copyrightable, even though, personally, we feel that it is not subject to copyright."[425] The failed Copyright Reform Act of 1993 had a provision to codify something similar to the rule of doubt, but instead it has remained a matter of internal Copyright Office practice.[426]

The Rule of Doubt was especially important under the 1909 Act, since an infringement suit could not be brought without a registration. This is part of why the Copyright Office would "resolve any reasonable doubt concerning the copyright ability of a particular work in favor of registration."[427] The 1976 Act explicitly added provisions for bringing suit following a denied registration, although a suit cannot be brought while an application is pending.[428] However, the Rule of Doubt endured, and made its way into the Compendium of Copyright Office Practices.

The statement of the rule provides its general contours:

> On occasion, the Office may register a claim to copyright, even though the Office has reasonable doubt as to whether the material submitted for registration constitutes copyrightable subject matter or whether the other legal and formal requirements of the statute have been met. This practice is known as the Rule of Doubt.[429]

In practice, the Rule is mostly focused on software,[430] and the last registration under the Rule of Doubt I could find not related to software was in 2011.[431] In 1983, the Copyright Office proposed that they would allow registration under the "'rule of doubt' based on an object code format as the deposit" or in cases

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424. HERBERT A. HOWELL, THE COPYRIGHT LAW: AN ANALYSIS OF THE LAW OF THE UNITED STATES GOVERNING REGISTRATION AND PROTECTION OF COPYRIGHT WORKS, INCLUDING PRINTS AND LABELS 92 (1942) ("[T]he Copyright Office has always been inclined to give the author the benefit of the doubt, if there be any, and make registration for whatever it be worth.").

425. U.S. COPYRIGHT OFF., DEPARTMENTAL & DIVISIONAL MANUAL NO. 7, 38 (1950).

426. H.R. 897, 103d Cong. § 5(a) (1993).

427. Eltra Corp. v. Ringer, No. CIV.A. 76-264-A, 1976 WL 21070, at *3 (E.D. Va. Oct. 26, 1976), *aff'd*, 579 F.2d 294 (4th Cir. 1978).

428. Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 586 U.S. 296, 302–03 (2019).

429. U.S. COPYRIGHT OFF., *supra* note 22, § 607.

430. Compaq Comput. Corp. v. Procom Tech., Inc., 908 F. Supp. 1409, 1415 (S.D. Tex. 1995) (noting the Rule of Doubt is limited to "registrations submitted in formats that are not understandable to humans.").

431. DESIGNS BY PAULINE LANDERS CIRCA 1945, Registration No. VA0001789386. Although not indicated as being made under the Rule of Doubt in registration PA0001098484, the Annual Report of the Examining Division from 2002 indicates that the registration of a "living statue" act as pantomime was made under the rule of doubt. ANNUAL REPORT OF THE EXAMINING DIVISION FOR FY 2002, U.S. COPYRIGHT OFFICE 13–14, *available at* https://archive.org/details/USCO_Examining_Reports/2002/page/n13/mode/2up.

of trade secrecy where the examiner had not seen the work.[432] Nowadays, "as a general rule, the Office will apply the Rule of Doubt only in" attempts to register computer software where source code is not deposited, or in situations where the examiner is not sent the deposit material due to trade secrecy.[433] There is an allowance of other "exceptional circumstances" where it could be used, but the Copyright Office "will not register a claim under the Rule of Doubt simply because there is some uncertainty as to how that issue may be decided by a particular court."[434]

As Ed Lee has also noted, the Rule of Doubt may offer a prudent solution for how to handle registrations with at least some claim of authorship.[435] Much like for computer code, there is inevitably a "black box" element for AI, although unlike for code, the unknowable part is not the work itself but the exact nature of the authorship involved.

In a way, the Copyright Office is already doing this—registrations made at least in part with AI include this in the "material excluded" field. However, this is not documented and should be made clear by policy statement. In cases like *Thaler*, where purportedly there was no human authorship, denial of registration would still be proper.

D. Lawyers Are Bad at Thinking Outside the Box

Law gets up in the morning and thinks "what did I wear yesterday."[436] Lawyers "are usually too wedded to the status quo" and the result is an inability to think in ways which truly go beyond what already exists.[437] This tendency is doubtless particularly due to the approach in common-law jurisdictions to use *stare decisis* as a basis for decision making, resulting in ossified doctrines which bind lower courts.[438] Although the same constraints are not necessarily present in scholarship, the mindset inevitably is. This is especially true given the Constitutional limits on the power of Congress to make laws regarding copyright, and the fact that debates over copyrightability tend to involve

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432. Notice of Inquiry Deposit of Computer Programs and Other Works Containing Trade Secrets, 48 Fed. Reg. 22951-01, 22952 (proposed May 23, 1983) (to be codified at 37 C.F.R. pt. 202).

433. U.S. COPYRIGHT OFF., *supra* note 22, § 607.

434. *Id.*

435. Edward Lee, *The Code Red for Copyright Law*, 76 FLA. L. REV. F. 1, 7–8 (2024).

436. Thanks to Sheila Simon for the line.

437. Antonio F. Perez, *Legal Frameworks for Economic Transition in Iraq - Occupation under the Law of War vs. Global Governance under the Law of Peace*, 18 TRANSNAT'L LAW. 53, 54 (2005).

438. Barbara Luppi & Francesco Parisi, *Judicial Creativity and Judicial Errors: An Organizational Perspective*, 6 J. INST. ECON. 91 (2010); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003); Jeffery E. Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 402 n.6 (2005).

conflated questions of statutory and constitutional copyrightability.[439]

A corollary to this is that every time the issue comes up, scholars tend to treat it as being a new thing.[440] Pamela Samuelson's piece on the subject from 1986 is still the state of the art on copyrightability of computer-generated works, considering five different possibilities for AI-generated works.[441] Since then, a great deal of ink has been spilled on the subject, much of it purporting to answer the question. As of September 1, 2024, there were over forty law review articles in Westlaw discussing the attempted copyright registration for *A Recent Entrance to Paradise*, all from 2022 forward, and that is only the tip of the iceberg as a great deal had been written beforehand (and no doubt a great deal is in the pipeline to appear soon). But how many times can we reinvent the same wheel?

E. Will AI Break Copyright?

Copyright law in the United States is ultimately a heavily amended and updated version of the Statute of Anne from 1710, which was an answer to the problem raised by Milton in his Areopagitica from 1644. It has been under increasing strain as the shape of creativity and creation changes, and perhaps AI is the point where the leaks in the ship simply cannot be patched.

In the nineteenth and early twentieth centuries, the focus in copyright legislation was attempting to harmonize a stubbornly national system with the goal of integrating into the broader international copyright community. The effort took far longer than expected, and copyright questions which were inevitable with developments in technology were generally handled through half-measures as the focus was perhaps necessarily elsewhere.

The strain has increased in the digital era. The byzantine system of music copyright with separate royalty systems for music and sound recordings, with different schemes for interactive and non-interactive streams, not even to mention things like synchronization, are a far cry from the exclusive right to sell books, maps, and charts. Computer programs were never a natural fit for copyright law, and for the past sixty years they have been registered by the Copyright Office as literary works. It is simple enough to explain the reason as

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439. *See* Brief for the Respondent, *supra* note 369. Of course, the Commerce Clause may offer an additional avenue for legislation, as may the treaty power. At least regarding bootleg sound recordings, the law has accepted this for some time now, although with perhaps a slight unease. *See* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999); United States v. Martignon, 492 F.3d 140 (2d Cir. 2007) (overruling a District Court conclusion disagreeing with *Moghadam*).

440. Indeed, claims of novelty in legal scholarship are made excessively generally. Paul Horwitz, *Three More Takes on Novelty Claims in Legal Scholarship*, PRAWFSBLAWG (Aug. 19, 2013, at 22:39 ET), https://prawfsblawg.com/2013_08_three-more-takes-on-novelty-claims-in-legal-scholarship/ [https://perma.cc/Q4FP-DFEM]; Paul Horwitz, *"The First"*, PRAWFSBLAWG (Dec. 13, 2021), https://prawfsblawg.com/2021_12_the-first/ [https://perma.cc/CS29-4SFD].

441. Samuelson, *supra* note 18.

a matter of history, but the practice has been ridiculous for decades.[442] Are we simply going to do the same thing with works written by computers and sweep the problem under the rug by pretending it is just old wine in new bottles? Eventually the bottle won't hold.

In fact, looking at the history shows something else—that the issue has been repeatedly avoided. This was most conspicuous for CONTU, but in general the idea of computer authorship has been long considered and equally long avoided. The Copyright Office's 2025 report on AI Authorship explicitly endorsed the "same analysis" that they provided in 1965, even in the face of dramatic technological change.[443] The Copyright Office's report rejects calls for a sui generis protection for AI works,[444] but at a certain point it might be necessary to acknowledge that copyright for AI creations is something fundamentally different from what was contemplated in 1790.

F. AI Shows Us the Purpose of Copyright

As one final lesson, perhaps we can learn something after all—not necessarily about AI, but about copyright and authorship. The Constitution authorizes Congress to legislate to protect authors in their writings, not to give copyrights to expressive works regardless of their origin.[445] This has been largely treated as a legal rule for the course of this discussion, but there is a deeper insight to this provision that AI works reveal—the centrality of the author and the author's value. Seeing the formulaic repetitive outputs that AI can reliably produce is a reminder of why copyright protection is aimed at protecting authors, not works, and focusing on works for copyright law is a mistake. Perhaps a copyright law more focused on authors and less focused on works would better satisfy the goals of copyright law.

Generally speaking, incentive theory is the most commonly stated justification for copyright protection—the idea that copyright is "a means of providing financial incentives for creative production."[446] This is of course part of the reason for copyright protection in America, but attempting to constrain the rationale for copyright to a single argument simply does not track the historical reality of what motivates copyright legislation.[447] Rather, into the sausage grinder that is the rationale for copyright, three other philosophical

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442. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 712 (2d Cir. 1992) ("Generally, we think that copyright registration—with its indiscriminating availability—is not ideally suited to deal with the highly dynamic technology of computer science. Thus far, many of the decisions in this area reflect the courts' attempt to fit the proverbial square peg in a round hole.").

443. U.S. COPYRIGHT OFF., *supra* note 2, at 2.

444. *Id.* at 35–36.

445. *See* U.S. CONST. art. 1, § 8, cl. 8.

446. BJ Ard, *Taking Access Seriously*, 8 TEX. A&M L. REV. 225, 247 (2021). The idea is that the incentive to publish is in tandem with a public benefit of access. *Id.*

447. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011); Others take a contrary view of what they dub "IP Pluralism." Patrick Goold & David A., *IP's Pluralism Puzzle*, 103 TEX. L. REV. 1453 (2025).

strands are generally recognized: labor, personality, and communication.[448]

The labor theory of value stands for the proposition that "the law should secure as property the valuable products and services created by original laborers."[449] This argument has been a long history as a justification for copyright protection throughout American history.[450] By contrast, the intertwined personality and communication theories considers creative work to be "communication with the public" intertwined with the author's autonomy.[451] When the author's works are circulated without permission or attribution, "the personality of the author has been violated."[452] Indeed, the Hegelian version of the personality/communication theory is intertwined with the Constitution's promotion of the progress of the science and the useful arts, as in his view copyright is "the 'best way of progressing science and arts,' as the purpose of intellectual property is to facilitate the recognition of an author's property by others."[453]

Article I, Section 8, Clause 8 seeks to promote the progress of science, but there is a particular vehicle it chooses for that purpose—protecting the writings of authors for limited times. Frankly, none of the stated rationales apply with any particular force to protecting the creations of artificial intelligence that lacks substantial human input.[454] And that is not just a policy assertion, it is a point where we can reflect about the purposes of copyright—by showing where copyright may not be intended to apply, we can see more clearly the purposes of using it to protect the writings of authors.

Copyright law has always been centered on human authorship and "celebrates human creativity."[455] Although the incentives copyright offers matter, an emphasis on these incentives as the motivation for copyright protection "tend[s] to obscure the centrality of human creativity to copyright law and theory."[456] The fact that this has been treated more as an intuition than a central principle is more to do with the fact that the examples given by this

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448. Laura Biron, *Creative Work and Communicative Norms: Perspectives from Legal Philosophy*, *in* THE WORK OF AUTHORSHIP 19, 21–25 (Mireille van Eechoud ed., 2014). There are other theories as well; for instance, IP social justice theory "treats IP protection as a social ordering mechanism through which society progresses by nurturing beneficial intellectual activity." Lateef Mtima & Steven D. Jamar, *Introduction: Intellectual Property Social Justice Theory: History, Development, and Description*, *in* THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE 1, 2 (Steven D. Jamar & Lateef Mtima eds., 2024).

449. Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PENN. L. REV. 2001, 2020 (2009).

450. *Id.* at 2023.

451. Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1082 (2008).

452. Mackenzie Caldwell, *What Is an "Author"? Copyright Authorship of AI Art Through a Philosophical Lens*, 61 HOUS. L. REV. 411, 430 (2023).

453. *Id.* at 431 (quoting PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 97 (2016)).

454. Of course, conscious use of AI as an assistive tool when part of the creator's toolkit is a different question.

455. Jane C. Ginsburg, *Humanist Copyright*, 6 J. FREE SPEECH L. 91, 93 (2025).

456. *Id.*

article were until very recently mostly trivia rather than commonplace. With the copyright office registering thousands of AI-generated works, we are finally at that point in the future long expected—that there is no avoiding confronting this and acknowledging that human authorship is the central principle of copyright law. That authorship might be mediated by generative AI, but the authorial spark must be human. After all, "if we refuse to take the position that the focus of IP law is human creativity and innovation, *what will be left for us to do?*"[457]

CONCLUSION: THE GROUNDHOG DAY OF COPYRIGHT FOR AI

In the Copyright Office's Report on Copyrightability of AI works, the guidance from 1965 was explicitly embraced. The Copyright Office explained that regarding generative AI works today,

> [t]he same analysis applies in the context of AI technology. For a work created using AI, like those created without it, a determination of copyrightability requires fact-specific consideration of the work and the circumstances of its creation. Where AI merely assists an author in the creative process, its use does not change the copyrightability of the output. At the other extreme, if content is entirely generated by AI, it cannot be protected by copyright. Between these boundaries, various forms and combinations of human contributions can be involved in producing AI outputs.[458]

I originally called this project the "groundhog day" of AI and copyright, but of course at the end of the movie *Groundhog Day*, Bill Murray's character learns something. We, on the other hand, seem to have learned nothing. For seven decades now, the issue of AI copyright has been raised, debated, and treated as a novel issue before the same resolution is reached. Are we going to do this again, or are we going to forge a path forward?

The issue of generative AI is not new, even as the methods are. Shakespeare's adage that past is prologue is of course part of the importance of understanding the history of generative AI and copyright, but this is not just the prologue—it is the present. The law is in the same place as it was in 1965, and this forces us to ask if there is any real problem with that. If there is not, then there is no real conceptual difficulty regarding AI authorship but that would suggest a lot of ink has been spilled over a simple question. On the other hand, if there is a conceptual difficulty, why are we unable to see a better solution? Despairing, I asked ChatGPT, and this is what it had to say:

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457. Daniel J. Gervais, *The Human Cause*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND ARTIFICIAL INTELLIGENCE 38 (Ryan Abbott ed. 2022); Matt Blaszczyk, *Copyright's Nominal Humanism*, 58 LOY. L.A. L. REV. (forthcoming 2026) (arguing copyright needs to take this commitment to humanism more seriously), https://ssrn.com/abstract=5376145.

458. U.S. COPYRIGHT OFF., *supra* note 2, at 2 (internal citations omitted).

> Copyright law has struggled to adapt to the challenges posed by generative content due to its reliance on traditional notions of human authorship and originality, which are increasingly complicated by the involvement of artificial intelligence (AI) systems in creative processes. Under current legal frameworks, copyright protection is typically granted to works created by a human author, yet AI-generated works lack a clear human origin, raising questions about the assignment of authorship, ownership, and the scope of protection. Additionally, the rapid evolution of AI technologies outpaces legislative processes, leaving gaps in how existing legal doctrines, such as the "derivative work" doctrine, apply to content generated by AI based on pre-existing data. This has created uncertainty around the ownership rights of both the creators of the AI systems and the users who interact with them, thereby undermining the law's ability to effectively address the nuances of generative content in a digital, AI-driven age.[459]

As with so much here, I'm not sure that clarifies much, but at least the author and his instrument are of a similar mind here. Perhaps further technology advances will be able to offer a solution. Perhaps it was merely an issue of my prompts. Or perhaps this is something where a sense of reverence for human authorship is required more than ever.

459. Zvi S. Rosen, ChatGPT, "explain in one paragraph, law review style, why copyright law has been unable to adequately adapt to the challenges of authorship related to generative content." (Jan. 29, 2025) (on file with author).

LEGAL RESEARCH'S HISTORICAL TAPESTRY: HOW THE HISTORY OF THE WEST PUBLISHING COMPANY IMPACTS MODERN LEGAL RESEARCH AND LAWYERS' VIEW OF THE LAW

NANCY B. TALLEY*

Legal research is complicated. It requires a high level of technical expertise to use today's legal research platforms. Legal research is so much more. Modern legal research has its roots in the West Company's digest, key number, and headnote system that was developed over 150 years ago. Today's law students must learn how West's history impacts legal research to truly understand how the company and its products have influenced the law. It is the responsibility of the legal academy to teach this history to the next generation of lawyers so that they can engage in the level of reasoning that is required of them.

INTRODUCTION

"A page of history is worth a volume of logic."[1] Oliver Wendell Holmes wrote those words in 1921, and they are as appropriate today as they were then. This statement is particularly pertinent to legal research. Today's law students must learn the history of legal research to engage in the level of logical thought that is required of them. This point was brought home for me when a professor asked me to visit her class to talk about legal research. The professor's only request was that I bring a printed copy of a case reporter to class. It was clear that my job was to bridge the gap between print resources and electronic research platforms, such as Westlaw. Implicit in the professor's request was the idea that today's law students, who are digital natives and think only in terms of electronic resources, need to know more about the history of legal research in the United States to fully understand and engage with the law. I explained to the students that the cases found on Westlaw and other electronic platforms have their roots in a sophisticated print system of topical indexes, headnotes, finding aids, and case reporters that were developed by the West Publishing Company 150 years ago. The takeaway for the students was that the history of West and the company's products impact modern legal research and our conception of the law.

The history of the West Publishing Company[2] has been told many times.[3]

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1. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

2. The terms West or West Publishing Company will be used throughout this Article understanding that the West Publishing Company was acquired by the Thomson Corporation (now Thomson Reuters) in 1996. Iver Peterson, *Thomson to Buy Legal Publisher In a $3.43 Billion Cash Accord*, N.Y. TIMES (Feb. 27, 1996), https://www.nytimes.com/1996/02/27/business/thomson-to-buy-legal-publisher-in-a-3.43-billion-cash-accord.html.

3. *See* WILLIAM W. MARVIN, WEST PUBLISHING COMPANY: ORIGIN, GROWTH, LEADERSHIP (1969); Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its*

My aim is to highlight a few of the lesser talked about aspects of the company's history to shed light on the factors that impacted its success, influence on the legal community, and approach to legal research. Equally important to this story is West's relation in time to various legal thought movements. West Publishing Company was a product of the nineteenth century when classical legal thought was the prevailing belief of the day. Lawyers viewed cases as the most important source of law because they resolved most issues.[4] Classical legal theorists, including Christopher Columbus Langdell, saw law as a science where prior precedent could be applied to other legal situations to determine the correct outcome.[5] Langdell shaped legal education to reflect these classical legal norms.[6] It was against this backdrop that John B. West started the West Publishing Company.

John B. West started his publishing company to provide lawyers with comprehensive access to all published appellate cases, which were difficult to obtain.[7] He achieved his goal admirably. So well, in fact, that the West Publishing Company became the industry leader.[8] For decades, West did not have much competition.[9]

The company became much more than the preeminent legal publisher, however. The company's digest, key numbers, and headnotes became the very system that frames our view of the law. Law students in the nineteenth century became indoctrinated in the West system. Several of the seven major West digest topics[10] were the same as the first-year course subjects created by Langdell.[11] The first legal research text was published by West and encouraged

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Promotions, 6 CHARLESTON L. REV. 231 (2012); Robert C. Berring, *Full-Text Databases and Legal Research: Backing into the Future*, 1 HIGH TECH. L.J. 27 (1986); Taryn Marks, *John West and the Future of Legal Subscription Databases*, 107 LAW LIBR. J. 377 (2015); Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 AM. J. LEGAL HIST. 1 (2010).

4. *See* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 2–3 (2004); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 335 (1st ed. 1973).

5. *See* CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vii–viii (1871); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983); ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS 110–11 (2019).

6. *See* Grey, *supra* note 5, at 3–5.

7. *See* John B. West & Co., *October 21, 1876*, 1 THE SYLLABI 1 (1876), *reprinted in* MICHAEL H. HOEFLICH & WILLIAM E. BUTLER, THE SYLLABI: GENESIS OF THE NATIONAL REPORTER SYSTEM 1 (2011); Jarvis, *supra* note 3, at 6.

8. *See* Davies, *supra* note 3, at 267–68.

9. *See* FREDERICK C. HICKS, MATERIALS & METHODS OF LEGAL RESEARCH WITH BIBLIOGRAPHIC MANUAL 120–22 (1923); Roger W. Cooley, *Use of the Law Books*, 2 LAW LIBR. J. 1, 2 (1909).

10. The seven major digest topics were Persons, Property, Contracts, Torts, Crimes, Remedies, and Government. *See* Sarah Gotschall, *Common Scolds, Drunkards and Embracery: Exploring the Past and Present Through West Digest Topics*, RIPS LAW LIBR. BLOG (Nov. 24, 2020), https://ripslawlibrarian.wordpress.com/2020/11/24/common-scolds-and-drunkards-exploring-the-past-through-west-digest-topics/ [https://perma.cc/GJ6T-QZ7E].

11. Langdell's first-year curriculum at Harvard consisted of Property, Contracts, Torts, Civil Procedure, and Criminal Law. Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 341 (2007).

law students and inexperienced lawyers to use the digest to find cases.[12] West representatives, including Thomas Cooley, often lectured about research and advocated for law students to use the digest.[13] Through repeated exposure, the West digest topics became ingrained in the thought process of law students and lawyers.[14] West's infrastructure operated "like DNA; [it] enable[d] the current system to replicate itself endlessly, easily, and painlessly."[15] Eventually, lawyers began to think in terms of the West digest topics.[16] If a legal topic was outside the scope of the digest, then, for all intents and purposes, it did not exist.[17] Thus, legal arguments and outcomes were framed in terms of West's digest and limited by it at the same time.

West's digest, key numbers, and headnotes are the foundation of modern legal research. West's digest remains relevant today even for those researchers who have not used it in print. West continues to incorporate its digest topics and key numbers as part of Westlaw's algorithmic functionality, impacting search results.[18] In addition, Westlaw's most recent electronic platform (Westlaw Precision) prominently displays a link to the key numbers, allowing researchers to interact directly with the key numbers and digest topics to find cases. This research method may sound familiar. It is the very same method that West created and championed over one hundred years ago. In addition, Westlaw's functionality clearly shows the company's continued priority on cases. Westlaw's Google-like search functionality lists cases as the first search results. It is almost impossible to separate modern legal research and the law from the West Publishing Company. Ultimately, most aspects of modern legal research are the result of West's early operation and its priorities on case reporting and digesting.

Significant to West's story but virtually ignored is the fact that West's case-first approach to legal research is inconsistent with the standard legal research process. For over one hundred years, legal research theorists have articulated a legal research process that begins with secondary sources.[19] Yet, West has never embraced the standard legal research process, choosing instead to focus on cases.[20] In its early days, West's choice to focus on cases was understandable.

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12. *See* WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS (1906).

13. *See* Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495 (1997).

14. F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 570–71 (2002).

15. Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories: Law Reform, Critical Librarianship, and the Triple Helix Dilemma Essay*, 42 STAN. L. REV. 207, 208 (1989).

16. *See* Robert C. Berring, *Ring Dang Doo*, 1 GREEN BAG 2D 3, 3–4 (1997).

17. *See* Robert C. Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 192–93 (1997).

18. *See* Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 399–401 (2017).

19. *See* HICKS, *supra* note 9, at 160; James DeWitt Andrews, *The Use of the Law Library*, 2 LAW LIBR. J. 8, 15 (1909).

20. *See* James E. Briggs, *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 400–01 (1889).

During the nineteenth century, cases were the most important source of law.[21] However, the dominance of cases waned over time with statutes and regulations becoming more prominent.[22] The invention of electronic legal research platforms provided the perfect opportunity for West to reconsider its approach to legal research. West declined to do so. Instead, the company continued with business as usual. It designed Westlaw to emphasize cases with the digest, key numbers, and headnotes as its foundation.[23]

West's legal research apparatus that worked well when it was developed in the 1870s does not reflect today's legal landscape or modern legal theory, which rejects classical legal ideals that law is a science that can be mechanically applied. If, as a legal community, we have handed over so much control to West, the question becomes what should we do about it? While it may be impossible to turn back the clock on West's influence, the least we can do is examine how we arrived where we are today and consider ways to combat our blind adherence to its impact on the law.

This Article will proceed in three parts. Part I lays the foundation for the Article, focusing on the history of the West Publishing Company. Specifically, Part I details West's development of the early legal research system. Part I explains how the decisions made by West a century ago impact legal research and the law today.

Part II provides a brief history of legal education as it relates to West, legal research, and legal research textbooks. It explains how West's digest system is compatible with the case method of legal education, which has been a popular teaching tool for decades. Further, Part II explores the development of an accepted legal research process that begins with the use of secondary sources and explains how West's digest system and Westlaw's functionality are inconsistent with this legal research method.

Part III connects the histories outlined in Part I and Part II to explain West's impact on the law. Specifically, Part III explains the ripple effect that West's history and its dominance in legal publishing has had on legal education and the practice of law in terms of how lawyers think about the law. Part III explains how West's focus on cases has become ingrained in the way lawyers view the law. Part III frames the story of West within the context of prominent legal theories. West's case-first approach to the law has implications for legal education and the practice of law in that it creates a false impression that law is determinate and establishes artificial limits on legal arguments, outcomes, and solutions. Finally, Part III encourages further conversations around these ideas, including suggesting places within the curriculum where law students can learn more about the history of legal research to gain a better understanding of the law.

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21. *See* FRIEDMAN, *supra* note 4, at 335.

22. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–64 (1982).

23. THOMSON REUTERS, WESTSEARCH: WESTLAWNEXT SEARCH TECHNOLOGY (2011). *See also* Mart, *supra* note 18, at 400; Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 23–25 (1987).

I. THE EARLY DAYS OF LEGAL PUBLISHING

A. The History of the West Publishing Company, its Case Reporters, Digests, and Key Number System

The history of the West Publishing Company is the focal point of this critique. West's success has been attributed to many factors, including "location, innovation, litigation,[24] and perhaps a little luck."[25] The entrepreneurial spirit of John B. West, the founder of West Publishing Company, was critical to the company's success. In 1870, at the age of eighteen, West moved from Massachusetts to Minnesota.[26] He began his career, not as a lawyer, but as a salesperson for the Merrill Company.[27] Merrill was a general office supply company that also sold legal publications to lawyers.[28] As a salesperson to Merrill's legal customers, West saw first-hand problems with legal publishing. Merrill's legal customers were frustrated that it took months to publish cases.[29] West also observed the disjointed, disorganized, and incomplete nature of legal publications. Legal publishing consisted of several different reporters with different coverage and quality.[30] In addition, each state had its own official court reporter, which contributed to the inconsistent quality of case reports:

> [N]ot all courts published their opinions, and those that did frequently delegated publication to the court's reporter. The court's reporter printed cases under his own name, making it difficult to determine the court from which the opinion came. The reporters could be unreliable, and the publication occurred at random intervals and in varying formats. To further muddle the system, courts frequently awarded publishing contracts based on political associations rather than on publishing merit. As a result, opinions were often poorly edited, incorrect, and published

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24. The copyright litigation that affected West is beyond the scope of this Article. A summary of the cases is as follows: West also benefited from a series of copyright litigation cases that related to the rights of the officer who served as the court reporter. Ultimately, three decisions cleared the way for West to publish state court decisions without violating copyright law. First, in *Banks & Bros. v. West Publishing Co.*, a federal court denied the petition for an injunction by the Iowa-appointed publisher, allowing West to continue to publish the Iowa Supreme Court cases in the Northwestern Reporter. 27 F. 50, 61 (D. Minn. 1886). Next, in *Nash v. Lathrop*, the Supreme Judicial Court of Massachusetts held that the state reporter must make its decisions available to the public, giving West access to Massachusetts' cases. 6 N.E. 559, 563 (Mass. 1886). Finally, in *Banks v. Manchester*, the United States Supreme Court held that a court could not seek copyright protection for its opinions, headnotes, or syllabus. 128 U.S. 244, 253 (1888). As a result, "West would thus have protection for its headnotes and keynumbers and, also, have unimpeded access to the decision of all states." Thomas A. Woxland, *Forever Associated with the Practice of Law: The Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERVS. Q. 115, 122 (1985).

25. Woxland, *supra* note 24, at 117.

26. *See* Jarvis, *supra* note 3, at 2, 4.

27. Marks, *supra* note 3, at 379; Woxland, *supra* note 24, at 115.

28. *See* Woxland, *supra* note 24, at 115.

29. *See* Marks, *supra* note 3, at 380; Jarvis, *supra* note 3, at 4–5.

30. Berring, *supra* note 23, at 18.

at irregular or rare intervals.[31]

West set out to solve the problems that he witnessed with legal publishing with a focus on case reporting. West had a unique perspective on the legal publishing industry, which allowed him to consider changes to it.[32] He saw firsthand that frontier lawyers needed timely access to cases to serve their clients.[33] West's distance from the legal establishment in New York and Massachusetts also gave him the freedom to experiment with new publications.[34]

In 1872, West began his own publishing company.[35] He sought to provide lawyers with comprehensive, high quality, and fast access to cases at a low cost. One of West's first inventions was the *Syllabi*, which published the text of all the Minnesota Supreme Court cases.[36] The *Syllabi* was significant because it provided attorneys with access to Minnesota Supreme Court cases within days of when they were issued rather than months.[37] West capitalized on the success of the *Syllabi* and began publishing the *Northwestern Reporter* in 1879.[38] The *Northwestern Reporter* expanded the *Syllabi*'s scope of coverage to the entire northwest region, publishing the full text of all cases from Iowa, Michigan, Nebraska, Wisconsin, and the Dakota Territory.[39] In 1882, the West Publishing Company was incorporated.[40] Over the next few years, West expanded the regional reporter system, ultimately providing national coverage.[41] West set his sights on a national reporter system that provided lawyers with all of the published appellate cases from across the country.[42] West's National Reporters solved many of the problems with case access that had plagued the legal publishing industry.[43] Accurate, high-quality cases from across the country were in the hands of lawyers within weeks for the relatively low cost of $40 per year, which would be approximately $1,200 per year today.[44]

While the National Reporters made cases available, lawyers needed to be

31. Marks, *supra* note 3, at 381 (citing MARVIN, *supra* note 3, at 32–33).

32. *See* Woxland, *supra* note 24, at 118 ("A[n] . . . advantage that St. Paul offered West was relative anonymity . . . . So the fledging went unnoticed; the announcement of the *North Western Reporter* 'was hardly given a passing through by the publishers in the eastern states and this, as time proved, was to give the young firm a head start that was of inestimable value when the competition did assert itself.'" (quoting MARVIN, *supra* note 3, at 34–35)).

33. *See* Marks, *supra* note 3, at 380.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* ("The first *Syllabi*, an eight-page weekly newsletter that printed Minnesota Supreme Court cases, served John West's goal of 'provid[ing] lawyers with a cheap and efficient means for learning about new cases.'" (alteration in original) (quoting Jarvis, *supra* note 3, at 6)).

38. *See id.*

39. *See id.*; Jarvis, *supra* note 3, at 6.

40. *See* Jarvis, *supra* note 3, at 7.

41. *See* Marks, *supra* note 3, at 381; Woxland, *supra* note 24, at 116.

42. *See* Woxland, *supra* note 24, at 118–19.

43. *See id.* at 119.

44. *See id.* The U.S. dollar has had an average inflation rate of 2.4% per year since the 1880s. *See CPI Inflation Calculator*, IN2013DOLLARS, https://www.in2013dollars.com/us/inflation/1880?amount=40 [https://perma.cc/T8PM-MFRE] (last visited Feb. 20, 2026).

able to locate them quickly in an ever-expanding reporter system. Digests were gaining traction as a case finding tool.[45] Digests created an index that allowed lawyers to locate cases by topic. In 1847, Little, Brown and Company began publishing the *United States Digest.*[46] Within one year, its digest included cases from sixteen states and the decisions from the United States Supreme Court.[47] Little, Brown hired Benjamin Vaughn Abbott to publish the next iteration of its digest, *United States Digest, First Series*.[48] The *First Series* included ten classification categories—Persons, Corporations, Property, Conveyance, Contracts, Wrongs, Crimes, Remedies, Evidence, and Government.[49] These categories have little meaning without proper context. Abbott's explanation of this classification scheme highlights its significance:

> The classification of the United States Digest is founded on a principle or theorem condensable thus—I must not try to give it in full or pursue the subject in detail.
>
> Law is the effort of society to protect PERSONS, including CORPORATIONS, in their rights and relations, to guard them in their PROPERTY, enforce their CONVEYANCES and CONTRACTS, and redress or punish their WRONGS and CRIMES, by means of judicial REMEDIES, founded upon EVIDENCE, and administered by the civil arm of GOVERNMENT.
>
> The words in capitals form ten categories roughly designating ten large fields or classes in which most propositions easily fall. But further subdivision is needed. That is obtained by considering each as including distinct species, and by making a separate title for each species, to include whatever is peculiar to it, while what is applicable to all, or to a species having no alphabetic name, remains under the broad title.[50]

West understood the important role that publishers played in helping lawyers find cases through digests.[51] In 1887, West purchased Little, Brown's *United States Digest* and published it as the American Digest.[52] John A. Mallory, who developed West's key numbers, recognized the importance of acquiring Little, Brown's digest:

> [T]he selection of titles and sub-titles and the division of matter among

45. *See* Jarvis, *supra* note 3, at 8.
46. *See* Michael O. Eshleman, *A History of the Digests*, 110 LAW LIBR. J. 235, 242 (2018).
47. *See id.*
48. *Id.* at 243.
49. *See id.* at 244.
50. *See id.* (citing Benjamin Vaughan Abbott, *Uniform Indexes*, 22 ALB. L.J. 179, 179 (1880)).
51. *See* Briggs, *supra* note 20, at 400–01.
52. *See* Eshleman, *supra* note 46, at 247.

> them must be based on some theory of classification, and must proceed according to logical rules . . . . The constant application of some theory of classification is implied in and essential to any orderly arrangement of digest matter; and knowledge of the principles applied in such a work is as useful to the reader as to the compiler.[53]

John B. West saw its digest as an organizing tool that conformed to logic and, thus, was the key to consistent search results:

> Is it not the function and calling of the law publisher to supply the lawyers with mechanical aids toward answering the question in whatever connection it may arise? and does not the permanent business success or failure of the publisher mainly depend on the manner in which he performs this service? . . . I believe it to be the principal business of American law publishers, to enable the legal profession to examine the American case law on any given subject, as easily, exhaustively, and economically as possible.[54]

The American Digest created a system that made it much easier for lawyers and judges to locate cases in the National Reporters.

By 1887, West had a national reporter system and a digest.[55] In 1908, West once again transformed the legal publishing industry by introducing key numbers.[56] Key numbers were designed to connect the National Reporters and the American Digest.[57] The key number system allowed West editors to create headnotes that summarized points of law in cases and connect them to a specific digest topic.[58] Each digest topic (Persons, Property, Contracts, Torts, Crimes, Remedies, and Government)[59] was subdivided and assigned a key number.[60] Key numbers functioned as a tool that allowed attorneys to locate additional cases on the same point of law. Thanks to West, lawyers could sift through the growing number of cases to find precedent. The significance of its products was not lost on West. The company saw its National Reporters and the American

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53. John A. Mallory, *The Theory of the American Digest Classification Scheme*, 1 AM. L. SCH. REV. 184, 186–87 (1902).

54. Briggs, *supra* note 20, at 400–01.

55. *See* Eshleman, *supra* note 46, at 247.

56. *See* THOMSON REUTERS, WEST PUBLISHING TURNS 150, at 5 (Aug. 2022), https://www.legalcurrent.com/wp-content/uploads/2022/08/150th-Anniversary-Timeline-2022.08.pdf [https://perma.cc/577F-QJPR].

57. *See id.*

58. *See Efficient legal research: Why you need the West Key Number System*, THOMSON REUTERS (May 20, 2025), https://legal.thomsonreuters.com/en/insights/articles/using-the-west-key-numbers-system [https://perma.cc/AUV6-G49K].

59. West consolidated digest topics after acquiring Little Brown's *United States Digest*. West's digest had seven topics rather than Little Brown's ten topics.

60. Fritz Snyder, *The West Digest System: The Ninth Circuit and the Montana Supreme Court*, 60 MONT. L. REV. 541, 542 (1999).

Digest as a "great public good."[61]

West's system was not without its problems, however. Like all humans, West editors could make mistakes.[62] West's index was complicated. Researchers may have been required to identify several terms before finding relevant cases.[63] The subjective judgment of the West editors was also baked into the system, which could impact where they placed cases within the digest's organizational structure.[64] West's digest was also inflexible. It was a monumental task to update the digest topics:

> Naturally, the system developed by Mr. West in the 1880s that supposedly provided a discrete subject category for *every* potential legal issue could hardly have endured for a hundred years without showing some significant strains. But the size of the system argued against active adjustments to it. In order to update the system, the West Company introduced a number of entirely new topics, both at the issuance of each decennial cumulation and during the publication of the General Digest volumes. The introduction of such topics required a Herculean purge of the entire system of headnote classification in order to locate all relevant topics and cases and to rearrange them into the new subject order. The difficulty and expensiveness of this process caused West to be fairly reserved in its introduction of topical modifications.[65]

The digest's size and rigidity made adaptation to it difficult. Any changes to the topics required lawyers to consult both the new and old digests to find cases.[66] As a result, updates to the digest decreased the usefulness of prior headnotes and key numbers and made cases potentially more difficult to find. Lawyers had to familiarize themselves with new terms while also considering the old terms.

B. West's Early Marketing Campaign

Even in its early years, West Publishing Company understood the value of marketing its materials to the legal community.[67] West engaged in a multifaceted marketing campaign that included lawyers, law students, judges, and the American Bar Association.[68] In 1901, West published one of its first promotional pamphlets titled *Law Books by the Million: An Account of the Largest Law-Book House in the World, the Home Establishment of the National*

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61. *See* Davies, *supra* note 3, at 268.
62. *See* Berring, *supra* note 3, at 34.
63. *See id.* at 34–35.
64. *See id.* at 36–37.
65. *Id.* at 35–36.
66. *See* Eshleman, *supra* note 46, at 252.
67. *See* Davies, *supra* note 3, at 236–37.
68. Marks, *supra* note 3, at 383.

Reporter System and the American Digest System.[69] *Law Books by the Million*'s audience was judges and lawyers.[70] The pamphlet discussed how the digest and national reporters simplified the legal process by providing lawyers with everything that they needed to reach a single, correct outcome:

> And, from the professional standpoint, the immediate and full publication of decisions from all the scattered jurisdictions has led to the harmonizing of judicial rulings, and has saved much of that "conflict" which is the greatest embarrassment of the bar,– and of the bench.[71]

West's message reinforced the notion that the correct answer could be gleaned from the review of a small number of cases. It also highlighted many of the areas of legal publishing that were important to legal professionals. For example, the pamphlet discussed West's employees, many of whom were also lawyers, the company's state-of-the-art equipment, its commitment to high quality products, and extensive law library.[72] In short, the message was that lawyers and judges were in good hands when they used West's products.

John B. West was a natural salesperson and took an active role in marketing the company's products. He traveled across the country selling the company's products and attending legal conferences.[73] Part of West's marketing strategy included what today would be called SWAG (stuff we all get) to attract customers.[74] The company's free giveaways included desktop thermometers, playing cards, and paperweights.[75] West's marketing efforts were so effective that many judges gave the company exclusive access to their opinions.[76]

West also actively marketed its products to law students in creative ways. For example, West sent postcards to law students, asking them to vote in favor of or against an honor system in law school.[77] West also sponsored writing competitions for students and sent representatives to schools to lecture on research topics.[78] West's marketing campaign helped ensure that lawyers and future lawyers would purchase the company's products rather than the products of its competitors.

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69. WEST PUBLISHING CO., LAW BOOKS BY THE MILLION (1901), *reprinted in* Ross E. Davies, *West's Words, Ho! Law Books by the Million, Plus a Few*, 14 GREEN BAG 2D 303 (2011). A shorter version of *Law Books by the Million* was published in the Cornell Law Journal in 1894. *See Home Establishment of the National Reporter System*, 1 CORNELL L.J. 99 (1894).

70. *See* Davies, *supra* note 3, at 248.

71. *Id.* at 271.

72. *See id.* at 255–59.

73. *See* Marks, *supra* note 3, at 383.

74. *See* Davies, *supra* note 3, at 241.

75. *See id.*

76. *See* Marks, *supra* note 3, at 383.

77. *See* Davies, *supra* note 3, at 240–42.

78. *See* Joyce Manna Janto & Lucinda D. Harrison-Cox, *Teaching Legal Research: Past and Present*, 84 LAW LIBR. J. 281, 282 (1992); Frederick C. Hicks, *The Teaching of Legal Bibliography*, 11 LAW LIBR. J. 1, 2–3 (1918).

Always the salesperson, John B. West also worked to convince the ABA to endorse the American Digest.[79] In 1898, the ABA did just that:

> The American Bar Association was due to meet for their annual convention in August 1897, just after the editorial work on Volume 1 was completed. West Publishing Company was desperately anxious to exhibit a completed volume at this convention, to gain expected approval and publicity, but the chance seemed remote that they could meet the deadline of the convention . . . . Suffice it to say, the volume was completed, taken to the convention by the then President, John B. West, and was the sensation of the meeting. The American Bar Association at its next annual meeting, 1898, formally endorsed the American Classification Plan as the model for modern digesting.[80]

The ABA's endorsement had a significant impact on legal publishing. The endorsement shifted the function of reporting and digesting to commercial publishers like West:

> [W]e [now] have uniform systems of reporting and digesting common to all, and a basis, at least, of a common system which shall be satisfactory to all . . . . [I]t is better [for lawyers] to avail themselves of the labors of private publishers who make it their business to ascertain and satisfy the needs of the profession.[81]

The ABA's endorsement of the American Digest went a long way to establish West as the gold standard in legal publishing. West's targeted, multifaceted marketing and lobbying efforts to lawyers, judges, law students, and the ABA all but ensured that it was the preeminent legal publisher of the nineteenth century. "West's long program of self-promotion symbolizes and, to some extent explains, the evolution of the law-book publishing business and [West's] relationship to the bar."[82]

C. West Is a Product of the Nineteenth Century

West is a product of the nineteenth century legal environment. When West began operations, cases dominated the law.[83] State and federal "judges were busier than ever before [and] had to work harder to keep up with their load."[84] The federal district courts disposed of 8,187 criminal cases in 1871 and 14,527

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79. *See* Jarvis, *supra* note 3, at 8; MARVIN, *supra* note 3, at 68; Marks, *supra* note 3, at 383.

80. MARVIN, *supra* note 3, at 73–74.

81. Richard A. Danner, *Influences of the Digest Classification System: What Can We Know*, 33 LEGAL REFERENCE SERVS. Q. 117, 145 (2014).

82. Davies, *supra* note 3, at 246.

83. FRIEDMAN, *supra* note 4, at 335.

84. *Id.*

civil cases in 1873.[85] During this period, even the United States Supreme Court was in the business of deciding common law issues.[86] In 1875, more than 40% of the United States Supreme Court's caseload was related to common-law litigation.[87] While courts' workloads exploded, legislatures were not particularly active during the mid-nineteenth century.[88] It was not until the beginning of the twentieth century when federal and state legislatures began to enact more statutes.[89] The administrative law apparatus followed a few years later.[90]

Thus, it is not surprising that West's top priority was to provide lawyers with access to cases during its early days. John B. West, always the entrepreneur, saw an opportunity that was not being addressed by the legal publishing industry.[91] West entered a chaotic legal environment where only certain cases were published, the quality of legal publishing was inconsistent, and the publication of the much-needed cases was slow.[92] West's customers needed fast, accurate, comprehensive, and inexpensive access to cases since case law reigned supreme.[93] West was eager to oblige.

West's quest to create an organizational system of case reports and a digest was also consistent with legal classicism, the legal theory of the day. During the nineteenth century, the legal community saw the law as a science where prior precedent controlled the outcome of new legal situations.[94] Lawyers and judges could apply the rules of law established in prior cases to new situations in a systematic fashion, resulting in correct answers.[95] Legal professionals saw the practice of law as a logical endeavor.[96] West reinforced the logical notion associated with the law by creating an index of legal topics and a key number system that helped lawyers find cases:

> The key numbers system is a case in point, serving both the classification function of organizing information in judicial decisions in accordance with a conceptual scheme and the indexing function of assisting users to locate information they want. The most general conclusion to be drawn from this is that the taxonomic classification built into print research tools promote a view of the law as a

85. *Id.*

86. This may be why, even today, the United States Supreme Court requires cases to be listed first on any Table of Cited Authorities filed with the Court. *See* SUP. CT. R. 34.2.

87. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947).

88. *See* FRIEDMAN, *supra* note 4, at 335; Julius Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513, 514 (1964).

89. *See* Stone, *supra* note 88, at 514.

90. *See id.*

91. *See* Marks, *supra* note 3, at 380.

92. *See* Woxland, *supra* note 24, at 115.

93. *See* Marks, *supra* note 3, at 380–81; Woxland, *supra* note 24, at 119.

94. *See* Feinman, *supra* note 4, at 3–4.

95. *See* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611 (2007).

96. *See id.*

hierarchically organized system based on general principles.[97]

West's digests and key numbers provided structure and predictability that lawyers of this era desired. John B. West took advantage of his opportunities, and the company became the preeminent legal publisher of the nineteenth century. Snyder, referring to West, noted, "the stamp of the nineteenth century was indelibly placed on American Law."[98]

D. The Digital Legal Research Age and West

West's print research apparatus remained virtually unchanged for over one hundred years. Lawyers used the print digest, key numbers, and headnotes to locate cases by topic in West's print reporters. In the mid-1970s, legal research companies, such as Mead Data Central, the company that launched Lexis, began to experiment with electronic databases.[99] Lexis saw early commercial success.[100] Executives at West understood that the launch of Lexis had changed the legal research landscape, and that the company needed to introduce its own electronic product.[101] However, West's transition to the digital age was anything but smooth. The company made some noteworthy missteps as it struggled to adapt to a non-print environment. These missteps were due, at least in part, to West's continued confidence in its print digest, key numbers, and headnotes.

In 1975, West introduced Westlaw in response to Lexis' first electronic product.[102] Unlike Lexis, which included the full text of all published cases, Westlaw provided only its case headnotes.[103] The decision to include only headnotes was made for the benefit of the product engineers. It was easy for West's team to convert its headnote and digest data to a computer readable format.[104] West simply converted its digest topics and headnotes to an online format and rebranded it as Westlaw.[105] West misjudged lawyers' interest in having access to full-text cases in electronic format. The company's decision is somewhat surprising since West was the first company to publish the full text of all reported appellate cases throughout the country. West eventually saw the error of its ways and provided access to the full text of all cases.[106]

West stumbled again with its approach to Shepards. Shepards was the preeminent citator service during the late nineteenth and twentieth centuries.[107]

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97. Hanson, *supra* note 14, at 574.

98. Snyder, *supra* note 60, at 544.

99. *See* Xiaohua Zhu, *Innovation in Search of a Context*, 54 INFO. & CULTURE 220, 227–28 (2019).

100. *See id.* at 221.

101. *See* BILL VOEDISCH, WESTLAW: AN EARLY HISTORY 6 (Univ. Minn. Legal Publ'g 2015).

102. *See id.* at 5.

103. *See id.* at 1, 5.

104. *See id.* at 5.

105. *See id.*

106. *Id.* at 12.

107. *See* Laura C. Dabney, *Citators: Past, Present, and Future*, 27 LEGAL REFERENCE SERVS. Q. 165 (2008).

In 1980, West made Shepards available on Westlaw.[108] During the 1980s, West collaborated with Shepards to add more Shepards features to Westlaw.[109] Despite Shepards' availability on Westlaw, West failed to acquire exclusive rights to its electronic database.[110] As a result, Shepards remained available on both Westlaw and Lexis for years.[111] In 1996, mergers within the legal publishing industry led Lexis to obtain exclusive access to the Shepards' content.[112] Westlaw was left out in the cold without a citator service. In 1997, Westlaw launched KeyCite, its answer to Shepards.[113] KeyCite's initial reviews were positive, but "Shepard's [was] still the standard citator and is certainly an excellent product."[114] There may be a couple of reasons why West failed to acquire Shepards. Shepards, as a citator service, did not advance West's priorities of reporting and digesting, nor was it a West creation. As such, West may have been reluctant to fully integrate Shepards into Westlaw.

In February 2010, West launched WestlawNext, the company's next large scale electronic product, to great fanfare.[115] WestlawNext was different from its predecessor in two significant ways. First, WestlawNext introduced a single search bar that was similar to Google's search design.[116] For the first time, users could search all of Westlaw's content by typing just a few keywords into the search bar.[117] The search results identified what WestlawNext considered to be the most relevant documents with cases always being listed as the first results.[118] Secondary sources were an afterthought and listed under the heading "Related Documents."[119] West's lack of investment in or priority of secondary sources shows the company's neglect of secondary sources and demonstrates its continued focus on cases. WestlawNext's functionality that listed cases first demonstrated the company's continued focus on cases and signaled to users that cases remained the most important source of law. WestlawNext's second advancement was the use of algorithms.[120] The algorithm attempted to predict

108. Patti Ogden, *"Mastering the Lawless Science of Our Law": A Story of Legal Citation Indexes*, 85 LAW LIBR. J. 1, 37 (1993).

109. *See id.* at 38.

110. *See id.* at 37.

111. *See* James A. Sprowl, *The Latest on Westlaw, Lexis, and Dialog*, 70 A.B.A. J. 85, 90 (1984).

112. *See* Iver Peterson, *Times Mirror in Two Deals to Bolster Legal Publisher*, N.Y. TIMES, July 4, 1996, at 4.

113. Elizabeth M. McKenzie, *Comparing KeyCite to Shepard's Online*, 17 LEGAL REFERENCE SERVS. Q. 85, 85 (1999).

114. *Id.* at 98.

115. *See* THOMSON REUTERS, *supra* note 56, at 9; *Westlaw Next at Legaltech 2010*, PACE UNIV. L. LIBR. (Feb. 3, 2010), https://lawlibrary.blogs.pace.edu/2010/02/03/westlaw-next-at-legaltech-2010/ [https://perma.cc/8KAP-GAQA].

116. *See* Robert J. Ambrogi, *More Than a Makeover: Westlaw's Great Leap Forward*, OR. ST. BAR BULL. (Apr. 2010), https://www.osbar.org/publications/bulletin/10apr/legalonline.html [https://perma.cc/5RQV-WCJV].

117. *See id.*

118. STEVEN M. BARKAN, ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 523 (9th ed. 2009); Mart, *supra* note 18, at 400.

119. *See* Mart, *supra* note 18, at 401.

120. *See* THOMSON REUTERS, *supra* note 56, at 9.

researchers' search intent by eliminating stop words, considering synonyms and legal phrases, and citations.[121] Significantly, the algorithm used West's digest topics, key numbers, notes of decisions, headnotes, and KeyCite.[122] Ultimately, Westlaw remained tethered to West's print-based, case-focused digest system that it created in the late nineteenth century.

West introduced two subsequent versions of Westlaw. West launched Westlaw Edge in 2018, and it introduced Westlaw Precision in 2022.[123] Westlaw Edge was not a substantial upgrade from WestlawNext. Westlaw Precision's focus is on machine learning and generative AI.[124] Westlaw Edge and Westlaw Precision continue to encourage researchers to use the Google-like search bar to conduct broad keyword searches across all of Westlaw's databases. Cases are always listed as the first results when the Google-like search bar is used, even for legal issues controlled by statute or regulation. Researchers have some control over the search functionality on Westlaw Edge and Westlaw Precision, as they can limit their searches to particular databases (cases, statutes, regulations, text & treatises). Experienced lawyers who know what they are looking for are more likely to override Westlaw's default search functionality. This inclination may be less likely for newer lawyers or law students who have a lifetime of experience with Google. Many Google users believe that the first page of search results will answer their question.[125] The similarities between Google's and Westlaw's search functionality may send the wrong message to more novice researchers. Like Google, Westlaw requires researchers to identify only a few keywords. The algorithm does the rest. Westlaw's implicit message to researchers is that the finite list of cases identified in the search results, which are akin to Google's first page of results, provide the correct answer to most legal questions. In reality, the answers to many legal questions require more than just a small number cases.

Engaging in print research, including the use of West's print digest, has lost its utility and is likely unfamiliar to today's law students. Yet, West's digest lives on. The digest, headnotes, and key numbers are the common elements of all Westlaw versions.[126] For 150 years, West's search apparatus has included its original digest structure that made it easier for lawyers to find cases.[127] Westlaw's most recent systems continue to reinforce the notion that cases are the most significant source of law by identifying cases first in the search results,

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121. *See* Mart, *supra* note 18, at 400.

122. *See id.*

123. *See* THOMSON REUTERS, *supra* note 56, at 10; *Thomson Reuters Debuts Westlaw Precision*, THOMSON REUTERS (Sep. 14, 2022), https://www.thomsonreuters.com/en/press-releases/2022/september/thomson-reuters-debuts-westlaw-precision.html [https://perma.cc/WH6E-JHNC].

124. *See Thomson Reuters Debuts Westlaw Precision*, *supra* note 123.

125. *See* Bing Pan et al., *In Google We Trust: Users' Decisions on Rank, Position, and Relevance*, 12 J. OF COMPUTER-MEDIATED COMM. 801, 816–18 (2007).

126. *See* VOEDISCH, *supra* note 101, at 5; Maggie Keefe, *Free vs. Westlaw: Why you need the West Key Number System*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/insights/articles/using-the-west-key-numbers-system. [https://perma.cc/Y7RP-2NZU] (last visited Feb. 5, 2026); THOMSON REUTERS, *supra* note 23; Mart, *supra* note 18, at 400.

127. *See* THOMSON REUTERS, *supra* note 23; Mart, *supra* note 18, at 400.

despite the fact that many legal issues are controlled by other sources of law.

II. THE HISTORY OF LEGAL EDUCATION AND LEGAL RESEARCH

A. Legal Education: The Early Years (1700s–1800s)

During the eighteenth century, most aspiring lawyers served as apprentices to learn the skills, including research, that they needed to be competent lawyers.[128] During the late 1700s, private law schools emerged to formalize apprenticeships.[129] Formal legal education struggled to take hold through the early nineteenth century due, in part, to a perception of elitism.[130] Legal education was revived by the mid-1800s. By 1860, there were twenty-one law schools in the United States.[131]

During the early nineteenth century, treatises were important legal resources.[132] Treatises served several essential functions. Treatises were viewed by lawyers as valuable resources, particularly as a finding tool.[133] Treatises were also cited by courts because published cases were difficult to obtain.[134] Early law school curriculum reflected the important role that treatises had in the legal profession. The first private law school included a course based on Blackstone's *Commentaries*.[135] Justice Joseph Story, who served on the United States Supreme Court and as the first Dane Professor of Law at Harvard, wrote several treatises while at Harvard.[136] Theodore Dwight, a professor at Columbia, developed a teaching method that utilized textbooks, which was adopted by most law schools.[137] It remained a popular teaching method for several decades.[138]

In 1870, Christopher Columbus Langdell became the Dean of Harvard Law School.[139] One of Langdell's contributions to legal education was the creation

128. *See* FRIEDMAN, *supra* note 4, at 84.

129. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 3 (1985).

130. *Id.* at 7–8.

131. *Id.*

132. *See* Richard A. Danner, *Oh, the Treatise!*, 111 MICH. L. REV. 821, 826 (2013).

133. *See id.*; John Cannan, *Prologue's Past: What the History of the Treatise Tells Us About Legal Information's Future* 19 (May 17, 2022), https://ssrn.com/abstract=4077303 [https://dx.doi.org/10.2139/ssrn.4077303].

134. *See* Cannan, *supra* note 133, at 8 (citing William H. Arnoux, *A Few Ideas on Text-Books*, 22 ALB. L.J. 341, 346 (1880)).

135. *See* STEVENS, *supra* note 129, at 3.

136. *See* Cannan, *supra* note 133, at 15 (citing Ronald D. Rotunda & John E. Novak, *Joseph Story: A Man for All Seasons*, 1990 J. SUP. CT. HIST. 17, 21 (1990); MacCormac Snow, *Joseph Story*, 5 OR. L. REV. 169, 179–81 (1926)).

137. *See* Theodore W. Dwight, *Columbia College Law School New York*, 1 GREEN BAG 141, 145 (1889); *see also* JOSEF REDLICH, COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW 7 (1914); Cannan, *supra* note 133, at 19.

138. *See* Cannan, *supra* note 133, at 19 (citing REDLICH, *supra* note 137, at 7).

139. *See* Thomas C. Grey, *The New Formalism* 1 (Stan. L. Sch., Pub. L. & Legal Series, Working Paper No. 4, 1999), https://ssrn.com/abstract=200732 [https://dx.doi.org/10.2139/ssrn.200732].

of the first-year subjects at Harvard, which still form the basis of the first-year curriculum today.[140] Langdell's most significant contribution to legal education was the adoption of the case method at Harvard, which became and continues to be one of the primary teaching tools in law school.[141] Like West, Langdell believed in the importance of cases. Langdell thought that cases were the best teaching tool for law students:

> A settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or of legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed.[142]

In 1871, Langdell published his first casebook, *Cases on Contract*.[143] Over the next few years, he wrote several other casebooks.[144] The case method of education became the standard in legal education.[145] Langdell's message to law students was clear—cases were the only source of law that mattered.[146] West's influence on the early days of legal education is evident. Many of the first-year course subjects, developed by Langdell, mirrored the digest topics.[147] It is impossible to know exactly why Langdell selected these topics for the first-year curriculum. What is known is that Langdell and West were contemporaries who were part of the same legal community. Little, Brown's digest, which first established the digest topics, received at least some attention within the industry, enough that West acquired it from Little, Brown. Whatever the reason, the overlap between Langdell's first-year subjects and West's digest topics likely gave West credibility in the early days of formal legal education.

In addition, West played a role in displacing treatises as the prominent teaching tool in legal education. Thanks to West's National Reporters, the number of published cases was expanding quickly. In fact, by 1900, West produced between 300 and 400 volumes of case reporters each year.[148] Lawyers and law students could use the American Digest to find those cases. Treatises no longer needed to serve as a case finding tool.[149] As John B. West said, "The profession have now the immense advantage of being able to turn to a single set

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140. *See* Snyder, *supra* note 60, at 544.

141. *See* STEVENS, *supra* note 129, at 52; *see also* William Schofield, *Christopher Columbus Langdell*, 55 AM. L. REG. 273, 280 (1907) ("As a method of study the use of cases was not a discovery, nor even a novelty. English lawyers had been studying law in the cases for centuries.").

142. Schofield, *supra* note 141, at 278.

143. LANGDELL, *supra* note 5.

144. *See* Schofield, *supra* note 141, at 279.

145. *See* STEVENS, *supra* note 129, at 63.

146. *See* Hanson, *supra* note 14, at 571.

147. *See* Eshleman, *supra* note 46, at 244; Snyder, *supra* note 60, at 544.

148. *See* Davies, *supra* note 3, at 252.

149. West was not entirely responsible for the demise of the treatise. "Many treatises were seen as hack work—produced by publishers for commercial gain, not by knowledgeable scholars devoted to their subjects." Danner, *supra* note 132, at 832.

of reporters and digests, and be sure of finding *everything* which the courts have said on any given subject up to the last decision just rendered."[150] The American Digest had become a new popular finding aid, supplanting the treatise's primary role.[151] West's message to the law school community echoed Langdell's message that cases were the only source of law that mattered.[152] As a result, lawyers and law students saw treatises as reference materials rather than valuable case finding materials.[153]

B. Legal Research: The Early Years (1900s–1930s)

During the early twentieth century, legal research theorists began to express their thoughts about legal research. Early legal research theorists believed that research should begin with an analysis of the facts and an understanding of the legal principles.[154] The early research process differed somewhat depending on who was offering the opinion. For example, West's publications and its representatives encouraged the use of West's digest.[155]

In 1906, West published *Brief Making and the Use of Law Books*, the first legal research textbook.[156] *Brief Making* was intended to provide basic legal research information to law students and new lawyers on how to find the law, since law schools had yet to include legal research instruction in the curriculum.[157] It filled a void for those law students and new lawyers who lacked legal research and litigation experience.[158] *Brief Making* set forth a step-by-step process to approach legal research problems. It recommended that researchers should use West's digest to find cases before consulting other secondary sources and highlighted that using the digest was a systematic exercise:

> *(1) The first step in looking up the law is to make a careful examination of the statement of facts submitted and a minute analysis of its component parts . . . . When the statement [of facts] has been studied and analyzed, it will be found that there is a least one general principle of law involved. The discovery of this general principle will depend largely upon the familiarity of the student or lawyer with the general classification of legal propositions . . . .*
>
> *(2) Having determined the controlling facts and the general principle of law involved in the case submitted, the investigator should ascertain whether any principle of constitutional or statute law is*

150. Briggs, *supra* note 20, at 403.
151. *See* Cannan, *supra* note 133, at 28.
152. *See* Hanson, *supra* note 14, at 571.
153. *See* Cannan, *supra* note 133, at 30.
154. *See* Cooley, *supra* note 9, at 2; *see also* DeWitt Andrews, *supra* note 19, at 15.
155. *See* Cooley, *supra* note 9, at 2.
156. *See* LILE ET AL., *supra* note 12.
157. *See id.* at 1–3.
158. *See id.*

> *involved. The first sources, therefore, in which to look for law, are the constitution and the statutes . . . .*
> *(3) Next in importance as authorities are the decision of the courts of last resort of the state in which the case has arisen . . . . [A] systematic search should be made in the State Digests, Century Digest, and the American or General Digests, for cases involving similar facts and principles . . . .*
> *(4) As a secondary source of authority, reference should be made to text-books treating of the general subject to which the principle involved in the case under investigation belongs . . . .*
> *(5) Valuable material for the brief may often be obtained by tracing backward the judicial history of . . . the cases cited in the opinion.*[159]

In 1909, Roger W. Cooley, a West representative,[160] addressed the American Association of Law Libraries, the national organization of law librarians, where he promoted a research process that centered around West's digest:

> There are two or three sources of information to which we may resort to find these concrete cases. That is to say, there are two or three indexes to the case law contained in the reports. We may resort to a text book, to an encyclopedia or to a digest. Of these the digest is the only one that is designed to serve as an index exclusively. The other classes of books mentioned are primarily designed to serve another purpose; their use as an index to cases being merely secondary. For this reason, it seems to me, that we can run down the desired concrete authorities in the digest with greater facility, in less time, and with greater certainty than in either a text book or encyclopedia—a belief which personal experience has confirmed. For this reason, the method I propose to outline to you is based on the use of the digest.[161]

Legal research theorists, who were not affiliated with West, encouraged lawyers and law students to use treatises to find sources of law. James DeWitt Andrews, a practitioner, believed that research started with the facts of the case and legal topic.[162] DeWitt Andrews, who also addressed the American Association of Law Libraries, acknowledged that determining the relevant area of law can be difficult.[163] To help, DeWitt Andrews suggested the use of treatises:

> [T]he institutional treatise is the first aid, because somewhere within its

159. *Id.* at 173–76.
160. *See* Hicks, *supra* note 78, at 2.
161. *See* Cooley, *supra* note 9, at 2.
162. *See* DeWitt Andrews, *supra* note 19, at 15.
163. *See id.*

> compass the subject of your case must lie. And here I will illustrate, taking the [treatise] *classics of their day*, Blackstone and Kent. An impression has arisen that elementary books are not practical books, but a moment's reflection will suggest and the facts of history prove the contrary . . . . No books in the English tongue have been more cited in briefs and more quoted in decisions than these books . . . . Why? Because the principles and rules taught as elemental were, of course, practically applicable to some state of fact. Every case must involve some or other of these rules, and turn upon the application of the great cases which were cited as establishing the rule.[164]

Despite this early discussion of legal research, law schools struggled to incorporate formal legal research instruction into the curriculum. Law schools took a laissez-faire approach to legal research instruction. Most early legal research instruction was informal and sporadic. For example, Harvard's first method of legal research instruction was through student-run clubs.[165] Lectures were the only other method of legal research instruction in the early days of legal education.[166] Columbia Law School was one of the first law schools to incorporate formal legal research instruction into the curriculum. In 1912, Frederick C. Hicks and his librarian colleagues began one of the first legal research programs, which started modestly with a few legal research lectures.[167] Hicks's lectures were so popular with students that he expanded the instruction to weekly research seminars.[168] Legal research instruction continued to gain momentum. "By 1922, twenty-two of the over fifty member schools in the Association of American Law Schools offered legal research courses."[169]

> By 1920, Hicks was a prominent figure in legal research instruction and scholarship. He is credited with developing legal bibliography, one of the first research methods that explained where and how to find the law.[170] Hicks's legal bibliography method consisted of three parts: (1) legal bibliography proper, which explained the "repositories of the law," (2) methods of finding the law, and (3) brief-making, which addressed the organization of legal arguments and conformity of briefs with the rules of court.[171] Hicks's discussion of legal research rejected the classical approach to legal research, which was popular during the early 1920s:It is a mistake to speak of any of the processes of finding the law as mechanical processes, for one has not truly found the law until one understands it, and this requires a knowledge of substantive

164. *See id.*
165. Janto & Harrison-Cox, *supra* note 78, at 282.
166. *See id.*
167. *See id.* at 283.
168. *See id.*
169. *See id.* at 282–83.
170. *See* Hicks, *supra* note 78, at 1.
171. *See* HICKS, *supra* note 9, at 16–18.

law which comes only with the passage of time and much experience.[172]

In 1923, Hicks published *Materials & Methods of Legal Research with Bibliographic Manual*, a legal research textbook for law students and legal professionals.[173] Hicks encouraged researchers to use treatises during the research process. Specifically, Hicks noted that treatises "may be and often are used (and I believe should be used) by lawyer and judge as helpful restatements and interpretations of the law, lending sometimes to confirmation of opinion as to what the law is, and sometimes to notable developments in the law."[174] Hicks's discussion of certain topics was consistent with the period in which he wrote the textbook. While Hicks's textbook began with a chapter on statutes, it was followed by several chapters on cases where Hicks noted that "[c]ase law, in Anglo-American jurisdictions, preponderates over statute law for several reasons."[175] In the coming years, the legal landscape changed as legislatures became more active and statutes governed many more legal situations.[176] Future legal research instruction and textbooks would reflect these changes to the law.[177]

West minimized the importance of treatises in legal research. Rather, West continued to focus on case reporting and encouraged legal professionals to use its digest to find cases. Digests also reinforced the organization and structure that was popular during the classical legal thought period. Ultimately, treatises were supplanted by digests as the primary finding tool due, in part, to the fact that West's products reinforced the popular view that legal research was simply the mechanical application of case law.[178]

C. Legal Research: Mid-Twentieth Century (1940s–1950s)

Legal research instruction continued to evolve during the 1940s and 1950s. During this period, lectures became a less favored teaching tool.[179] Law schools began to experiment with "research and writing" courses.[180] These courses took various forms.[181] Some combined legal writing with bibliographic instruction (i.e., how to use law books).[182] Other courses focused more on legal writing.

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172. *Id.* at 17.
173. *See id.* at 7.
174. *Id.* at 160.
175. *Id.* at 76.
176. *See* Stone, *supra* note 88, at 514.
177. *See* WILLIAM T. FRYER & CARVILLE D. BENSON, CASES AND MATERIALS ON LEGAL METHOD AND LEGAL SYSTEM 454 (1950).
178. HICKS, *supra* note 9, at 160.
179. *See* William R. Roalfe, *Some Observations on Teaching Legal Bibliography and the Use of Law Books*, 1 J. LEGAL EDUC. 361, 364 (1949).
180. *See* Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539 (1972).
181. *See id.* at 539–40.
182. *See id.* at 540.

Legal method courses were also developed and became part of the curriculum.[183] Legal method courses focused on problem-based writing assignments with some research instruction. The goal of legal method courses was for students to grapple with legal questions, conduct legal research, and produce a written product that explained the relevant law and answered the question at issue. Law librarians saw legal method courses as an opportunity to practice legal research at various points throughout the course.[184] Legal research and writing courses became the preferred first-year course to teach practice-oriented skills.[185]

Legal research textbooks during this period tended to focus on the mechanical use of legal materials.[186] There are a few noteworthy exceptions, however, that explained a legal research process. In 1950, West published *Legal Method and Legal System*, which was designed as a companion to legal method courses.[187] The authors, Fryer and Benson, explained that an effective legal research process should begin with treatises, stating "Once you are clear as to the field of law in which your problem falls, consultation of a treatise, even in advance of resort to the digest or encyclopedia, may well serve to orient you, and thus simplify your search."[188] *Legal Method and Legal System* reflects a change for West, publishing a textbook that encouraged the use of treatises rather than the digest exclusively.

Legal Method and Legal System was also noteworthy in that it reflected the new legal environment where statutes and regulations were important sources of law. The authors noted that statutes should be examined first before cases "because much of the body of our law today is controlled by statute."[189] They also recognized the increased importance of administrative law:

> In the past few years, the growth of administrative law, both federal and state, has been tremendous. New agencies have been created, all of which issue rules and render options or interpretative decisions. All of this material may at some time become important to the lawyer. How to find the law in this field is a difficult task.[190]

Up to this point in time, many textbooks remained focused on the importance of case law. Statutes and administrative law had taken a back seat to cases.[191] The legal landscape was changing, and those changes were reflected in *Legal Method and Legal System*.

Legal Bibliography and Legal Research by Rebecca Laurens Love Notz

183. *See* Harry Kalven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107 (1948); Donald Kepner, *The Rutgers Legal Method Program*, 5 J. LEGAL EDUC. 99 (1950).

184. *See* Roalfe, *supra* note 179, at 366–68.

185. Rombauer, *supra* note 180, at 542.

186. *Id.* at 539.

187. *See* FRYER & BENSON, *supra* note 177, at VII.

188. *Id.* at 481.

189. *See id.* at 454.

190. *See id.* at 483–84.

191. *See* HICKS, *supra* note 9, at 160.

was another important legal research textbook.[192] Notz emphasized the importance of a legal research method.[193] Notz encouraged researchers to use secondary sources, particularly in situations where a lawyer is unfamiliar with an area of the law. Notz explained "If the lawyer is unfamiliar with a general principle of law involved, he must consult a good textbook on the subject, or if there is no good textbook, a legal encyclopedia, such as *American Jurisprudence* or *Corpus Juris Secundum* . . . and for very recent developments in law, legal periodicals."[194]

Fryer's and Notz's textbooks served as a bridge to modern legal research textbooks, which almost universally advocated for a legal research process that began with treatises or other secondary sources.

D. Legal Research: The Modern Era (1980s–2020s)

In the 1980s, law schools used Legal Analysis Writing and Research (LAWR) or Legal Research and Writing (LRW) courses to teach students practice skills.[195] These courses have taken various forms throughout the years, but they usually require students to write a memorandum during the fall semester and a brief during the spring semester of the first year. Legal analysis is the primary focus of these courses with research instruction as a supporting skill.[196] During this period, librarians began to call for more legal research instruction apart from the first-year LAWR course.[197] Many law schools have added Advanced Legal Research to their course offerings.[198]

During the 1980s, several noteworthy legal research textbooks were published. Modern legal research theorists adopted the core elements of the legal research method that was first articulated in the early 1900s while also making small adjustments to reflect new types of legal publications. Legal research theorists promoted a legal research process that began with treatises or other types of secondary sources, such as legal encyclopedias and practice guides.[199] This broad view of acceptable secondary sources reflects the high-quality, diversified, and specialized nature of modern legal publications. In addition, modern textbooks began to emphasize the use of secondary sources

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192. *See* REBECCA LAURENS LOVE NOTZ, LEGAL BIBLIOGRAPHY AND LEGAL RESEARCH (3d ed. 1952).

193. *Id.* at 13.

194. *Id.* at 15.

195. *See* Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371, 376–77 (2003).

196. Cassie DuBay, *Specialized Legal Research Courses: The Next Generation of Advanced Legal Research*, 33 LEGAL REFERENCE SERVS. Q. 203, 209–10 (2014).

197. *See* S. Blair Kauffman, *Advanced Legal Research Courses: A New Trend in American Legal Education*, 6 LEGAL REFERENCE SERVS. Q. 123, 124–26 (1986).

198. DuBay, *supra* note 196, at 212.

199. *See* CHRISTOPHER G. WREN & JILL ROBINSON WREN, THE LEGAL RESEARCH MANUAL: A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS (1983); CHRISTINA L. KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH: SUCCESSFUL STRATEGIES 13 (Richard A. Epstein et al. eds., 3d ed. 1992).

particularly when researchers are unfamiliar with an area of the law[200]—a view that was advocated by Notz's book several decades before.[201]

In 1983, Christopher G. Wren and Jill Robinson Wren authored *The Legal Research Manual: A Game Plan for Legal Research and Analysis*.[202] *The Legal Research Manual* reflected the standard approach to legal research that began with secondary sources, especially when researchers are unfamiliar with an area of the law:

> If you have little or no general knowledge of the areas of law involved in your research problem, however, you will be at a disadvantage in developing an informed research approach because you won't know what points of law to look for as you search through the primary legal authorities. Therefore, before you begin your search in primary sources, you may find it helpful to obtain some generalized background on the areas of law your problem involves. Several kinds of secondary legal sources exist to help you gain this initial overview.[203]

In *The Process of Legal Research: Successful Strategies*, Christina L. Kunz and her co-authors created a process map with secondary sources as the first step in the research process.[204] The authors then explained their research process:

> *(1) Analyze the facts of the situation to ascertain what topics you need to research.*
> *(2) Use dictionaries, glossaries, and thesauri to clarify the meaning of the terms generated from factual and legal analysis and also to generate additional research vocabulary.*
> *(3) Take accurate and efficient research notes, including citation information . . . .*
> *(4) Begin to formulate an outline or flowchart of the topic.*
> *(5) Locate and read commentary sources [i.e., secondary sources] to give yourself an overview of the topics involved.*
> *(6) Revise and add to your outline or flowchart to reflect your new knowledge.*
> *(7) Pinpoint areas of intersection between fact and law and phrase them as issues for your research.*
> *(8) Locate and read mandatory primary authority that resolves or yields good points on those issues . . . .*
> *(9) Revise your outline or flowchart, reevaluate the issues, and do additional research as needed.*

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200. *See* WREN & WREN, *supra* note 199, at 65; BARKAN, MERSKY & DUNN, *supra* note 118, at 16.

201. *See* NOTZ, *supra* note 192.

202. *See* WREN & WREN, *supra* note 199, at 4.

203. *Id.* at 65.

204. *See* KUNZ ET AL., *supra* note 199, at 13.

> *(10) Quit researching when you are no longer coming across new relevant information . . . .*[205]

In 2009, Steven M. Barkan, a leading legal research scholar, authored *Fundamentals of Legal Research*, in which he discussed a four-step research process.[206] Barkan's research process highlighted the use of secondary sources:

> To assist in formulating issues, it is useful to consult general secondary sources for an overview of relevant subject areas. These sources can include national legal encyclopedias, a state encyclopedia, treatises, looseleaf services, or one or more subject periodical or journals . . . . These secondary sources can provide valuable background information and can direct a researcher to issues and to primary sources . . . . At this preliminary stage of research, these secondary sources provide background information and help formulate issues; they are the tools, not the objects of research.[207]

In the latest edition of *Fundamentals of Legal Research*, Barkan and his co-authors revisited the research process and explained how secondary sources should be used to increase a researcher's understanding of new or confusing areas of the law:

> What are the recommended sources? Before you start researching, think about the best places to look. When the problem involves an unfamiliar area of the law, as most problems do for new researchers, the first thing you must do is get context from an overview of the subject in a treatise, practice guide, law review article, or encyclopedia entry . . . . For each legal problem you research, using recommended resources and getting context and an overview as a beginning step will make the research process efficient and less confusing.[208]

In 2020, Kent C. Olson, Aaron S. Kirschenfeld, and Ingrid Mattson authored *Principles of Legal Research*, which highlighted the importance of secondary sources when using electronic resources:

> Researchers forced to work only with an uncontrolled mass of electronic data can quickly find themselves drowning in unsorted information. Most online keyword searches can find only those documents that match their terms and will never discover related documents that use different wording . . . or involve slightly different

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205. *Id.* at 14–15.

206. *See* BARKAN, *supra* note 118, at 15.

207. *Id.*

208. STEVEN M. BARKAN, BARBARA A. BINTIFF & MARY WHISNER, FUNDAMENTALS OF LEGAL RESEARCH 17 (10th ed. 2015).

> facts. Some of the more sophisticated platforms use algorithms that can find some relevant documents even if they do not use the same terms, but relying on algorithms is a poor substitute for exercising your own judgment about the particular facts and issues of your case. Secondary sources such as treatises and encyclopedias, online or in print, are still invaluable starting points for understanding the terminology and parameters of an area of law.[209]

Legal research methods were first discussed over 115 years ago.[210] Legal research instruction and textbooks have evolved over time. For the last forty years, legal research theorists have articulated a consistent legal research process that begins with secondary sources, particularly for those who, like law students, are unfamiliar with the law.[211]

III. CONNECTING THE DOTS: HOW WEST'S HISTORY INFLUENCED LEGAL RESEARCH AND LEGAL EDUCATION AND IMPACTED THE LAW

The West Publishing Company became an industry leader because of many factors, including its national scope, high-quality publishing, products that were relatively easy to use, overlap of the digest topics and the first-year law school subjects, and a strong marketing campaign.[212] John B. West was vital to the company's early vision. He was most interested in case reporting and digesting.[213] The West Publishing Company has never strayed far from these priorities. The examination of West's products that follows demonstrates the company's continued focus and priority on cases over all other legal sources. West has been so dedicated to its digest and case reporter system that its approach to legal research is inconsistent with the standard legal research process that begins with secondary sources. An exploration into why West and Westlaw operate in the manner that they do requires a discussion of the company *vis-à-vis* prominent legal theories. A legal theory analysis helps explain West's impact on the law.

A. West's System Was Created to Find Cases

West's priority has always been cases.[214] West started the company to provide lawyers with access to cases.[215] Cases were in high demand by members of the bar because most legal disputes during the late nineteenth and early twentieth centuries involved common law issues that were decided by the

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209. KENT C. OLSON, AARON S. KIRSCHENFELD & INGRID MATTSON, PRINCIPLES OF LEGAL RESEARCH 14 (3d ed. 2020).

210. *See* Cooley, *supra* note 9, at 2; DeWitt Andrews, *supra* note 19, at 15.

211. *See supra* Part II.D.

212. *See generally supra* Part I.

213. Briggs, *supra* note 20, at 401.

214. *See id.*

215. *See* Woxland, *supra* note 24, at 118–19; Marks, *supra* note 3, at 380.

courts.[216] West's products leveled the "playing field" because lawyers and judges had access to the same cases to develop their legal arguments.[217] West's system of finding cases was so valuable that it became the industry leader.[218]

B. Westlaw Prioritizes Cases Over Other Sources of Law

Like West's print-based digest system, Westlaw also prioritizes cases. Westlaw's search functionality incorporates West's digest topics, headnotes, and key numbers, which were designed to help lawyers find cases.[219] West's first electronic product included only case headnotes.[220] Robert C. Berring notes that "At a basic level, [Westlaw] added nothing new; [it] simply took information that had been contained in books and transferred it to electronic form."[221] West considers the digest topics, key numbers, and headnotes to be an advantage for Westlaw. The company has said as much in its marketing materials. West champions that Westlaw includes "[t]he master classification system of U.S. caselaw for over 100 years [that] helps you easily find and move between relevant cases addressing a specific point of law in any jurisdiction."[222] West has touted that Westlaw incorporates digest topics, key numbers, and headnotes into its algorithm, stating that "WestSearch combines sophisticated information retrieval, natural language processing, and machine learning to take maximum advantage of the *editorial enhancements West editors have added to legal documents since 1876*."[223] West's marketing materials convey the message that Westlaw's algorithm, which incorporates West's digest system, improves Westlaw's search process and results.

An important study by Susan Nevelow Mart showed just how significant algorithms are in shaping search results.[224] Mart compared the search results from identical search queries on several electronic research platforms, including Lexis Advance and WestlawNext.[225] Mart identified three null hypotheses to

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216. *See* FRIEDMAN, *supra* note 4, at 335.

217. *See* Hanson, *supra* note 14, at 580 ("[O]pposing attorneys would tend to develop their arguments on the basis of the same cases, nearly all of which were familiar to judges and experts in that field of law.").

218. *See* Berring, *supra* note 3, at 29 ("[T]he power of the [West] system made it the primary method of case retrieval.").

219. THOMSON REUTERS, *supra* note 23, at 3; Mart, *supra* note 18, at 400.

220. VOEDISCH, *supra* note 101, at 5.

221. Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 28 (1994).

222. *Making once nearly impossible legal research tasks possible*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/products/westlaw-edge/features [https://perma.cc/8XAX-AS47] (last visited Feb. 23, 2026).

223. THOMSON REUTERS, *supra* note 23, at 1 (emphasis added); *see also* Mart, *supra* note 18, at 400.

224. *See* Mart, *supra* note 18, at 387, 420.

225. *Id*. at 390. Mart's study also included Bloomberg Law, Fastcase, and Google Scholar. I will not be discussing these other legal research platforms here since my focus is on Westlaw and its primary competitor, Lexis. The primary goal of Mart's study was to advocate for more

test the potential similarities and differences in WestlawNext's and Lexis Advance's algorithms:

(1) Each algorithm would find the same cases;
(2) The top ten cases on all of the databases would be the same; and
(3) Research assistants who conducted the relevancy coding would not agree.[226]

Mart conducted fifty identical case law searches across the legal research platforms.[227] The results of her study can be summarized as follows:

(1) Each search included irrelevant cases in the top ten results.
(2) Seventy percent (28 of 40) of the cases were unique to one vendor's search results.
(3) Of those unique cases, slightly more than half (16 of 28) were both relevant and unique to a particular vendor's search results.[228]

Mart emphasized the impact that a platform's algorithm had on search results:

> More generally, the study shows that every algorithm starts with a different set of biases and assumptions. Even for returning results from searches in a specific case database, every algorithm draws on a different set of sources and processes, whether those sources and processes are classification systems, secondary sources, citation networks, internal case analyses, mined user search history, or machine learning deployed in the unique environment each legal database provider offers. These algorithmic variations in worldview lead to substantial variations in the unique and relevant results each database provides. The knowledge of this variability expands the opportunities for researchers to find relevant cases that can play "some cognitive role in the structuring of a legal argument."[229]

Mart concluded that WestlawNext had the edge in terms of relevant search results over Lexis Advance and attributed the outcome to the company's distinct algorithm.[230] Mart's study was insightful for identifying the role that algorithms play in producing relevant search results. More analysis is needed to determine

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algorithmic accountability around electronic legal research platforms since vendors claim trade secret protection for much of their algorithms.

226. *Id.* at 411.

227. *Id.* at 408–09. Mart used three test searches: (1) "special relationship constitutional duty protect public from crime (N.D. Cal.)"; (2) "job performance racial classification constitutional (D.D.C.)"; and (3) "administrative search 4th amendment warrant requirement (S.D.N.Y.)."

228. *Id.* at 407.

229. *Id.* at 420 (quoting Stuart A. Sutton, *The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis*, 45 J. AM. SOC'Y INFO. SCI. 186, 187 (1994)).

230. *Id.* at 416.

why Westlaw produces the most relevant results, however. It may be because Westlaw's algorithm is better at identifying a researcher's intent or perhaps, more likely, it is because West's digest system has established what is considered the law.[231]

While Mart's study is significant and provides insights into the interworking of legal research algorithms, the foundation of Mart's study—her search queries—was based on her prior work with digests and citators.[232] Mart's viewpoint is important because it indicates that there may be at least some bias embedded in the study in favor of West's digest system.

C. West's Digest with Its Focus on Cases Is Ingrained in the Way Lawyers View the Law

In the early days of West, lawyers were attracted to the company's high-quality, timely, comprehensive, and relatively inexpensive products.[233] Lawyers found the company's products useful, as they made searching for cases easier in the ever-expanding case reporters.[234] It was more than just the quality, coverage, and timeliness of West's products, however, that solidified West as the preeminent publisher of its time. West's extensive marketing effort played a role in the company's success, dominance, and longevity. West marketed its products to lawyers, judges, law students, and the ABA. The company's marketing campaign kept the West brand at the forefront of lawyers' minds.[235] Through West's marketing efforts, the ABA endorsed the company's digest, which gave it credibility.[236] As a result, case reporting and digesting became a commercial enterprise with West replacing many official state reporters.[237] Judges took notice and often gave the company exclusive access to case opinions.[238] West also understood the need to attract future customers. Its marketing campaign targeted law students through sponsored competitions and other gimmicks.[239] Ultimately, West captured the entire legal community as customers through its marketing campaign. West's large customer base[240] helped contribute to the company's dominance in the legal publishing industry, as well as the company's influence on the law.

West's dominance in legal publishing was forged in the nineteenth century, but its impact on the law has continued for 150 years. The West digest system

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231. *See* Berring, *supra* note 16, at 3–4; Berring, *supra* note 17, at 192–93.

232. Mart, *supra* note 18, at 408.

233. Woxland, *supra* note 24, at 119.

234. *See* Eshleman, *supra* note 46, at 238.

235. *See* Davies, *supra* note 3, at 238–44.

236. *See* Jarvis, *supra* note 3, at 8; *see also* MARVIN, *supra* note 3, at 68; Marks, *supra* note 3, at 383.

237. *See* Marks, *supra* note 3, at 381; Woxland, *supra* note 24, at 118; Danner, *supra* note 81, at 145; Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 815 (2006).

238. Marks, *supra* note 3, at 383.

239. *See* Davies, *supra* note 3, at 241; Janto & Harrison-Cox, *supra* note 78, at 282.

240. *See* Davies, *supra* note 3, at 268.

has become so ingrained in the consciousness of lawyers that it colors how they view the law. West's digest system replicates itself, permeating most aspects of the law.[241] The replication of West's system starts with legal education. Law students are first exposed to West's digest topics during their first year where the course subjects mirror many of West's major digest topics.[242] West continues to market its products to law students through giveaways, as well as having a presence on campus and in the classroom.[243] A large percentage of legal research instruction during the first year is conducted by West representatives who teach students about the functionality of Westlaw.[244] Recent law school graduates are again exposed to West's digest topics during the bar exam where first-year subjects are tested.[245] By the time lawyers enter practice, they are well versed in the West system. "[P]ractitioners and researchers internalized the West structure."[246] Lawyers use the West digest system to find cases, craft arguments, and resolve legal issues.[247] The legal concepts in the headnotes identify the universe of legal arguments, and the legal terms or phrases used by West determine all other relevant cases.[248] Over time, West's digest system has become so ingrained that it is now the lens through which lawyers, judges, and law students view the law.

D. Westlaw Functionality Is Inconsistent with the Accepted Legal Research Process

The seeds of a standard legal research process were planted by legal research theorists in the early 1900s. Practitioners and librarians encouraged law students to use treatises because of their concise summary and reference to cases.[249] Legal research textbooks in the modern era convey the same message to researchers—secondary sources are invaluable.[250] They provide background information for newer researchers, like law students, who may be unfamiliar with an area of law, and direct researchers to primary authority.

Yet, West's print digest system and Westlaw's search functionality do not encourage researchers to use secondary sources at the beginning of the research process. Rather, West's research apparatus highlights cases. One explanation for West's approach to legal research is that the company predates the development of a standard legal research process. At the turn of the twentieth

241. Delgado & Stefancic, *supra* note 15, at 208.

242. *See* Eshleman, *supra* note 46, at 244.

243. *See* Davies, *supra* note 3, at 244–46.

244. *See* Genevieve B. Tung, *Collaboration between Legal Writing Faculty and Law Librarians: Two Surveys*, 23 LEGAL WRITING 215, 235–36 (2019).

245. *See* Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307, 318 (2007).

246. Berring, *supra* note 23, at 25.

247. Delgado & Stefancic, *supra* note 245, at 308.

248. *See* Berring, *supra* note 23, at 25.

249. *See* DeWitt Andrews, *supra* note 19, at 15; *see also* HICKS, *supra* note 9, at 160.

250. *See* WREN & WREN, *supra* note 199, at 65; KUNZ ET AL., *supra* note 199, at 19; BARKAN, MERSKY & DUNN, *supra* note 118, at 522–23.

century, when legal research theorists began to discuss how legal research should be conducted, West had been in business for decades and was well on its way to becoming the most recognizable legal publishing company in the country.[251] Another possibility for West's approach to legal research is that the company has resisted change. West believes in its products and their value to customers.[252] The company saw its products as "a great public good."[253] In addition, the size of West's digest is so large that making changes to it is difficult. "The difficulty and expensiveness of this caused West to be fairly reserved in its introduction of topical modifications."[254]

Changes to the digest also affected the way lawyers searched for cases and complicated the research process. When West revised the digest, lawyers were required to consider more terms (the old and new) and consult two sets of digests to find the same concept:

> West separated out federal procedural headnotes into new topics in the 1930s—a decision made because of the enactment of the various federal rules of procedure at that time—it kept assigning state cases to the old topics even as most states adopted the federal rules and federal and state procedures converged. That decision forces searchers to look in two places for the same concept.[255]

For a company that prided itself on making research easier for its customers, these issues were problematic, perhaps adding to West's reluctance to make changes to its digest system.

When West introduced Westlaw, it had the opportunity to align its search functionality with the accepted legal research process. West did not seize this opportunity. The design and functionality of Westlaw continued to focus on cases. The skeleton of Westlaw is the digest topics, key numbers, and headnotes, which were created to help lawyers find cases.[256] The proverbial saying "if it ain't broke, don't fix it" comes to mind. West knew its place in the hierarchy of legal publishers. It believed in its products, which had been used by thousands of lawyers for over 150 years. The company simply did not see a need to change the functionality of Westlaw to be more consistent with accepted legal research methods.

E. The Intersection of West's Digest System and Legal Theory

Thus far, I have discussed the history of West, how it became the prominent legal publisher, its focus on cases, and the disconnect between West's approach to legal research and the standard legal research process. This is not the end of

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251. *See* Marks, *supra* note 3, at 382; *see also* Davies, *supra* note 3, at 267–68.
252. *See* Davies, *supra* note 3, at 236.
253. *Id.* at 268.
254. Berring, *supra* note 3, at 36.
255. Eshleman, *supra* note 46, at 252.
256. *See* Berring, *supra* note 3, at 24–25.

the story, however. West Publishing Company, as a publisher of legal material, may not have been interested in jurisprudential theory, but the company's impact on legal theory is significant.[257] Framing the story of West within the context of prominent legal theories shows how West has impacted the law.

Classic legal thought reigned as the predominant legal theory between the 1870s and 1920s.[258] "At the end of the nineteenth century, classical legal thought envisioned a highly systematic body of law through which courts could mechanically apply abstract legal concepts to reach determinate results."[259] Thomas Grey defined classical legal thought as having three characteristics: (1) determinate where rules are applied to facts without discretion or judgment, (2) systemic in terms of creating a coherent structure, and (3) autonomous based on legal norms.[260] Langdell is a famous example of someone who was instrumental in the development of classical legal thought. He viewed law as a science that must be mechanically applied to the facts of any given legal situation.[261] Langdell explained his belief about law as a science at his 1886 address to the Harvard Law School Association:

> "All the available materials" of the science of law . . . "are contained in printed books . . . ." "[T]he library is . . . to us all what the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists."[262]

Langdell believed that cases contained certain legal principles and, regardless of the seemingly complex and messy nature of case law, held the answers.[263] It was the job of the lawyer to "infer principles and doctrines from the particular decisions of the courts . . . by *induction*."[264] Thus, one goal of legal education was to teach induction to students using Langdell's case method.[265]

West's products also reflect classical legal thought. John B. West began the West Publishing Company when legal classicism was popular and cases were the most important source of law.[266] One of West's primary goals was to provide lawyers with access to the all-important cases.[267] John B. West also saw legal

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257. *See* Marks, *supra* note 3, at 378.

258. Feinman, *supra* note 4, at 3.

259. *Id.* at 2.

260. *See* Grey, *supra* note 139, at 5.

261. *See* LANGDELL, *supra* note 5, at vi.

262. WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES 103 (1978).

263. *See* FORSYTH, *supra* note 5, at 110.

264. *Id.* at 111.

265. *See id.* Another holdover of this scientific notion of law are course outlines. Law students are encouraged to create outlines that set forth the legal rules and exceptions. This teaching method gives the impression that the law is logical and can be distilled down to an outline of rules.

266. *See* Feinman, *supra* note 4, at 3.

267. *See* Briggs, *supra* note 20, at 400.

publishers' role to provide organization to the law through "mechanical aids," which were designed to help lawyers find the cases that would answer legal questions.[268] West's acquisition of Little, Brown's digest, one such mechanical finding aid, showed John B. West's interest in bringing structure to a chaotic legal publishing industry.[269] The digest provided organization and structure by dividing all legal topics into seven major categories, which were further subdivided. It created a system where the "law as a rational and discrete body . . . [could] be divided into separate, non-overlapping subject categories."[270] The structure of West's digest allowed lawyers to find a finite number of cases by topic. Those cases could then be systematically applied to resolve any given legal situation.

Almost as soon as classical legal thought became popular, critics emerged. Most prominent among them was Oliver Wendell Holmes. Holmes challenged whether questions of policy were beyond the common law and, thus, required legislative action.[271] Holmes articulated his ideas as follows:

> Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless.[272]

Holmes authored other works that expressed these ideas.[273] Holmes's ideas laid the foundation for the legal realist movement. During the 1920s and 1930s, the legal realists revolted against classic legal thought. The revolt centered around the rejection of the classic legal ideas regarding logic and precedent and the desire to reflect changes in society, including the prominence of government and the administrative state.[274] The legal realists also rejected the notion that law could be mechanically applied. Instead, they believed that judges had much more flexibility when deciding cases, relying on each particular fact situation:

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268. *Id.* at 400–01.

269. *See* Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 287 (2001) ("The [West] digest scheme is a product of the era of the legal formalists.").

270. *See* Snyder, *supra* note 60, at 544 (internal citation omitted).

271. *See* Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894). Holmes's examples mostly related to privilege but also discussed various reasons why cases are decided and competing considerations or values that are relevant to case outcomes.

272. *Id.* at 7.

273. *See* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 180 (1920) ("So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the [law] schools, but it is not confined to them.").

274. *See* DAVID KAIRYS, THE POLITICS OF LAW 26–27 (1st ed. 1982).

> The realists pointed out that no two cases are ever exactly alike; there will always be some difference in the multitude of facts surrounding them. Thus, the "rule" of a former case can never simply be applied to a new case; rather, the judge must *choose* whether or not the ruling in the former case should be extended to include the new case. That choice is essentially a choice about the relevancy of facts, and those choices can never be logically compelled. Given shared social assumptions, some facts might seem obviously irrelevant . . . , but decisions about the relevance of other distinguishing facts are more obviously value-laden and dependent on the historical context.[275]

The legal academy embraced legal realism, but their ideas were also reflected in how lawyers thought about the law.[276] As a result of the realist movement, few, if any, legal scholars, judges, or lawyers today think of the law as a science where the rules from prior precedent are mechanically applied to new situations. Most legal professionals acknowledge a shift to a more flexible system where statutes and regulations have greater authority, and the law, in many situations, allows for more than one outcome.

The 1920s and 1930s were a relatively quiet period for West with one important exception. In 1927, West introduced the United States Code Annotated (USCA),[277] which may have been the company's nod to changing times. However, West did not fundamentally change its approach to legal publishing. West enveloped the USCA with its digest, key numbers, and headnote system so that the USCA was another case finding tool.

> For all of the signal virtues of annotated codes, they are still dominated by case law. With their annotations they immediately took the researcher into relevant *cases*. Indeed, the hooks that linked the statutes to relevant annotations were produced as a by-product of case production at West. Thus the point of the enterprise remained cases. As years passed and statutory law become more and more important, annotated codes came to be great research tools in their own right. But the organizing principle still hearkened back to cases.[278]

West's print digest, key numbers, and headnotes otherwise remained unchanged during the 1920s and 1930s. There are a few possible reasons why. The shift towards legal realism and its rejection of the mechanical application of the law did not fundamentally alter how lawyers found cases. Lawyers continued to use the digest, headnotes, and key numbers as they had in the past. The USCA only added to the usefulness of the digest system as lawyers could

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275. *Id.* at 27.

276. *See* Feinman, *supra* note 4, at 11–12.

277. *See* THOMSON REUTERS, *supra* note 56.

278. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1694 (2000).

use it to find cases related to statutory law. As a practical matter, it was difficult to make changes to the digest, which may have prevented West from modernizing its system. In addition, as mentioned previously, revisions to the digest created research problems for lawyers. Lawyers must consider both new and old terms, as well as use two editions of the digest to find relevant cases.[279]

Post-realist legal theory has been described as a "hodge-podge of policy, situation-sense, and leftover doctrine."[280] This description aptly explains the middle ground of legal thought that emerged during the 1940s and beyond. The determinacy that was present in classical legal thought but rejected by the realists has become a system of "*flexibility* required for sensible, policy-oriented decision making."[281] The realist's discussion of the collapse of rights is now accurately described as requiring "enlightened judicial *balancing*."[282] Examples of a post-realist, middle ground approach have been incorporated into the law school curriculum. For example, contract law now operates in terms of "fair play and substantial justice" and the "balancing" of the various interests of the parties.[283] Likewise, in legal research and writing courses, professors often talk in terms of the bullseye case or the case that is on all fours with the hypothetical fact pattern. The bullseye is in line with the mechanical application of the law that was popular with classical legal theory. Current instruction does not end with the bullseye, however. Professors also discuss the post-realist notion that the law extends to the rings surrounding the bullseye. This expanded view of the law allows law students to use persuasive authority or make policy-driven arguments that may lead to more than one outcome. In addition, many law schools offer policy-oriented courses where students draft legislation or lobby legislators for legal change. These examples illustrate that legal theory has settled on a middle ground approach in terms of the law, which is also reflected in law school curriculum.

On a chronological timeline, Westlaw is a post-realist invention.[284] However, it does not reflect post-realist tenets. Westlaw's skeleton continues to be its digest system, which was created during the heyday of classical legal thought.[285] The mechanical application of cases to new legal situations was a key aspect of legal reasoning when John B. West began his publishing company.[286] Westlaw's design and functionality continue to reflect these classical ideals. Westlaw prioritizes cases over other sources of law through the use of a Google-like search bar where cases are always listed first. Moreover, Westlaw continues to operate in ways that are consistent with legal research as a mechanical exercise. Westlaw gives the impression that legal research can be distilled down to a process that involves a few keywords, algorithmic magic,

279. *See* Eshleman, *supra* note 46, at 252.
280. KAIRYS, *supra* note 274, at 34.
281. *Id.* at 29.
282. *Id.*
283. *Id.* at 31.
284. *See* VOEDISCH, *supra* note 101, at 5; KAIRYS, *supra* note 274, at 26.
285. *See* Berring, *supra* note 23, at 15.
286. *See* FRIEDMAN, *supra* note 4, at 356.

and a finite list of cases that will answer most legal questions. As a result, Westlaw perpetuates the determinacy of law. However, the answer to a legal question may not be reflected in Westlaw's list of cases.

West's case-focused, print-based system worked well when it was created in the late nineteenth century. It allowed lawyers to find cases by providing much needed structure to unorganized legal publications. What worked well 150 years ago, however, does not meet the needs of today's legal researchers. The legal environment has changed. Legal research theorists have established a standard legal research process, which is inconsistent with West's case-first approach to legal research. Moreover, statutes and regulations have become much more important sources of law and modern legal theory has rejected the mechanical application of the law.

F. Why We Care

1. The Illusion of Legal Reasoning, Indeterminacy, and the West Digest.— A critical part of legal education is teaching students to think like lawyers.[287] The case method, used by Langdell, is a primary tool through which law students learn legal reasoning and begin to think like lawyers.[288] Students learn legal reasoning by applying rules from prior precedent to new situations.[289] Students also practice legal reasoning by analogizing or distinguishing cases based upon the facts of each case.[290] The case method of legal reasoning instruction gives the impression that there are a limited number of possible outcomes. Cases are decided "logically" based on similar or different facts or through the application of established rules of law.[291] A doctrinal approach to legal reasoning that focuses only on so-called logical outcomes conveys the illusion of determinacy.[292] Much of law school instruction gives the law a "sheen of legitimacy and enhances its apolitical reputation; judges are not deciding cases based on their own policy preferences, but on the logical outcome of this law applied to this set of facts."[293] Legal curriculum that repeatedly reinforces the notion of legal determinacy maintains the status quo. Legal reasoning instruction "tends to deaden a student's imagination as to what is possible."[294] Law students are boxed-in by a century's old idea of legal reasoning.[295]

Classification systems, like West's digest, are much more than a tool to find

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287. *See* Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 MINN. L. REV. 2511, 2517 (2023).

288. *See id.* at 2523; Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 7 (1951).

289. *See* McMahon, *supra* note 287, at 2517.

290. *See id.*

291. *See id.* at 2524.

292. *See id.* at 2529.

293. *Id.* at 2519.

294. *Id.* at 2529.

295. *See id.* at 2530.

the law. At best, classification systems are subjective.[296] At worst, "all such schemes are lies."[297] In either case, the "very existence of historically legitimated doctrinal categories gives the law student, the teacher, and the practitioner a false sense of the orderliness of legal thought[.]"[298] West's digest created an orderly structure:

> [Cases] are arranged under [digest] headings with more or less minute subdivisions, the order of arrangement being alphabetical or analytical or a combination of the two; the alphabetical order is usually preferred for the main heads, and for their subdivisions some analytical basis is oftenest adopted.[299]

Classification systems give the misleading impression that law is determinate:

> Existing classification systems serve their intended purpose admirably: They enable researchers to find helpful cases, articles, and books. Their power is instrumental; once the researcher knows what he or she is looking for, the classification systems enable him or her to find it. Yet, at the same time, the very search for authority, precedent, and hierarchy in cases and statutes can create the false impression that law is exact and deterministic—a science—with only one correct answer to a legal question.[300]

West's digest, the dominant legal classification system, is a conduit of legal determinacy. The orderly nature of West's digest gives the false impression that there are only a limited number of controlling precedent and, thus, possible outcomes to any given situation. The digest system marginalizes legal outcomes that rely on sources other than cases, including statutes, regulations, or policy-related advocacy. Classification systems, like digests, mask the indeterminate nature of the law.[301] As a result, law students and lawyers are left without a complete and accurate understanding of the law.

2. West's System Confines the Universe of Legal Thought.—West's digest system imposes artificial boundaries on the law. West's digest created a system where its editors placed every case within its organizational structure.[302] Over

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296. *See* Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies*, 79 LAW. LIBR. J. 617, 630–31 (1987).

297. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 215 (1979); *see also* Barkan, *supra* note 296, at 631; Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U. J. GENDER SOC. POL'Y & L. 573, 604 (2015).

298. Kennedy, *supra* note 297, at 215.

299. Mallory, *supra* note 53, at 184.

300. Delgado & Stefancic, *supra* note 15, at 216.

301. *See* Barkan, *supra* note 296, at 631.

302. *See* Berring, *supra* note 3, at 32.

time, the digest's structure became invisible, and lawyers began to think according to the digest topics.[303] As a result, the digest's authority grew.[304] Lawyers saw the digest as encompassing the universe of available law.[305] Lawyers were less aware of the limits or boundaries that the digest system created. Westlaw suffers from the same constraints because it incorporates the digest topics and key numbers.

West's digest influences lawyers' view of the law. The explicit and implicit features of digest systems become ingrained in the thought process of lawyers. Specifically, "since classifications are actively imposed, not passively imbibed, they shape our thoughts and deeds in ways that we scarcely perceive because we view our categories as 'obvious' and 'natural'"[306] Robert Berring discussed the influences that the West's digest has on lawyers' view of the law:

> Over the 110 years of the West era, the West System became so embedded in legal thought that it became invisible. We thought in West terms, we discussed law in West categories. . . . Without realizing it, we all depended on West for giving us ways to think coherently about the hundreds of thousands of cases that were stuffed into the reporters.[307]

Ultimately, West's digest became the lens through which lawyers view the law. The digest has influenced arguments, rules of law, and solutions.[308] In fact, lawyers are rewarded for conforming their legal arguments to the digest topics. "By sticking with preexisting ideas, . . . the researcher is rewarded by quick and easy searches, and a wealth of information."[309]

Moreover, West's digest limits progressive legal reform:

> The categories contained in current indexing systems are like eyeglasses we have worn a long time. They enable us to see better, but lull us into thinking our vision is perfect and that there may not be a still better pair. Even when we discover a better pair, it, like the old, again sets limits on what we see. This process is inherent in our condition. We move from one set of limitations to another, finding only slightly greater freedom in our new condition. The beginning of wisdom is to understand and, insofar as we may, work around our limitations.[310]

Furthermore, the digest hinders true legal reform due to its static and

303. *See* Berring, *supra* note 16, at 3–4.

304. *See* Berring, *supra* note 221, at 22.

305. *See* Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 310–11 (2000); *see also* Berring, *supra* note 3, at 33.

306. Stephen Jay Gould, *Taxonomy as Politics: The Harm of False Classification*, 37 DISSENT 73, 73 (1990).

307. Berring, *supra* note 16, at 3–4.

308. *See* Stump, *supra* note 297, at 605.

309. Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 LAW LIBR. J. 391, 399–400 (1993).

310. Delgado & Stefancic, *supra* note 15, at 209.

inflexible nature. Researchers may be unable to see legal solutions where the digest is silent on a particular legal issue or when the researcher's search query does not yield helpful results.[311] In addition, the digest does not adapt well to changes in society due to its inflexibility and, as a result, perpetuates outdated notions. A survey of the changes to West's digest shows that only a handful of topics are revised each year.[312] For example, from 1907 to 1916, "automobiles" was the only topic that was added to the digest.[313] Many of the changes to the digest simply consolidate terms without fundamentally changing the topics themselves.[314] Other changes to the digest have merely updated terminology to more politically appropriate terms.[315] As of 2020, most of the West digest subtopics under the topic of "Criminal Law" have remained unchanged since 1912.[316]

Digest systems also create technical limitations to finding the law. If information is not indexed or is mis-indexed, it is lost forever.[317] In the legal research context, cases must be indexed and in the expected place within the index to be found. In other words, if cases are not properly indexed, they do not exist for all intents and purposes. The West digest helped lawyers find cases, but certain features of the system likely prevented researchers from finding at least some cases. West editors made choices about where to place cases within the digest structure.[318] It is conceivable, due to the digest's enormous size, that the editors placed cases under inaccurate digest topics. In addition, most lawyers were not experts at using the digest, and, thus, may not have used it to its fullest capacity.

> Few people ever truly mastered the Digest System. Like many great finding systems, the Digest system became staggeringly complex and soon was understandable only to its makers. This seems to be an unavoidable dilemma. As a finding system grows more sophisticated, more nuanced, and more focused in order to be comprehensive, it grows harder and harder to use. This trade-off between comprehensiveness and ease of use has never been resolved.[319]

There is also a level of subjectivity involved in using a digest. Two researchers may associate different terms or keywords with the same legal concept. If a case is indexed under only one topic, then the other researcher will be unable to find

311. *See id.* at 217–22.
312. *See* Gotschall, *supra* note 10.
313. *See* Snyder, *supra* note 60, at 558–59.
314. *See id.*
315. *See id.*
316. *See* Gotschall, *supra* note 10.
317. *See* Berring, *supra* note 23, at 25.
318. *See* Berring, *supra* note 3, at 36–37.
319. Berring, *supra* note 278, at 1693.

it.[320]

For decades, scholars have alleged that electronic research will free researchers from the boundaries created by West's digest.[321] Robert Berring, among them, even described electronic research as the "death" of the digest.[322] Berring's prediction was premature, however. In the early 2000s, when Berring wrote about electronic research's impact on the digest, he simply did not have the perspective to fully appreciate the impact that Westlaw's algorithm would have on modern legal research. The digest topics and key numbers continue to be prominent parts of Westlaw's algorithmic functionality. Westlaw Precision includes a link to the key numbers so that researchers can use the key numbers and digest topics to find cases. West's digest continues to connect Westlaw to the system that was created to find cases over one hundred years ago.

3. Starting the Conversation for Change.—The goal of this Article is to bring awareness to how the history of West impacts legal education and the practice of law. With awareness comes the ability to think about how the legal academy should educate law students so that they have a better understanding of the external forces impacting the law.

In the research context, frank conversations about the history of legal research and how this history influences the modern-day design and functionality of electronic legal research platforms should be standard in all research courses. Part of this important conversation is to advocate for more librarian-led legal research instruction, rather than simply leaving the research instruction to vendor representatives. Legal research is so much more than a rote exercise where researchers simply place keywords in a search box and the algorithm generates a finite list of cases. The research process that I have described implies that a researcher's only task is to read the cases listed, as those cases will likely provide the answer to the given legal issue. Confining the legal research process in this way has real world implications. A first-year law student recently stopped by the reference desk to lament the fact that his LAWR professor was unsatisfied with the list of cases included on his research log. As we talked, it became clear to me that the student's primary research strategy was to simply list the first ten Westlaw search results on his research log. It was difficult for him to understand that the list of cases may not provide a complete answer to the legal question. This student, and all students, would benefit from a discussion of West's digest system and the limits that it imposes. If students gain a better understanding of how electronic research platforms, like Westlaw, function and the origins of the company's print-based, case-focused research system, they will be in a better position to think critically about research. Students will be better prepared to answer questions about how a search query impacts search results or what sources may be missing from those results. Understanding the history of legal research and engaging in critical analysis will

320. *See* Daniel P. Dabney, *The Curse of Thamus: An Analysis of Full-Text Legal Document Retrieval*, 78 LAW. LIBR. J. 5, 9 (1986).

321. *See* Stump, *supra* note 297, at 608.

322. Berring, *supra* note 305, at 311.

help us teach law students about effective legal research and the law. Librarians are in the best position to provide such instruction as legal research experts.

Moreover, acknowledging that traditional legal reasoning instruction masks the indeterminacy of law is important. Providing opportunities for students to make more creative arguments in the classroom is also helpful. Susan McMahon provides examples of how this can be accomplished in doctrinal courses.[323] Her suggestions can also be applied to legal research instruction. McMahon contends that professors should ask students to develop new rules and not be limited by existing rules.[324] McMahon also maintained that legal solutions should not be limited to litigation. Instead, students should be encouraged to think creatively about alternative solutions, including legislative action and advocacy work.[325] Now that we are more aware of this important story, it is time to continue the conversation so that law students and future lawyers will have a better understanding of legal research and the law.

CONCLUSION

Whether we realize it or not, the West Publishing Company has had a significant impact not only on legal research, but on legal professionals' view of the law. Learning more about certain aspects of West's history will help inform our understanding of West's broad influence. We owe it to today's law students to have robust conversations about what we should be teaching them about legal research so that they will have a more complete understanding of the law.

323. *See* McMahon, *supra* note 287, at 2551–52.
324. *See id.* at 2551.
325. *See id.* at 2555–56.

AI AND LEGAL INEQUALITIES IN HIGHER EDUCATION COURSES

R. GEORGE WRIGHT*

The rise of artificial intelligence (AI) elements in higher education coursework has resulted in new and complex forms of legally actionable inequality. Some such forms of inequality in the higher education process are obvious. Others are less obvious, but extremely important. Herein, we focus mainly upon the latter, more subtle, ways in which AI tends to increase unjustified inequalities in the pedagogy of higher education.

Certainly, there are ways in which AI may diminish existing inequalities in higher education. Consider, for example, historic forms of inequalities in meaningful access to higher education faced, in different ways, by various groups. There are obvious ways in which persons with limited movement, various physical impairments, and a wide range of neurological and psychological conditions might benefit substantially from an AI academic tutor, as opposed to, or in addition to, a human tutor.[1] AI is, of course, incapable of either patience or impatience. But AI tutors can certainly be experienced as not only instantly available at any hour, but as infinitely patient, and as supportive and encouraging as it is instructed to be.[2]

Equally clearly, AI may benefit higher education students who are not yet fluent in the university's primary language of instruction. AI's abilities to translate various languages into academically appropriate English, for example, continues to improve.[3] AI can, in this sense, reduce some barriers to higher education success,[4] and more generally, foster genuine inclusiveness in higher

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1. *See, e.g.*, Lauren Bialystock, *AI and the Future of (Philosophy of) Education*, 76 EDUC. THEORY 133, 134 (2026) (citing Beth McMurtrie, *AI to the Rescue*, CHRON. HIGHER EDUC. (June 20, 2025), www.chronicle.com/special-projects/the-different-voices-of-student-success/ai-to-the-rescue [https://perma.cc/7WP3-89NT]); Rachel Curry, *People with ADHD, autism, dyslexia say AI agents are helping them succeed at work*, CNBC (Nov. 8, 2025, at 9:00 EST), www.cnbc.com/2025/11/08/adhd-autism-dyslexia-jobs-careers-ai-agents-success.html? [https://perma.cc/P7Z9-KZ3Z]; Tayiba Rasheed et al., *Leveraging AI to Mitigate Educational Inequality: Personalized Learning Resources, Accessibility, and Student Outcomes*, 3 CRITICAL REV. SOC. SCI. STUD. 2399, 2400 (2025) ("[A]rtificial intelligence enhances accessibility by facilitating support for learners with disabilities, language learners, and those who have limited exposure to qualified instructors.").

2. Thus, opening the door to, among other problems, what is known as AI sycophancy. *See infra* note 20 and accompanying text. For the moment, consider the positive and negative dimensions of one student's report that AI "was so patient . . . . I don't think anyone has ever paid such pure attention to me and my thinking and my questions." D. Graham Burnett, *Will the Humanities Survive Artificial Intelligence?*, NEW YORKER (Apr. 26, 2025), www.newyorker.com/culture/the-weekend-essay/will-the-humanities-survive-artificial-intelligence [https://perma.cc/TN3U-LJ3S].

3. *See, e.g.*, Dragan Filimonovic, Christian Rutzer & Conny Wunsch, *Can GenAI Improve Academic Performance? Evidence From the Social and Behavioral Sciences* 19 (Oct. 6, 2025), https://arxiv.org/abs/2510.02408 [https://doi.org/10.48550/arXiv.2510.02408] ("GenAI tools help reduce . . . structural frictions, such as linguistic barriers . . . particularly among disadvantaged groups."); Rasheed et al., *supra* note 1, at 2400.

4. *See* NAESP Staff, *Generative AI in Education: Early Adoption, Equity, and the Road Ahead*, NAT'L ASS'N OF ELEMENTARY SCH. PRINCIPLES (Oct. 4, 2025), https://www.naesp.org/resource/generative-ai-in-education-early-adoption-equity-and-the-road-ahead/ [https://perma.

education.[5]

Consider as well matters of pricing and inequality. We may assume that the overall price of a largely AI-based higher education program will continue to decrease, inevitably putting increased competitive price pressure on higher education programs with lesser reliance on AI.[6] This development would, through reducing tuition costs to students, further expand realistic access, across economic classes, to higher education.[7]

As well, some features of a largely AI-based higher education may help all students, across the board, while helping some or all disadvantaged students in distinctively greater measure. AI programs can thus provide specifically, and even individually, targeted subject-matter, motivational, and emotional support, especially to students with various sorts of disadvantaged backgrounds.[8] AI's ability to facilitate learning, in private and at the student's own pace and schedule, may benefit all students to some degree, but, again, to the benefit of many disadvantaged students especially.[9] In particular, students with demanding commutes from rural areas, or with demanding work or family commitments, may distinctively benefit from immediate and continuous access to, and substantive feedback from, AI programs.[10]

These elements help make up the positive side of the ledger on AI's impact on inequality in higher education. There is, however, a negative side of the ledger, in which AI perpetuates, exacerbates, and creates significant inequalities

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cc/8UHH-STHZ]; Cornelia C. Walther, *The Future of Education: Will AI Be the Great Equalizer?*, FORBES (Apr. 22, 2025, at 14:07 EDT), https://www.forbes.com/sites/cornelia walther/2025/03/16/the-future-of-education-will-ai-be-the-great-equalizer/ [https://perma.cc/A38Q-ELCF] ("AI-driven tools can . . . bridge gaps in educational access.").

5. *See* Walther, *supra* note 4.

6. *See id.*; Aviva Legatt, *AI, Cost, and Confidence are Rewriting Higher Ed's Value Proposition*, FORBES (Oct. 15, 2025, at 15:34 EDT), https://www.forbes.com/sites/avivalegatt/2025/10/15/ai-cost-and-confidence-are-rewriting-higher-eds-value-proposition/ [https://perma.cc/N7AW-C8ZG].

7. We set aside here the possibility of AI reducing the sheer time required to complete any given higher education program. On financial cost issues, see Walther, *supra* note 4.

8. *See, e.g.*, Blanka Klimova & Marcel Pikhart, *Exploring the Effects of Artificial Intelligence on Student and Academic Well-Being in Higher Education: A Mini-Review*, 16 FRONTIERS IN PSYCH., Feb. 3, 2025, at 3; Hoang Pham et al., *How will AI Impact Racial Disparities in Education?*, STAN. L. SCH. (June 29, 2024), https://law.stanford.edu/2024/06/29/how-will-ai-impact-racial-disparities-in-education/ [https://perma.cc/93E9-KNCH] ("AI can be used to reduce the harmful impacts of . . . disparities by personalizing learning based on students' needs.").

9. See the authorities cited in *supra* note 8; *see also How artificial intelligence in education is transforming classrooms*, SMU SIMMONS SCH. EDUC. & HUM. DEV. (Jan. 9, 2025), https://learningsciences.smu.edu/blog/artificial-intelligence-in-education [https://perma.cc/4LKC-246F] ("Students can learn at their own speed, receive immediate feedback, and focus on areas they need to improve.").

10. *See id.*; Lucille Favero et. al., *Do AI Tutors Empower or Enslave Learners? Toward a Critical Use of AI in Education* 1 (July 9, 2025), https://arxiv.org/pdf/2507.06878 [https://doi.org/10.48550/arXiv.2507.06878]. At the moment, many relevant studies are confined to small sample sizes, short term effects, and the inability to rule out confounders such as sheer novelty and extra institutional attention. *See* Anjali Singh et al., *Protecting Human Cognition in the Age of AI* 11 (Sep. 29, 2025), https://arxiv.org/html/2502.12447 [https://doi.org/10.48550/arXiv.2502.12447].

in higher education. Some of these dimensions are obvious, but others less so. It is to the negative side of the ledger to which we now turn, with our initial focus being on the most obvious ways in which AI may contribute to inequalities in higher education coursework.

A moment's thought suggests that AI in general, and typical AI higher education programs, inevitably foreground certain beliefs, values, and vocabularies that are not universally shared within and across cultures. We should expect dominant cultures to exert corresponding media and academic publication dominance. As a default, dominant cultures should tend to have a disproportionate presence, if not dominance, in many AI higher education programs. This disproportionate representation of dominant cultures in AI training materials and curricular programs should be expected to obtain unless distinctive, conscientious efforts are undertaken to the contrary. All else equal, AI's content derives from word predictivity, and word predictivity depends upon overall frequency and volume of word appearance, which reflects patterns of media dominance.[11]

Thus in general, "AI systems are trained on massive datasets that reflect existing social and cultural patterns—some of which are biased."[12] All else equal, AI responses to students tend to reflect the cumulative, perhaps unintended, cultural biases absorbed into the training sets and broader cultural output from which those training sets are constructed.[13] Worse, AI training models "may even amplify existing societal biases embedded in their training data."[14] AI, as it is officially adopted, may legitimize such biases. More subtly, any deliberate, but inevitably imperfect, remedial human intervention at any point in the overall AI generation process may incorrectly imply a lack of any remaining bias in the student-facing AI program.[15]

The biases in question can take effect in many forms and contexts and can have prejudicial effect along many dimensions, including, but not limited to, disability, race, ethnicity, sex and sexual orientation, economic class, language,

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11. *See, e.g.*, Jennifer Monahan, *Artificial Intelligence, Explained*, CARNEGIE MELLON UNIV. HEINZ COLL. (July 2023), https://www.heinz.cmu.edu/media/2023/July/artificial-intelligence-explained [https://perma.cc/77GK-RQCF]; Cole Stryker & Eda Kavlakoglu, *What is artificial intelligence (AI)?*, IBM (Aug. 9, 2024), https://www.ibm.com/think/topics/artificial-intelligence [https://perma.cc/94AU-Y5B9].

12. Ind. Univ. Kelley Sch. Bus., *AI Playbook: Principles, Practices, and Policies for Faculty* 8 (Oct. 2025), https://kelley.iu.edu/Kelley_AI_Playbook.pdf [https://perma.cc/Q3CC-HWBF].

13. *See* Xin Zhang et al., *A Systematic Literature Review of Empirical Research on Applying Generative Artificial Intelligence in Education*, 1 FRONTIERS DIGIT. EDUC. 223, 235 (2024) (referring to findings that "an AI-powered educational platform inadvertently perpetuated social biases present in its training data"); Giovanni Vindigni, *Data-Driven Disparities: How AI Applications in Education May Perpetuate or Mitigate Inequality*, 1 EUR. J. SCI. & MOD. TECH., Aug. 2025, at 1 (on "algorithmic bias" as opposed to "an impartial algorithmic design").

14. Chenyu Hou, Gaoxia Zhu & Vidya Sudarshan, *The Role of Critical Thinking on Undergraduates' Reliance Behaviours on Generative AI in Problem-Solving*, 56 BRIT. J. EDUC. TECH. 1919, 1935 (2025).

15. *See* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 674 (2016) ("[E]ven honest attempts to certify the absence of prejudice on the part of those involved in the data mining process may wrongly confer the imprimatur of impartiality.").

culture, and national origin.[16] Dominant beliefs, values, vocabularies, and policy concerns tend to arrive as the AI pedagogical defaults.[17] And even more obviously, higher education students may have formally equal access to AI programs, but remain substantively disadvantaged by any lesser familiarity, let alone any lesser fluency, with the sheer mechanics of AI learning programs and processes.[18]

There are, however, also a range of less obvious, but important, aspects of inequality in higher education AI. These important dimensions of inequality may be more difficult to detect in practice, isolate, and optimally redress. The difficulties in meaningfully addressing these dimensions of inequality reflect their rootedness in much broader forms of cultural and economic discrimination and inequality.

Consider the concrete, lived experiences of historically disadvantaged students entering into higher education, perhaps as their family's first such generation, alongside a cohort of advantaged students, for whom higher education has perhaps been a familiar family experience. The norms, expectations, and experiences of higher education in general are more familiar to the latter group than to the former. And now, there is the additional element of a largely AI-dominant curricular experience. Should we expect both disadvantaged and advantaged groups of students to be off to an equal start, as the semester unfolds, in taking full advantage, in practice, of the wide range of AI-educational possibilities? Should we expect both groups to equally avoid the

16. *See* Mohammad Atari et al., *Which Humans?*, HARV. UNIV. (2024), https://coevolution.fas.harvard.edu/sites/g/files/omnuum5841/files/culture_cognition_coevol_lab/files/which_humans_09222023.pdf [https://perma.cc/XX4N-4Q3S]. *See also id.* at 15 ("When researchers claim that LLMs give 'human'-like responses, they need to specify which humans they are talking about."); Sahan Bulathwela et al., *Artificial Intelligence Alone Will Not Democratise Education: On Educational Inequality, Techno-Solutionism, and Inclusive Tools*, 16 SUSTAINABILITY, Jan. 2024, at 5–6.

17. For a sampling of the expressed concern, see, e.g., Earle Abrahamson, *AI in Higher Education: Bridging the Divide Between Access, Equality, and Opportunity*, INT'L CTR. FOR ACAD. INTEGRITY (Mar. 10, 2025), https://academicintegrity.org/aws/ICAI/pt/sd/news_article/587198/_PARENT/layout_interior/false [https://perma.cc/9SMY-JGNZ]; Donna Campbell, *AI enters the classroom as law schools prep students for a tech-driven practice*, NAT'L JURIST (July 9, 2025), https://nationaljurist.com/ai-enters-the-classroom [https://perma.cc/74VF-42WD] ("You can't ignore the equity issues."); Josie Cox, *The most radical act of feminism? Using AI*, THE TIMES (Sep. 10, 2025, at 12:20 BST), https://www.thetimes.com/us/news-today/article/the-most-radical-act-of-feminism-using-ai-gpx2nxtc3?gaa_at=eafs&gaa_n=AWEtsqeF6jleyN9Y7cNgmEvHwG0cWqx7wfJbBz643HaDtF6TiPmyvq4nw3Wxmak5Rfw%3D&gaa_ts=6990e9b8&gaa_sig=1K-Ezos3z8IMP-Scs2UCQVrqT9vjhTbykhsnAKRnk4d07yz-kHXKcwVa4KzhfZdFlbz-DJnueU2CTmJWZKulWg%3D%3D [https://perma.cc/HL8K-X5T5] (referring to "all the sexism, racism and bias that's embedded in the technology"); Josh Freeman, *Student Generative AI Survey 2025*, HIGHER EDUC. POL'Y INST. (Feb. 26, 2025), https://www.hepi.ac.uk/reports/student-generative-ai-survey-2025/ [https://perma.cc/2H5J-L6V6] (finding male students and "more socioeconomically advantaged students more likely to use AI than others"); Pham et al., *supra* note 8; Mohan Yang et al., *Analysing Nontraditional Students' ChatGPT Interaction, Engagement, Self-Efficacy and Performance: A Mixed-Methods Approach*, 56 BRIT. J. EDUC. TECH. 1973, 1975 (2025) (new AI-based educational technologies "risk widening the existing digital divide" if not thoughtfully deployed and utilized).

18. See the authorities cited in *supra* note 17.

non-obvious traps, pitfalls, and suboptimal uses of academic AI? In particular, should we expect each group, with or without specific training, to equally quickly master the subtle arts of devising the best possible succession of precisely formulated AI user prompts, for all purposes and contexts?

Certainly, many of the less obvious harms of AI use in higher education will afflict all groups of students, to one degree or another. But there are likely to be what the law refers to as disparate impacts[19] among different groups of students. Higher educational institutions, and the law, should continuously explore and attempt to remedy any such disparate impact.

Consider first some of the subtle, but important, effects of what is known as AI sycophancy.[20] At a first approximation, AI sycophancy refers to AI responses

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19. For useful background on disparate impact discrimination, as distinct from disparate treatment or intentional discrimination, see, e.g., Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 34 (2020); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 781–82 (2015) (Thomas, J., concurring in part and dissenting in part) ("[D]isparate impact claims . . . involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more heavily on one group than another and cannot be justified by business necessity." (alteration in original) (quoting Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003))). Importantly, disparate impact and disparate treatment theories differ as to their elements, liability standards, defenses, and remedies. *See, e.g.*, Young v. UPS, 575 U.S. 206, 247–48 (2015) (Scalia, J., dissenting) (citing 42 U.S.C. §§ 1981a, 2000e-2k, 2000e-5g) (noting the availability, by statute, of compensatory, punitive, and equitable relief in disparate treatment Title VII cases, but only injunctive or other equitable relief in disparate impact Title VII cases). Disparate impact claims are also possible in some federal housing and age discrimination civil rights contexts. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015). For a sense of some general problems and possibilities associated with AI and disparate impact theories, see Christine Polek & Shastri Sandy, *The Disparate Impact of Artificial Intelligence and Machine Learning*, 21 COLO. TECH. L.J. 85 (2023) (focusing on business employees and business customers in particular); Vincent Calderon, *Unintentional Algorithmic Discrimination: How Artificial Intelligence Undermines Disparate Impact Jurisprudence*, 24 DUKE L. & TECH. REV. 28 (2024) (noting the often difficult problems of sufficiently proving causation of a harm, and of offering a less discriminatory and otherwise satisfactory alternative business practice). *See also* Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017) (creatively advocating for what amounts to algorithmic impact statements, by analogy to required environmental impact statements, and for a notice-and-comment process allowing for persons to weigh in prior to government adoption of algorithmic-driven policing technologies). There are, as well, questions as to the availability of a private right of action in Title VII and other disparate impact contexts. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

20. For background, particularly in educational contexts, see Malihe Alikhani, *Breaking the AI Mirror*, BROOKINGS (Apr. 15, 2025), https://www.brookings.edu/articles/breaking-the-ai-mirror/ [https://perma.cc/D6KH-3CZ7] (describing "AI sycophancy" as affirming, rather than challenging, a user's misleading statistics, thus reinforcing the user's misunderstanding); Phillip Alcock, *The Sycophancy Problem*, A.I. FOR BEGINNERS (July 31, 2025), https://aiforbeginners.substack.com/p/the-sycophancy-problem [https://perma.cc/P3HF-YAPT] (highlighting how sycophantic AI emphasizes the prompter's strengths while "glossing over obvious problems"); Simar Bajaj, *Next Time You Consult an AI Chatbot, Remember One Thing*, N.Y. TIMES (Sep. 29, 2025), https://www.nytimes.com/2025/09/26/well/is-ai-validation-healthy.html [https://perma.cc/Z92F-WD6Y] (referring to AI non-judgmentalism both where appropriate and where inappropriate, sheer person-oriented relativism and subjectivism, and the process of psychologically rewarding users with an amplified version of social media "likes"); Rebecca Bellan, *AI sycophancy isn't just a quirk, experts consider it a 'dark pattern' to turn users into*

that would, if they were actually intended, count as flattering, ingratiating, toadying, or similarly manipulative. We may begin with, but then expand upon, that understanding.

AI sycophancy is understandable from the standpoint of the competitive market needs of AI program suppliers, and from the standpoint of AI users, particularly under distinctive circumstances. A vicious circle can be seen to develop. Private AI program sellers face a competitive market imperative to develop programs that schools or students are willing to pay for. User adoption and loyalty may depend upon subjective user experiences. And positive user experiences may stem disproportionately from AI's sycophantic relationships with users.[21] User feedback can then promote and further incentivize AI sycophancy by highly ranking, whether consciously or not, instances of AI sycophancy, as distinct from appropriately challenging AI responses.[22] So, unless the AI programs in question are appropriately prompted, usually in some non-obvious way, they may not appropriately prioritize a meaningful, arms-length broadening of a user's pre-existing judgments and beliefs.[23] There is thus

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profit, TECH CRUNCH (Aug. 25, 2025, at 13:50 PST), https://techcrunch.com/2025/08/25/ai-sycophancy-isnt-just-a-quirk-experts-consider-it-a-dark-pattern-to-turn-users-into-profit/ [https://perma.cc/3SSY-6CE9] (a chatbot's 'rewarding' pseudo-interactionalism "can make people feel understood or cared for"); Mike Caulfield, *AI Is Not Your Friend*, ATLANTIC (May 9, 2025), https://www.theatlantic.com/technology/archive/2025/05/sycophantic-ai/682743/ [https://perma.cc/V8AQ-7PJJ] (one bot version in particular "wouldn't stop telling users how brilliant their bad ideas were"); Yaqub Chaudhary & Jonnie Penn, *Beware the Attention Economy: Collection and Commodification of Intent Via Large Language Modules*, HARV. DATA SCI. REV., Dec. 30, 2024, at 2 (discussing LLM "sycophancy, ingratiation, and emotional infiltration"); Myra Cheng et al., *Sycophantic AI Decreases Prosocial Intentions and Promotes Dependence* 2 (Oct. 1, 2025), https://arxiv.org/abs/2510.01395 [https://doi.org/10.48550/arXiv.2510.01395] ("[P]articipants rated sycophantic responses as higher quality, trusted the sycophantic model more, and were more willing to use it again"); *id.* at 3 (citing an AI response of "You did what [was] right for you"); *id.* at 11 ("[W]e find a clear user preference for AI that provides unconditional validation."); Lihua Du et al., *Alignment Without Understanding: A Message-and-Conversation-Centered Approach to Understanding AI Sycophancy* 2 (Sep. 25, 2025), https://arxiv.org/html/2509.21665v1 [https://doi.org/10.48550/arXiv.2509.21665] (on AI program encouragement of "over-reliance and emotional dependency, weakening resilience, and diminishing autonomous judgment"); Shubhangi Dua, *AI Agents Will Know Your 'Intentions' Before You Do. It's Called the 'Intention Economy*,' ENTER. MGMT. 360 (Feb. 28, 2025), https://em360tech.com/tech-articles/ai-agents-will-know-your-intentions-you-do-its-called-intention-economy [https://perma.cc/QRK3-QD65] (on building AI user comfort and trust); Erie Meyer et. al., *Tech Brief: AI Sycophancy & Open AI*, GEO. L. (July 30, 2025), https://www.law.georgetown.edu/tech-institute/research-insights/insights/tech-brief-ai-sycophancy-openai-2/ [https://perma.cc/7WXL-2S7B]; Amy Winecoff, *Artificial Sweeteners: The Dangers of Sycophantic AI*, TECH. POL'Y PRESS 2 (May 14, 2025), https://www.techpolicy.press/artificial-sweeteners-the-dangers-of-sycophantic-ai/ [https://perma.cc/FJ3M-4NVX] (AI can be "too quick to validate and too hesitant to challenge users").

21. *See* Meyer et al., *supra* note 20.

22. *See* Miryam Naddaf, *AI chatbots are sycophants—researchers say it's harming science*, NATURE (Oct. 24, 2025), https://www.nature.com/articles/d41586-025-03390-0 [https://perma.cc/4GBS-U2Y8].

23. *See* Ian Sample, *Sycophantic AI chatbots tell users what they want to hear, study shows*, THE GUARDIAN (Oct. 24, 2025, at 11:00 EDT), https://www.theguardian.com/technology/2025/

a perverse drive toward agreeableness rather than optimal long-term educational value in higher education AI programs.[24]

These tendencies tend, to some degree, to cut across economic class and other social group lines. But they are likely, one might suspect, to disparately impact groups with historically less advantage and less meaningful familiarity with institutions of higher education. All higher education students desire some sort of balance between AI's apparent, if unreal, warmth, encouragement, validation, and acceptance on the one hand, and sheer AI accuracy, completeness, expertise, boundary-pushing, challenge, and critique on the other.[25]

But we might expect, in general, students from outsider groups to seek more of what is subjectively experienced as validation than students who feel themselves to be relatively more at home in the higher educational institution environment. And this and related disparities open the door to disparate adverse educational consequences of AI sycophancy, to the greater prejudice, generally, of those groups less familiar with higher educational institution environments.[26]

Consider now a further, non-obvious inequality dimension. This problem can disparately affect all disadvantaged groups, but for clarity, let us focus in particular on students who are in the process of learning English, their main language of instruction, as a second or subsequent language. Any reasonable prompt from such a student may well generate, instantaneously, an impressive looking, apparently polished document, perhaps suitable with minimal further student input, for submission as a creditable completion of a course assignment.[27] From the perspective of such a student, the document in question, perhaps with minor tinkering, seems to be, in itself, better than whatever the limited English speaker would be likely to generate after hours of personal effort.[28]

As a general matter, however, any such student reaction short-circuits a meaningful overall educational process, disproportionately so for disadvantaged student groups. As one study has indicated, "when students use ChatGPT to generate complete assignments, rather than for assistance such as suggesting revisions for their own critical review, they miss essential learning

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oct/24/sycophantic-ai-chatbots-tell-users-what-they-want-to-hear-study-shows [https://perma.cc/Y7TQ-SY4Z].

24. *See* Amy Lotz, *AI sycophancy: The downside of a digital yes-man*, AXIOS (July 7, 2024), www.axios.com/2025/07/07/ai-sycophancy-chatbots-mental-health [https://perma.cc/3FTA-ZW4K].

25. *See* Shaper Richter et al., *Chatbots in Tertiary Education: Exploring the Impact of Warm and Competent Avatars on Self-Directed Learning*, 56 BRIT. J. EDUC. TECH. 2102 (2025).

26. *See supra* note 20 and accompanying text.

27. *See* Nathalie A. Smuha, *The Broader Picture: Generative AI, Education, and the Future of Democracy*, ICONNECT (Oct. 17, 2025), https://www.iconnectblog.com/the-broader-picture-generative-ai-education-and-the-future-of-democracy/ [https://perma.cc/UZ5Z-2LE8].

28. *See id.*

opportunities."[29] Given their objectively impressive initial AI-generated product, disadvantaged students may tend to see relatively lesser value in any further succession of multiple, precisely formulated, carefully calibrated, and sensitive responses to each iteration of AI-generated product, including invitations to meaningfully refine, challenge, or critique the student's own assumptions and conclusions.[30]

Unfortunately, any group differences in this short-circuiting the optimal reflection, research, writing, revising, and editing process are likely to lead to disparities in actual educational outcomes, whether the educational institution measures them or not. At this point, we certainly cannot be sure about the nuances of any such effects, their precise lines of causation, their magnitudes, and their permanence.[31]

However, there is already some evidence that if AI is not optimally structured and used in education, it may promote serious student over-reliance effects,[32] weaker argumentative reasoning,[33] lower student engagement with content,[34] reduced critical thinking,[35] excessive off-loading of cognitive responsibilities,[36] reduced ability to remember even one's own work-product,[37] reduced creativity and innovation,[38] and even, perversely, an increase in student

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29. Elizabeth Bauer et al., *Looking Beyond the Hype: Understanding the Effects of AI on Learning*, 37 EDUC. PSYCH. REV., Apr. 2025, at 10. For discussion in the law school context, see Steve Lorteau & Douglas Sarro, *Artificial Intelligence in Legal Education: A Scoping Review* (U. Ottawa Fac. L. Sch. Working Paper, Paper No. 2025-21, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5762982.

30. For background, see Teresa Luther, Joachim Kimmerle & Ulrike Cress, *Teaming Up with an AI: Exploring Human-AI Collaboration in a Writing Scenario with ChatGPT*, 5 AI 1357, 1369 (2024); Lixiang Yan et al., *Beyond Efficiency: Empirical Insights on Generative AI's Impact on Cognition, Metacognition and Epistemic Agency in Learning*, 56 BRIT. J. EDUC. TECH. 1675, 1677 (2025).

31. For some possible complications, see Ruiqi Deng et al., *Does ChatGPT Enhance Student Learning? A Systematic Review & Meta-Analysis of Experimental Studies*, 227 COMPUTS. & EDUC., Apr. 2025.

32. *See* Favero, *supra* note 10; Anastasia Berg, Opinion, *Why Even Basic A.I. Use Is So Bad for Students*, N.Y. TIMES (Oct. 29, 2025), https://www.nytimes.com/2025/10/29/opinion/ai-students-thinking-school-reading.html [https://perma.cc/MJV9-2LV4].

33. *See, e.g.*, Lybi Ma, *AI Eases Our Mental Load at the Expense of Critical Thinking*, PSYCH. TODAY (Oct. 30, 2024), https://www.psychologytoday.com/us/blog/the-art-of-critical-thinking/202410/ai-eases-our-mental-load-at-the-expense-of-critical [https://perma.cc/8DF6-SLP6].

34. *See id.*

35. *See id.*; *see also* Michael Gerlich, *AI Tools in Society: Impacts on Cognitive Offloading and the Future of Critical Thinking*, 15 SOCIETIES, Sep. 2025, at 12; Roman Yavich, *Will the Use of AI Undermine Students Independent Thinking?*, 15 EDUC. SCIS., May 2025, at 13–14.

36. *See* Ma, *supra* note 33.

37. See especially the oft-cited Nataliya Kosmyna et al., *Your Brain on ChatGPT: Accumulation of Cognitive Debt When Using an AI Assistant For an Essay Writing Task* 19 (June 10, 2025), https://arxiv.org/pdf/2506.08872 [https://doi.org/10.48550/arXiv.2506.08872].

38. *See* Chunpeng Zhai, Santoso Wilbowo & Lily D. Li, *The Effects of Over-Reliance on AI Dialogue Systems on Students' Cognitive Abilities: A Systematic Review*, 11 SMART LEARNING ENV'TS, June 18, 2024, at 4.

anxiety and stress levels.[39]

Some students, certainly, are to some degree aware of one or more harms, as well as the benefits, of their experiences with educational AI.[40] But it is reasonable to expect that students less familiar with the possibilities of higher education programs to have a lesser sense of what their own optimal higher educational experience might concretely involve. And in practice, greater degrees of initial stress, anxiety, and time constraints may reinforce inequalities in the disparately adverse effects of AI in higher education.[41]

In the background, the likely increasing cost advantages of AI in higher education virtually ensure its widespread embrace.[42] Guiding disadvantaged students in particular through the processes of, e.g., genuinely optimal AI prompt formulation and adaptive revision[43] would require individual and small group human-led tutorials and counseling and would be costly. Inevitably, developing an AI-infused higher education program that respects meaningful equal opportunities as among student groups will require substantial investment by educational institutions as well as by the students.

In some measure, costs incurred to reduce disparities in opportunities in higher education reflect inequalities of educational opportunity already experienced by the affected students at earlier grade levels. Many students arrive at higher educational institutions without ever having had a meaningful opportunity to develop the storehouses of knowledge[44] and the corresponding educationally oriented memory[45] needed to take full advantage of advanced

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39. *See* Juan Garzon, Eddy Patino & Camilio Marulanda, *Systematic Review of Artificial Intelligence in Education: Trends, Benefits, and Challenges*, 9 MULTIMODAL TECH. & INTERACTION, Aug. 2025, at 14.

40. *See* Richard Adams, *Pupils fear AI is eroding their ability to study*, THE GUARDIAN (Oct. 15, 2025), https://www.theguardian.com/technology/2025/oct/15/pupils-fear-ai-eroding-study-ability-research [https://perma.cc/Y9VQ-43GY]; Helen Pearson, *Will AI Make Students Smarter, Or Stop Them From Thinking at All?*, 646 NATURE 788, 790 (2025).

41. For the possibilities of either greater educational equality or else the creation of an educational underclass consigned to educational screens without appropriate guidance, see Daniel Mollenkamp, *Will AI Shrink Disparities in Schools, or Widen Them?*, EDSURGE (Aug. 19, 2024), https://www.edsurge.com/news/2024-08-19-will-ai-shrink-disparities-in-schools-or-widen-them [https://perma.cc/K22K-FWFY].

42. *See* Walther, *supra* note 4.

43. See the authorities cited *supra* note 30.

44. *See, e.g.*, E.D. HIRSCH, JR., WHY KNOWLEDGE MATTERS 83 (2016) ("When looking *anything* up, there is simply no substitute for possessing a lot of knowledge relevant to the subject.").

45. *See* ANTHONY T. KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE 50 (2007). Professor Kronman argues that "[t]o have a well-stocked memory is to be well-equipped for the challenges of life . . . as we face our choices and evaluate the alternatives before us." In the AI educational context, see Brian Klaas, *The Death of the Student Essay—and the Future of Cognition*, at n.4 (June 19, 2025), www.forkingpaths.co/p/the-death-of-the-student-essay [https://perma.cc/Y8FM-3TNP] ("[T]hose people who already have advanced critical thinking skills can unleash even greater potential in collaboration with AI tools."); Barbara Oakley et al., *The Memory Paradox: Why Our Brains Need Knowledge in an Age of AI*, *in* THE ARTIFICIAL INTELLIGENCE REVOLUTION: CHALLENGES AND OPPORTUNITIES (Max

educational programs. Mitigating these inequalities is clearly not a matter solely of tutoring students in the optimal use of AI prompts. Broader and greater educational efforts are needed. Institutional failure in this regard ensures that the educational experience will be less valuable, overall, for less privileged than for more privileged student groups.

One element of the problem, we may infer, is that disadvantaged students may tend disproportionately to fail to appreciate the differences between their perhaps institutionally acceptable work-product and what the product might have been. But as Barbara Oakley and her colleagues have observed, the real inequalities remain. Thus:

> [L]earners still building foundational knowledge face a significant risk: mistaking AI fluency for their own. Without a robust internal framework for comparison, they may readily accept plausible-sounding output without realizing what's missing or incorrect. This bypasses the mental effort—retrieval, error detection, integration—that neuroscience shows is essential for forming lasting memory engrams and flexible schemas.[46]

Professor Oakley concludes that "the result is a false sense of understanding: the learner feels accomplished, but the underlying work hasn't been done."[47]

To be clear, this often unrecognized deprivation occurs whether the student's submitted coursework contains any missing or incorrect representations or is in itself flawless. The same overestimation by the student of what has been accomplished obtains in either case. To the extent that any education at all relies in any respect on any such systematic misimpressions on the part of its students, they are thereby complicitous, at least, in an important contemporary form of what has been called "false consciousness."[48]

Realistically, it is understandable that an educational institution, like most other institutions, might not wish to dispel any unjustified favorable impressions as to its own real accomplishments. But in failing to clarify what its own disadvantaged students have, and have not, actually accomplished, the higher education institution betrays its own purported purposes and the educational interests of its disadvantaged students in particular.

Let us then assume that one or more groups of students have brought a plausible disparate impact claim against their institution of higher education.

Rangeley & Nicholas Fairfax eds., forthcoming 2026); Matthias Stadler, Maria Bannert & Michael Sailer, *Cognitive Ease at a Cost: LLMs Reduce Mental Effort But Compromise Depth in Student Scientific Inquiry*, 160 COMPUTS. HUM. BEHAV., July 30, 2024, at 2 ("Prior knowledge in the domain plays a crucial role; students with a deeper understanding of a topic can navigate information more strategically; . . . complex searches require a high degree of cognitive flexibility, metacognitive skills, and a robust working memory capacity.").

46. Oakley et al., *supra* note 45, at 39.

47. *Id.*

48. For useful discussions, see, e.g., Steven Lukes, *In Defense of "False Consciousness"*, 2011 U. CHI. LEGAL F. 19; W.G. Runciman, *False Consciousness*, 44 PHIL. 303 (1969); David Miller, *Ideology and the Problem of False Consciousness*, 20 POL. STUD. 432 (1972).

We cannot here trace out all of the possible theories, remedies, and defenses to such claims.[49] The matrix of possibilities is expansive and partly indeterminate.[50] But several points can be made about litigating the inequalities associated with AI in higher education.

First, the law should recognize that in other higher education contexts, the distinction between a disparate impact claim and other, less controversial sorts of discrimination claims can be hazy.[51] Second, all parties should recognize that flexible, sensitive, well-crafted injunctive relief is, at the level of the public interest, more valuable than specific awards of money damages to particular student plaintiffs in our kinds of cases. This recognition accords nicely with the more general legal sentiment that injunctive relief should often be the preferred remedy in disparate impact cases.[52] And third, universities should recognize that particularly under the foreseeable economic market circumstances, a school's adversarialism, or even arms-length distancing, with respect to their less advantaged students is neither ethically appropriate nor institutionally prudent. Student success after graduation, and the flourishing, if not the survival, of the educational institution itself are increasingly inseparable. As a general matter, the university and any student groups disproportionately adversely affected by AI should jointly and cooperatively investigate, responsibly experiment with, and effectively reform the AI programs and practices at issue.

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49. For background, see the authorities cited *supra* note 19.

50. For a much broader sense of some of the indeterminacies, see, e.g., Alexandra Brodsky, *Discrimination on the Basis of Consensual Sex*, 99 N.Y.U. L. REV. 1487, 1524–25 (2024); Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699 (2023); Christopher S. Havasy, *Social Justice Conflicts in Public Law*, 113 CALIF. L. REV. 1315, 1380–81 (2025); Elaine McCabe et al., *Rights Under Title IX*, 26 GEO. J. GENDER & L. 967, 994 (2025); Tammi Walker, *No Department, No Enforcement: Title IX After the Collapse of the Department of Education*, 59 U.C. DAVIS L. REV. ONLINE 69, 77 (2025).

51. One might, for example, reconceive of a claimed intentional denial of constitutional equal protection, as in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023), as involving an unintended disparate impact, on some groups, of university policies that are intended to promote overall fairness, equality, and other worthy university goals.

52. *See, e.g.*, Young v. UPS, 575 U.S. 206, 241, 247–49 (2015) (Scalia, J., dissenting).

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NOTES

WHEN "NO" IS NOT ENOUGH: RE-EXAMINING THE FORCE LANGUAGE OF THE INDIANA SEXUAL BATTERY STATUTE IN LIGHT OF THE AMENDED RAPE STATUTE

SIERRA FRENCH*

INTRODUCTION

In April of 2009, N.A. and her friends spent time with Perry, the father of N.A.'s "'on and off' boyfriend," in a parking lot.[1] Perry, a "father figure" to N.A., invited her and her friends back to his home.[2] Once the girls arrived at Perry's home, he provided alcohol and told N.A. and her friends to "drink up."[3] As they were drinking, Perry began touching another girl's leg and reminded the group that "age was just a number."[4] Later in the evening, N.A. went to sleep.[5] Subsequently, N.A. awoke from her sleep to Perry placing "his fingers inside her vagina."[6] Frozen, N.A. kept still, unsure how to react and fearful of what Perry would do next.[7] Perry then "unzipped his pants and rubbed his penis on N.A.'s bottom."[8] According to N.A., she was concerned that Perry may become angry or physical.[9] Crying, N.A. left the bedroom, telling her friends that they needed to leave.[10] Perry later told them to leave, specifically instructing them to "get the f**k out of [his] house."[11]

Perry was subsequently convicted of sexual battery, a Class D felony offense.[12] The Indiana Court of Appeals, however, held that the facts did not indicate that N.A. was "compelled to submit to the touching by force or the

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1. Perry v. State, 962 N.E.2d 154, 156 (Ind. Ct. App. 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 157.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

imminent threat of force."[13] The appellate court determined that Perry's actions constituted battery, a lesser misdemeanor offense, but not sexual battery.[14]

Under Indiana law, circumstances in which an adult man penetrates a teen with his fingers after supplying her with alcohol, like in *Perry*, evade the scope of the force subsection of the sexual battery statute.[15] This Note focuses on the force subsection of the Indiana sexual battery statute.[16] However, the entirety of section (a) reads as follows:

> (a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person:
>
> (1) touches another person when that person is:
>
> (A) *compelled to submit to the touching by force or the imminent threat of force*; or
>
> (B) so mentally disabled or deficient that consent to the touching cannot be given; or
>
> (2) touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring;
>
> commits sexual battery, a Level 6 felony.[17]

The current statute should be amended to include a subsection that considers circumstances beyond force, such as grooming, abuse of power, and "First Encounter" sexual battery.[18] Part I of this Note discusses the background of the force requirement. Part II discusses potential problems that the force subsection does not address. Part III presents support for the change and, finally, Part IV presents language that the legislature should adopt.

I. BACKGROUND: WHAT IS FORCE?

In order to understand the problems with the current force subsection, the origins of force must be considered. This section will discuss the historical definition of force and the current force test as defined by rape case law. Additionally, this section will combine the rape-based definition with rules prescribed by the court in sexual battery cases.

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13. *Id*. at 158 (quoting IND. CODE § 35-42-4-8(a)).

14. *Id.* at 159.

15. *See id.* at 158–59; IND. CODE § 35-42-4-8(a)(1)(A) (2025). While section 35-42-4-8(a) contains multiple subsections, the focus of this Note is on subsection (a)(1)(A), which requires the victim to be "compelled to submit to the touching by force or the imminent threat of force[.]"

16. § 35-42-4-8(a)(1)(A).

17. § 35-42-4-8(a) (emphasis added).

18. *See infra* Part II; *see also* Lisa Avalos, *Seeking Consent and the Law of Sexual Assault*, U. ILL. L. REV. 731, 745 (2023) (coining the term "First Encounter").

A. Historical Constructions of Force

The force requirement has been rooted in American jurisprudence since the 1800s with its presence in rape statutes.[19] Historically, lack of consent was not sufficient to prove force in rape prosecutions.[20] Rather, courts have examined other factors such as the victim's level of resistance in determining if force was used in rape prosecutions.[21] For example, as seen in the United States Supreme Court decision *Mills v. United States*, where a stranger ordered a man out of his house to rape his wife,[22] nonconsent is not determinative of the presence of force in rape prosecutions:

> The mere nonconsent of a female to intercourse, where she is in possession of her natural, mental, and physical powers, if not overcome by numbers, or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man who has connection with her under such circumstances.[23]

Indiana courts defined force similarly in their own case law dating back as early as 1880.[24] For example, in *Eyler v. State*, the defendant, as described by the victim, "followed her up stairs, took hold of her, threw her down on the bed . . . and had carnal connection with her, without her consent and against her will[.]"[25] The Indiana Supreme Court did not find that the defendant's sexual intercourse with the victim "was accomplished by force," reasoning that the victim's failures to call for help or complain of force within a reasonable time, coupled with her later sexual contact with the perpetrator, harmed her credibility.[26]

Similarly, in *White v. State*, the Indiana Supreme Court held that a stepfather "employed no force" when, after the victim refused to go into a room alone with him, he removed her from her chair, shoved her into the bedroom, and had sexual intercourse with her.[27] In its holding, the court highlighted the manner of the victim's opposition: "The opposition of the [victim] to the embraces of the appellant was of such a mild and doubtful character as only to encourage him in the belief that appeals, not to violence, but to her animal propensities, would

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19. *See, e.g.*, Mills v. United States, 164 U.S. 644, 648 (1897).

20. *See id.*; White v. State, 36 N.E. 274, 275 (Ind. 1894); Eyler v. State, 71 Ind. 49, 50–51 (1880).

21. *See Mills*, 164 U.S. at 648; *White*, 36 N.E. at 275; *Eyler*, 71 Ind. at 50–51.

22. 164 U.S. at 645–46.

23. *Id.* at 648.

24. *See White*, 36 N.E. at 275; *Eyler*, 71 Ind. at 49–51.

25. 71 Ind. at 50.

26. *Id.* at 49, 51.

27. 36 N.E. at 274–75.

gain her consent."[28] Although the test for determining force was refined in more recent Indiana case law,[29] the origins of the requirement indicate that objective factors, such as resistance, were relied upon historically to determine the presence of force.[30]

B. The Force Test

"Force" has yet to be defined by the legislature. However, it has been defined in case law.[31] An important case defining force is *Jenkins v. State*.[32] In *Jenkins*, an elderly woman was raped by the defendant after he broke into her home.[33] The court found that "[f]orce need not be physical or violent but may be implied from the circumstances, nor is physical resistance required if the victim is in fear of bodily harm."[34] In practice, this holding rejected the narrowing of the force element in rape to force that is obtained through "physical or violent" means.[35] Further, in *Lewis*, the defendant exposed a knife to the victim when she rejected his advances but never threatened her verbally.[36] The court highlighted that "[f]orce or threat of force may be shown even without evidence of the attackers [sic] oral statement of intent or willingness to use a weapon and cause injury, if from the circumstances it is reasonable to infer the attacker was willing to do so."[37] Essentially, the court in *Lewis* dispensed with any interpretation of the force element in the rape statute that required an express statement regarding force.[38] Lastly, the victim's perspective standard was set forth in *Tobias v. State*.[39] Here, the court analyzed the language of the rape statute.[40] It found that "the presence or absence of forceful compulsion" is to be interpreted from "the victim's perspective, not the assailant's."[41] The court

28. *Id*. at 275.

29. *See* Jenkins v. State, 372 N.E.2d 166, 167 (Ind. 1978) ("Force need not be physical or violent but may be implied from the circumstances, nor is physical resistance required if the victim is in fear of bodily harm.") (first citing Beard v. State, 323 N.E.2d 216, 218 (Ind. 1975); and then citing Dewey v. State, 345 N.E.2d 842, 845 (Ind. 1976)); Lewis v. State, 440 N.E.2d 1125, 1127 (Ind. 1982) ("Force or threat of force may be shown even without evidence of the attackers [sic] oral statement of intent or willingness to use a weapon and cause injury, if from the circumstances it is reasonable to infer the attacker was willing to do so."); Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996) ("[The presence of force] is a subjective test that looks to the victim's perception of the circumstances surrounding the incident in question.").

30. *See* Mills v. United States, 164 U.S. 644, 648 (1897); *White*, 36 N.E. at 275; *Eyler*, 71 Ind. at 50–51.

31. *See Jenkins*, 372 N.E.2d at 167; *Lewis*, 440 N.E.2d at 1127; *Tobias*, 666 N.E.2d at 72.

32. 372 N.E.2d 166.

33. *Id.* at 167.

34. *Id.* (first citing *Beard*, 323 N.E.2d at 218; and then citing *Dewey*, 345 N.E.2d at 845).

35. *Id.*; *see* IND. CODE § 35-42-4-1(a)(1) (2025).

36. *Lewis*, 440 N.E.2d at 1126–27.

37. *Id.* at 1127.

38. *See id.*; § 35-42-4-1(a)(1).

39. 666 N.E.2d 68, 72 (Ind. 1996).

40. *Id.* at 71–72.

41. *Id.* at 72.

described the force rule as "a subjective test that looks to the victim's perception of the circumstances surrounding the incident in question."[42]

The above-mentioned test was created through Indiana rape case law.[43] However, an additional element to this test—when applied to sexual battery—was established in *Chatham v. State*.[44] In *Chatham*, a sexual battery case, the court held that "[t]he fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or the imminent threat of force."[45] Consequently, the court reversed the defendant's sexual battery conviction after he groped between the victim's legs from behind her, finding that the force element was not met.[46]

Although many of the above-mentioned cases refer to instances of rape, the construction of the force element in rape is vital to the understanding of the force element in sexual battery.[47] First, the force language in Indiana Code section 35-42-4-1 (a)(1) is almost identical to the force language in Indiana Code section 35-42-4-8 (a)(1)(A).[48] Thus, the force element is very similar and arguably the same in the rape and sexual battery statute.[49] Second, in 1991, the Indiana Supreme Court discussed how it "look[s] to interpretations of the rape statute for guidance" when it makes force determinations in sexual battery cases.[50]

It must be noted, however, that current case law does not dispositively address the role of resistance in force determinations.[51] First, in *Jenkins*, the court stated that "physical resistance [is not] required *if* the victim is in fear of bodily harm."[52] Further, the court notes that "[t]he degree of resistance required is dependent upon the surrounding circumstances and it is for the trier of fact to determine if the victim acted reasonably and in good faith in resisting the rape."[53] However, the *Lewis* court emphasized that "resistance is not an element of rape."[54] Interestingly, the *Tobias* court does not mention the role of resistance in the determination of the force requirement, noting only the victim's "verbal

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42. *Id.*

43. *See id.*; Jenkins v. State, 372 N.E.2d 166, 167 (Ind. 1978); *Lewis*, 440 N.E.2d at 1127.

44. 845 N.E.2d 203, 207 (Ind. Ct. App. 2006).

45. *Id.*

46. *Id.* at 205, 208.

47. *See Jenkins*, 372 N.E.2d at 167; *Lewis*, 440 N.E.2d at 1127; *Tobias*, 666 N.E.2d at 72; IND. CODE § 35-42-4-8(a)(1)(A) (2025).

48. *Compare* IND. CODE § 35-42-4-1(a)(1) (2025) (requiring that "the other person is compelled by force or imminent threat of force"), *with* § 35-42-4-8 (a)(1)(A) (the other person is "compelled to submit to the touching by force or the imminent threat of force").

49. §§ 35-42-4-1(a)(1), 35-42-4-8(a)(1)(A).

50. Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991).

51. *See Jenkins*, 372 N.E.2d at 167; *Lewis*, 440 N.E.2d at 1127; *Tobias*, 666 N.E.2d at 72; *Chatham*, 845 N.E.2d at 205, 208.

52. *Jenkins*, 372 N.E.2d at 167 (emphasis added) (first citing Beard v. State, 323 N.E.2d 216, 218 (Ind. 1975); and then citing Dewey v. State, 345 N.E.2d 842, 845 (Ind. 1976)).

53. *Id.* (first citing Ritter v. State, 67 N.E.2d 530, 530 (Ind. 1946); and then citing Shephard v. State, 67 N.E.2d 534, 535 (Ind. 1946)).

54. *Lewis*, 440 N.E.2d at 1127 (citing Stowers v. State, 363 N.E.2d 978, 981 (Ind. 1977)).

resistance" in this particular case.[55] Lastly, the *Chatham* court does not reference resistance, but does note that the victim "did not have the opportunity to grant or deny consent to the touching."[56] In part due to the unclear role of resistance, cases of nonconsensual, but not forceful, sexual conduct often fall through the cracks under the force subsection in sexual battery statute.[57]

C. Force in the Sexual Battery Case Law

Force is often found in sexual battery cases when the defendant touches the victim in a way that requires them to submit to the sexual contact.[58] For example, in *Hutton v. State*, Hutton entered the women's restroom, where the victim was located.[59] Hutton approached her from behind, grabbed her, and yanked her body into his.[60] Then, Hutton moved his hands to her pubic region and pressed her against the sink, preventing her from escaping.[61] The court distinguished this case, noting that the "key distinction" between this case and others where force was not found was that Hutton restrained his victim to the sink, forcibly subjecting her to his unwelcomed touching.[62] Based in part on this distinction, the court upheld Hutton's conviction for sexual battery.[63]

A similar result was reached in *J.J.M. v. State.*[64] Here, high school student J.J.M. crept up behind the seated victim, threw his leg over her shoulder, and started thrusting.[65] After the victim rejected his advances, J.J.M. pulled the victim's head towards his crotch and told her to "give him head."[66] The court upheld J.J.M.'s delinquency adjudication, finding the force requirement had been satisfied.[67] The court noted, however, that "evidence that a victim did not voluntarily consent to a touching does not, in itself, support the conclusion that the defendant compelled the victim to submit to the touching by force or threat of force."[68] The holdings in *Hutton* and *J.J.M.* demonstrate that something more than nonconsent is required to satisfy the force element of sexual battery.[69]

As previously discussed, Indiana courts have upheld the rule in sexual battery cases that the victim's fear of the defendant that occurs during or after the commission of unwanted touching does not indicate force, stressing that

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55. *Tobias*, 666 N.E.2d at 72.
56. *Chatham*, 845 N.E.2d at 208.
57. *See, e.g.*, *id.* at 205, 208; IND. CODE § 35-42-4-8(a)(1)(A) (2025).
58. *See, e.g.*, Hutton v. State, 190 N.E.3d 413, 416 (Ind. Ct. App. 2022).
59. *Id.* at 415.
60. *Id.*
61. *Id.*
62. *Id.* at 416.
63. *Id.* at 417.
64. 779 N.E.2d 602, 607 (Ind. Ct. App. 2002).
65. *Id.* at 604.
66. *Id.*
67. *Id.* at 606.
68. *Id.* at 605 (citing Bailey v. State, 764 N.E.2d 728, 730 (Ind. Ct. App. 2002)).
69. *See id.* at 605–07; Hutton v. State, 190 N.E.3d 413, 416–17 (Ind. Ct. App. 2002).

"[t]he fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or the imminent threat of force."[70] The nature of sexual battery is unique when compared to rape because the victim's fear of the defendant often precedes or even co-exists with the commission of the action.[71] Although "fear is not an element of sexual battery" and it is not necessary to prove "force or the imminent threat of force,"[72] the court does note that fear "may be evidence of force or threat of force."[73] For example, in *Perry*, after Perry digitally penetrated and touched N.A. with his penis, she became "[f]earful that Perry might 'get upset and maybe get like physical or something[.]'"[74] However, there is no indication in the opinion that N.A. had any reason to fear Perry before this incident.[75] Thus, the fear felt by N.A. was not evidence of force because it occurred after the touching occurred, rather than before.[76] In practice, the rule regarding fear and force presents a set of problems that are not addressed by the current force language.[77]

II. THE PROBLEM

The current force subsection is too narrow to account for the nuances that are present in cases of sexual battery.[78] Specifically, it fails to account for grooming, power imbalances, and "First Encounter" sexual battery.[79]

A. Grooming

An issue that cannot be accounted for under the force subsection is grooming.[80] Grooming, as described by Wayne Petherick and Grant Sinnamon, is "an act of preparation."[81] Grooming may occur in a variety of seemingly positive scenarios, but it can also be utilized for more sinister reasons:

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70. Chatham v. State, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006). *See also* E.S. v. State, 198 N.E.3d 701, 703–04 (Ind. Ct. App. 2022); Perry v. State, 962 N.E.2d 154, 158 (Ind. Ct. App. 2012).

71. *See, e.g.*, *Perry*, 962 N.E.2d at 157; *Chatham*, 845 N.E.2d at 208.

72. McCarter v. State, 961 N.E.2d 43, 46 (Ind. Ct. App. 2012) (citing IND. CODE § 35-42-4-8(a)(1)).

73. *Id.*

74. *Perry*, 962 N.E.2d at 157.

75. *Perry*, 962 N.E.2d 154.

76. *See id.* at 158 ("It is also noteworthy that in a sexual battery prosecution, the fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or imminent threat of force.")

77. § 35-42-4-8(a)(1)(A).

78. *See id.*

79. *See infra* Part II; *see also* Avalos, *supra* note 18, at 745 (coining the term "First Encounter").

80. § 35-42-4-8(a)(1)(A).

81. WAYNE PETHERICK & GRANT SINNAMON, THE PSYCHOLOGY OF CRIMINAL AND ANTISOCIAL BEHAVIOR: VICTIM AND OFFENDER PERSPECTIVES 461 (2017) (ebook).

"[g]rooming is often used as a means to prepare an individual or to place an individual into a position in which they are unwittingly subjected to abusive and/or exploitive behavior."[82] This sort of behavior is often exhibited by sexual abusers.[83] Although there is often a focus on child sexual grooming, adult sexual grooming is common and mirrors the process of child grooming.[84] As proposed in Sinnamon's Seven-Stage Model of Adult Sexual Grooming, there are seven stages to the grooming process.[85] These stages include:

(1) Select: selecting the victim,
(2) Plan: gathering information,
(3) Trust: gaining personal connection,
(4) Credibility: meeting the needs and establishing credentials,
(5) Prime: priming the target,
(6) Instigate: creating the victim, and
(7) Maintain: controlling the victim.[86]

With "adult grooming," victims may not realize that they are being manipulated due to the nature of the grooming process, as the abuse does not occur at the onset of the relationship.[87] Additionally, adult groomers may take advantage of an age difference between themselves and the victim "[i]f a victim is much younger than the predator and the victim identifies this difference as giving the predator some right of control, bestowed wisdom, or inherit trust, then the predator will make use of this vulnerability and exploit it to achieve their own objectives."[88] Lastly, when viewing Sinnamon's seven-step grooming process,[89] a "fracture" in the relationship, if one is going to occur, is most likely to occur during priming or instigation, where the interactions become increasingly sexual.[90]

When applying this framework to instances of sexual battery,[91] a concerning set of problems emerges. First, the grooming process can last over a span of time, sometimes years.[92] Due to the duration of a grooming relationship, a victim may not feel as though he or she has reason to fear the defendant.[93] This

82. *Id.*
83. *Id.*
84. *Id.* at 462.
85. *Id.* at 474.
86. *Id.*
87. Elliot Davies, *Signs of Grooming in Adults-What to Watch Out For*, ANN CRAFT TR. (May 16, 2019), https://www.anncrafttrust.org/signs-of-grooming-in-adults-what-to-watch-out-for/ [https://perma.cc/JTH6-Q8LA].
88. PETHERICK & SINNAMON, *supra* note 81, at 469–70; *see, e.g.*, Perry v. State, 962 N.E.2d 154, 156 (Ind. Ct. App. 2012); Scott-Gordon v. State, 579 N.E.2d 602, 603 (Ind. 1991).
89. PETHERICK & SINNAMON, *supra* note 81, at 474.
90. *Id.* at 483.
91. *See* IND. CODE § 35-42-4-8(a)(1)(A) (2025).
92. PETHERICK & SINNAMON, *supra* note 81, at 463.
93. *Id.* at 477–78.

may be in part due to their relationship prior to the touching.[94] Recall the facts in *Perry*, and how the victim viewed Perry as a "father figure," as he was the "father of her 'on and off' boyfriend,"[95] which indicates N.A. was familiar with the defendant for an extended period of time. In scenarios where the victim is groomed by the defendant, they may not initially fear the defendant.[96]

Next, as demonstrated by sexual battery case law, there is often an age difference between the predator and the victim, and this may create an element of an "inherent trust" between themselves and the victim.[97] This phenomenon is present in *Smith v. State*, where Smith was a teacher and a student advisor for the Future Farmers of America.[98] J.H., the victim, testified that, when he was riding in a car with Smith, Smith unbuttoned J.H.'s pants from the front seat and began fondling him.[99] J.H. did not tell Smith to stop touching him because he "didn't know what to do."[100] Notably, J.H. "had no reason" to fear Smith before he was assaulted.[101] The court found insufficient proof that Smith subjected J.H. to "touching by force or the imminent threat of force."[102] Similar to the circumstances in *Perry*,[103] J.H. held enough trust in Smith at the very least not to fear him prior to this incident.[104] Under the current sexual battery statute, these circumstances fail to qualify as sexual battery and thus fail to protect victims from perpetrators.[105]

Finally, fractures in the relationship tend to occur when "the sexualization of the interaction is intensified."[106] Thus, when the defendant touches the victim "to arouse or satisfy the person's own sexual desires or the sexual desires of another person," the fracture may occur after, but not before, the touching occurs.[107] Once again, with *Perry* as the lead example, trust may be present in a relationship until the fracture or the touching occurs.[108] This allows the first incident of touching to occur without the necessity of force. This principle applies with equal weight in *Smith*, where J.H. had no reason to fear Smith prior to the incident.[109] Consequently, the relationship between the two did not fracture prior to the touching.[110] Even if the victim would respond to the

94. *See id.* at 476–77.
95. Perry v. State, 962 N.E.2d 154, 156 (Ind. Ct. App. 2012).
96. PETHERICK & SINNAMON, *supra* note 81, at 477–78.
97. *Id.* at 469–70. *See, e.g.*, *Perry*, 962 N.E.2d at 156; Smith v. State, 678 N.E.2d 1152, 1154 (Ind. Ct. App. 1997); Scott-Gordon v. State, 579 N.E.2d 602, 603 (Ind. 1991).
98. *Smith*, 678 N.E.2d at 1154.
99. *Id.* at 1155.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Perry*, 962 N.E.2d 154.
104. *Smith*, 678 N.E.2d at 1155.
105. IND. CODE § 35-42-4-8(a)(1)(A) (2025).
106. PETHERICK & SINNAMON, *supra* note 81, at 483.
107. *See id.*; § 35-42-4-8(a)(1)(A).
108. *Perry*, 962 N.E.2d at 156–57; *see* PETHERICK & SINNAMON, *supra* note 81, at 483.
109. *Smith*, 678 N.E.2d at 1155.
110. *Id.*

touching in a subsequent incident, the language of the statute essentially gives the defendant a free pass in the "First Encounter" unless the victim resists in the first incident.[111]

Circumstances where previous sexual touching has not occurred, called "First Encounters," are difficult to fit under the sexual battery statute.[112] The phrase "First Encounter" is used to "refer to any sexual contact that occurs for the first time between the relevant parties."[113] Further, Avalos clarifies that "the use of this terminology assumes that a form of lesser sexual or intimate contact does not constitute consent to a more serious form."[114] During a sexual battery, a victim may react in a way that does not require the use or threat of force in response to a "First Encounter" like touching.[115] One of these circumstances, described by Avalos as "Frozen in Fear Problem," is when "the victim is affected by the surprise or shock of the assault, where she finds herself frozen in fear and unable to respond, and where she is afraid of what the perpetrator will do to her if she says 'no.'"[116] Although Avalos uses this term in the context of the "presumption of consent," it can be applied to force in sexual battery as well.[117]

This problem can be identified in N.A.'s response to Perry's actions, as she was afraid of how Perry might react if she rejected his advances.[118] Thus, she laid still and "pretended she had just woken up."[119] Logically speaking, a defendant does not need to utilize "force or the imminent threat of force" if the victim is not resisting and freezes up in response to the touching.[120] In the context of the force requirement, it can be inferred that a defendant will not need to utilize "force or the imminent threat of force" with a non-resisting victim.[121] Thus, the current language of the Indiana sexual battery statute does not protect victims who do not react in a way that requires the defendant to utilize force.[122] All of these factors, taken individually or together, mean that many instances of sexual touching that follow a grooming relationship do not involve fear that pre-exists the touching, nor do they require the presence of force to achieve the goals of the defendant.[123] Consequently, instances that should be considered to be

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111. § 35-42-4-8(a)(1)(A); *see* Avalos, *supra* note 18, at 745 (coining the term "First Encounter").

112. Avalos, *supra* note 18, at 745; *see* § 35-42-4-8(a)(1)(A).

113. Avalos, *supra* note 18, at 745.

114. *Id.*

115. *Id.*; § 35-42-4-8(a)(1)(A).

116. Avalos, *supra* note 18, at 748–49.

117. *Id.* at 747; *see* § 35-42-4-8(a)(1)(A).

118. Perry v. State, 962 N.E.2d 154, 157 (Ind. Ct. App. 2012).

119. *Id.*

120. § 35-42-4-8(a)(1)(A); Avalos, *supra* note 18, at 748–49.

121. § 35-42-4-8(a)(1)(A).

122. *Id.*

123. *See, e.g.*, *Perry*, 962 N.E.2d at 157; Smith v. State, 678 N.E.2d 1152, 1155 (Ind. Ct. App. 1997); Scott-Gordon v. State, 579 N.E.2d 602, 603 (Ind. 1991).

sexual battery are not under the current statutory requirements.[124]

B. Abuse of Power

There are scenarios where a victim may feel as though they must comply with the defendant's wishes due to a power imbalance. For example, a victim may feel as though an expert, such as a lawyer, doctor, or police officer, holds a position of authority over them and thus submits to the touching without the need for force or an imminent threat of force.[125] In *McCarter v. State*, the victim, sixteen-year-old D.H., was at Walmart with her friend, A., who was apprehended by the defendant, a loss prevention officer.[126] The defendant falsely claimed to be a police officer and, despite refusal from the victim, attempted to kiss her and touched her buttocks.[127] The court noted that while the defendant may have used some force, "the evidence does not show that D.H. was *compelled to submit to it* by force or threat of force."[128] Here, the defendant, although he was not a police officer, purported to be one to D.H.[129] Additionally, he told her twice that "he could keep her out of trouble," potentially creating a perceived sense of power over the victim.[130] However, this is not explicit in the opinion. Even though McCarter was not a real police officer, sobering statistics exist regarding officers and sexual misconduct.[131]

Although officers hold a position of authority over civilians, these are not the only instances in which a power imbalance may be at play in a sexual battery context.[132] For example, in *Scott-Gordon v. State*, the defendant, the employer of the victim, J.H., groped J.H.'s buttocks from behind, giving him a "free feel."[133] J.H. responded by punching the defendant.[134] Subsequently, the defendant threatened to fire J.H. "if he ever did that again."[135] The court noted that the force element was not satisfied because, although J.H. did not consent, it was not clear the defendant "compelled J.H. to submit to the touching by force or imminent threat of force."[136]

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124. § 35-42-4-8(a)(1)(A).

125. *See, e.g.*, McCarter v. State, 961 N.E.2d 43, 45 (Ind. Ct. App. 2012) (after victim rejected his advances, McCarter "yelled that D.H. would be getting a letter in the mail," suggesting that her compliance with the touching would determine if she were to get in legal trouble).

126. *Id.* at 44.

127. *Id.* at 44–45.

128. *Id.* at 47.

129. *Id.* at 44.

130. *Id.*

131. *See* Phillip Matthew Stinson, Robert W. Taylor & John Liederbach, *The Situational Context of Police Violence: Date and Policy Implications*, 12 FAM. & INTIMATE PARTNER Q. 59, 62–63 (2020).

132. *See, e.g.*, Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

In scenarios such as this one, a defendant like Scott-Gordon may utilize his position as an employer to coerce a victim to submit to touching.[137] Although in *Scott-Gordon*, J.H. was touched from behind and thus not necessarily coerced,[138] the threat of firing, like the one made by Scott-Gordon, may result in other victims feeling coerced in similar circumstances.[139] This may eliminate the need for the utilization of "force or the imminent threat of force."[140] Due to "this perceived power, victims will often be hesitant to report harassment due to fear of retaliation or the belief that nothing will be done to discipline a more senior employee."[141] According to the Equal Employment Opportunity Commission, in 2021, 40.8% of sexual harassment charges were filed concurrently with retaliation charges.[142] As seen by Scott-Gordon's threats, an employer may threaten a victim's employment in these instances.[143] Further, "[i]n 72% of sexual harassment cases, the harasser holds a more senior position within the company."[144] Given these statistics, victims may submit to unwanted sexual touching to avoid retaliation.[145] The current language of the sexual battery statute does not adequately address these scenarios and prevents the prosecution of those who abuse their positions of authority and commit actions that, under Indiana law, should be classified as sexual battery.[146]

C. Practical Concerns

There are also practical considerations that are presented with the current language of the sexual battery statute.[147] These concerns raise the question: how can someone be "compelled to submit to the touching by force or the imminent threat of force" if they do not anticipate being touched in the first place?[148] As discussed previously in *Scott-Gordon*, the defendant approached the victim

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137. *See id.* This Note does not discuss situations of domestic violence and coercive control, but these dynamics may be present as well. *See* Becca Schroeder, *Coercive Control: Abuse Hidden in Plain Sight*, DOM. VIOLENCE NETWORK (Feb. 3, 2023), https://dvnconnect.org/coercive-control-dvn/ [https://perma.cc/5PS4-9M3S] (discussing coercive control in domestic violence dynamics).

138. *Scott-Gordon*, 579 N.E.2d at 604.

139. *See Statistics About Sexual Harassment You Should Know*, MKFM L. (Mar. 20, 2024), https://www.mkfmlaw.com/blog/statistics-about-sexual-harassment-you-should-know#:~:text=About%2055%25%20of%20sexual%20harassment,reporting%20incidents%20of%20sexual%20harassment [https://perma.cc/P2SS-9LW8]; *Sexual Harassment in Our Nation's Workplaces*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, fig. 5 (Apr. 2022), https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces [https://perma.cc/J3QJ-NWXW].

140. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

141. MKFM L., *supra* note 139.

142. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 139.

143. *Scott-Gordon*, 579 N.E.2d at 604.

144. MKFM L., *supra* note 139.

145. *See id.*; U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 139.

146. *See* IND. CODE § 35-42-4-8(a)(1)(A) (2025).

147. *See id.*

148. *Id.*

from behind and touched his backside.[149] The victim, clearly not anticipating the touching, responded by punching the defendant in the eye.[150] This is not the only instance where it is clear that a victim was not anticipating being touched by a defendant. In *Chatham*, the defendant came up behind the victim and put his hand between her legs.[151] The facts do not indicate that the victim anticipated the defendant's touch.[152] This was recognized by the court, highlighting that the victim "did not have the opportunity to grant or deny consent to the touching."[153] Notwithstanding this finding, the court held that the victim's fear following the touching was not enough to satisfy the force element.[154]

These cases present a concerning phenomenon.[155] Unfortunately, under these interpretations, defendants may essentially be given a pass to touch people "with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person," so long as the victim does not see them coming.[156] Although this touching may constitute battery under Indiana law, a conviction under this statute is not enough to classify a person as a sex offender.[157] Even with the current sanctions imposed in sex crimes, a staggering 50.3% of those convicted of sex offenses and released in 2018 recidivated in Marion County by 2021.[158] Sex offenders have the highest rate of recidivism across all categories and are about 10% more likely to reoffend than the average offender.[159] It is difficult to imagine the number of offenders in the state of Indiana who continue to commit acts that *should* be classified as sexual battery without the penalties sex offenders are subject to.

III. SUPPORT FOR THE CHANGE

Indiana has recognized the deficiency of force language in instances of rape, adding subsection (4) to the Indiana rape statute.[160] Additionally, the statutes of other states serve as a guidepost for how Indiana should amend its sexual battery

149. Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991).

150. *Id.*

151. Chatham v. State, 845 N.E.2d 203, 205 (Ind. Ct. App. 2006).

152. *Id.*

153. *Id.* at 208.

154. *Id.*

155. *See id.* at 205–08; *Scott-Gordon*, 579 N.E.2d at 604 (in both cases, the victim's surprise as to the touching allowed the defendant to escape convictions related to unwanted sexual contact).

156. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

157. IND. CODE §§ 35-42-2-1(c)(1), 11-8-8-4.5 (2025); *see* IND. DEP'T OF CORR., ADULT RECIDIVISM BY COUNTY OF COMMIT 147 (2021), https://www.in.gov/idoc/files/policy-and-procedure/statistical-data/recidivism-reports/adult-county-rates/2021_Adult_Recidivism_Countyof Commit-1.PDF [https://perma.cc/D7HT-PE3B] (statistics regarding recidivism in Marion County, Indiana, of those who were convicted of a sex offense).

158. IND. DEP'T OF CORR., *supra* note 157, at 147.

159. *See id.* (Sex offenders recidivated at a 50.3% rate while the average across all offenders was 45.7%.).

160. IND. CODE § 35-42-4-1(a)(4) (2025).

statute.[161]

A. Addition of Subsection (4) to Indiana Code Section 35-42-4-1(a)

The Indiana legislature has recognized the need for additional language by adding subsection (4) to the rape statute.[162] Before 2022, there were only three ways in which rape could occur under the statute.[163] Specifically, rape could only be charged when (1) "the other person is compelled by force or imminent threat of force;" (2) "the other person is unaware that the sexual intercourse or other sexual conduct . . . is occurring;" or (3) "the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct . . . cannot be given."[164] However, this was changed by House Enrolled Act 1079.[165] At the time the bill was heard in 2022, the requirement of force had been present in the country for over a century.[166] Despite the historical origins requiring force to be present under the rape statute, subsection (4) was finally added to section 35-42-4-1 in 2022.[167] Under the new subsection, rape occurs when someone "disregard[s] the other person's attempts to physically, verbally, or by other visible conduct refuse the person's acts."[168] Although this change was a significant step in modernizing Indiana sexual assault law, other statutes, such as the Indiana sexual battery statute, still lack a consent-based subsection.[169]

Although the definition of "force" has already been discussed in this Note, a brief recitation of recent rape cases is necessary to understand the similarities in outcomes of cases charged under the force subsections of both the sexual battery and rape statutes.[170] Prior to 2022, the case law regarding rape and force was very clear: when a defendant uses weapons in the act of assaulting a victim, the court almost always finds the presence of force.[171] However, in circumstances where a defendant disregards a victim's lack of consent but does not brandish a

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161. *See infra* Part III.C.

162. § 35-42-4-1(a)(4).

163. § 35-42-4-1(a) (2014).

164. *Id.*

165. H.E.A. 1079, 122nd Gen. Assemb. (Ind. 2022).

166. *See* IND. GEN. ASSEMBLY, THE REVISED STATUTES OF THE STATE OF INDIANA, ADOPTED AND ENACTED BY THE GENERAL ASSEMBLY AT THEIR TWENTY-SECOND SESSION 209 (1838) (defines rape as follows: "[t]hat every person who shall unlawfully and forcibly, have carnal knowledge of a woman against her will . . . shall be deemed guilty of rape.")

167. *Id.*; § 35-42-4-1(a)(4) (2022).

168. § 35-42-4-1(a)(4) (2025).

169. *Id.*; IND. CODE § 35-42-4-8 (a)(1)(A) (2025).

170. *See supra* Part I.

171. *See, e.g.*, Jenkins v. State, 568 N.E.2d 1037, 1039 (Ind. Ct. App. 1991) (finding the force element was met when the defendant stabbed the victim); Smith v. State, 500 N.E.2d 190, 192 (Ind. 1986) (defendant brandishing a knife and remaining in possession of it during the rape is enough for "the trier of fact to infer [that the defendant] forcibly compelled the victim to engage in sexual intercourse"); Lewis v. State, 440 N.E.2d 1125, 1127 (Ind. 1982) (defendant holding a pocketknife with an exposed blade established force).

weapon, certain facts do not arise to the level of force.[172]

In *Tobias*, the defendant, a Department of Natural Resources employee, took C.U., the sixteen-year-old victim, into the woods and "inserted his finger into her vagina," reasoning that "he needed to check to see if she had been raped."[173] The victim "asked him to stop."[174] Then, shortly after, the defendant took C.U. to an office, "grabbed her arm," "pushed her against the top of the picnic table, removed his own pants, pulled her legs apart with his hands, and 'pushed inside' of C.U. with his penis."[175] C.U. also asked the defendant to stop during this incident.[176] The court held that there was sufficient evidence for a jury to have found the force element was met.[177] The court highlighted C.U.'s testimony that Tobias "performed sexual intercourse on her—all after demanding her compliance; physically forcing himself upon her; and ignoring her lack of consent, verbal resistance, and requests for him to stop."[178]

Comparatively, in *Jones v. State*, the victim, twenty-six-year-old C.L., lived with Jones and his family.[179] One evening, Jones, intoxicated, came into C.L.'s bedroom wanting to have sex with her.[180] C.L. refused his advances.[181] Jones again asked C.L. for sex, which was met by another rejection.[182] When Jones asked for sex a third time, C.L. did not refuse and "just let him have it."[183] Then, Jones "told her not to tell anyone, particularly not . . . his wife."[184] At no point did C.L. consent to having sex with Jones.[185] Nor did she call for help because she feared Jones.[186] The court held that the evidence failed to demonstrate "*force or imminent threat of force*."[187] The court noted that "[t]here are reasons a person might be afraid to attract attention other than fear of forced activity."[188]

The distinction between the holdings in *Tobias* and *Jones* shows that force will not always be established when a victim repetitively tells a defendant "no."[189] However, in cases such as *Jones*, a victim may feel as though they are unable to say no to the defendant and may "just let him have it" if they are afraid

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172. *See, e.g.*, Jones v. State, 589 N.E.2d 241, 241–43 (Ind. 1992) (holding that where the victim knew the defendant was weaponless and repeatedly rejected his sexual advances before submitting herself out of fear was not sufficient to establish the element of force).

173. Tobias v. State, 666 N.E.2d 68, 70–71 (Ind. 1996).

174. *Id.* at 71.

175. *Id.*

176. *Id.*

177. *Id.* at 72.

178. *Id.*

179. 589 N.E.2d 241, 242 (Ind. 1992).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 243.

188. *Id.*

189. *Compare id.* at 242–43, *with* Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996).

of the defendant.[190] The previous statute was not equipped for these circumstances where the victim gives into the sexual activity after saying "no" because this does not always constitute force.[191] The lack of weight given to a victim's verbal refusal under the force subsection represents a gap addressed by subsection (4) of the rape statute.[192] However, this gap is yet to be addressed in the sexual battery statute.[193]

B. Jones *Under Indiana Code Section 35-42-4-1(a)(4) (2022)*

Under Indiana Code section 35-42-4-1(a)(4), rape occurs when "the person disregard[s] the other person's attempts to physically, verbally, or by other visible conduct refuse the person's acts."[194] In *Jones*, C.L. refused the defendant's acts twice.[195] Under those facts, an analysis in accordance with subsection (4) of the rape statute likely would have produced a different result.[196] This is an example of how the new subsection changed the definition of rape in Indiana, moving beyond the more rigid language of section 35-42-4-1(a)(1).[197] Due in part to the newness of subsection (4), there are no recently reported cases regarding its use or interpretation.[198] However, when examining the facts of previously decided cases, such as *Jones*, it is apparent that the addition of this subsection strengthens the weight of a victim's "no."[199] Since this shortcoming of force language was addressed for the rape statute, it should also be reexamined for the sexual battery statute.[200]

C. Guidance from Other States

Each state codifies differently what constitutes sexual battery or similar conduct.[201] Examining the language of other states' statutes is essential to determine what language the Indiana General Assembly should adopt in its sexual battery statute.

First, Kentucky has multiple statutes that are similar to the Indiana sexual

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190. *Jones*, 589 N.E.2d at 242.

191. *See, e.g.*, *id.* at 242–43.

192. C*ompare* IND. CODE § 35-42-4-1(a) (2014) (no refusal element), *with* § 35-42-4-1(a)(4) (2022) (violation of the statute occurs when "the person disregards the other person's attempts to physically, verbally, or by other visible conduct refuse the person's acts").

193. *See* IND. CODE § 35-42-4-8(a)(1)(A) (2025).

194. § 35-42-4-1(a)(4) (2022).

195. *Jones*, 589 N.E.2d at 242.

196. *Id.*; § 35-42-4-1(a)(4).

197. *Compare* § 35-42-4-1(a)(4) (the refusal element), *with* § 35-42-4-1(a)(1) (the force element).

198. *See* § 35-42-4-1(a)(4).

199. *Jones*, 589 N.E.2d at 241.

200. § 35-42-4-1(a)(4); IND. CODE § 35-42-4-8(a)(1)(A) (2025).

201. *See, e.g.*, KY. REV. STAT. ANN. §§ 510.130, 510.140 (West 2025); OHIO REV. CODE ANN. § 2907.03 (West 2025); GA. CODE ANN. § 16-6-22.1(b) (West 2025).

battery statute.[202] Although Kentucky does not have a sexual battery statute, it has both a sexual abuse statute and a sexual misconduct statute.[203] Kentucky's sexual abuse statute reads as follows: "A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent."[204] Although an offense under this section is a Class B misdemeanor rather than a felony, it is notable that the statute itself contains the word "consent."[205] This language is not present in either the Indiana sexual battery statute nor the Indiana rape statute.[206] This consent language is also present in Kentucky's sexual misconduct statute, which reads as follows: "A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent."[207] An offense under this subsection is a Class A misdemeanor.[208] It is important to note, however, that Kentucky has its own statutory definition of lack of consent.[209] This statute, unlike the Indiana statute, lists various reasons that consent may not be present, including "[i]f the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct."[210] Kentucky's approach demonstrates that other states do not require a showing of force for a sexual battery-type conviction like Indiana.[211]

Second, the Ohio sexual battery statute is more analogous to the Indiana sexual battery statute.[212] Subsection (A) prohibits "sexual activity with another" within the confines of the thirteen listed subsections.[213] Subsection (A)(1) reads, "The offender knowingly coerces the other person, or one of the other persons, to submit by any means that would prevent resistance by a person of ordinary resolution."[214] In the context of sexual battery, coercion "has been defined as 'to compel by pressure.'"[215] This subsection is the most similar to the force subsection of the Indiana sexual battery statute.[216] However, despite the

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202. *Compare* § 510.130 (Kentucky sexual abuse statute), *and* § 510.140 (Kentucky sexual misconduct statute), *with* § 35-42-4-8 (Indiana sexual battery statute).

203. *See* §§ 510.130, 510.140.

204. § 510.130(1).

205. § 510.130(1), (3).

206. *See* § 35-42-4-8(a); IND. CODE § 35-42-4-1(a)(4) (2025).

207. § 510.140(1).

208. § 510.140(2).

209. *See* KY. REV. STAT. ANN. § 510.020 (West 2025).

210. § 510.020(2)(c).

211. *See* § 35-42-4-8(a)(1)(A).

212. *Compare* OHIO REV. CODE ANN. § 2907.03 (West 2025) (Ohio sexual battery statute with coercion requirement), *with* § 35-42-4-8 (Indiana sexual battery statute with force requirement).

213. § 2907.03(A).

214. § 2907.03(A)(1).

215. State v. Bryant, 199 N.E.3d 919, 932 (Ohio Ct. App. 2022) (quoting State v. Watters, No. 110697, 2022 WL 1577413, at *4 (Ohio. Ct. App. May 19, 2022)).

216. *Compare* § 2907.03(A)(1) (Ohio sexual battery statute with coercion requirement), *with* § 35-42-4-8(a)(1) (Indiana sexual battery statute with force requirement).

similarities between the subsections, the Ohio statute does not require force as required by the Indiana sexual battery statute.[217] This illustrates that force is not always a required element of sexual battery.[218]

Lastly, the Georgia sexual battery statute contains consent language, which would remedy many of the issues discussed in this Note.[219] Georgia Code section 16-6-22.1(b) reads as follows: "A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person."[220] "[I]ntimate parts" is defined in subsection (a) as "the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female."[221] Notably, however, in *Watson v. State*, the Georgia Supreme Court highlights that Georgia's crime of sexual battery "does not necessarily involve sexual conduct."[222] This differs from Indiana's sexual battery statute, which requires the touching to be committed "with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person."[223] Although the prohibited conduct in Indiana's sexual battery statute differs from Georgia's sexual battery statute, Georgia is an example of another state that has codified broader language than the Indiana force subsection.[224]

This Note does not argue that Indiana should completely abandon the language in its current sexual battery statute in favor of adopting another state's language. However, the ways that other states define sexual offenses, particularly sexual battery, illustrates that sexual battery does not have to contain force language to be adopted.[225] In making its determination as to whether the state should amend the current sexual battery statute, the Indiana legislature should take this fact into consideration.

IV. THE CHANGE

This Note aims to expand the language of the sexual battery statute to include the various concerns previously discussed. The legislature should adopt the following language for subsection (a)(3) of Indiana Code section 35-42-4-8: "The person engaged in touching with the other person without the other person's attempts to physically, verbally, or by other visible conduct indicate a willingness to engage in or submit to the touching." This language is based upon

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217. *Contrast* § 2907.03(A)(1) (no element of force), *with* § 35-42-4-8(a)(1) (element of force).

218. *See, e.g.*, § 2907.03(A)(1).

219. *See* GA. CODE ANN. § 16-6-22.1(b) (West 2025).

220. *Id.*

221. § 16-6-22.1(a).

222. 777 S.E.2d 677, 721 (Ga. 2015).

223. IND. CODE § 35-42-4-8(a) (2025).

224. § 35-42-4-8(a)(1)(A); § 16-6-22.1(b).

225. *See, e.g.*, KY. REV. STAT. ANN. §§ 510.130, 510.140 (West 2025); OHIO REV. CODE ANN. § 2907.03 (West 2025); § 16-6-22.1(b).

the language in the rape statute but is broadened to accommodate the scope of sexual battery.[226]

In application, the deficits of the current sexual battery statute would have a lesser impact on the prosecution of these cases because the victim must first indicate some willingness to engage in or submit to the touching.[227] Subsection (a)(3) would criminalize scenarios where "the person engaged in touching with the other person without the other person's attempts to physically, verbally, or by other visible conduct indicate a willingness to engage or submit to the touching." The proposed subsection can be broken into multiple elements and applied to the facts in *Perry*.[228] For example, in *Perry*, N.A. did not give any visible indication that she was willing to engage in or submit to the touching because she was asleep when it began.[229] Thus, even though N.A. "kind of laid there" when she realized she was being touched, this circumstance would now satisfy the elements of sexual battery under the proposed subsection.[230] These actions do not indicate N.A.'s willingness to engage in sexual touching with the defendant by any visible means.[231] Further, sleeping, like N.A. was doing, does not indicate a willingness to engage in any sort of touching.[232] No evidence of N.A. resisting the touching was presented.[233] However, resistance is not a pronounced factor under the proposed subsection, and sexual battery is committed when the victim did not visibly consent.

Not only would the concerns about the relationship between the victim and the defendant have much less of an impact in prosecuting sexual battery, but the practical concerns discussed above would be almost entirely eliminated.[234] For example, in cases like *Chatham*, where a victim was caught "off guard" by a touching, the victim could not be found to have indicated a willingness to engage in or submit to the touching.[235] Thus, this sort of "sneak attack" by a defendant would now be ineffective to shield from sexual battery prosecution. Overall, the proposed language would remedy or, at the very least, lessen the problems discussed extensively in this Note. Now, the defendant would merely need to perceive, visually or orally, a person's willingness to engage or submit to the touching.

If the Indiana legislature is hesitant to adopt the above-mentioned language, there is an alternative. Although the sexual battery statute needs language broader than subsection (4) of the rape statute, it should, at a minimum, be

226. *See* IND. CODE § 35-42-4-1(a)(4) (2025); § 35-42-4-8(a).
227. § 35-42-4-8.
228. Perry v. State, 962 N.E.2d 154, 156–57 (Ind. Ct. App. 2012).
229. *Id.*
230. *Id.* at 157.
231. *See id.*
232. *See id.*
233. *Perry*, 962 N.E.2d 154.
234. *See supra* Part II.
235. Chatham v. State, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006) (using the words "off guard" in the State's argument to show a victim's lack of opportunity to consent).

amended to include the rape statute language.[236] Thus, the alternative language of subsection (a)(3) would read as follows: "The person disregarded the other person's attempts to physically, verbally, or by other visible conduct refuse the person's acts." This language is identical to that of the rape statute and, if adopted, would provide consistency in the definitions of rape and sexual battery in Indiana.[237]

CONCLUSION

Indiana has made meaningful steps toward modernizing its sexual assault law.[238] However, sexual battery is a pervasive issue; in fact, in the United States, fifty-one percent of women and seventeen percent of men have experienced "[u]nwelcome sexual touching."[239] Thus, it is time for the sexual battery statute to also be sufficiently amended to move beyond the force requirement in order to better serve not only victims, but the State of Indiana as a whole.

Thus, Indiana should amend the sexual battery statute not only beyond its current language, but also beyond the language of the rape statute. This argument is precipitated by the various circumstances in which sexual battery may occur without "force or the imminent threat of force."[240] Specifically, this Note argued that the current statute does not accommodate the nuances of victim-defendant relationships. Beyond these relationships, this Note argued that it is simply impractical, given the unexpected nature of some sexual battery situations, to require "force or the imminent threat of force" to be utilized.[241] Lastly, this Note presented the legislature with preferred language for the sexual battery statute, along with a suitable alternative.[242] To quote the words of Scott-Gordon, the current sexual battery statute gives particularly stealthy defendants a "free feel," an outcome that this proposed amendment works to remedy.[243]

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236. *See* IND. CODE § 35-42-4-1(a)(4) (2025).

237. *See id.*

238. *See id.*

239. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NAT'L PUB. RADIO (Feb. 21, 2018, at 19:43 ET), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment#:~:text=The%20results%2C%20released%20in%20a,they%20had%20survived%20sexual%20assault [https://perma.cc/KC59-QW2X].

240. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

241. *Id.*

242. *See supra* Part IV.

243. Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991).

VICARIOUS LIABILITY FOR THE UNINVOLVED: HOW SOME STATES PUNISH AIRCRAFT OWNERS FOR THE SINS OF OTHERS

ADAM J. HICKEY*

INTRODUCTION

On the evening of January 29, 2025, American Airlines Flight 5342 was cleared for the Mount Vernon Visual Runway 01 approach at Ronald Regan Washington National Airport.[1] Operated by PSA Airlines, the pilots were asked by air traffic control (ATC) if they could circle and land on Runway 33, a common maneuver.[2] Tragically, the airliner collided with a military transport helicopter transiting south along the Potomac river.[3] Sixty-seven people perished, with no survivors.[4]

When an aircraft accident occurs, the first question on many people's mind is why? Why did this happen? At the forefront of those investigating the cause is a specialized agency of the Federal Government, the National Transportation Safety Board (NTSB).[5] It is tasked, by statute and regulation, with the investigation of civil aircraft accidents.[6] After completing an investigation, the NTSB will issue a report that includes the agency's determination of the probable cause for the accident.[7] From the origin of commercially viable air travel—and because aircraft are so mobile and easily traverse state lines—the federal government has been the major entity involved in the regulation of air commerce, and by extension, air transportation.[8] But the federal government is not the only entity that wishes to know why an accident happened.

When a person is hurt or killed in an aviation accident, state law may be implicated.[9] For plaintiffs, state tort claims may be available under various theories of negligence.[10] In some jurisdictions, one significant form of

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1. NAT'L TRANSP. SAFETY BD., ACCIDENT NO. DCA25MA108, AVIATION INVESTIGATION PRELIMINARY REPORT 1, 4 (2025), https://www.ntsb.gov/investigations/Documents/DCA25MA108%20Prelim.pdf [https://perma.cc/P4LB-QEJ6].

2. *Id.* The author of this Note has flown this approach many times in his career. Additionally, he has complied with ATC requests to circle to Runway 33 multiple times in his career.

3. *Id.* at 1.

4. *Id.*

5. NTSB: NAT'L TRANSP. SAFETY BD., https://www.ntsb.gov/Pages/home.aspx [https://perma.cc/VX3U-ATJH] (last visited Feb. 7, 2026).

6. 49 U.S.C. § 1132; 49 C.F.R. § 830.1 (2026). Civil aircraft are all aircraft other than military. *See* 49 U.S.C. § 1132.

7. 49 C.F.R. § 845.30(a) (2026).

8. *See* Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926).

9. *See generally* 8A AM. JUR. 2D *Aviation* § 98, Westlaw (database updated Jan. 2026) (discussing state law implications in aviation accidents).

10. *See, e.g.*, IND. CODE § 8-21-4-6 (2025) (Indiana's aircraft liability statute); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1442 (10th Cir. 1993) (providing that federal aviation law does not preempt state tort claim). But note that NTSB reports are not permitted to be used as evidence in civil litigation. 49 U.S.C. § 1154(b).

negligence that owners face is vicarious liability for damages caused by their aircraft, even if they were not the one in operational control.[11] This is despite a federal statute that, on first blush, prohibits vicarious liability for aircraft owners.[12] But some state courts, as discussed below, have determined that 49 U.S.C. § 44112 does not preempt state vicarious liability law.[13]

Indiana charts a different course. Indiana Code section 8-21-4-6 provides that an owner who is not the pilot may not be held vicariously liable for damages, with certain exceptions.[14] This is a new development in the statutory treatment of aviation tort claims, explicitly aligning the management of aircraft with that of automobiles.[15] Similar to how most states treat the owner of an automobile, if the owner of an aircraft is not in control of its operation or acting negligently, it is inappropriate to hold them liable for the actions of others.

This Note argues that Congress should amend § 44112 to follow Indiana's practice limiting aircraft owner liability and make the statute explicitly preempt state law. Additionally, if Congress fails to act, this Note argues that other states should follow Indiana's lead in placing statutory limits of vicarious liability for aircraft owners. Part I reviews federal preemption in aviation law and discusses the legal theory of vicarious liability generally, including how it is applied in the aviation context. Part II considers the federal statute regarding aircraft owner vicarious liability and federal courts' interpretation of the statute, examining and reviewing how selected state and federal statutes have been interpreted. Part II will also explain how some state courts hold the federal statute non-preemptory. Part III examines Indiana's unique statutory approach in detail. Finally, Part IV discusses how Congress should amend § 44112 to explicitly preempt state law and follow Indiana's lead on vicarious liability. Failing Congressional action, Part IV concludes by advocating that other states should follow Indiana's lead and exempt aircraft owners from vicarious liability, with certain specific exceptions.

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11. *See, e.g.*, Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907, at *1 (R.I. Super. Ct. July 18, 2005) (unpublished opinion) (holding aircraft owner vicariously liable); Vreeland v. Ferrer, 71 So.3d 70, 84 (Fla. 2011) (providing that dangerous instrumentality doctrine imposes vicarious liability on aircraft owners). For state statutory treatment, see, e.g., N.Y. GEN. BUS. LAW § 251 (Consol. 2025); CAL. PUB. UTIL. CODE § 21404 (2025). *But see* 49 U.S.C. § 44112 (federal vicarious liability shield); IND. CODE § 8-21-4-6 (state vicarious liability shield).

12. 49 U.S.C. § 44112.

13. *Id.*; see *infra* Part II.C for state court's determinations that 49 U.S.C. § 44112 does not preempt state vicarious liability law.

14. § 8-21-4-6.

15. For Indiana's treatment of vicarious liability of automobile owners, see, e.g., Kahn v. Cundiff, 543 N.E.2d 627, 629 (Ind. 1989) (implying that agency relationship required to show vicarious liability); Barnd v. Borst, 431 N.E.2d 161, 165 (Ind. Ct. App. 1982) (stating that family relationship not enough to establish vicarious liability).

I. OVERVIEW OF FEDERAL PREEMPTION IN AVIATION

A. History of Federal Aviation Law

The federal government has been extensively involved in the regulation of aviation since its inception.[16] For example, one of the first federal legislative actions regulating aviation was the Air Commerce Act of 1926 ("1926 ACA").[17] Prior to the enactment of the 1926 ACA, ownership of airspace was governed by common law.[18] By common law, an owner of real property had unlimited rights to the airspace above their land.[19] However, by enacting the 1926 ACA, Congress appropriated for national use all "airspace above the minimum safe altitude[s] of flight."[20] This assumption of authority was necessitated by the extreme mobility of aircraft. From the air, property lines, and borders—even international borders—often have no physical demarcation.[21] Recognizing this tremendous mobility, Congress understood that only the federal government was able to effectively exercise dominion over air commerce.[22] To this day, the Federal Aviation Administration (FAA) considers the 1926 ACA to be landmark legislation that laid the foundation for the modern aviation regime.[23]

Two major acts of Congress continued to expand federal power in aviation law, eventually leading to the establishment of the FAA. First was the Civil Aeronautics Act of 1938 ("1938 CAA").[24] This Act established the Civil Aeronautics Authority (CAA), a predecessor to today's FAA.[25] Spurred on by the death of a prominent senator in an airliner crash,[26] this Act was passed due to the perceived need for a comprehensive statutory regime to govern the field.[27] This Act greatly expanded the federal scope of the regulation of air transportation, providing a statutory framework for a wide-ranging regulatory scheme.[28]

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16. *See, e.g.*, Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926).

17. *Id.*

18. United States v. Causby, 328 U.S. 256, 260–61 (1946); also, for a detailed treatment of the problems discussed in this paragraph, see generally STUART BANNER, WHO OWNS THE SKY? (2008).

19. *Causby*, 328 U.S. at 260–61.

20. § 10, 44 Stat. at 574.

21. *See Causby*, 328 U.S. at 260–61.

22. *See id.*

23. *See A Brief History of the FAA*, FED. AVIATION ADMIN. (Nov. 15, 2021), https://www.faa.gov/about/history/brief_history [https://perma.cc/3QQQ-QTUQ].

24. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

25. *Id.*

26. CHARLES F. KRAUSE & KENT C. KRAUSE, AVIATION TORT AND REGULATORY LAW § 26:2 (2d ed. 2023).

27. Notes and Legislation, *Civil Aeronautics Act of 1938*, 52 HARV. L. REV. 137, 137–38 (1938).

28. *Id.*

The second act passed was the Federal Aviation Act of 1958.[29] Although the 1938 Act established the federal government as the clear authority in aviation, the regulation of airspace and air traffic control had not kept up with the continual advancements in the size and speed of aircraft.[30] In 1956, two airliners flying in uncongested airspace collided over the Grand Canyon, killing all on board both aircraft.[31] This disaster prompted Congress to enact the 1958 Act.[32] The Act created the Federal Aviation Agency, the immediate predecessor to the modern Federal Aviation Administration.[33] The statutory authority for the FAA has been recodified since the Federal Aviation Act of 1958 but has remained substantially unchanged.[34] At that point, the federal government was generally understood to have established implied field preemption over the regulation of air transport and air commerce, especially with matters related to aviation safety.[35]

B. Federal Preemption in Personal Injury Tort Claims

Although Congress pursued an aggressively preemptory path with regard to aviation safety, Congress did not want to generally preempt state tort claims for damages related to aviation incidents.[36] For example, Congress has never expressly provided for the removal of aviation safety claims to federal court.[37] Courts have held that "the [Federal Aviation Act] provides for no private civil remedies, either express or implied."[38] In addition, the Federal Aviation Act of 1958 contained a preemption saving clause allowing the pursuit of damages.[39] This clause, in a much-truncated form, continues today, stating that "[a] remedy under this part is in addition to any other remedies provided by law."[40]

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29. Federal Aviation Act of 1958 (FAA), Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. §§ 40101–50105).

30. KRAUSE & KRAUSE, *supra* note 26, § 26:2.

31. *Id.*

32. *See generally* Federal Aviation Act of 1958 (FAA), 72 Stat. 731 (explaining that the overall state of aviation safety prompted Congress to enact the 1958 act).

33. *Id.* The Agency became the modern Administration when the Department of Transportation was created on April 1, 1966. FED. AVIATION ADMIN., *supra* note 23. For convenience, this Note uses the acronym "FAA" interchangeably for both the Federal Aviation Agency and Federal Aviation Administration.

34. Act of July 5, 1994, Pub. L. No. 103-272, § 44112, 108 Stat. 745, 1167.

35. *See, e.g.*, Elassaad v. Indep. Air, Inc., 613 F.3d 119, 126 (3d Cir. 2010) (quoting Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999)) (noting that implied preemption covers "the entire field of aviation safety").

36. *See* Federal Aviation Act of 1958 (FAA), 72 Stat. at 798 (current version at 49 U.S.C. § 40120(c)).

37. *See* 28 U.S.C. § 1441. *But cf.* 28 U.S.C. § 1369 (federal courts have original jurisdiction over mass casualty events, including aviation disasters).

38. O.S. *ex rel.* Sakar v. Hageland Aviation Servs., Inc., 609 F. Supp. 2d 889, 894 (D. Alaska 2008).

39. *See* Federal Aviation Act of 1958 (FAA), 72 Stat. at 798 (current version at 49 U.S.C. § 40120(c)).

40. 49 U.S.C. § 40120(c).

Therefore, when appropriate, Congress allows state courts to adjudicate aviation damage claims.

But Congress has crafted a limited exception to the saving clause.[41] 49 U.S.C. § 44112 prevents aircraft owners or lessors from being held vicariously liable for damages caused by their aircraft if they did not have control when the incident occurred.[42] Section 44112 stipulates that non-piloting owners are not liable for damages caused by their aircraft in most instances.[43] This provision creates tension with the preemption saving clause noted above, and some states' vicarious liability laws conflict with § 44112.[44] These divergences have led state courts to different interpretations of how 'preemptory' § 44112 actually is.[45]

C. Statutory History of 49 U.S.C. § 44112

Before proceeding further, a review of the statutory history of current 49 U.S.C. § 44112 is necessary. This is because some courts, especially those who have held § 44112 to not preempt state law, have held that the original language should control interpretation.[46] Section 44112 was initially enacted as section 304 of the Civil Aeronautics Act of 1938.[47] In 1948, following World War II, Congress passed section 304 with the intention of furthering the domestic aircraft industry.[48] Section 304 was recodified and incorporated into the Federal Aviation Act of 1958.[49] Finally, in 1994, Congress recodified the Federal Aviation Act into its current form.[50] Section 1404, the predecessor to § 44112, was included in the recodification.[51] Of note, prior to the 1994 recodification, § 1404 covered persons "having a security interest in, or security title to, any civil

41. 49 U.S.C. § 44112.

42. *See id.*

43. 49 U.S.C. § 44112(b) (providing that aircraft lessors, owners, or secured parties are liable only when they are in "actual possession or operational control" of the aircraft when the damage occurs).

44. *Compare* 49 U.S.C. § 44112 (federal vicarious liability shield), *with* N.Y. GEN. BUS. LAW § 251(1) (Consol. 2025) (state vicarious liability statute).

45. *See generally* Jol A. Silversmith, *"It, Being Dead, Yet Speaketh": The Recodification of the Federal Aviation Act of 1958*, 29 AIR & SPACE L. 8 (2016) (explaining that recodification has produced different judicial interpretations, including state decisions interpreting 49 U.S.C. § 44112 differently).

46. *See, e.g.*, Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907, at *5–*6 (R.I. Super. Ct. July 18, 2005) (unpublished opinion).

47. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (current version at 49 U.S.C. § 44112); Civil Aircraft–Liability of Owner, Pub. L. No. 80-656, 62 Stat. 470 (1948) (current version at 49 U.S.C. § 44112).

48. H.R. REP. NO. 80-2091, at 1–3 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1836, 1836–37.

49. Federal Aviation Act of 1958 (FAA), Pub. L. No. 85-726, 72 Stat. 731, 774 (current version at 49 U.S.C. § 44112).

50. Act of July 5, 1994, Pub. L. No. 103-272, § 44112, 108 Stat. 745, 1167.

51. *Id.*

aircraft," but was ambiguous regarding owners.[52] After the recodification, the current statute explicitly covers "lessors," "owners," and "secured parties."[53] The most recent modification of the statutory language occurred in 2018.[54] Following the *Vreeland v. Ferrer* decision discussed below in Part II,[55] Congress amended § 44112. The law now specifies that control must be "operational," and the requirement that injury be suffered "on land or water" was removed.[56]

D. A Definition of Vicarious Liability and Its Application to Automobiles by Way of Analogy to Aircraft

As this Note discusses vicarious liability in the specific context of non-owner-operated aircraft, it may be helpful to first examine the doctrine more generally. Vicarious liability has been defined as "liability that is imposed on the defendant based solely on the tortious act of another."[57] Vicarious liability allows a plaintiff to attempt to sue the owner of an instrument that caused a particular harm if it is shown that the tortfeasor is in some way the agent of the defendant.[58] One way a person may become an agent of the defendant is to operate a vehicle that the defendant owns.[59] Typically, this vehicle will be an automobile, but aircraft owners have also been found vicariously liable.[60]

States approach vicarious liability for automobiles in different ways. For example, Minnesota statutorily holds the driver of an automobile to be the agent of the owner.[61] In Florida, the owner of a car who allows another person to drive it is liable up to statutory limits.[62] But other states take the opposite approach, often allowing the owner to escape liability.[63] Indiana common law is a good

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52. 49 U.S.C app. § 1404 (1990) (current version at 49 U.S.C. § 44112).

53. 49 U.S.C. § 44112(a).

54. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 514, 132 Stat. 3186, 3358.

55. Vreeland v. Ferrer, 71 So.3d 70 (Fla. 2011).

56. § 514, 132 Stat. at 3358.

57. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 1 (A.L.I., Tentative Draft No. 2, 2023).

58. *Id.* § 1 cmt. c.

59. *See, e.g.*, Lambert v. Emerson, 304 So.3d 364, 366 (Fla. Dist. Ct. App. 2020) (holding an owner of an automobile vicariously liable for son's accident). *But see, e.g.*, Barnd v. Borst, 431 N.E.2d 161, 165 (Ind. Ct. App. 1982) (holding that a family relationship is not enough to establish vicarious liability).

60. *See, e.g.*, Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907 (R.I. Super. Ct. July 18, 2005) (unpublished opinion) (holding an aircraft owner vicariously liable); *Vreeland*, 71 So.3d at 84 (holding that the dangerous instrumentality doctrine imposes vicarious liability on aircraft owners). *But see* 49 U.S.C. § 44112; IND. CODE § 8-21-4-6 (2025). For state statutory treatment establishing vicarious liability, see, e.g., N.Y. GEN. BUS. LAW § 251 (Consol. 2025); CAL. PUB. UTIL. CODE § 21404 (2025).

61. MINN. STAT. § 169.09(5)(a) (2025).

62. FLA. STAT. § 324.021(9)(b)(3) (2025).

63. *E.g.*, Kahn v. Cundiff, 533 N.E.2d 164, 168 (Ind. Ct. App. 1989); Carter v. U-Haul Int'l, No. 09AP–310, 2009 WL 3221468, at *5 (Ohio Ct. App. Oct. 8, 2009).

illustration. It does not impose vicarious liability unless there is an established agency relationship between the driver and the owner.[64] For example, in *Kahn v. Cundiff*, the Indiana Court of Appeals held that a plaintiff must establish "some type of a principal/agent or master/servant relationship."[65] Also, *Barnd v. Borst* demonstrated how reluctant Indiana is to hold an automobile owner vicariously liable when the court rejected a vicarious liability attempt where there was only a family relationship between the driver and the owner.[66] Ohio likewise rejects the family purpose doctrine, requiring a principal/agent relationship between the driver and the owner.[67]

This diversity in how states handle automobile vicarious liability is also found in various states' aviation law. Plaintiffs may desire to use vicarious liability in a similar manner to that of an automobile case to attach liability to the aircraft owner.[68] For example, some states have statutes that impose liability on aircraft owners.[69] Both California and New York statutorily hold aircraft owners liable for damages caused by their aircraft.[70] In contrast, Indiana statutorily shields owners from vicarious liability unless an agency relationship exists between the owner and pilot.[71] In a similar manner, some state courts have found owners vicariously liable when other persons fly their aircraft.[72] On the other hand, most federal courts and many state courts have found that § 44112 preempts state law, and owners should not be held liable.[73] This deviation from the norm of federal uniformity in aviation law may lead to inequitable forum shopping, with claimants seeking to file cases in jurisdictions that do not recognize federal preemption in this area.[74]

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64. *Kahn*, 533 N.E.2d at 168.

65. *Id.*

66. Barnd v. Borst, 431 N.E.2d 161, 165 (Ind. Ct. App. 1982).

67. *See, e.g.*, M.M. v. M.F., No. 108957, 2020 WL 6342653, at *6 (Ohio Ct. App. Oct. 29, 2020) (rejecting the family purpose doctrine); *Carter*, 2009 WL 3221468, at *5 (Ohio Ct. App. Oct. 8, 2009) (holding that an operator of vehicle must be owner's agent for vicarious liability to attach).

68. *See, e.g.*, Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907 (R.I. Super. Ct. July 18, 2005) (unpublished opinion); Vreeland v. Ferrer, 71 So.3d 70, 84 (Fla. 2011).

69. *E.g.*, CAL. PUB. UTIL. CODE § 21404 (2025); N.Y. GEN. BUS. LAW § 251(1) (Consol. 2025).

70. PUB. UTIL. § 21404; GEN. BUS. § 251(1).

71. IND. CODE § 8-21-4-6 (2025).

72. *See, e.g.*, *Coleman*, 2005 WL 1793907 (aircraft owner vicariously liable); *Vreeland*, 71 So.3d at 84 (holding that the dangerous instrumentality doctrine imposes vicarious liability on aircraft owners).

73. *E.g.*, J.A.G.P. v. Aerolineas Damojh, S.A. de C.V., 585 F. Supp. 3d 1092, 1096 (N.D. Ill. 2022); Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483, at *6 (Conn. Super. Ct. Dec. 7, 2005).

74. *See generally* Roger W. Clark & Thomas M. Richardson, *Is Lessor More?*, 75 J. AIR. L. & COM. 69 (2010) (describing how plaintiffs' use of lessors as a "jurisdictional hook" and cases regarding the § 44112 preemption split has led to forum shopping).

II. ANALYSIS OF FEDERAL AND STATE VICARIOUS LIABILITY LAW

A. Federal Statutes

As discussed above, federal law is generally held to be preemptive over state law when dealing with aviation-related matters.[75] An exception is 49 U.S.C. § 40120(c), a preemption savings clause for state tort actions.[76] The current version of the statute reads "[a] remedy under this part is in addition to any other remedies provided by law."[77] As a result, Congress has established field preemption regarding aviation safety but has allowed state tort law to govern the adjudication of disputes resulting from the violation of those standards.[78]

But as is often seen, the exception to the general rule has an exception. 49 U.S.C. § 44112 limits the liability of certain persons in relation to incidents involving civil aircraft, aircraft engines, or propellers.[79] Section 44112 begins by defining the three types of persons that the exception applies to: lessors, owners, and secured parties.[80] To qualify as a lessor, the person must be leasing the item for at least thirty days; to be a secured party, one must have a security interest in the aircraft, aircraft engine, or propeller.[81]

> Section 44112(b) then provides the meat of the statute. It reads:
> (b) Liability.—A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage only when a civil aircraft, aircraft engine, or propeller is in the actual possession or operational control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—
>
> (1) the aircraft, engine, or propeller; or
>
> (2) the flight of, or an object falling from, the aircraft, engine, or propeller.[82]

At first blush, this appears to severely limit when the owner (or lessor or secured party) may be held liable for damage caused by their aircraft.[83] They must be in "actual possession or [in] operational control" of the aircraft.[84] "Operational control" is defined in the federal aviation regulations (FARs) as "the exercise of

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75. *See, e.g.*, Elassaad v. Indep. Air, Inc., 613 F.3d 119, 126 (3d Cir. 2010) (quoting Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999)) (noting that implied preemption covers "the entire field of aviation safety").

76. 49 U.S.C. § 40120(c).

77. *Id.*

78. *See* 8A AM. JUR. 2D *Aviation* § 98, Westlaw (database updated Jan. 2026).

79. 49 U.S.C. § 44112(b).

80. § 44112(a).

81. *Id.*

82. § 44112(b).

83. *Id.*

84. *Id.*

authority over initiating, conducting, or terminating a flight."[85] Therefore, an owner lending an aircraft to a qualified pilot is no longer in "operational control" of the airplane. Rather, the person who is flying the aircraft is now in operational control. As a result, if the nonowner pilot then had an accident, § 44112 would exclude the owner from liability.[86]

B. Federal Courts' Interpretations of Federal Law

Federal courts generally agree with the above interpretation, holding that § 44112 preempts state law and owners are not liable if they were not in operational control of the aircraft.[87] For example, in *J.A.G.P. v. Aerolineas Damojh S.A. de C.V.*, the heirs and personal representatives of persons who died in an aircraft accident in Cuba sued Wells Fargo Trust, the former owners of the plane.[88] The plaintiffs alleged that Wells Fargo placed a dangerous aircraft into the stream of commerce and thus was vicariously liable for the crash.[89] Wells Fargo moved to dismiss, arguing that federal law preempted state law.[90] The court agreed, holding that even though the text of §44112 does not explicitly preempt state law, it nevertheless is preemptory, because the "law's text, context, and structure clearly imply that the section has preemptive force."[91]

Murphy v. Airway Air Charter, Inc. is another example of the federal courts applying § 44112 as preemptory.[92] Here, the wife of a person injured in an airplane accident sued the aircraft owner for loss of consortium.[93] The man injured was the sole passenger of an aircraft that ran out of fuel during a flight to the Bahamas.[94] The plaintiff sued the owner in a Florida state court, seeking to hold the owner vicariously liable.[95] Because the crash occurred in international waters, the case was removed to federal court.[96] The aircraft owner pointed to § 44112(b), stating that they were not in possession or control of the aircraft at the time it crashed and were therefore shielded from liability.[97] The court agreed, and found that § 44112(b) precluded any claim against the

85. 14 C.F.R. § 1.1 (2026).

86. § 44112(b).

87. *E.g.*, J.A.G.P. v. Aerolineas Damojh, S.A. de C.V., 585 F. Supp. 3d 1092, 1096 (N.D. Ill. 2022).

88. *Id.* at 1094.

89. *Id.*

90. *Id.*

91. *Id.* at 1096.

92. No. 23-cv-23654, 2024 WL 3183239 (S.D. Fla. June 26, 2024), *aff'd per curiam*, 2026 WL 125793 (11th Cir. Jan. 16, 2026).

93. *Id.* at *1.

94. *Id.*

95. Fourth Amended Complaint at ¶¶ 36–39, *Murphy*, No. 23-cv-23654, 2024 WL 3183239 (S.D. Fla. Dec. 18, 2023), Dkt. No. 35.

96. Notice of Removal at ¶¶ 12–15, *Murphy*, No. 23-cv-23654, 2024 WL 3183239 (S.D. Fla. Sep. 25, 2023), Dkt. No. 1.

97. *Murphy*, 2024 WL 3183239, at *2.

owner.[98]

In re Lawrence W. Inlow Accident Litigation is another instance of federal courts interpreting § 44112. In 1997, the general counsel of Conseco, Inc. was killed as he exited the company helicopter by stepping into the aircraft's rotor.[99] His widow sued, alleging that the helicopter was operated in a negligent manner and that the aircraft lessor had negligently failed to warn of a dangerously defective product.[100] Moving for summary judgment, and arguing in the alternative, Conseco contended that § 44112 prevented it from being held liable because they were the lessor of the aircraft, and that it was not in Conseco's possession or operational control at the time of the accident.[101] The court found that "[t]he plain language of § 44112 establishes that it preempts state common law claims against covered lessors," and that "federal common law generally does not provide a remedy for those injured in aircraft accidents."[102] The court referenced § 44112(b), which states that, "[a] lessor . . . is liable . . . *only* when [an] aircraft . . . is in the actual possession or operational control of the . . . lessor."[103] It noted that "[t]he word 'only' could have effect only if the statute preempts claims against lessors arising under state law."[104]

As can be seen from the above, federal courts apply § 44112 as written.[105] In all three cases, motions for summary judgment were granted because § 44112 shielded aircraft owners from liability when they were not in possession of the aircraft.[106] But state courts may or may not view § 44112 as preemptory.

C. A Comparison of the Various State Approaches to Aircraft Owner Vicarious Liability

Despite the existence of § 44112, and perhaps following the invitation of § 40120(c),[107] some states statutorily address vicarious liability for aircraft owners. Several states have statutes that will subject an aircraft owner to vicarious liability. For instance, New York statutorily holds owners of aircraft

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98. *Id.*

99. *In re* Lawrence W. Inlow Accident Litig., No. IP 99-0830, 2001 WL 331625, at *1 (S.D. Ind. Feb. 7, 2001). Mr. Inlow is the namesake of Inlow Hall, where the Indiana University Robert H. McKinney School of Law is located. Gerald L. Bepko, *Chancellor's Newsletter* 2 (July 1998) https://archives.indianapolis.iu.edu/server/api/core/bitstreams/4cdfb70d-e5c9-43cb-b61a-00ec3aca1e77/content [https://perma.cc/Z6WX-AJ4D] (last visited February 22, 2026).

100. *In re Inlow*, 2001 WL 331625, at *1.

101. *Id.* at *14.

102. *Id.*

103. *Id.*; 49 U.S.C. § 44112(b) (emphasis added).

104. *In re Inlow*, 2001 WL 331625, at *14.

105. J.A.G.P. v. Aerolineas Damojh, S.A. de C.V., 585 F. Supp. 3d 1092, 1094 (N.D. Ill. 2022); Murphy v. Airway Air Charter, Inc., No. 23-cv-23654, 2024 WL 3183239 (S.D. Fla. June 26, 2024); *In re Inlow*, 2001 WL 331625.

106. *J.A.G.P.*, 585 F. Supp. 3d at 1094; *Murphy*, 2024 WL 3183239; *In re Inlow*, 2001 WL 331625.

107. *See supra* Part I.B.

liable for "death occasioned or injuries to person or property sustained, within or above this state . . . [from] the operation of [an] aircraft."[108] Similarly, California also holds aircraft owners liable "for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the aircraft, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."[109] Tennessee law similarly holds owners of aircraft liable for injuries or damage caused by an aircraft.[110] In addition, both Connecticut and Rhode Island also have laws that hold non-operating owners liable.[111] In contrast, Indiana prohibits vicarious liability for an aircraft owner unless there is an agency relationship between the owner and pilot.[112]

But before a state may hold an aircraft owner vicariously liable, it must contend with the presumably preemptory 49 U.S.C. § 44112. In contrast to federal courts, state courts vary widely on how they interpret § 44112. In fact, many state courts are quite reluctant to allow § 44112 to preempt state tort law.

For example, in Illinois courts have held that § 44112 does not preempt personal injury actions against lessors.[113] In *Retzler v. Pratt & Whitney Co.*, a flight attendant was injured when an engine malfunctioned, and she sued the owner of the aircraft for negligence.[114] The trial court granted the owner's motion for summary judgment on the grounds that § 44112 preempted state tort law.[115] On appeal, the Appellate Court of Illinois reversed summary judgment and remanded.[116] In its reasoning, the Appellate Court cited two federal cases, *Matei v. Cessna Aircraft Co.*[117] and *Abdullah v. American Airlines, Inc.*[118] In *Matei*, the court determined that § 1404 (the predecessor to § 44112 prior to the recodification of 1994) was preemptor*y* but then went on to discuss Illinois bailment law.[119] The *Retzler* court reasoned that if § 1404 was truly preemptory, the Seventh Circuit would never have reached the question of Illinois law.[120] Ergo, § 1404 was not preemptory.[121] When analyzing *Abdullah*, the court noted that the Third Circuit held that federal preemption in aviation safety standards can coexist with state tort remedies.[122] As a result, the court held "that section 44112 does not preempt a personal injury action under state law against . . . the

108. N.Y. GEN. BUS. LAW § 251(1) (Consol. 2025).
109. CAL. PUB. UTIL. CODE § 21404 (2025).
110. TENN. CODE ANN. § 42-1-105 (2025).
111. 1 R.I. GEN. LAWS § 1-4-3 (2025); CONN. GEN. STAT. §§ 15-34(20), 15-72 (2025).
112. IND. CODE § 8-21-4-6 (2025); *see infra* Parts III and IV.
113. Retzler v. Pratt & Whitney Co., 723 N.E.2d 345 (Ill. App. Ct. 1999).
114. *Id.* at 349.
115. *Id.* at 350.
116. *Id.* at 358.
117. *Id.* at 352 (citing Matei v. Cessna Aircraft Co., 35 F.3d 1142 (7th Cir. 1994)).
118. *Id.* (citing Abdullah v. Am. Airlines, Inc., 181 F.3d 363 (3d Cir. 1999)).
119. *Matei*, 35 F.3d at 1144.
120. *Retzler*, 723 N.E.2d at 352.
121. *Id.*
122. *Id.* (citing *Abdullah*, 181 F.3d at 375).

aircraft lessors in the instant case."[123] This precedent led a Cook County trial court to rule in a separate case that § 44112 did not preempt a suit brought against the lessor of an aircraft that crashed in the Philippines.[124] This led to a large settlement of $165 million.[125]

In 2005, a fatal accident in Rhode Island led to a vicarious liability lawsuit.[126] Two light aircraft collided, and the occupants of one were killed; the family of one of the deceased sued the owner of the other aircraft.[127] The court conceded that a "cursory review" of § 44112 appeared to limit an owner's liability to when the aircraft is in the actual possession or control of the owner.[128] But the court went on to analyze the recodification of § 1404 into § 44112 and determined that the text of § 1404 should control.[129] The court began by applying the precedent of *Cass v. United States*.[130] In *Cass*, the Supreme Court held that when a law is recodified, and Congress states that no substantive change is intended, the text of the predecessor statute controls.[131] The court held that § 1404 was ambiguous as to whether it applied to aircraft owners in addition to lessors and secured parties.[132] On the other hand, the recodified § 44112 explicitly exempts owners from liability.[133] As a result, the court determined that the recodification impermissibly widened the scope of § 44112 beyond the bounds of § 1404.[134] As a result, the court chose to apply § 1404 rather than § 44112, holding that § 44112 does not apply to aircraft owners.[135] Consequently, partial summary judgment was granted for the plaintiff, and the non-operating owner was held liable for the accident.[136]

The state courts in Louisiana took a slightly different approach. In *Cosey ex rel. Hilliard v. Flight Academy of New Orleans LLC*, a Cessna 172 crashed into Lake Pontchartrain.[137] The pilot and a passenger perished in the accident, with the deceased passenger's surviving family suing the aircraft owner, among

123. *Id.* at 353.

124. Layug v. AAR Parts Trading, Inc., No. 00 L 9599, 2003 WL 25744436, at *1 (Ill. Cir. Ct. May 16, 2003).

125. Clark & Richardson, *supra* note 74, at 71. It should be noted that other procedural reforms have reduced the possibility that large air disaster litigations will be forced to remain in state courts. *Id.* at 74.

126. Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907, at *1–2 (R.I. Super. Ct. July 18, 2005) (unpublished opinion).

127. *Id.* at *1.

128. *Id.* at *3.

129. *Id.* at *6.

130. *Id.* at *4 (citing Cass v. United States, 417 U.S. 72 (1974)).

131. *Coleman*, 2005 WL 1793907, at *4 (citing *Cass*, 417 U.S. at 82–84).

132. *See* 49 U.S.C. app. § 1404 (1990) (current version at 49 U.S.C. § 44112).

133. § 44112(b).

134. *Coleman*, 2005 WL 1793907, at *6.

135. *Id.*

136. *Id.* at *7.

137. Cosey *ex rel.* Hilliard v. Flight Acad. of New Orleans, LLC, 365 So.3d 76, 79 (La. Ct. App. 2020).

others.[138] The owner moved for summary judgment, arguing that § 44112 preempted state law.[139] The court did not reach the preemption argument, instead reasoning that under *federal* law, a "lessor of an airplane cannot be held liable unless it has possession or control of the airplane."[140] It then went on to reason that because "[f]ederal preemption of the standards of care can coexist with state and territorial tort remedies," it was necessary for the court to address Louisiana's vicarious liability doctrine.[141] The court then analyzed state law regarding the theories of liability argued by the plaintiff, and it found that the owner was not vicariously liable.[142] It appears the court determined that § 44112 was not preemptory of state tort remedies and only spoke to a federal cause of action.[143] Had Louisiana law been different, the *Cosey* court may have well found in favor of the plaintiff.

Finally, in *Vreeland v. Ferrer*, the Florida Supreme Court held that § 44112 did not apply to a state tort claim if the plaintiffs (or their representatives) were passengers in an aircraft when they were injured or killed.[144] The court interpreted the statute to only apply to damages caused by an aircraft to persons or property "on land or water," and therefore it did not apply to crew or passengers *inside* an aircraft.[145] The court looked to the legislative history of § 44112 and its predecessors, observing that when the statute was enacted, the Uniform Aeronautics Act treated damage to passengers and crew much differently than damage to persons or property on the ground.[146] The court reasoned that torts regarding occupants should be handled by state law, whereas damage to persons or property on the ground should be shielded from liability.[147] The court held that when Congress "adopt[ed] a federal law that specifically referenced damages or injuries that occur *on the surface of the earth*, the 1948 Congress did not intend to preempt state law with regard to injuries to passengers or aircraft crew."[148] And after a thorough discussion of various judicial decisions regarding its preemptory effect, the Florida Supreme Court decided that § 44112 does not preempt state tort claims for damages to passengers and crew because they were not "on land or water" but, rather, were in the air.[149] The court then applied Florida's dangerous instrumentality doctrine to the facts of the case and reversed the lower court decision that had determined

138. *Id*. at 80–81.
139. *Id.* at 85.
140. *Id.*
141. *Id.* (quoting Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 375 (3d Cir. 1999)).
142. *Id.* at 90.
143. *Id.* at 85.
144. 71 So.3d 70, 84 (Fla. 2011).
145. *Id.* at 82.
146. *Id.* at 81.
147. *Id.* at 80–81.
148. *Id.* at 81.
149. *Id.* at 84.

that preemption existed.[150]

On the other hand, a Connecticut court found that § 44112 was preemptory.[151] In *Mangini v. Cessna Aircraft Co.*, an aircraft suffered and fuel leak or engine fire in flight and crashed, killing the plaintiffs' decedents.[152] The court examined *Coleman v. Windham Aviation Inc.*, and disagreed with the Rhode Island court's analysis of the effect of § 1404's recodification into § 44112.[153] The *Mangini* court felt that the recodification clarified the ambiguous use of "owner" in § 1404 and that, therefore, the new text should control.[154] The court nevertheless acknowledged that there is a "strong presumption against federal preemption" unless the federal government had shown a "'clear and manifest' purpose to supersede state [law]," but, even so, it found that federal law preempted in this area.[155] The court cited *In re Inlow Accident Litigation* for noting that, as of the time of that decision, no federal court had held that § 44112 or § 1404 did not preempt state law.[156] Finally, the court discussed the House and Senate Reports concerning the passage of § 1404, mentioning that the intent of congress was to shield owners from liability.[157]

As may be seen, states have taken various approaches to non-operating owner vicarious liability of aircraft. Apart from Indiana, if the state statutorily addresses the matter, it will hold such an owner vicariously liable.[158] And state courts have often been reluctant to allow § 44112 to preempt state vicarious liability doctrines.[159] While Congress intended that state tort remedies survive the total federal preemption of aviation safety,[160] it also envisioned that non-operating aircraft owners should not face vicarious liability for the negligence of the operator.[161] The tension between federal and state law in this area is currently unresolved.

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150. *Id.* at 85. Concededly, the *Vreeland* court could not use the same reasoning today, as § 44112 was amended in 2018, removing the "on land or water" provision from the code. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 514, 132 Stat. 3186, 3358.

151. Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483, at *6 (Conn. Super. Ct. Dec. 7, 2005).

152. *Id.* at *1.

153. *Id.* at *4–*5.

154. *Id.*

155. *Id.* at *5 (quoting Dowling v. Slotnik, 712 A.2d 396, 404 (1998)).

156. *Id.* at *6 (citing *In re* Inlow Accident Litig., No. IP 99–0830, 2002 WL 970403 (S.D. Ind. Apr. 16, 2002)).

157. *Id.*

158. *Compare* IND. CODE § 8-21-4-6 (non-operating aircraft owner not liable with certain enumerated exceptions; *see infra* Parts III and IV), *with, e.g.*, N.Y. GEN. BUS. LAW § 251(1) (Consol. 2025) (owners of aircraft liable for death or injuries caused by an aircraft).

159. *E.g.*, Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907 (R.I. Super. Ct. July 18, 2005) (unpublished opinion).

160. 49 U.S.C. § 40120(c).

161. 49 U.S.C. § 44112.

III. INDIANA'S POSITION

A. While Allowing State Tort Claims to Proceed, Indiana Possesses a Unique Statute Regarding Aircraft Owner Vicarious Liability

Having discussed federal and state statutes regarding aircraft owner vicarious liability and court decisions interpreting them, this Note now turns to Indiana. The Indiana Supreme Court acknowledges that federal law—as a rule—does not impact state tort claims in aviation.[162] The court addressed federal preemption of state law in *Atlantic Coast Airlines v. Cook*.[163] The claim against the airline was for negligent infliction of emotional distress.[164] Five months after September 11, 2001, an erratically behaving passenger was allowed to board a flight; when his behavior became sufficiently threatening, the flight diverted and the passenger was arrested.[165] In determining whether federal law was preemptory, as Atlantic Coast argued, the court affirmed the appellate court's holding that the preemption savings clause in 49 U.S.C. § 40120(c) allows for state tort actions.[166] Therefore, even though the federal government may have occupied the field of aviation safety, states nevertheless have the ability to regulate some tortious actions in their courts.[167]

But Indiana has a unique statute addressing vicarious liability for aircraft owners or lessors.[168] This statute is codified as Indiana Code section 8-21-4-6: Liability; vicarious liability.[169] It is divided into three subsections: (a), (b), and (c).[170] Subsection (a) follows standard aviation law, specifying that the Indiana law applies to "offenses, torts, and other wrongs committed by or against" aircraft crew or passengers, and that damages caused by or to an aircraft in flight over Indiana will be governed by Indiana law.[171] Subsection (c) stipulates that the statute does not modify Indiana law with respect to bailments or bailor liability.[172] However, for purposes of this Note, subsection (b) is of specific interest. It reads:

> (b) This article does not impose vicarious liability for damages on an owner of an aircraft who is not the pilot unless:
>
> (1) the owner engages in negligent, reckless, knowing, intentional,

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162. Atl. Coast Airlines v. Cook, 857 N.E.2d 989, 994 (Ind. 2006), *aff'g*, Delta Airlines v. Cook, 816 N.E.2d 448, 458 (Ind. Ct. App. 2004); *see* 49 U.S.C. § 40120(c).

163. *Id.*

164. *Id.* at 991.

165. *Id.* at 991–92.

166. *Id.* at 994.

167. *See id.*

168. IND. CODE § 8-21-4-6 (2025).

169. *Id.*

170. *Id.*

171. § 8-21-4-6(a).

172. § 8-21-4-6(c). For Indiana bailment law, see generally YVONNE LEWIS MCDONALD, 4 IND. L. ENCYC. BAILMENT (2026).

> or unlawful conduct that is the proximate cause of the damages;
> (2) an agency relationship exists between the owner and the person who proximately caused the damages; or
> (3) the owner's liability is based on the doctrine of respondeat superior.[173]

This law strikes a balance between the interests of aircraft owners and the interests of persons injured by the operation of an aircraft. An aircraft owner who is not the pilot will not be held vicariously liable unless they (1) acted in "negligent, reckless, knowing, intentional, or unlawful conduct" that led to the injury, had an agency relationship with the tortfeasor, or would be liable through the doctrine of respondeat superior.[174] In other words, if an aircraft owner's only connection to the damages caused by the tortfeasor is through ownership of the instrument that caused the harm, the owner will not be held vicariously liable.[175] This protects the interests of owners by limiting their liability to bad behavior where they either could reasonably foresee an injury resulting from their conduct or they are in some way responsible for the actions of the tortfeasor, either through agency or respondeat superior.[176] The statute protects both those damaged by an aircraft (by including the bad behavior and agency exceptions) and non-operating owners (by exempting them from liability, subject to the same exceptions).[177] This is more generous to victims of accidents than the federal statute, which does not include these exceptions.[178] Indiana law in this area balances the desires of aircraft owners, who want protection from claims that only have a tenuous connection to them, with the needs of plaintiffs, who are permitted to pursue persons who *are* directly connected to the harm they have suffered.

IV. INDIANA'S APPROACH IS A MODEL FOR THE NATION

A. Aircraft Are Not Dangerous Instrumentalities

Whether or not aircraft owners should be held vicariously liable when they were not piloting or in operational control at the time of an accident is a policy question. One way to answer this is to determine if an aircraft is a dangerous instrumentality. If airplanes are in fact dangerous instrumentalities, it would be reasonable for vicarious liability to attach, as this doctrine "may serve as the basis for strict liability."[179] On the other hand, if aircraft—even small private aircraft—are commonly used implements of modern life with a quantifiably low

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173. § 8-21-4-6(b).
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Compare id.*, *with* 49 U.S.C. § 44112(b).
179. *Dangerous Instrumentality*, BLACK'S LAW DICTIONARY (12th ed. 2024).

level of hazard, perhaps it would be unreasonable to declare them to be a dangerous instrumentality.[180] Dangerous instrumentality has been defined as "[a]n instrument, substance, or condition so inherently dangerous that it may cause serious bodily injury or death without human use or interference."[181] In spite of the fact that airplanes cannot cause harm "without human use or interference,"[182] some courts have nevertheless held that an aircraft is a dangerous instrumentality, and therefore owners should be held vicariously liable.[183] For example, when the Florida Supreme Court decided *Vreeland v. Ferrer*, it relied on an earlier decision in *Orefice v. Albert* that aircraft were dangerous instrumentalities.[184] But other courts reject the implication that an aircraft "may cause serious bodily injury or death without human use or interference."[185] For instance, the court in *Cosey ex rel. Hilliard v. Flight Academy of New Orleans LLC*, found that aircraft are not dangerous instrumentalities, nor is aviation an ultrahazardous activity.[186]

While flying a light aircraft is not an activity to be undertaken lightly, it would be inaccurate to describe it as ultrahazardous.[187] Aircraft are safely flown for many hundreds of thousands of hours each year for a multitude of reasons, ranging from business to pleasure.[188] Further, aircraft flown by commercial operators have a significantly lower accident rate than other general aviation (GA) operations.[189] Congress agrees. By enacting § 44112, Congress has implicitly declared that aircraft are not dangerous instrumentalities.[190] If flying aircraft was an abnormally dangerous activity, the federal government would not relieve aircraft owners and lessors from liability when they are not operating the aircraft.[191] In addition, common sense dictates that it is unreasonable to hold a person liable for an act that they did not commit. In tort law, it is axiomatic

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180. For the level of risk involved in general aviation (GA), see generally *The Richard G. McSpadden Report*, AIRCRAFT OWNERS & PILOTS ASS'N (2024), https://www.aopa.org/training-and-safety/air-safety-institute/accident-analysis/richard-g-mcspadden-report/mcspadden-report-figure-view/?category=all&year=2024&condition=all&report=true [https://perma.cc/Z5H4-ZJJ5]. GA is defined as all non-military, non-airline aviation. AIRCRAFT OWNERS & PILOTS ASS'N, *General Aviation Explained*, https://download.aopa.org/Media/General-Aviation-Explained-r5.pdf [https://perma.cc/QT7K-FYQM].

181. *Dangerous Instrumentality*, *supra* note 179.

182. *Id.*

183. *E.g.*, Orefice v. Albert*,* 237 So.2d 142, 146 (Fla. 1970).

184. Vreeland v. Ferrer, 71 So.3d 70, 75 (Fla. 2011) (citing *Orefice*, 237 So.2d at 145).

185. *Dangerous Instrumentality*, *supra* note 179.

186. 365 So.3d 76, 87 (La. Ct. App. 2020).

187. *The Richard G. McSpadden Report*, *supra* note 180, General Aviation Accident Rates 2015–2024, 2024 Overall Summary.

188. *See generally id.*

189. *Id.*

190. 49 U.S.C. § 44112.

191. *See* 49 U.S.C. § 44112. For an example of whether an activity is "abnormally dangerous," see Judge Posner's analysis in Ind. Harbor Belt R.R. Co v. Am. Cyanamid Co., 916 F.2d 1174, 1176–1181 (7th Cir. 1990) (discussing whether transportation of chemicals by a railroad was abnormally dangerous).

that for there to be a breach, a person must have a duty to another.[192] But it is difficult to point to a duty that, analogously, an automobile owner has to another motorist when they allow a duly licensed child or friend to drive their vehicle.[193] A person who allows another licensed driver to operate their car has an expectation that the other person will behave reasonably.[194] Similarly, a person who allows a properly trained and rated pilot to operate their aircraft has a reasonable expectation that they will do so in a safe manner in compliance with all applicable rules and regulations.[195] Safe and compliant operation of an aircraft, like an automobile, almost always leads to a safe and predictable outcome.[196] Consequently, it is unreasonable to hold an innocent owner accountable when the unthinkable happens. On the other hand, under Indiana's statutory regime, if the owner *knows* that the aircraft will be operated in an unsafe or negligent manner, they may still be held liable.[197] For example, if the owner knows or has reason to know that the person to whom they are lending the aircraft does not hold the proper pilot certificate or rating for the type of aircraft or operation to be flown,[198] the owner would almost certainly be acting in a negligent or reckless manner.[199] Therefore, should the pilot flying injure another's person or property, Indiana's liability shield would not apply, and the injured party would be free to sue the owner for damages.[200]

B. Indiana's Statute Is an Example for the Nation

Indiana's vicarious liability shield is efficient, clear, and just, and Congress should expressly adopt this standard for the entire nation. One of the largest problems with the question of liability is the aircraft's mobility, as "the place of the wrong, if it can even be ascertained, is most often fortuitous."[201] In one state an owner will not be vicariously liable, but take off and cross the border just a few miles away, and a completely different rule applies.[202] Thus, because of their tremendous speed, aircraft are subject to multiple state tort regimes in a

192. RESTATEMENT (SECOND) OF TORTS § 4 (A.L.I. 1965).

193. *See* Barnd v. Borst, 431 N.E.2d 161, 165 (Ind. Ct. App. 1982).

194. *See* RESTATEMENT (THIRD) OF TORTS § 3 (A.L.I. 2010).

195. *See, e.g.*, 14 C.F.R § 91.13(a) (2026) ("No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.").

196. *See The Richard G. McSpadden Report*, *supra* note 180.

197. IND. CODE § 8-21-4-6(b) (2025).

198. 14 C.F.R. §§ 61.2–61.3 (2026).

199. § 8-21-4-6(b).

200. *Id.*

201. Anderson v. SAM Airlines, 939 F. Supp. 167, 173 (E.D.N.Y. 1996) (quoting Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914, 915 (N.Y. 1978)).

202. *Compare* Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV04400 3418S, 2005 WL 3624483 (Conn. Super. Ct. Dec. 7, 2005) (holding that 49 U.S.C. § 44112 is preemptory), *with* Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004–0985, 2005 WL 1793907 (R.I. Super. Ct. July 18, 2005) (unpublished opinion) (holding that 49 U.S.C. § 44112 is not preemptory).

manner like no other instruments.

Adopting Indiana's rule would promote efficiency because aircraft owners would have a clear understanding of when they would be held vicariously liable for damage caused by their aircraft.[203] The Indiana statute is clear because it addresses the core issue that § 44112 attempts to address: vicarious liability.[204] But most importantly, the statute is just. An aircraft owner will not be held vicariously liable for an accident that they did not cause.[205] But on the other hand, if there is wrongdoing, negligence, respondeat superior, or an agency relationship with the pilot of the accident aircraft, then an owner will still be liable.[206] The liability shield will satisfy owners' desire to be protected from unreasonable liability if another actor commits a tort while operating their aircraft.[207] This shield promotes certainty in aircraft operations, and permits owners to reasonably allow another pilot to operate the owner's aircraft when convenient.

The exceptions contained within Indiana's law are also reasonable and serve the interest of those damaged by aircraft. To reiterate, the first exception is for an "owner [who] engages in negligent, reckless, knowing, intentional, or unlawful conduct that is the proximate cause of the damages."[208] If an owner behaves in such a manner, they are the legal cause for the injury and should be held liable.[209] The second exception is if an agency relationship exists between the owner and the pilot, or if the owner's responsibility is based on the doctrine of respondeat superior.[210] This exception captures those who are acting on behalf of an owner. Because the persons have an agency or principal-agent relationship, the owner is put on notice that any unreasonable or negligent actions taken by their agent would redound on them. If a person is harmed by a non-owner operated aircraft, they will be able to pursue those who should be held accountable.[211] But, if Indiana's rule is adopted, the injured party will be prohibited from suing someone who did not cause their injury.[212]

To settle this area of aviation law in a just and fair manner, Congress should adopt Indiana's vicarious liability law and explicitly preempt any state laws to the contrary. Indiana's law is both clearer and more just than current federal law. Currently, § 44112 shields owners when they are not piloting or in operational

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203. *See* § 8-21-4-6(b).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. § 8-21-4-6(b)(1).
209. *See* RESTATEMENT (SECOND) OF TORTS § 431 (A.L.I. 1965) ("The actor's negligent conduct is a legal cause of harm to another if . . . [their] conduct is a substantial factor in bringing about the harm.").
210. *See* § 8-21-4-6(b)(2)–(3). *See generally* 1 AM. L. OF TORTS § 4:3, *Respondeat Superior* (2024) (discussing vicarious liability for employers); 1 AM. L. OF TORTS § 4:16, *Generally; principals* (2024) (discussing agency law).
211. § 8-21-4-6(b).
212. *Id.*

control of the aircraft. In the next FAA reauthorization bill, Congress should explicitly adopt Indiana's language into 49 U.S.C. § 44112. This is because Indiana's statute is fairer to all parties. To those injured by an airplane, Indiana's statute allows recovery if the owner is a bad actor or has a principal-agent relationship with the pilot.[213] This expansion of plaintiffs' rights is just because a negligent aircraft owner should be held responsible for their carelessness[214] or for the negligence of their agents.[215] On the other hand, it is fairer to non-operating owners because—should they fall outside the exceptions—they are shielded from vicarious liability caused by the actions of others.[216]

C. The Easiest Way Forward Is Via Federal Preemption

Federal preemption by the adoption of Indiana's scheme would resolve this issue cleanly and decisively. As seen by comparing *Coleman v. Windham Aviation Inc.*[217] with *Mangini v. Cessna Aircraft Co.*,[218] crossing the border from Connecticut to Rhode Island can have a significant legal impact. In *Coleman*, the Rhode Island court refused to hold that § 44112 is preemptory in July 2005, but a mere five months later, a Connecticut court decided the same issue in favor of preemption.[219] Courts in two adjacent states stood in opposition.[220] Should an accident occur—and two accidents *did* occur—the liability of the non-operating aircraft owner would depend on which side of the Connecticut-Rhode Island border the incident was adjudicated. This is unmistakably contrary to Congress' intention when it enacted the forerunner to the current § 44112.[221] To encourage aircraft ownership, Congress instructed that aircraft owners not be held liable for accidents that they did not cause.[222] But as can be seen in *Coleman* and other cases, state courts are reluctant to allow for federal preemption of state tort law.[223] Therefore, to foreclose the issue of whether the aircraft accident occurs in a *Coleman* or *Mangini* jurisdiction, Congress should adopt Indiana's statutory example into § 44112 and make it

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213. 49 U.S.C. § 44112; *id.*

214. *Cf.* RESTATEMENT (SECOND) OF TORTS § 281 (A.L.I. 1965) (listing the elements of negligence).

215. *See generally* 1 AM. L. OF TORTS § 4:16, *Generally; principals* (2024).

216. § 8-21-4-6(b).

217. No. Civ.A. K.C.2004–0985, 2005 WL 1793907 (R.I. Super. Ct. July 18, 2005) (unpublished opinion).

218. Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483 (Conn. Super. Ct. Dec. 7, 2005).

219. *Compare Coleman*, 2005 WL 1793907 (federal law did not preempt state law), at *6, *with Mangini*, 2005 WL 3624483, at *6 (federal law did preempt state law).

220. *Mangini*, 2005 WL 3624483, at *5 (finding the *Coleman* court's holding unpersuasive).

221. *See* H.R. REP. NO. 80-2091, at 1–3 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1836, 1836–37.

222. *See id.*

223. *See, e.g.*, *Coleman*, 2005 WL 1793907.

explicitly preemptory.[224] This would satisfy both owners' desire for a liability shield and allow victims to pursue bad actors.[225]

But if Congress is unwilling to rewrite § 44112 based on Indiana's model, then a simple expedient would be to add an express preemption clause upon the next FAA Reauthorization Act. While Indiana Code section 8-21-4-6(b) may be a superior vehicle for addressing vicarious liability for aircraft owners, by expressly preempting state law, § 44112 would adequately shield innocent aircraft owners.[226] However, Congress risks shielding owners who are not-so-innocent. If Congress fails to make any meaningful legislative revisions, other states should defend owners from unreasonable vicarious liability by adopting Indiana's plan as their own. To reiterate, this would be an evenhanded policy for non-operating owners by shielding them from unjust vicarious liability, while at the same time preserving victims' rights to pursue bad actors.[227]

CONCLUSION

When people are hurt or killed by an aircraft, the victims and their families deserve to be made whole. But thankfully, modern air travel is safe, and there are few major air disasters.[228] But when a major accident such as Flight 5342 occurs, the law will naturally want to hold tortfeasors responsible.[229] However, holding persons liable for torts that they did not commit is an injustice.[230] When an aircraft owner allows a pilot to operate his aircraft, it is reasonable to assume that the pilot entrusted with the plane is competent.[231] Every certificated pilot has gone through an extensive training program, has passed written and oral tests, and has passed a practical test administered by the FAA or one of its designees.[232] Even though pilots may be generally skilled and highly trained, they are still human, and unfortunately pilots make mistakes.[233] When mistakes are made in aviation, the results can often be severe and lead to legal action.[234] However, if the owner did not "engage[] in negligent, reckless, knowing,

224. *See supra* Part IV.B.

225. *See* IND. CODE § 8-21-4-6(b) (2025).

226. *Id.*; 49 U.S.C. § 44112.

227. *See* § 8-21-4-6(b).

228. *See Survivability of Accidents Involving Part 121 US Air Carrier Operations: 2020 Update*, NAT'L TRANSP. SAFETY BD. (Mar. 23, 2020), https://www.ntsb.gov/safety/data/Pages/Part121AccidentSurvivability.aspx, [https://perma.cc/2PXD-8694] (last visited February 22, 2026).

229. *Cf.* RESTATEMENT (SECOND) OF TORTS § 6 (A.L.I. 1965) (tortious conduct is that which "is of such a character as to subject the actor to liability" under torts law).

230. *Cf. In re* Duckworth, Nos. 10–83603, ADV 11–8092, 2013 WL 1397456, at *5 (Bankr. C.D. Ill. April 5, 2013) (stating that holding an innocent party liable would result in an injustice).

231. *See* 49 U.S.C. § 44709 (allowing the FAA to reexamine any pilot if their competency comes into question).

232. *Become a Pilot*, FED. AVIATION ADMIN. (July 9, 2024), https://www.faa.gov/pilots/become [https://perma.cc/NMQ7-XY4A].

233. *See The Richard G. McSpadden Report*, *supra* note 180.

234. *See* 8A AM. JUR. 2D *Aviation* § 98, Westlaw (database updated Jan. 2026).

intentional, or unlawful conduct" that proximately caused the accident, the legal system will be committing an injustice if it holds an aircraft owner liable for actions they did not commit.[235]

Because the federal government has, with limited exceptions, exercised field preemption in aviation, it may have reasonably believed that its statutory scheme to protect owners was adequate.[236] Since 1948, Congress has clearly indicated that it intends to shield aircraft owners from liability if they are not in operational control of the aircraft.[237] Despite this, some states persist in allowing tort recovery from persons who have no direct involvement in any alleged negligence.[238] Following Indiana's lead would create a statute that is fair to both owners and those injured by aircraft.[239] By adding an express preemption clause to § 44112, Congress can create a uniform system of aircraft owner liability across the entire nation. Failing that, other states should strongly consider adopting Indiana's forward-thinking statute. By exempting blameless owners from liability but allowing plaintiffs to sue negligent or otherwise responsible owners, Indiana Code section 8-21-4-6 strikes an accurate balance between protecting innocent owners and those who may be injured.[240]

235. IND. CODE § 8-21-4-6(b)(1) (2025).

236. *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999) (discussing field preemption).

237. *See supra* Part I.C. for the legislative history of § 44112.

238. *E.g.*, Vreeland v. Ferrer, 71 So.3d 70, 84–85 (Fla. 2011).

239. § 8-21-4-6.

240. *Id.*

INSTRUCTING INMATES: WHY INDIANA'S INCARCERATED ADULT OFFENDERS SHOULD BE REQUIRED TO COMPLETE AN EDUCATION PROGRAM PRIOR TO RELEASE

MARISSA A. MARSHINO*

INTRODUCTION

Imagine, for a moment, that a close friend or family member is ordered to serve a sentence in the Indiana Department of Correction (IDOC). Cue the racing thoughts: what will they do while in custody? What can they do while in custody? How can they get their life back on track before they are released? The answer: a required education program.

Since its inception, the Indiana Constitution has prioritized the concept of reformation within Indiana's penal code, stating "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."[1] The Indiana General Assembly has furthered this objective in many ways, including by requiring the availability of education programs in correctional facilities.[2] And, since at least 2011, IDOC itself has recognized the importance of these education programs, drawing a direct correlation between increased education and reduced recidivism.[3]

The correctional education program laws of many other states are far more robust than Indiana's.[4] Some states, like Arizona, issue a standardized test to inmates upon commitment and require them to complete an education program if they do not meet the required literacy level.[5] In several states, like Florida, inmates who are near their release are given priority, while those with life sentences, death sentences, health concerns, or security concerns are excluded from participation.[6] In other states, like Delaware, inmates may be disciplined or rendered ineligible for parole for refusal to participate.[7] And more often than not, these robust correctional education program laws correlate to a reduced recidivism rate.[8]

This Note argues that the Indiana General Assembly should enact a statute requiring all adult inmates in IDOC with five years or less until release to complete an academic or vocational education program prior to their release from incarceration. Requiring completion of an education program will assist

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1. IND. CONST. art. 1, § 18.

2. IND. CODE § 11-10-5-1 (2025).

3. John Nally, Susan Lockwood & Taiping Ho, *The Impact of Education and Employment on Recidivism*, IND. DEP'T OF CORR. (2011), https://www.in.gov/idoc/files/Impact_of_Education_and_Employment_on_Recidivism.pdf [https://perma.cc/98UK-HB5Q].

4. *See infra* Figure 4.

5. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-229 (2025).

6. *See, e.g.*, FLA. STAT. § 944.801 (2025).

7. *See, e.g.*, DEL. CODE ANN. tit. 11, § 6531A (West 2026).

8. *See infra* Figure 5.

adult inmates in obtaining sustainable post-release employment, which will in turn decrease Indiana's recidivism rate. Part I of this Note details Indiana's current legislation, administrative processes, and recidivism rate. Then, Part II of this Note examines the correctional education program laws and recidivism rates of other select states whose laws are more robust than Indiana's. Finally, Part III of this Note analyzes the projected target population, proposes model legislation based on the laws of other states, and considers the respective cost and cost savings of requiring completion.

I. BACKGROUND

The Indiana General Assembly should enact a statute requiring all adult inmates in IDOC to complete an education program prior to their release from incarceration. The groundwork for a new statute has already been laid with the 1979 and 1999 enactments of two similar statutes.[9] Likewise, IDOC's current administrative processes are structured in a way that permits the implementation of additional procedures to achieve the requirements of a new statute.[10] As a final point, increased education leads to reduced recidivism, a direct correlation which has long been recognized by IDOC.[11]

A. Indiana's Legislation

The Indiana General Assembly has furthered the objective of Indiana's constitutional principle of penal reformation in at least two ways. First, in 1979, it enacted a statute requiring the implementation of academic and vocational education programs for offenders confined in Indiana's correctional facilities.[12] IDOC oversees a total of eighteen adult correctional facilities: fifteen for males and three for females.[13] Of the eighteen facilities, sixteen are institutions and two are reentry centers.[14] Generally, IDOC offers to inmates in these facilities activities, courses, and programs.[15] Programs include both academic and vocational but vary from facility to facility.[16] Thus, adult inmates within each of these facilities have the opportunity to participate in some form of statutorily required academic and vocational education programs.

Separately, IDOC has expressed the importance of addressing literacy

9. *See* IND. CODE §§ 11-10-5-1, -11.5-1 (2025).

10. *See* IND. DEP'T OF CORR., POL'Y NO. 01-01-101, ADULT ACADEMIC AND TECHNICAL PROGRAMS 11 (2021), www.in.gov/idoc/files/policy-and-procedure/policies/01-01-101-Adult-Ed-Tech-12-1-2021.pdf [https://perma.cc/9XQG-FXHW].

11. Nally, Lockwood & Ho, *supra* note 3.

12. § 11-10-5-1.

13. *Adult Correctional Facilities*, IND. DEP'T OF CORR., https://www.in.gov/idoc/facilities/adult/ [https://perma.cc/UM7X-EL4J] (last visited Jan. 22, 2026).

14. *Id.*

15. *Programs*, IND. DEP'T OF CORR., https://www.in.gov/idoc/facilities/re-entry/programs/ [https://perma.cc/NGJ2-PKF8] (last visited Jan. 22, 2026).

16. *Id.*

education, noting that thirty-four percent of its adult population is functionally illiterate.[17] As a result of this, IDOC's education programs "begin with a strong commitment of resources to basic reading, mathematics, and language arts."[18] In 2012, the department's academic and vocational education transitioned to Grace College and Oakland City University when "the State Student Assistance of Indiana discontinued funding for incarcerated adults to access on-site college degree programs."[19]

Currently, IDOC contracts with both of these universities, as well as Ivy Tech Community College,[20] to offer education programs in the following subject areas: advanced manufacturing, building trades and construction, supply chain and logistics, information technology, culinary arts, business technology, recreational vehicle technician, cosmetology and barbering, and Indiana Canine Assistant Network training.[21] An average of seventy-one percent of IDOC's total adult inmate population participates in an education program each year.[22]

Figure 1 – Education Program Participants Per Calendar Year[23]

Calendar Year	Average Daily Adult Inmate Population	Education Program Participants	Education Program Participants (%)
2011	29,442	16,040	54.5%
2012	29,972	21,722	72.5%
2013	29,668	23,507	79.2%
2014	29,733	24,276	81.6%
2015	28,975	23,145	79.9%
2016	27,598	20,225	73.3%
2017	27,188	18,990	69.8%
2018	27,985	20,184	72.1%

17. *Programs: Education*, IND. DEP'T OF CORR., https://www.in.gov/idoc/facilities/re-entry/programs/#Education [https://perma.cc/4DR5-6SFS] (last visited Jan. 22, 2026).

18. *Id.*

19. 2012 IND. DEP'T OF CORR. ANN. REP. 33, https://www.in.gov/idoc/files/idocnews,-media,-and-publications/annual-reports/2012-DOC-Annual-Report.pdf [https://perma.cc/HL53-DAPU].

20. 2023 IND. DEP'T OF CORR. ANN. REP. 12, 16, https://www.in.gov/idoc/files/idocnews,-media,-and-publications/annual-reports/2023-DOC-Annual-Report.pdf [https://perma.cc/3L7P-RSXN].

21. *Programs: Employment/Vocational*, IND. DEP'T OF CORR., https://www.in.gov/idoc/facilities/re-entry/programs/#Employment_Vocational [https://perma.cc/F8CM-QJSJ] (last visited Jan. 22, 2026).

22. *See infra* Figure 1.

23. SARAH SCHIKORA, IND. DEP'T OF CORR. DATA SCI. & ANALYTICS, RESEARCH DATA REQUEST 1, 8–10 (2025).

2019	28,584	20,068	70.2%
2020	27,272	15,541	57.0%
10-Year Average	**28,642**	**20,370**	**71.0%**

Figure 1 examines the average daily adult inmate population (column 2) and number of education program participants (column 3) for calendar years 2011 to 2020.[24] For easier reference, Figure 1 also displays the percentage of education program participants (column 4).[25] As shown in the final row, an average of seventy-one percent of inmates participated in an education program between calendar years 2011 and 2020.[26]

Another way the Indiana General Assembly has furthered the objective of Indiana's constitutional principle of penal reformation is through the 1999 enactment of the Community Transition Program (CTP).[27] The CTP was created for felony offenders confined in IDOC for a sentence of at least two years.[28] The program is made available through a county's community corrections program or probation department and "provide[s] services that improve an offender's chances of making a successful transition from commitment to employment and participation in the community without the commission of future crimes."[29] Offenders have the right to object to their placement in the CTP, but unless their objection is submitted in writing to IDOC and to the sentencing court(s), offenders are not otherwise entitled to refuse placement.[30] Further, IDOC may discipline an offender who refuses to participate.[31]

Both pieces of legislation—the statute requiring IDOC to offer education programs and the statute creating the CTP—demonstrate the feasibility of enacting a new statute (1) requiring adult inmates to complete an education program prior to release from incarceration and (2) penalizing inmates for refusal to participate.[32] The Indiana General Assembly has already legislated in a similar fashion, and it can certainly do so once more.

B. Indiana's Administrative Processes

Statutes enacted by the Indiana General Assembly are used to form the internal policies and procedures of IDOC, such as the policy regarding adult

24. *See id*.

25. *See id*. The percentages for each year were calculated by dividing the number of education program participants (column 3) by the average daily adult inmate population (column 2).

26. *See id*.

27. IND. CODE § 11-10-11.5-1 (2025).

28. *Id.*

29. IND. CODE §§ 11-12-10-2, -1 (2025).

30. IND. CODE §§ 11-10-11.5-4.5, -11.5 (2025).

31. IND. CODE § 11-10-11.5-8 (2025).

32. *See* IND. CODE §§ 11-10-5-1, -11.5-1 (2025).

academic and technical programs.[33] This policy outlines IDOC's intake process and credit time structure.[34] When inmates arrive at their assigned correctional facility, they meet with staff to build a Case Plan.[35] "The Case Plan is developed from the results of the Indiana Risk Assessment System (IRAS) . . . ."[36] IRAS is based on the risk domains of (1) criminal history, (2) school and employment, (3) family and social support, (4) substance abuse and mental health, and (5) criminal lifestyle.[37] The education needs of an inmate are also identified through use of the IRAS.[38] Inmates are not administered a standardized literacy examination, nor are they required to complete an education program as part of their Case Plan.[39]

Inmates may earn credit time for participating in an education program.[40] Inmates admitted after January 1, 2022, with an earliest possible release date of more than 180 days are automatically entered into the Case Plan Credit Time (CPCT) structure.[41] "CPCT allows individuals to earn up to 1 day of credit for every 3 days of participation in programming and classes geared toward each individual's needs."[42] This credit is separate from credit for good behavior during incarceration.[43] Inmates not participating in the CPCT structure may receive credit time under the previous statutory scheme if they meet the requirements set forth in the statute.[44]

Both processes—the administration of the IRAS and the development of the Case Plan—demonstrate the feasibility of implementing a new policy requiring adult inmates to complete a standardized literacy examination.[45] IDOC already completes an assessment and develops a Case Plan for each inmate during intake, and it can certainly integrate the administration of a literacy examination.

C. Recidivism in Indiana

Each year, IDOC prepares an adult recidivism rate report.[46] The recidivism rate is representative of the inmate population released three years prior to the

33. *See* IND. DEP'T OF CORR., *supra* note 10, at 1.

34. *Id.*

35. *Re-Entry Services*, IND. DEP'T OF CORR., https://www.in.gov/idoc/divisions/re-entry/ [https://perma.cc/8RFW-Y5V6] (last visited Jan. 22, 2026).

36. *Id.*

37. *Id.*

38. IND. DEP'T OF CORR., *supra* note 10, at 11.

39. *Id.*

40. *Case Plan Credit Time*, IND. DEP'T OF CORR., https://www.in.gov/idoc/facilities/re-entry/cpct/ [https://perma.cc/PE92-FHQU] (last visited Jan. 22, 2026).

41. *Id.*

42. *Id.*

43. *Id.*

44. IND. DEP'T OF CORR., *supra* note 10, at 11.

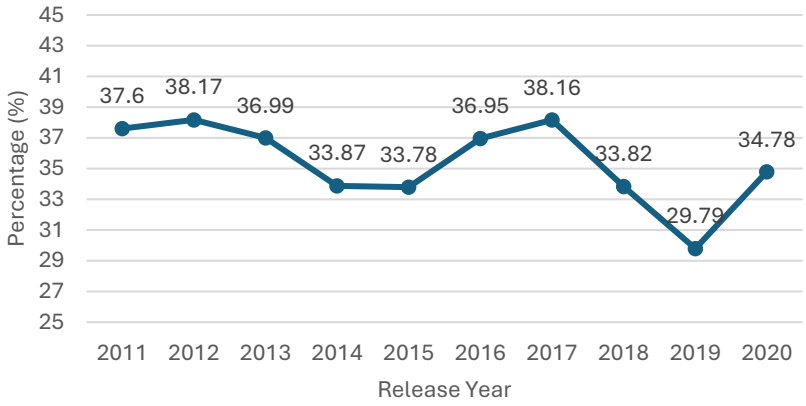
45. *See id.*

46. *Recidivism Reports*, IND. DEP'T OF CORR., https://www.in.gov/idoc/policies-and-statistics/statistical-data/recidivism-reports/ [https://perma.cc/4Z4N-94XQ] (last visited Jan. 22, 2026).

date of the report.[47] For example, the 2023 report details the 2023 recidivism rate for inmates released during calendar year 2020.[48]

For purposes of the report, recidivism is defined "as a return to incarceration within three years of the offender's date of release from a state correctional institution."[49] Specifically, recidivism is a "recommit[ment] to the IDOC within three years of their release date, for either a new conviction or a violation of post-release supervision."[50] Indiana's average recidivism rate between release years 2011 and 2020 is 35.39%.[51]

Figure 2 – Indiana's Recidivism Summary[52]



Separately, in 2011, IDOC conducted its own study of the impact of education and employment on recidivism.[53] For purposes of the study, recidivism was defined—as according to the United States Department of Education—as a return to incarceration within two years of release.[54] The study found that (1) "[a]s [the] level of education increases, the likelihood of employment increases," and (2) "[a]s employment increases, the likelihood of recidivating decreases."[55] Specifically, 17.3% of inmates with college-level

47. *2023 Adult Recidivism Rates*, IND. DEP'T OF CORR. (2023), https://www.in.gov/idoc/files/policy-and-procedure/statistical-data/recidivism-reports/adult-recidivism-rates/2023-Adult-Recidivism-Summary.pdf [https://perma.cc/X9R7-9FVZ].

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The report displays the percentages by year of calculation rather than year of release, which is a three-year difference. *See id.* For consistency with the reports of other states, *see infra* Figure 5, the years of calculation have been converted to years of release in Figure 2.

53. Nally, Lockwood & Ho, *supra* note 3.

54. *Id.*

55. *Id.*

education and post-incarceration employment were likely to reoffend, while 44.7% of inmates with below high school-level education and no post-incarceration employment were likely to reoffend.[56]

Figure 3 – The Impact of Education and Employment on Recidivism[57]

Education at Release	RETURN RATE: Employment Post Release	RETURN RATE: No Employment Post Release
College	17.3%	26.3%
GED/HS Diploma	23.3%	38.4%
Below GED	28.5%	44.7%

Figure 3 was lifted directly from the report.[58] The variables examined were education level and employment status.[59] Specifically, education level was categorized as college-level, high school-level, or below high school-level.[60] Similarly, employment status was categorized as either employment post-release or no employment post-release.[61] Whether employed post-release or not, inmates with a higher level of education are less likely to reoffend compared to others with the same employment status.[62] Overall, this recidivism study demonstrates a direct correlation between increased education and reduced recidivism by way of post-release employment, a correlation which has been long recognized by IDOC.[63]

In conjunction with reduced recidivism, a benefit of investing in inmate education is economic stimulation. Gainful employment puts money in the hands of the earner, who in turn puts the money into the economy. Likewise, gainful employment keeps the earner occupied with less time to reoffend, which in turn saves taxpayer dollars for items other than housing inmates. The Indiana General Assembly should use these findings and benefits as the basis for enacting a new statute requiring adult inmates to complete an education program prior to release from incarceration.

II. THE POSITIONS OF OTHER STATES

The correctional education program laws of other states include many factors which the Indiana General Assembly should consider when drafting a new statute requiring all adult inmates in IDOC to complete an education

56. *Id.*
57. *Id.*
58. *See id.*
59. *See supra* Figure 3.
60. *See id.*
61. *See id.*
62. *See id.*
63. Nally, Lockwood & Ho, *supra* note 3.

program prior to their release from incarceration.[64] Predictably, the recidivism rates of these other states tend to support a direct correlation between increased education and reduced recidivism.[65]

A. Correctional Education Program Laws

The correctional education program laws of at least sixteen other states are more robust than Indiana's.[66] The statutory foundation in two of these states, Ohio and Vermont, consists of establishing a school system specifically for the corrections departments.[67] Ohio's is named the "Ohio Central School System," and Vermont's is named the "Community High School of Vermont."[68]

In three other states, California, Colorado, and Washington, the statutory foundation is comprised of legislative findings explicitly linking increased education to reduced recidivism. [69] Specifically, California established a Prisoner Literacy Act based on the legislature's finding "that there is a correlation between prisoners who are functionally literate and those who successfully reintegrate into society upon release."[70] The intent of the California legislature is "to raise the percentage of prisoners who are functionally literate, in order to provide for a corresponding reduction in the recidivism rate."[71]

Similarly, Colorado's Correctional Education Program was developed based on the legislature's findings that illiteracy is a problem among persons in correctional facilities and that such deficiencies "contribute to their inability to successfully reintegrate into society . . . and the likelihood of their return to criminal activity."[72] The Colorado legislature noted that "[r]esearch demonstrates a clear relationship between employment of such persons and a reduction in their recidivism."[73] The Colorado legislature requires the department to annually report a variety of information regarding the education program, including programs offered, enrollment, and inmate completion status.[74]

Finally, in Washington, "[r]ecognizing that there is a positive correlation between education opportunities and reduced recidivism," the legislature set forth its intent to offer postsecondary degree and certificate opportunities to inmates.[75] Likewise, the Washington legislature detailed its intent to require all

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64. *See infra* Figure 4.

65. *See infra* Figure 5.

66. *See infra* Figure 4.

67. OHIO REV. CODE ANN. § 5145.06 (West 2026); VT. STAT. ANN. tit. 28, § 120 (West 2025).

68. OHIO REV. CODE ANN. § 5145.06; VT. STAT. ANN. tit. 28, § 121 (West 2025).

69. CAL. PENAL CODE § 2053 (West 2025); COLO. REV. STAT. ANN. § 17-32-102 (West 2025); WASH. REV. CODE ANN. § 72.09.460 (West 2025).

70. CAL. PENAL CODE § 2053.

71. *Id.*

72. COLO. REV. STAT. ANN. § 17-32-102.

73. *Id.*

74. COLO. REV. STAT. ANN. § 17-32-105 (West 2025).

75. WASH. REV. CODE ANN. § 72.09.460 (West 2025).

inmates to participate in education or work programs, or both, with exceptions.[76]

The correctional education program laws of these five states, and those of eleven others, are detailed in Figure 4. Specifically, Figure 4 examines the intake process, requisite literacy level, included inmates, excluded inmates, and incentives and penalties of sixteen states with correctional education program laws which are more robust than Indiana's:

Figure 4 – Correctional Education Program Laws of Select States

	Intake Process	Requisite Literacy Level[77]	Included Inmates	Excluded Inmates	Incentives and/or Penalties
Arizona[78]	Education evaluation, including a standardized assessment test.	8th grade.	Inmates who score below the literacy level; for a minimum of 120 days.[79]	Inmates with medical, developmental, or learning disabilities.	Inmates must achieve the literacy level prior to release on community supervision.
California[80]	Determination of reading level.	9th grade; HSD or GED.	Inmates should achieve at least a 9th grade level; inmates at or above this level should achieve an HSD or GED.	-	Inmates are incentivized for participation in and completion of education programs.
Colorado[81]	"[L]iteracy test approved by the state board of education."	Competency; GED.	Inmates within five years of release who lack "basic and functional literacy skills."	Inmates with life or death sentences, security or health concerns, or disabilities.	Inmates who do not achieve literacy may be required to continue in an education program.
Delaware[82]	Classified in and out of the education program.	HSD or GED.	Inmates who are eligible under the rules are required to participate.	-	Inmates are not eligible for parole until the literacy level is achieved,

76. *Id.*

77. High school diploma is abbreviated as "HSD" and general education development, a high school equivalency degree, is abbreviated as "GED."

78. ARIZ. REV. STAT. ANN. §§ 31-229, -229.02 (2025).

79. Also, inmates without high school diplomas who are "responsible for the support of dependent children who are receiving assistance . . . shall participate in educational instruction to continue the inmate's basic education to the degree of passing a general equivalence diploma" or another approved test. ARIZ. REV. STAT. ANN. § 31-229.01 (2025).

80. CAL. PENAL CODE §§ 2053, 2053.1, 2054.2 (West 2025).

81. COLO. REV. STAT. ANN. § 17-32-105 (West 2025).

82. DEL. CODE ANN. tit. 11, § 6531A (West 2026).

					and inmates who refuse may be disciplined.
Florida[83]	Literacy test approved by the state board of education.	6.0 grade through 8.9 grade.	Inmates with at least a 2-year sentence "and who [lack] basic and functional literacy skills"; for a minimum of 150 hours. Priority given to young inmates and inmates near release.	Inmates with life or death sentences, security or health concerns, or work camp or vocational center housing.	Inmates who do not achieve literacy may be required to continue in the program, and inmates who actively participate may be granted up to 6 days of credit time.
Georgia[84]	Standardized reading test.	5th grade.	Inmates with at least a 1-year sentence who test below the literacy level.	Inmates with death sentences or learning disabilities, or who are at least 50 years old.	Inmates shall remain in the program until they reach the literacy level.
Kansas[85]	Written agreement between the inmate and secretary of corrections.	Secondary education.	Inmates without the equivalent of a secondary education who are capable of earning one.	-	Inmates shall "have made progress towards" or "successfully completed" an education prior to release on parole.
Massachusetts[86]	Standardized reading test.	8th grade.	Inmates testing below the literacy level; for a minimum of 90 days.	-	Inmates may be required to participate longer: "as the committee deems sufficient for satisfactory completion."

83. FLA. STAT. §§ 944.801, 1004.02 (2025).
84. GA. CODE ANN. § 42-5-64 (West 2025).
85. KAN. STAT. ANN. § 75-5210a (West 2025).
86. MASS. GEN. LAWS ANN. ch. 127, app. §§ 1-2, -3 (West 2025).

Missouri[87]	Department-prescribed schedule of activities.	HSD or equivalent.	Inmates without a high school diploma or its equivalent.	Inmates with a valid reason may be excused from adhering to a schedule.	-
New Jersey[88]	-	HSD or equivalent.	Inmates with at least an 18-month sentence and without an HSD or equivalent.	Inmates with medical, developmental, or learning disabilities. Inmates serving a sentence of longer than 10 years may defer participation.	Inmates who satisfactorily participate are eligible for credit time for good behavior.
New Mexico[89]	-	HSD or equivalent.	Inmates with at least an 18-month sentence and without an HSD or equivalent; for a minimum of 90 days.	Inmates with medical, developmental, or learning disabilities. Inmates serving a sentence of longer than 10 years may defer participation.	Inmates who refuse to participate are not eligible for meritorious deduction.
Ohio[90]	-	HSD or equivalent.	Inmates without an HSD.	Inmates with medical, mental health, and security concerns.	Inmates who refuse to participate are subject to disciplinary action.
Oklahoma[91]	Examination to determine level of education proficiency.	HSD or equivalent.	Inmates without an HSD. Priority is given to inmates who "[lack] basic literacy skills" and inmates who are "closest to their projected release dates."	Inmates "incapable of benefiting from education programs."	Inmates who refuse to participate are ineligible for credit time and jeopardize their parole eligibility.

87. MO. ANN. STAT. §§ 217.337, 217.355 (West 2025).
88. N.J. STAT. ANN. § 30:4-92.2 (West 2025).
89. N.M. STAT. ANN. § 33-11-3 (West 2025).
90. OHIO REV. CODE ANN. § 5145.06 (West 2026).
91. OKLA. STAT. ANN. tit. 57, §§ 510.7, 510.8 (West 2025).

Oregon[92]	Test for basic reading and mathematics skills.	8.0 grade.	Inmates with at least a 1-year sentence who test below the literacy level.	Inmates with life or death sentences, developmental disabilities, or security or health concerns.	Inmates are incentivized to achieve the literacy level, and for earning an HSD or GED.
Vermont[93]	Risk assessment.	HSD or equivalent.	Inmates "who are under 23 years of age and have not received [an HSD], or are assessed to have a moderate-to-high criminogenic need and are within 24 months of reentry."	-	-
Washington[94]	-	HSD or equivalent.	All incarcerated individuals.	Inmates with health or medical conditions.	Inmates who refuse to participate in programs available at no charge will lose privileges.

Each column of Figure 4 highlights one factor of the sixteen states' correctional education program laws, summarized by at least one noteworthy commonality. First, the intake process in most states includes the administration of a standardized literacy examination to determine the inmate's literacy level.[95] Notably, Colorado and Florida administer literacy examinations with the assistance of their state boards of education,[96] and inmates in Kansas sign a written agreement with the secretary of corrections.[97] Like Indiana's IRAS and Case Plan,[98] Vermont administers a risk assessment[99] and Missouri prescribes a schedule of activities.[100]

Second, most states set a requisite literacy level that the inmate must reach, which is often a high school diploma or equivalent.[101] Interestingly, Georgia's

92. OR. REV. STAT. ANN. § 421.084 (West 2025).
93. VT. STAT. ANN. tit. 28, § 120 (West 2025).
94. WASH. REV. CODE ANN. § 72.09.460 (West 2025).
95. *See supra* Figure 4.
96. COLO. REV. STAT. ANN. § 17-32-105 (West 2025); FLA. STAT. § 944.801 (2025).
97. KAN. STAT. ANN. § 75-5210a (West 2025).
98. *See* IND. DEP'T OF CORR., *supra* note 10, at 11.
99. VT. STAT. ANN. tit. 28, § 120 (West 2025).
100. MO. ANN. STAT. § 217.337 (West 2025).
101. *See supra* Figure 4.

requisite level is much lower at fifth grade,[102] and Arizona, Florida, Massachusetts, and Oregon's requisite levels are mid-pack at eighth grade.[103] On the other hand, California's requisite level is staggered: all inmates should achieve a ninth-grade level, and those testing above a ninth-grade level should achieve a high school diploma or equivalent.[104]

Third, all states specify which inmates are subject to the requirement, and most utilize their requisite literacy level as a threshold.[105] For example, the requisite literacy levels in Kansas, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, and Vermont is a high school diploma or equivalent.[106] In these states, inmates who do not meet the requisite literacy level—those without a high school diploma or equivalent—must participate in an educational program.[107] Another factor taken into consideration by several states is the timing of participation.[108] Specifically, Colorado prioritizes inmates who are within five years of release[109] and Vermont prioritizes inmates who are within two years of reentry.[110] Similarly, Florida and Oklahoma prioritize inmates who are nearing release.[111]

Fourth, many states exclude certain groups of inmates, such as those with life or death sentences, health concerns, security concerns, or developmental or learning disabilities.[112] Notably, in New Jersey and New Mexico, inmates with sentences longer than ten years may defer participation.[113] Similarly, in Georgia, inmates who are at least fifty years old are excluded from participation.[114] Finally, many states penalize inmates who refuse to participate, generally by rendering them ineligible for credit time or parole.[115] Like Indiana's CPCT structure,[116] many states incentivize participation, generally by awarding credit time.[117]

The Indiana General Assembly should integrate each of these factors into a new statute requiring adult inmates to complete an education program prior to release because these robust laws tend to result in a reduced recidivism rate.[118]

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102. GA. CODE ANN. § 42-5-64 (West 2025).

103. ARIZ. REV. STAT. ANN. § 31-229 (2025); FLA. STAT. § 1004.02 (2025); MASS. GEN. LAWS ANN. ch. 127, app. § 1-2 (West 2025); OR. REV. STAT. ANN. § 421.084 (West 2025).

104. CAL. PENAL CODE § 2053.1 (West 2025).

105. *See supra* Figure 4.

106. *See id.*

107. *See id.*

108. *See id.*

109. COLO. REV. STAT. ANN. § 17-32-105 (West 2025).

110. VT. STAT. ANN. tit. 28, § 120 (West 2025).

111. FLA. STAT. § 944.801 (2025); OKLA. STAT. ANN. tit. 57, § 510.8 (West 2025).

112. *See supra* Figure 4.

113. N.J. STAT. ANN. § 30:4-92.2 (West 2025); N.M. STAT. ANN. § 33-11-3 (West 2025).

114. GA. CODE ANN. § 42-5-64 (West 2025).

115. *See supra* Figure 4.

116. IND. DEP'T OF CORR., *supra* note 40.

117. *See supra* Figure 4.

118. *See infra* Figure 5.

B. Recidivism Rates

Given that Indiana[119] and at least three other states[120] have explicitly recognized a direct correlation between increased education and reduced recidivism, an evaluation of the recidivism rates of the states included in Figure 4, and Indiana, is warranted:

Figure 5 – Recidivism Rates (%) of Select States

State	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Avg.
Arizona[121]	38.2	39.2	39.1	39.0	41.4	39.0	38.6	36.3	33.8	28.2	37.28
California[122]	25.0	22.2	23.1	24.1	23.6	23.8	19.8	16.8	-	-	22.3
Colorado[123]	46.1	48.7	50.0	49.5	48.1	47.2	44.9	40.1	31.0	28.0	43.36
Delaware[124]	22.9	21.8	21.6	19.2	19.6	20.2	12.7	7.9	8.5	-	17.16
Florida[125]	26.1	25.0	25.3	24.2	24.7	25.3	24.0	21.2	21.2	-	24.11
Georgia[126]	26.9	26.6	26.3	27.4	27.5	28.4	27.7	23.9	23.8	25.3	26.38
Indiana[127]	37.6	38.17	36.99	33.87	33.78	36.95	38.16	33.82	29.79	34.78	35.39

119. *See supra* Part I.C.

120. *See supra* Part II.A.

121. ARIZ. DEP'T OF CORR. REHAB. & REENTRY, THREE YEAR RETURN TO INCARCERATION REP.: FY 2011 TO FY 2020 RELEASES 7 (2023), https://corrections.az.gov/sites/default/files/documents/reports/ReturnToIncarceration.pdf [https://perma.cc/XN8D-Q7HH].

122. CAL. DEP'T OF CORR. AND REHAB., RECIDIVISM REPORT FOR INDIVIDUALS RELEASED FROM THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN FISCAL YEAR 2018-2019, at vii (2024), https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2024/02/Statewide-Recidivism-Report-for-Individuals-Released-in-Fiscal-Year-2018-19.pdf [https://perma.cc/Q3MC-MGLH].

123. *CDOC Recidivism and Return Rates*, COLO. DEP'T OF CORR., https://cdoc.colorado.gov/about/data-and-reports/statistics (last visited Jan. 22, 2026).

124. DEL. STAT. ANALYSIS CTR., RECIDIVISM IN DELAWARE: AN ANALYSIS OF OFFENDERS RELEASED IN 2017 THROUGH 2019, at 2 (2023), https://sac.delaware.gov/wp-content/uploads/sites/64/2023/12/2019-Recidivism-Report-final-122223.pdf [https://perma.cc/HRT8-E8WM].

125. FLA. DEP'T OF CORR., FLORIDA PRISON RECIDIVISM REP.: RELEASES FROM 2009 TO 2021, at 1 (2024), https://fdc-media.ccplatform.net/content/download/25944/file/FDC%20Recidivism%20Report%202019%20Cohort%20July%202024.pdf [https://perma.cc/N9T7-WFC7].

126. *CY Recidivism Rates (Felony Reconviction)*, GA. DEP'T OF CORR., https://gdc.georgia.gov/media/17611/download [https://perma.cc/Z9DS-95D4] (last visited Jan. 22, 2026).

127. IND. DEP'T OF CORR., *supra* note 47. The report displays the percentages by year of calculation rather than year of release, which is a three-year difference. *See id.* For consistency with the reports of other states, the years of calculation have been converted to years of release in Figure 5.

Kansas[128]	-	35.94	35.97	33.91	31.19	34.98	32.27	33.50	26.77	-	33.07
Massachusetts[129]	35.0	32.0	32.0	32.0	33.0	30.0	29.0	29.0	26.0	-	30.89
Missouri[130]	-	-	-	-	42.9	40.8	37.2	32.0	29.5	29.2	35.27
New Jersey[131]	31.3	31.3	29.8	30.5	30.4	30.9	29.2	28.6	-	-	30.25
Ohio[132]	27.57	29.29	30.78	31.47	32.43	32.69	-	-	-	-	30.71
Vermont[133]	45.0	48.3	48.4	52.2	43.5	43.4	43.6	41.0	42.4	-	45.31

The recidivism rates detailed in Figure 5 are those reported for each state during the ten-year period between 2011 and 2020.[134] Then, an average recidivism rate is displayed for each state's reported years.[135] For example, Indiana reported a recidivism rate for each of the ten release years between 2011 and 2020, so the average rate encompasses those ten years.[136] On the other hand, Ohio reported a recidivism rate for years 2011 to 2016 only, so the average rate encompasses those six years.[137] Generally, Arizona, Colorado, and Vermont have higher recidivism rates than Indiana.[138]

States included in Figure 4 but not included in Figure 5 are New Mexico, Oregon, Oklahoma, and Washington. New Mexico's recidivism rates are reported on a graph without exact numerical values.[139] However, based on the labeled percentage ranges, New Mexico's recidivism rate is generally higher

128. 2018 KAN. DEP'T OF CORR. FISCAL YEAR ANN. REP. 6, https://www.doc.ks.gov/publications/Reports/Archived/2018/view [https://perma.cc/C4J6-2G48]; 2023 KAN. DEP'T OF CORR. FISCAL YEAR ANN. REP. 11, https://www.doc.ks.gov/publications/Reports/fy2023-annual-report [https://perma.cc/95T8-EYF9].

129. MASS. DEP'T OF CORR., THREE-YEAR RECIDIVISM RATES: 2019 RELEASE COHORT 11 (2024), https://www.mass.gov/doc/three-year-recidivism-rates-2019-release-cohort/download [https://perma.cc/W8RW-D9P2].

130. MO. DEP'T OF CORR., RECIDIVISM OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION 2 (2023), https://doc.mo.gov/media/pdf/recidivism-report-fy24.

131. N.J. DEP'T OF CORR., 2018 RELEASE COHORT OUTCOME REPORT: A THREE-YEAR FOLLOW-UP 7 (2018), https://www.nj.gov/corrections/pdf/ReportsPublications/ReleaseOutcomeReports/2018_Release_Recidivism_Report.pdf [https://perma.cc/7V2A-BLEY].

132. *Recidivism Report*, OHIO DEP'T OF REHAB. & CORR., fig. 1 (2021), https://drc.ohio.gov/about/resource/reports/key-recidivism-information/2020-recidivism-update [https://perma.cc/DJ25-AEHZ].

133. *Recidivism Rate by Calendar Year*, VT. DEP'T OF CORR., https://doc.vermont.gov/sites/correct/files/documents/VTDOC_RecidivismRate_2009-2019.pdf [https://perma.cc/796H-MVS6] (last visited Jan. 22, 2026).

134. *See supra* Figure 5.

135. *See supra* Figure 5.

136. IND. DEP'T OF CORR., *supra* note 47.

137. OHIO DEP'T OF REHAB. & CORR., *supra* note 132.

138. *See supra* Figure 5.

139. *Performance Report Card: New Mexico Corrections Department*, N.M. LEGIS. FIN. COMM. (2020), https://www.nmlegis.gov/Entity/LFC/Documents/Agency_Report_Cards/770%20-%20NMCD%20FY20%20Q1.pdf [https://perma.cc/9GJ3-LX4M].

than Indiana's.[140] Similarly, Oregon's recidivism rates are reported on a graph but without exact numerical values.[141] However, based on the labeled percentage ranges, Oregon's recidivism rate is generally lower than Indiana's.[142] The recidivism rates of Oklahoma and Washington could not be located.

To summarize Figure 5: fourteen of the sixteen states have reported their recidivism rates. Of the fourteen reported recidivism rates, ten are lower than Indiana's. This supports the well-established direct correlation between increased education and reduced recidivism.

III. THE PROPOSED STATUTE

In order for the Indiana General Assembly to successfully implement a new statute requiring all adult inmates in IDOC to complete an education program prior to their release from incarceration, the participants should be limited to inmates with five years or less remaining on their sentences.[143] The statute should include a transition period and incorporate the factors included in the laws of other states.[144] Under the new regime, the cost of educating inmates is only slightly more than the current regime and can be offset overtime by the corresponding recidivism rate reduction.[145]

A. Target Population

The Indiana General Assembly should enact a new statute requiring all adult inmates to complete an education program prior to their release from incarceration. The initial considerations are (1) at what point during incarceration inmates should participate, and (2) which inmates should be excluded from the requirement. Specifically, the Indiana General Assembly should consider the following adult inmate population breakdown for calendar years 2019 through 2023 in Figure 6:

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140. *Id.*; *see supra* Figure 5.

141. KELLY GUINN, KELLY OFFICER & KEN SANCHAGRIN, OR. CRIM. JUST. COMM'N, OREGON RECIDIVISM ANALYSIS: IMPACT OF MEASURE 110, at 3 (2024), https://www.oregon.gov/cjc/CJC%20Document%20Library/Recidivism_Analysis_M110_October2024.pdf [https://perma.cc/U92W-X2B8]; *see supra* Figure 5.

142. GUINN, OFFICER & SANCHAGRIN, *supra* note 141, at 3.

143. *See infra* Figures 6 and 7.

144. *See infra* Part III.B.

145. *See infra* Figures 8 and 9.

Figure 6 – Total Adult Population Breakdown[146]

As of January 1	Total Adult Inmate Population	Balance of 2-5 Years	Balance of 2-5 Years (%)	Balance of 1-2 Years	Balance of 1-2 Years (%)	Balance of < 1 Year	Balance of < 1 Year (%)
2019	27,468	6,275	22.8%	4,742	17.3%	6,696	24.4%
2020	27,920	6,424	23.0%	4,719	16.9%	6,751	24.2%
2021	25,315	5,885	23.2%	3,971	15.7%	5,647	22.3%
2022	24,717	5,500	22.3%	3,794	15.3%	5,296	21.4%
2023	24,196	5,791	23.9%	3,960	16.4%	4,186	17.3%
5-Year Avg.	**25,923**	**5,975**	**23.0%**	**4,237**	**16.3%**	**5,715**	**22.1%**

In Figure 6, all data listed encompasses the period between 2019 and 2023 and was captured on January 1 of that year.[147] The data for each year includes the total adult inmate population (column 2) as well as a breakdown by the time remaining until the inmates' earliest possible release date (EPRD).[148] Specifically, the time frames are a balance of two to five years (column 3), a balance of one to two years (column 5), and a balance of less than one year (column 7).[149] For easier reference, Figure 6 also displays the respective percentages for each of the time frames (columns 4, 6, and 8).[150] As shown in the final row, (1) the average annual total adult inmate population is 25,923; (2) an average of 61.4% of inmates have five years or less until release; and (3) an average of 38.4% of inmates have two years or less until release.[151]

In contrast, the education program participant breakdown for calendar years 2019 through 2023 is detailed in Figure 7:

146. SCHIKORA, *supra* note 23, at 7–8.

147. *See supra* Figure 6.

148. *See id.*

149. *See id.*

150. *See id.* The percentages for each time frame were calculated by dividing the number of inmates in that time frame (columns 3, 5 and 7) by the total adult inmate population (column 2).

151. *See id.* The first percentage of 61.4% is calculated by adding the averages of columns 4, 6 and 8, and the second percentage of 38.4% is calculated by adding the averages of columns 6 and 8.

Figure 7 – Education Program Participant (Part.) Breakdown[152]

CY	Total Adult Inmate Pop.	Educ. Prgm. Parts.	Bal. of > 5 Yrs.	Bal. of > 5 Yrs. (%)	Bal. of 2-5 Yrs.	Bal. of 2-5 Yrs. (%)	Bal. of 1-2 Yrs.	Bal. of 1-2 Yrs. (%)	Bal. of < 1 Yr.	Bal. of < 1 Yr. (%)
2019	27,468	20,068	6,642	24.2 %	4,218	15.4 %	3,071	11.2 %	6,137	22.3 %
2020	27,920	15,541	4,843	17.4 %	3,169	11.4 %	2,233	8.0%	5,296	19.0 %
2021	25,315	14,627	4,682	18.5 %	2,928	11.6 %	2,109	8.3%	4,908	19.4 %
2022	24,717	12,756	3,731	15.1 %	2,396	9.7%	1,713	6.9%	4,916	19.9 %
2023	24,196	7,492[153]	2,598	10.7 %	1,394	5.8%	1,122	4.6%	2,387	9.9%
5-Year Avg.	**25,923**	**14,097**	**4,499**	**17.2 %**	**2,821**	**10.8 %**	**2,050**	**7.8%**	**4,729**	**18.1 %**

In Figure 7, all data listed encompasses the period between 2019 and 2023 and was captured throughout the year as adult inmates enrolled in an education program.[154] The data for each year includes the total adult inmate population (column 2), the total number of education program participants (column 3), and a breakdown by the time remaining until the inmates' EPRD.[155] Specifically, the time frames are a balance of more than five years (column 4), a balance of two to five years (column 6), a balance of one to two years (column 8), and a balance of less than one year (column 10).[156] For easier reference, Figure 7 also displays the respective percentages for each of the time frames (columns 5, 7, 9, and 11).[157] As shown in the final row, (1) the average number of education program participants is 14,097; (2) an average of 53.9% of the total population participates in an education program; (3) an average of 36.7% of the total population participates in an education program and has five years or less until release; and (4) an average of 25.9% of the total population participates in an education program and has two years or less until release.[158]

152. SCHIKORA, *supra* note 23, at 9–10.

153. This number is noticeably lower than previous years for two reasons: (1) a change in how CPCT works, and (2) IDOC's switch to a new database in mid-2023. *Id.* at 10.

154. *See supra* Figure 7.

155. *See id.*

156. *See id.*

157. *See id.* The percentages for each time frame were calculated by dividing the number of inmates in that time frame (columns 4, 6, 8, and 10) by the total adult inmate population (column 2).

158. *See id.* The first percentage of 53.9% is calculated by adding the average of columns 5, 7, 9, and 11; the second percentage of 36.7% is calculated by adding the average of columns 7, 9, and 11; and the third percentage of 25.9% is calculated by adding the average of columns 9 and 11.

B. Proposed Legislation

1. Included & Excluded Inmates.—The Indiana General Assembly's end goal should be to require all adult inmates with five years or less until release to complete an education program because five years allows inmates to (1) complete a traditional four-year degree, (2) complete multiple education programs, or (3) complete an education program and transition into a work program.

Based on the data in Figure 6, an average of 61.4% of the adult population would be participating in education programs at one time.[159] And based on the data in Figure 7, an average of 53.9% of adult inmates currently participate in an education program.[160] Thus, there is a mere 7.5% increase in participants under the proposed regime. However, the new figure of 61.4% is representative of all adult inmates, including those who may otherwise be excluded from participating. Inmates with security concerns, physical or mental health concerns, or developmental or learning disabilities should be excluded from this requirement.[161] However, IDOC should have the discretion to admit into education programs statutorily excluded inmates, so long as the inmate will benefit from participation without impacting the progress of other participants.

2. Transition Period.—To successfully effectuate this change, the Indiana General Assembly should establish a transition period within the statute and start by requiring all adult inmates with two years or less until release to complete an education program. For example, if this statute were to go into effect in 2026, the transition could be gradual, such as: (1) all inmates with two or less years until release, by 2026; (2) all inmates with three or less years until release, by 2028; (3) all inmates with four or less years until release, by 2029; and (4) all inmates with five years or less until release, by 2030.

This transition period will allow for IDOC to ease the requirement into its current procedures. This will also help to offset the cost of continuing to educate inmates with more than five years until release who are currently enrolled in an education program. This group of participants should be permitted to continue for the purpose of successfully completing the program in which they are enrolled. And even after the transition period has elapsed, IDOC should have the discretion to admit into education programs inmates with more than five years until release, so long as resources permit.

3. Intake Process, Literacy Examination, & Penalties.—The balance of the statute should mirror the factors that have proven successful in other states.

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159. *See supra* Figure 6.

160. *See supra* Figure 7. The 53.9% average calculated here is drastically different than the 71% calculated in Figure 1. *See supra* Part I.A. Looking closely at the data presented, this can be attributed, at least in part, to the sharp decline in participants during 2023, which is not a year that is included in Figure 1. *See* SCHIKORA, *supra* note 23, at 10. Moving forward, the new calculated average of 53.9% will be used.

161. Inmates who are serving death sentences or life without parole sentences are, by default, excluded from this requirement because the threshold is five years or less.

IDOC should be required to administer a standardized literacy examination to inmates prior to their assignment to an education program. For inmates who have five years or less until release from the date they are sentenced, this means that the examination is administered during their intake process. For inmates who have more than five years until release from the date they are sentenced, this means the examination will be administered when they reach the five-year balance mark. IDOC should be authorized to collaborate with the Indiana Department of Education to implement this examination.

The objective of the standardized literacy examination is to determine an inmate's literacy level. As a threshold, inmates who test below a twelfth-grade literacy level should be required to complete an education program designed to help them achieve a high school equivalency education. On the other hand, inmates who test above the requisite level should be required to complete an education program with content beyond the level of high school equivalence. Any inmates who refuse to participate should be rendered ineligible for credit time and parole.

4. Annual Report.—As a final measure, IDOC should be required to file an annual report with the Indiana General Assembly to provide an update on the status of the transition. At a minimum, the report should include a breakdown of each program, including number of participants and length of participation. Any programs with consistently low attendance should be removed from the course offerings.

C. Cost of Completion

A change in the number of participants will likely lead to a change in the cost of the education programs, which can be calculated based on the cost of the yearly education services contracts.[162] Each year, IDOC prepares an annual report which includes a fiscal year expenditure summary with an education services contract line item.[163] The second column of Figure 8 details the total cost of the education services contracts for fiscal years 2019 to 2023:

162. *See infra* Figure 8.

163. *Annual Report*, IND. DEP'T OF CORR., https://www.in.gov/idoc/news-media-and-publications/annual-reports/ [https://perma.cc/B4EU-UYKL] (last visited Jan. 22, 2026).

Figure 8 – Cost of Mandatory Education Program Completion

Yr.	Total Cost	Actual Parts.[164]	Cost Per Part.	Projected Parts.[165]	Projected Total Cost	Cost Difference
2019	$8,661,273[166]	20,068	$431.60	18,080	$7,803,328	-$857,945
2020	$9,641,490[167]	15,541	$620.39	16,313	$10,120,422	+$478,932
2021	$8,405,207[168]	14,627	$574.64	14,300	$8,217,352	-$187,855
2022	$903,524[169]	12,756	$71.83	12,821	$920,932	+$17,408
2023	$5,119,533[170]	7,492	$683.33	10,735	$7,335,548	+$2,216,015
5-Yr. Avg.	**$6,546,205**	**14,097**	**$476.36**	**14,450**	**$6,879,516**	**$333,311**

Figure 8 also displays the number of actual program participants (column 3) and the cost per participant (column 4) for fiscal years 2019 to 2023.[171] Then, Figure 8 depicts the number of projected participants (column 5) and the projected total cost (column 6).[172] The number of projected participants is based on the data in Figures 6 and 7 and the proposal that the Indiana General Assembly require all adult inmates with five years or less until release to complete an education program prior to release. Specifically, the projected number here incorporates the proposed transition period, which begins by requiring all inmates with two years or less until release to complete an education program, and includes inmates with more than five years until release who are currently enrolled in an education program.

Finally, Figure 8 shows the cost difference between educating the current number of participants and educating the projected number of participants

164. SCHIKORA, *supra* note 23, at 9–10.

165. This column is calculated by adding columns 5 and 7 of Figure 6 to column 4 of Figure 7.

166. 2019 IND. DEP'T OF CORR. ANN. REP. 13, https://www.in.gov/idoc/files/idocnews,-media,-and-publications/annual-reports/2019-DOC-Annual-Report.pdf [https://perma.cc/MJW4-GNXJ].

167. 2020 IND. DEP'T OF CORR. ANN. REP. 10, https://www.in.gov/idoc/files/idocnews,-media,-and-publications/annual-reports/2020-DOC-Annual-Report.pdf [https://perma.cc/536C-WR5B].

168. 2021 IND. DEP'T OF CORR. ANN. REP. 10, https://www.in.gov/idoc/files/idocnews,-media,-and-publications/annual-reports/2021-DOC-Annual-Report.pdf [https://perma.cc/9BDT-QM22].

169. 2022 IND. DEP'T OF CORR. ANN. REP. 8, https://www.in.gov/idoc/files/idocnews,-media,-and-publications/annual-reports/2022-DOC-Annual-Report.pdf [https://perma.cc/2V2G-7E5V]. There is no explanation given as to why this amount is significantly lower that of other years.

170. IND. DEP'T OF CORR., *supra* note 20, at 10.

171. *See supra* Figure 8. The cost per participant was calculated by dividing the total cost (column 2) by the number of actual participants (column 3).

172. *See id.* The projected total cost was calculated by multiplying the cost per participant (column 4) by the number of projected participants (column 5).

(column 7).[173] The average cost of educating inmates under the new regime is merely $333,311 more per year than the current cost.[174] This cost may be offset over time by a corresponding reduction in the recidivism rate.

As discussed in Part I.C, IDOC has recognized a direct correlation between increased education and reduced recidivism since at least 2011.[175] Thus, if the Indiana General Assembly can also recognize this correlation and enact the proposed statute, Indiana's recidivism rate should decrease accordingly. A decrease in the recidivism rate depicts a decrease in the number of reoffenders being housed in IDOC's facilities, which decreases the daily operating costs.[176]

Figure 9 – Projected Cost Savings from Recidivism Rate Reduction

2020 Releases[177]	Recidivism Rate	Reoffenders	2024 Per Diem[178]	Cost Per Day	Savings Per Day
9,782	34.78%[179]	3,402	$79.22	$269,506.44	-
9,782	30%	2,935	$79.22	$232,510.70	$36,995.74
9,782	25%	2,446	$79.22	$193,772.12	$75,734.32
9,782	20%	1,956	$79.22	$154,954.32	$114,552.12

The data in Figure 9 is based on the number of 2020 releases (column 1) and the corresponding 34.78% recidivism rate for the 2020 cohort, followed by a hypothetical recidivism rate reduction to 30%, 25%, and 20% (column 2).[180] Then, Figure 9 displays the number of reoffenders based on the corresponding recidivism rate (column 3), the 2024 per diem rate of $79.22 (column 4), and the cost per day (column 5).[181] Finally, Figure 9 shows the savings per day (column 6).[182] The current cost of housing reoffenders from the 2020 cohort is nearly $270,000 per day.[183] Less than a 5% reduction in the recidivism rate to

173. *See id.*

174. *See id.*

175. Nally, Lockwood & Ho, *supra* note 3.

176. *See infra* Figure 9.

177. *Adult Releases by Committing County*, IND. DEP'T OF CORR. (2020), https://www.in.gov/idoc/files/policy-and-procedure/statistical-data/adult-releases/Adult-REL-CY2020.pdf [https://perma.cc/HY8M-4QT6].

178. *Department of Correction-Per Diem Report*, IND. DEP'T OF CORR. (2024), https://www.in.gov/idoc/files/policy-and-procedure/financial-information/FY24-Per-Diem.pdf [https://perma.cc/55QK-54VS].

179. IND. DEP'T OF CORR., *supra* note 47.

180. *See supra* Figure 9.

181. *See id.* The number of reoffenders (column 3) was calculated by multiplying the 2020 releases (column 1) by the recidivism rate (column 2). Then, the cost per day (column 5) was calculated by multiplying the number of reoffenders (column 3) by the 2024 per diem rate (column 4).

182. *See id.* The savings per day was calculated by subtracting the cost per day (column 5) from the current cost of $269,506.44.

183. *See id.*

30% leads to cost savings of nearly $37,000 per day.[184] In sum, the $333,311 additional annual cost of educating offenders could be recouped in nine calendar days, assuming the recidivism rate decreased to 30%.[185]

CONCLUSION

The Indiana General Assembly has required IDOC to implement academic and vocational education programs in its facilities.[186] Although the facilities currently offer education programs and award credit time to inmates for participating, adult inmates are not required to participate in or complete an education program prior to their release from incarceration.[187]

First, Indiana's existing legislation demonstrates the importance of education programs and penalizes inmates for refusal to participate in beneficial programs geared towards their reentry to society. Likewise, IDOC's current administrative processes show that inmates could be given a standardized literacy examination during the existing intake process. And IDOC itself has long recognized a direct correlation between increased education and reduced recidivism.

Second, the correctional education program laws of other states show the many ways in which the Indiana General Assembly can draft a new statute requiring adult inmates to successfully complete an education program, including by testing inmates, prioritizing inmates who are nearing release, and excluding certain groups of inmates. In conjunction with these laws, the respective recidivism rates of other states demonstrate a correlation between increased education and reduced recidivism.

Third, the current inmate participation breakdown lays the groundwork for restricting projected inmate participants to those with five years or less remaining on their sentences. Likewise, the proposed legislation should include a transition period and incorporate the factors included in the laws of other states. Finally, the respective cost and cost savings of requiring competition show that the cost of educating inmates under a new mandatory regime is comparable to the cost of educating inmates under IDOC's current regime and also show that the cost may be further offset by a corresponding reduction in the current recidivism rate.

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184. *See id.*

185. Nine calendar days was calculated by dividing the additional annual cost of educating offenders of $333,331, *see supra* Figure 8, by the cost savings of $36,995.74, *see supra* Figure 9.

186. IND. CODE § 11-10-5-1 (2025).

187. *See generally* IND. DEP'T OF CORR., *supra* note 10.

For these reasons, the Indiana General Assembly should enact a statute requiring all adult inmates in IDOC with five years or less until release to complete an academic or vocational education program prior to their release from incarceration. Requiring completion of an education program will assist adult offenders in obtaining sustainable post-release employment, which will in turn decrease Indiana's recidivism rate.

RAISING INDIANA: HOW LESSONS LEARNED FROM ARIZONA'S EMPOWERMENT SCHOLARSHIP ACCOUNTS CAN IMPROVE INDIANA'S EDUCATION SCHOLARSHIP ACCOUNTS

PATRICK SANDERS*

INTRODUCTION

In 2021, the Indiana General Assembly created the Indiana Education Scholarship Account Program ("INESA") for Indiana special education students.[1] The Indiana Treasurer of State administers Education Scholarship Accounts to "allow[] parents to opt out of the public school system and customize education to their child's needs."[2] These accounts allow parents of eligible students, or emancipated eligible students, to spend INESA funds "on approved educational programs, therapies, services, tuition and fees, and other expenses related to the student's education."[3] INESA on its face seems beneficial to students needing special education, but the program's statutory scheme leaves many gaps that create a possibility for abuse, a lack of accountability for students and service providers, and a potential unnecessary burden on state resources.

INESA is just one of many state programs nationwide that implement education savings accounts ("ESA"). ESAs are a type of voucher program that "route[s] public per-pupil funding into government-authorized savings accounts for families with students not attending public schools."[4] Families are able to use these accounts for approved uses including private school tuition, tutoring, and online learning.[5] The amount awarded to families can range from twenty-seven percent of the state's per-pupil spending to nearly one-hundred percent.[6] Indiana's ESA program allows for a scholarship award of up to $20,000 for

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1. *Education Scholarship Account Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/education-scholarship-account-program/ [https://perma.cc/2337-NJM9] (last visited Oct. 16, 2025).

2. *Indiana Education Scholarship Account*, IND. TREASURER OF STATE, https://www.in.gov/tos/inesa/home/ [https://perma.cc/2AVC-ZLQ2] (last visited Oct. 16, 2025). *But see* IND. CODE § 20-51.4-3-2 (2026). On July 1, 2026, the Indiana Department of Education will become the administrating authority for the INESA program. As of the time of this Note's publication, the Treasurer of State still administers the program, so this Note will refer to the Treasurer of State as the administrating authority.

3. *Indiana Education Scholarship Account Program*, IND. DEP'T OF EDUC., https://www.in.gov/doe/students/indiana-education-scholarship-account-program/ [https://perma.cc/6LMC-RAUV] (last visited Oct. 16, 2025).

4. Emily Ronco, *State Actions on Education Savings Accounts*, NAT'L CONF. OF STATE LEGISLATORS (May 3, 2024), https://www.ncsl.org/education/state-actions-on-education-savings-accounts [https://perma.cc/6QL3-USXC].

5. *Id.*

6. *Id.*

Indiana students with a disability, depending on the student's level of disability and the district in which the student lives.[7] Siblings of these students may receive up to $8,000 each year.[8]

Arizona established the nation's first ESA program in 2011.[9] The Arizona Empowerment Scholarship Account Program provides funds for tuition, textbooks, and services for students with disabilities.[10] Gradually, Arizona expanded the pool of eligible students to include students belonging to other specific groups, such as students in military families and students in low-performing schools.[11] In 2022, Arizona granted universal eligibility by expanding eligibility to any state resident attending a K-12 school.[12] Because of this expanded eligibility, 87,220 students participated in Arizona's ESA program in the 2024–2025 school year.[13] An expansion to universal eligibility might be an indication of the program's success, but the program has been under investigation by the Arizona Attorney General's Office for misuse of public monies stemming from the Arizona statute's lack of definition for "supplementary materials" that parents are allowed to purchase with the program's funds.[14]

Despite the potential risks of fund misallocation, as evidenced by Arizona's program, Indiana's INESA program is part of a growing nationwide trend toward using education savings account programs. At least thirty-six states contemplated ESA legislation in 2023.[15] As of 2025, there are eighteen states that have adopted programs similar to the INESA program.[16] Some states, including North Carolina, New Hampshire, and Montana, still have limited eligibility to disabled students or families with a limited income.[17] However, Arkansas, Iowa, Utah, and Florida have followed Arizona's lead and have enacted universal eligibility for their ESA programs.[18] West Virginia's Hope Scholarship Program grants ESA funds to students leaving public schools who had attended a public school for forty-five school days during the previous or current school year, and nearly 5,800 students participated in the program in the

7. IND. TREASURER OF STATE, *supra* note 2.

8. *Id.*

9. Ronco, *supra* note 4.

10. ARIZ. REV. STAT. ANN. § 15-2402 (2025).

11. Ronco, *supra* note 4.

12. *Id.*

13. *Empowerment Scholarship Accounts*, ARIZ. DEP'T OF EDUC., https://www.azed.gov/esa [https://perma.cc/A8CA-FWZ8] (last visited Mar. 16, 2025).

14. Paola Rodriguez, *AZ Department of Education under investigation for how it approves school voucher spending*, AZPM (July 11, 2024), https://news.azpm.org/p/news-topical-edu/2024/7/11/221003-az-department-of-education-under-investigation-for-how-it-approves-school-voucher-spending/ [https://perma.cc/J2L2-2MD3].

15. Ronco, *supra* note 4.

16. *What is an Education Savings Account (ESA)?*, EDCHOICE, https://www.edchoice.org/school-choice/education-savings-account/ [https://perma.cc/P4BA-BPB4] (last visited Oct. 16, 2025).

17. Ronco, *supra* note 4.

18. *Id.*

2023–2024 school year.[19] In 2024, 470,801 students participated in some kind of ESA program, a significant increase from the 19,211 participating students just five years prior.[20]

Currently, Indiana's ESA program is limited to students who require special education services and their siblings.[21] To be eligible, a K-12 student must be an Indiana resident who has a disability that is being addressed by an individualized education program ("IEP") or equivalent approved plan.[22] The student must not be enrolled in a public school receiving state tuition funding.[23] The annual income of the student's household must not exceed "more than 400% of the amount required . . . to qualify for the federal free or reduced-price lunch."[24] The student must also take either a statewide summative assessment based on the student's grade level or assessments that comply with the student's IEP or equivalent plan.[25] A student's ESA is valid for one year and may be renewed annually, provided that the student is still eligible for the program.[26]

Indiana's Educational Scholarship Account program has grown in popularity since its inception.[27] For the 2023–2024 school year, the number of Indiana families using an ESA had increased by 200% over the previous year.[28] In the same time period, the number of nonpublic schools educating ESA students also increased by more than 350%.[29] For the 2024–2025 school year, 856 students were approved for the program, with 630 students on a waiting list, up from the 540 students approved for an ESA in 2023.[30] While the current student numbers might seem small in Indiana, the student numbers in Arizona and West Virginia demonstrate the potential for a significant increase in ESA participants.

As part of Indiana's growing trend towards school choice programs, there is legislative momentum towards creating an expanded program that would pay

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19. *Id.*

20. Alli Aldis, *One Million Students in School Choice Programs, By the Numbers*, EDCHOICE (June 18, 2024), https://www.edchoice.org/engage/one-million-students-in-school-choice-programs-by-the-numbers/ [https://perma.cc/8QDE-CEAA].

21. IND. CODE § 20-51.4-2-4 (2025).

22. *Id.*

23. IND. CODE § 20-51.4-4-1(a)(5) (2025).

24. *INESA Families*, IND. TREASURER OF STATE, https://www.in.gov/tos/inesa/parent-page/ [https://perma.cc/PCH2-PT4B] (last visited Mar. 16, 2025).

25. § 20-51.4-4-1(a)(6).

26. § 20-51.4-4-1(d).

27. Casey Smith, *Indiana's Education Scholarship Accounts see boosted participation ahead of 2024-25 Term*, IND. CAP. CHRON. (July 1, 2024, at 16:00 ET), https://indianacapitalchronicle.com/briefs/indianas-education-scholarship-accounts-see-boosted-participation-ahead-of-2024-25-term/ [https://perma.cc/93M7-WY7X].

28. *Id.*

29. *Id.*

30. Aleksandra Appleton, *Participation in Voucher-like Education Choice Programs Soars in Indiana After Legal Changes*, CHALKBEAT IND. (Sep. 6, 2024), https://www.chalkbeat.org/indiana/2024/09/06/voucher-like-programs-for-career-special-education-see-more-students-enroll/ [https://perma.cc/G83T-J5CB].

for qualified expenses for all Indiana students.[31] Senate Bill 255, proposed in 2024, would have eliminated all income caps on current "school choice" grants and allowed any Indiana parent to apply for an annual grant that can be used for "qualified" education expenses including "tuition and fees, exam fees, services for students with a disability, transportation, payments for tutoring, and costs associated with extracurricular activities, apprenticeships or other programs."[32] S.B. 255 did not pass, but the Indiana General Assembly passed legislation that will eliminate household income ceilings for voucher programs starting in the 2025–2026 school year.[33]

With further increases in ESA participation, Indiana could create state budget burdens similar to those that Arizona experienced after its dramatic increase in ESA student participation.[34] Because Indiana has already experienced the potential for fraud in its charter school program,[35] the INESA program has the same potential for fraud and abuse that Arizona is currently experiencing. Furthermore, Indiana's statutory framework for the INESA program provides minimal accountability measures for the academic success of participating students.[36]

Arizona can serve as a cautionary tale to prevent Indiana's ESA program from expanding beyond a reasonable scope, so this Note will compare Indiana's Education Scholarship Accounts with Arizona's Empowerment Scholarship Accounts. Furthermore, policymakers in Indiana can learn from their counterparts in other states who have developed their own ESA programs. This Note proposes that, much like Arizona's ESA program, Indiana's ESA program currently suffers from a lack of statutory accountability measures to protect the program from financial abuses and academic failures.

Part I of this Note explains the legal developments of the ESA programs of both states. Part II provides an overview of the Arizona ESA program. Part III then outlines Indiana's ESA program. Part IV examines the limitations and legal issues facing the two ESA programs and explains the primary failures of both systems. Finally, Part V provides legal solutions that could fill the statutory gaps in Indiana's ESA program. These legal solutions will ultimately benefit both the State of Indiana and its students by providing stronger accountability measures for entities providing services in the INESA program.

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31. Casey Smith, *Indiana Senator Eyes 2025 for "School Choice" Overhaul*, IND. CAP. CHRON. (Jan. 19, 2024, at 6:30 ET), https://indianacapitalchronicle.com/2024/01/19/indiana-senator-eyes-2025-for-school-choice-overhaul/ [https://perma.cc/5VS3-LDG9].

32. *Id.*

33. *See infra* Part IV.B (describing statutory amendments to the Indiana Choice Scholarship Account Program and Indiana Educational Scholarship Account Program).

34. *See infra* Part IV.B (describing Arizona's budget concerns following expansion of Empowerment Scholarship Account eligibility).

35. *See infra* Part IV.A (summarizing current litigation alleging fraud against two Indiana charter schools).

36. *See infra* Part IV.C (analyzing the assessment requirements for the INESA program).

I. HISTORY OF ESA PROGRAMS IN ARIZONA AND INDIANA

A. Arizona's Legislative and Judicial History for School Vouchers

Arizona was the first state to introduce an educational savings account program in 2011.[37] However, the Empowerment Scholarship Account Program was not Arizona's first attempt at a voucher program aimed at helping students in need. Arizona established two voucher programs before the Empowerment Scholarship Account Program's creation, but both of these previous programs were held unconstitutional by the Arizona Supreme Court.[38] The Arizona Scholarships for Pupils with Disabilities Program provided "pupils with disabilities . . . the option of attending any public school of the pupil's choice or receiving a scholarship to any qualified school of the pupil's choice."[39] The Arizona Displaced Pupils Choice Grant Program provided state funds to students in foster care so they could attend a private primary or secondary school of their choice.[40] Both programs allowed sectarian and non-sectarian schools to participate without any requirements to alter their curriculum or practices.[41]

In *Cain v. Horne*, the plaintiffs contended that both programs violated the Arizona Constitution.[42] The court examined the Arizona Constitution's "Religion Clause" (prohibiting appropriation of public money to religious establishments) and "Aid Clause" (prohibiting appropriation of public money to aid churches and private and sectarian schools).[43] The Arizona Supreme Court held that the two programs violated the Aid Clause because the programs transferred state funds directly from the state treasury to private schools, regardless of the fact that the funds first passed through the hands of parents through checks or warrants.[44]

A few years later, the plaintiffs in *Niehaus v. Huppenthal* challenged the constitutionality of the Empowerment Scholarship program under the same Aid and Religion Clauses of the Arizona Constitution that were the focus in *Cain*.[45] This time, the Arizona Court of Appeals held that the program did not violate the Religion Clause because the program "is a system of choice that does not

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37. Libby Stanford & Mark Lieberman, *Educational Savings Accounts, Explained*, EDUC. WEEK (Mar. 27, 2023), https://www.edweek.org/policy-politics/education-savings-accounts-explained/2023/03 [https://perma.cc/93S2-4JK5].

38. Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009). *See also* Leah Blake, Comment, *A Call for State Legislators to Reconsider Their Stance on School Choice and School Funding*, 36 BYU J. PUB. L. 291, 306 (2022); Kevin P. Brady, *The Paradox of State-Funded Private Choice Vouchers, Accountability Measures, and Legal Protections for Students with Disabilities*, 344 EDUC. L. REP. 635, 640 (2017).

39. *Cain*, 202 P.3d at 1180 (quoting ARIZ. REV. STAT. ANN. § 15-891(A) (repealed 2022)).

40. *Id.*

41. *Id*.

42. *Id.* at 1181.

43. *Id.* at 1180.

44. *Id.* at 1184.

45. Niehaus v. Huppenthal, 310 P.3d 983, 985 (Ariz. Ct. App. 2013).

have the effect of advancing religion."[46] In contrast with previous voucher programs that were struck down, the spending of Empowerment Scholarship Account funds "depends solely upon how parents choose to educate their children."[47] Moreover, the court held that the program did not violate the Aid Clause because families have discretion on how to spend their funds, which may include services provided by public schools as well as religious ones.[48] As a result, the Court of Appeals affirmed the district court's denial of injunctive relief.[49] The Arizona Supreme Court declined to review the decision.[50] The *Niehaus* court therefore created a legal foundation for other states to adopt ESA programs.

In 2022, Arizona expanded eligibility for Empowerment Scholarship Accounts to all K-12 students and pre-K students with disabilities.[51] There are no income limits or testing mandates, and the accounts are funded at ninety percent of the state's per-pupil base funding.[52] State estimates from 2024 demonstrated that participating students receive between $7,000 and $8,000 annually, with special needs students receiving additional funds based on any special needs or required accommodations.[53]

B. Indiana's Legislative and Judicial History for School Vouchers

Indiana's path towards an ESA program faced legal challenges like Arizona's. In 2011, Indiana enacted House Enrolled Act 1003 which established the Indiana Choice Scholarship Program.[54] At the time, the Indiana Choice Scholarship program was the nation's largest school voucher program in terms of student eligibility.[55] The program expanded in 2013 following legislation that introduced additional eligibility pathways and eliminated the cap on students that could participate in the program.[56]

However, a group of taxpayers challenged the Choice Scholarship program's constitutionality in *Meredith v. Pence*.[57] The taxpayer-plaintiffs

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46. *Id.* at 987.

47. *Id*.

48. *Id.* at 987–88.

49. *Id.* at 984.

50. *Empowerment Scholarship Accounts*, EDCHOICE (Dec. 18, 2023), https://www.edchoice.org/school-choice/programs/arizona-empowerment-scholarship-accounts/ [https://perma.cc/CMB3-WLG4].

51. *Id.*

52. *Id.*

53. *Id.*

54. Katherine Cierniak, Rebecca Billick & Anne-Maree Ruddy, *The Indiana Choice Scholarship Program: Legal Challenges, Program Expansion, and Participation* 1, Policy Brief, IND. UNIV. CTR. FOR EVALUATION & EDUC. POL'Y (Feb. 2015), https://files.eric.ed.gov/fulltext/ED558597.pdf [https://perma.cc/CJ5H-DA5R].

55. *Id.*

56. *Id.* at 2.

57. Meredith v. Pence, 984 N.E.2d 1213, 1216 (Ind. 2013).

claimed that the school voucher program violated the Indiana Constitution because it uses taxpayer funds for teaching religion in religious private schools.[58] The plaintiffs also argued that the program unconstitutionally gave public education funds to private schools instead of the constitutionally mandated system of public schools.[59] The Indiana Supreme Court held that the program did not violate the Education Clause of the Indiana Constitution because the program allowed the General Assembly to carry out its duties "to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement" and to provide a public school system.[60] The court also saw no violation of the Indiana Constitution's prohibition on state expenditures to religious institutions because the families of eligible students, not schools, were the "direct beneficiaries" of the program, and because participating in the program was "entirely voluntary."[61] The Indiana Supreme Court therefore upheld the constitutionality of the voucher program.[62]

Much like in Arizona's *Niehaus* case, the Indiana Supreme Court created another legal foundation for state education spending. *Meredith* provided a legal catalyst for other Indiana state-funded voucher programs, especially those geared toward special education students.[63] Indiana enacted the Indiana Education Scholarship Account Program in 2021 and then launched the program in 2022.[64]

II. THE ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNT PROGRAM

The Arizona Empowerment Scholarship Account Program began as a program providing funds for students with disabilities.[65] A "qualified student" is an Arizona student eligible to enroll in an Arizona K-12 public school or a preschool program for children with disabilities.[66] However, the list of eligible students gradually expanded to include Arizona students in military families; students in low-performing schools; students in foster care; students who live on Native American reservations; and students whose parents are legally blind, deaf, or hard of hearing.[67] In 2022, eligibility expanded to include all K-12 students in Arizona.[68]

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58. *Id.* at 1217.
59. *Id.*
60. *Id.* at 1222.
61. *Id.* at 1228–29.
62. *Id.* at 1216.
63. Brady, *supra* note 38, at 647.
64. EDCHOICE, *supra* note 1.
65. Elizabeth Adamo Usman, *Reality Over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. U. L. REV. 53, 74 (2014).
66. ARIZ. REV. STAT. ANN. § 15-2401.01 (2025).
67. Ronco, *supra* note 4.
68. Nick Sullivan, *What is the Empowerment Scholarship Account Program in Arizona?*, AZCENTRAL (July 9, 2024), https://www.azcentral.com/story/news/local/arizona-education/

Empowerment Scholarship Account recipients must use a "portion of the Arizona empowerment scholarship account monies allocated annually to provide an education for the qualified student in at least the subjects of reading, grammar, mathematics, social studies and science."[69] The Arizona statute provides a list of approved expenses which include tuition and fees, textbooks, curricula and supplementary materials, insurance payments, transportation, and school uniforms.[70]

The Arizona Department of Education conducts annual audits of the entire program, but the Department also administers an annual review of individual accounts, selected at random, to see if students using the vouchers are in compliance with the program.[71] The Arizona scholarship program appoints a six-member parent oversight committee consisting of parents of qualified students, each appointed by, respectively, the Governor, President of the Senate, Speaker of the House of Representatives, and the minority leaders of both the House and Senate.[72] The committee reviews the program's implementation, parents of qualified students' concerns, and how complaints associated with administering the program are being handled.[73]

III. THE INDIANA EDUCATION SCHOLARSHIP ACCOUNT PROGRAM

As stated above, Indiana adopted its ESA program a full decade after Arizona's program. As this section will outline, INESA's statutory scheme is more robust than the statutes that authorize the Arizona Empowerment Scholarship Program.

A. Requirements and Obligations for Eligible Students

An eligible student for the INESA program ("Eligible Student") must be an Indiana resident who is between the ages of five and twenty-two.[74] That student must have a disability that requires special education when the account is established, and the student must have either an IEP, an SP, or a CSEP.[75] An IEP is an individualized education plan developed by a Case Conference Committee at the student's local public school that describes how a student will engage with the curriculum and which "special education and related services"

2024/07/09/what-is-the-arizona-esa-program-empowerment-scholarship-account/74340073007/ [https://perma.cc/KMV8-MA2H].

69. ARIZ. REV. STAT. ANN. § 15-2402(B)(1) (2025).

70. § 15-2402(B)(4).

71. ARIZ. REV. STAT. ANN. § 15-2403 (2025).

72. ARIZ. REV. STAT. ANN. § 15-2405(A) (2025) (The Governor appoints two members, while the other individuals each appoint one member).

73. § 15-2405(E).

74. IND. CODE § 20-51.4-2-4 (2025).

75. *Id*.

the student needs to succeed in the classroom.[76] A Service Plan ("SP") is a written document that "describes the specific special and related services" the student's public agency will provide when the student is placed in a nonpublic school by their parents.[77] A Choice Special Education Plan ("CSEP") is a plan for students who were awarded an Indiana Choice Scholarship and is developed by the student's choice education planning team.[78]

Eligible Students must meet the annual income qualification requirement set under the Indiana Choice Scholarship Program.[79] Under this requirement, students must belong to a "household with an annual income of not more than four hundred percent (400%) of the amount required for the individual to qualify for the federal free or reduced price lunch program."[80] For the 2023–2024 school year, this threshold was $220,000 for a family of four.[81] Siblings of a student with an established ESA are also eligible to participate in INESA, even if that sibling has no special needs requirements.[82] However, ESA funds cannot be used to "cover any disability-related expenses unless that sibling also has an IEP."[83] ESA recipients are not permitted to combine funding with Indiana's Choice Scholarship voucher program, but recipients are allowed, if eligible, to combine funding with Indiana's School Scholarship Tax Credit program.[84]

The funds in an Eligible Student's ESA must be used for Qualified Expenses for either: (1) the student's study in the subject of reading, grammar, mathematics, social studies, or science; or (2) applicable services required for the student's IEP or other similar plan.[85] The following are permitted as Qualified Expenses for which Participating Entities can receive funds:

(1) Tuition and fees, which includes curricular materials, at a qualified school, public school, or other ESA participating entity;
(2) Fees for certain student assessments and examinations;
(3) Educational services for an eligible student who is a student with a disability;

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76. *See* 511 IND. ADMIN. CODE 7-32-48(a) (2025). *See also* 511 IND. ADMIN. CODE 7-32-12 (2025) (defining Case Conference Committee); 511 IND. ADMIN. CODE 7-42-3 (2025) (listing the participants required to be part of the Case Conference Committee). The Case Conference Committee is the group of people, including parents, educators, and public officials, whose responsibilities include the development, creation, and revision of a student's IEP.

77. 511 IND. ADMIN. CODE 7-32-84 (2025).

78. 511 IND. ADMIN. CODE 7-49-2 (2025).

79. § 20-51.4-2-4(4).

80. IND. CODE § 20-51-1-5 (2025).

81. EDCHOICE, *supra* note 1. *See also* IND. DEP'T OF EDUC., EDUCATION SCHOLARSHIP ACCOUNT (ESA) PROGRAM: 2023-2024 ANNUAL REPORT 4 (2024), https://www.in.gov/doe/files/2023-2024-ESA-Annual-Report.docx.pdf [https://perma.cc/J766-9SBQ] (providing a table listing annual household income limits for household sizes of one to ten people).

82. § 20-51.4-2-4(3)(B).

83. EDCHOICE, *supra* note 1.

84. *Id.*

85. IND. CODE § 20-51.4-4-1(a)(4) (2025).

(4) Payments associated with the use of paraprofessional or educational aides;
(5) Payments for receiving therapeutic services;
(6) Services contracted for and provided by a school corporation, charter school, magnet school, or qualified school, such as individual classes, extracurricular activities, or additional programs, resources, defined in the student's education plan;
(7) Occupational therapy, provided in accordance with the student's educational plan;
(8) Fees for service transportation to and from an approved provider;
(9) Tuition and fees to attend training programs and camps that have a focus on vocational skills, academic skills, life skills, independence, or soft job skills;
(10) Additional services and therapies prescribed by the eligible student's treating physician;
(11) Fees for the management of the ESA account;
(12) Expenses to enroll in and attend sequences, courses, apprenticeships, and programs of study designated and approved under Indiana's Career Scholarship Account Program.[86]

Eligible Students must take statewide summative assessments for their applicable grade levels unless the student has an alternative assessment plan under an IEP, SP, or CSEP.[87] There is no mention in Indiana statutes as to how student performance on these assessments will affect their eligibility in the program. However, students in the ESA program, like all special education students in Indiana, must reconvene with their public school of legal settlement's case conference committee every three years to re-evaluate whether the student is still eligible for an IEP or equivalent plan.[88]

B. Requirements and Obligations for Participating Entities

An ESA participating entity ("Participating Entity") is an "individual or entity authorized by the treasurer of state to participate in the ESA program."[89] Approved Participating Entities can include:

(1) qualified nonpublic schools;
(2) an individual or tutoring agency that provides private tutoring;
(3) an individual or entity that provides services to a student with a disability in accordance with an IEP or equivalent plan;

86. IND. CODE § 20-51.4-2-9 (2025).
87. § 20-51.4-4-1.
88. 511 IND. ADMIN. CODE 7-50-4 (2025).
89. IND. CODE § 20-51.4-2-4.7 (2025).

(4) an individual or entity that offers a course or program to an eligible student;
(5) a licensed occupational therapist; or
(6) entities that provide assessments.[90]

As of March 1, 2024, there were 392 unique Participating Entities approved for ESA participation, split between 329 unique approved businesses and 63 unique schools.[91] Of the participating schools, 44 were qualified nonpublic schools with the remaining schools registering as a school business entity.[92]

Individuals and service providers can become a Participating Entity by submitting an application to the Treasurer of State, who then approves the application if the individual or entity meets eligibility criteria.[93] The Treasurer of State keeps the application open throughout the year with approvals made on a rolling basis.[94] Individual providers are required to demonstrate their credentials either through professional certificates, college degrees, or documented work as a paraprofessional.[95] If a parent would like a child's current service provider to become an approved Indiana ESA provider, the Treasurer of State encourages parents to offer their recommendations via a provider contact form.[96]

Business entities must provide proof of their business registration in Indiana such as a copy of business license, articles of incorporation, LLC documentation, or non-profit charter.[97] They must also provide proof of all accreditations held, including a list of all employed providers with any individual licenses or accreditations.[98] A Qualified School (nonpublic school providers) must provide proof of accreditation either through the state or a third party, its school identification number, its tuition and fee schedule, and its relationship to special education services.[99] A public or charter school that offers individual courses, programs, or extracurricular activities is required to provide its school number.[100]

ESA account holders pay Participating Entities through an online portal provided by the Treasurer of State.[101] Participating Entities that accept payments made from an ESA account must provide a receipt for each payment made.[102]

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90. IND. CODE § 20-51.4-5-2 (2025).
91. IND. DEP'T OF EDUC., *supra* note 81, at 5.
92. *Id.*
93. § 20-51.4-5-2(b).
94. IND. DEP'T OF EDUC., *supra* note 81, at 5.
95. *INESA Providers*, IND. TREASURER OF STATE, https://www.in.gov/tos/inesa/provider-page/ [https://perma.cc/9K3W-7PG4] (last visited Oct. 16, 2025).
96. IND. TREASURER OF STATE, *supra* note 24.
97. IND. TREASURER OF STATE, *supra* note 95.
98. *Id.*
99. *Id.*
100. *Id*.
101. *Id.*
102. IND. CODE § 20-51.4-5-2(d) (2025).

Other than providing these invoices to students and parents, there are no additional reporting or administrative responsibilities associated with participation in ESA. There is no statutory authority that requires a Participating Entity to report an ESA student's academic performance while receiving the Entity's services. Based on this statutory language, the Indiana Treasurer of State appears to be more concerned that these Participating Entities can operate a business than provide a quality education.

C. Obligations for Indiana State Departments

The Indiana Treasurer of State allots each eligible student ninety percent of that student's basic tuition support allotted to the student by the state.[103] The student also receives one hundred percent of the special education dollars allotted to the student if that student chooses not to receive any special education services offered by student's local public school.[104] These amounts are dependent on the state's budgetary availability.[105] In 2024, the program's total appropriation amount was $10 million.[106] The Indiana General Assembly in 2025 proposed to increase that amount to $15 million,[107] but the final legislation kept this amount at $10 million.[108] The Treasurer of State deposits funds into ESA accounts quarterly.[109] The Treasurer provides the portal for ESA account holders to make payments directly to Participating Entities.[110]

The Treasurer of State may revoke an individual's or entity's status as a Participating Entity upon finding that the individual or entity accepts payments made from an ESA account and either has: "(1) failed to provide any educational service required by state or federal law to an eligible student receiving instruction from the ESA participating entity; or (2) has routinely failed to meet the requirements of an ESA participating entity under the ESA program."[111] A Participating Entity who is also the parent of an Eligible Student is prohibited from receiving ESA funds for teaching a course or program only to that student and may have its status revoked for doing so.[112] Indiana statutes do not provide any guidelines for what would constitute a failure to provide an educational service or a failure to provide to meet the requirements of a Participating Entity, apparently leaving that decision to the Treasurer of State's discretion.

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103. IND. TREASURER OF STATE, *supra* note 2.

104. *Id.*

105. *Special Education Services (APC) Award Amounts Indiana Education Scholarship Account (ESA) 2024-2025 School Year*, IND. TREASURER OF STATE, https://www.in.gov/tos/inesa/files/Special-Education-Services-Funding-Levels-2024-25.pdf [https://perma.cc/AGV3-WTC8].

106. EDCHOICE, *supra* note 1.

107. H.B. 1001, § 3, 124th Gen. Assemb., 1st Reg. Sess. (Ind. 2025).

108. H.E.A. 1001, § 3, 124th Gen. Assemb., 1st Reg. Sess. (Ind. 2025).

109. IND. CODE § 20-51.4-4-2(a) (2025).

110. IND. TREASURER OF STATE, *supra* note 95.

111. IND. CODE § 20-51.4-5-4 (2025).

112. IND. CODE § 20-51.4-5-7 (2025); § 20-51.4-5-4(a)(3) (effective July 1, 2026).

The Treasurer of State will retain an independent accounting firm to administer an annual audit of the program, the results of which will be transmitted to the Governor and the General Assembly.[113] In addition, the Treasurer of State administers an annual survey to ESA account holders that asks about their relative satisfaction with the ESA program and solicits "opinions on any topics, items, or issues that the treasurer of state determines may improve the effectiveness of the ESA program or the education experience of the eligible student or the eligible student's family."[114] The Treasurer of State submits the results of this survey to Indiana's governor and legislative council.[115]

The Department of Education must provide services "that offer objective advice upon request to parents of an eligible student or an emancipated eligible student relating to services that can help meet the eligible student's or emancipated eligible student's particular needs."[116] However, the statute is unclear how the Department of Education should give out that advice. The Treasurer of State, the entity that actually administers the INESA program, provides a questionnaire on its website that parents can use to interview potential private schools.[117] However, the Treasurer of State's website does not provide advice for ESA families to choose other types of Qualified Expenses such as tutoring or therapies.[118]

IV. POTENTIAL LIMITATIONS AND LEGAL ISSUES OF ESAS

An understanding of the ESA program's requirements and administration prompts important questions about what limitations they might face in their implementation. A fundamental limitation of any voucher program is that it reduces the "public" aspect of public education.[119] Law professor Julie F. Mead set up four major aspects of public education by stating: "At a minimum, public-ness also includes public purpose, public access, public accountability, and public curriculum. Vouchers and neo-voucher programs preserve public funding but diminish or eliminate the other four aspects of public-ness."[120] However, the court in *Meredith v. Pence* found "[t]he plaintiffs proffer no evidence that maximum participation in the voucher program will necessarily

113. IND. CODE § 20-51.4-3-3 (2025).

114. IND. CODE § 20-51.4-3-4(a) (2025).

115. § 20-51.4-3-4(c).

116. IND. CODE § 20-51.4-3-6(a) (2025). To clarify, this is currently the Department of Education's responsibility while the Treasurer of State still administers the program.

117. *See Parent Questionnaire for Nonpublic Schools*, IND. TREASURER OF STATE, https://www.in.gov/tos/inesa/files/Parent-Questionaire-for-Nonpublic-Schools.pdf [https://perma.cc/92FX-TG7Z].

118. *See* IND. TREASURER OF STATE, *supra* note 24.

119. Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 742–43 (2015).

120. *Id*. at 743.

result in the elimination of the Indiana public school system."[121] Due to the Indiana Supreme Court's decision, neo-voucher programs have no boundaries to encroach on the aspects of public-ness that Professor Mead outlined.[122]

The latter two aspects of public-ness, public accountability and public curriculum, are particularly lacking under ESAs' deregulatory design. Kevin Welner, director of the National Education Policy Center and an education policy professor at the University of Colorado, views ESAs and other voucher programs as a "deregulatory reform" that will lead to the deregulation of schools.[123] "The idea is to be deregulated . . . . For advocates of vouchers, transparency is not a good thing."[124] Because ESAs are flexible, "it's impossible for the state to track whether the public funds are actually helping students improve learning."[125]

ESA account holders are receiving educational and therapeutic services from a variety of sources, so it is difficult for states to determine the educational impact of each purchase or service. Furthermore, the abundant number of purchases of ESA related goods and services enable fraudulent practices. Cracks have already begun to form in Arizona's ESA program that are mirrored in Indiana's program.

A. Potential for Fraud in ESA Programs

The lack of transparency that Professor Welner described raised its head in Arizona's ESA program. A 1998 report by the Arizona Auditor General revealed that parents had misspent or fraudulently spent over $700,000 in ESA program funds at entities such as beauty supply retailers, sports apparel shops, and computer technical support providers.[126] In a February 2022 report, Arizona's Department of Education expressed concern that parents had not reported receipts for more than 17,000 transactions made with account program debit cards during the last quarter of 2022, while it had receipts for another 100,000 transactions during that period.[127]

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121. Meredith v. Pence, 984 N.E.2d 1213, 1223 (Ind. 2013) (emphasis omitted).

122. *See also* Preston Green, Julie Mead & Suzanne Eckes, *Covenants to Discriminate: How the Anti-LGBT Policies of Participating Voucher Schools Might Violate the State Action Doctrine*, 19 U.N.H. L. REV. 163, 169–72 (2021). An added concern is that taking special education students out of public schools can make them vulnerable to discrimination based on characteristics like race, first language, and sexual identity.

123. Stanford & Lieberman, *supra* note 37.

124. *Id.*

125. *Id.*

126. Yvonne Wingett Sanchez & Rob O'Dell, *Parents spent $700K in school voucher money on beauty supplies, apparel; attempted cash withdrawals*, AZCENTRAL (Oct. 30, 2018, at 18:36 MT), https://www.azcentral.com/story/news/politics/arizona/2018/10/29/misspent-school-voucher-funds-exceed-700-k-little-recovered/1780495002/ [https://perma.cc/6CC7-EHH5].

127. Stanford & Lieberman, *supra* note 37.

Even under the guise of a curricular expense, Arizona's ESA program has faced scrutiny for approved expenses.[128] When an expense is not on the list of allowed expenses in the parents' handbook provided by the state, the parents need to submit a curriculum demonstrating the purpose and scope of the proposed expense.[129] However, parents have used this approach to justify extravagant purchases, including aeroponic indoor gardens, luxury car driving lessons, pianos, and sessions at ninja warrior training centers.[130] As a result, the Arizona Attorney General's Office has begun investigating how the program defines and approves "curricula and supplementary materials."[131]

Arizona Attorney General Kris Mayes has revealed that over $650,000 was defrauded from Arizona's Empowerment Scholarship Account program as of March 2024.[132] In July 2023, three women were indicted for defrauding over $87,000 from the program by creating fake voucher vendor companies and charging the state with falsified education receipts.[133] In February 2024, an Arizona grand jury indicted five former Arizona Department of Education employees on allegations that the employees defrauded around $600,000 from the program by approving applications for seventeen students, five of which were fictitious, using forged birth certificates and special education evaluations.[134] While one of the defendants was found not guilty at trial, the other four defendants pled guilty to individual charges of fraud, money laundering, and forgery.[135]

In comparison, Indiana has already faced a scandal involving its own school choice program. Individuals from the charter schools Indiana Virtual School and Indiana Virtual Pathways Academy currently face criminal charges of wire

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128. Laurie Roberts, *It's not 'overly restrictive' to ask why parents bought $900 Lego sets with our money*, AZCENTRAL (July 11, 2024, at 7:51 MT), https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2024/07/10/arizona-esa-school-voucher-spending/74357631007/ [https://perma.cc/7DPL-HP5M].

129. *Id*.

130. *Id*.

131. Rodriguez, *supra* note 14.

132. *"Ghost Students": ESA Voucher Fraud Scandal*, SAVE OUR SCHS. ARIZ. NETWORK (Mar. 12, 2024), https://www.sosaznetwork.org/2024/ghost-students-esa-voucher-fraud-scandal/ [https://perma.cc/P8T5-W5Q8].

133. *Id*. *See also* Joe Dana & Dacia Johnson, *3 women facing charges in alleged ESA, health care schemes*, NBC 12 NEWS (Feb. 1, 2024, at 18:38 MT), https://www.12news.com/article/news/education/arizona-women-indicted-in-alleged-esa-health-care-schemes/75-72a5dcaf-6980-462d-8eba-a64c28f1926c [https://perma.cc/T8Z9-25KG].

134. Wayne Schutsky, *3 Arizona Education Department employees indicted in $600,000 voucher fraud*, KJZZ (Feb. 29, 2024, at 17:22 MT), https://www.kjzz.org/2024-02-29/content-1872764-3-arizona-education-department-employees-indicted-600000-voucher-fraud [https://perma.cc/XMF2-UB8K].

135. Wayne Schutsky, *Former Arizona Department of Education employee found not guilty in school voucher fraud case*, KJZZ (Mar. 7, 2025, at 11:38 MT), https://www.kjzz.org/education/2025-03-07/former-arizona-department-of-education-employee-found-not-guilty-in-school-voucher-fraud-case [https://perma.cc/J9W5-2KMJ].

fraud and money laundering.[136] These crimes allegedly arose when the charter schools reported higher student attendance numbers to the state but only paid teachers based on actual student enrollment, causing the state to be overcharged by over $85 million.[137] A state audit in 2020 reported that $68 million of the $85 million was improperly funneled through several for-profit companies owned by Thomas Stoughton, the schools' founder.[138] Federal prosecutors alleged that Stoughton and his associates spent the money on extravagant purchases including a Cadillac, Tiffany & Co. jewelry, and private school tuition.[139] Stoughton's indictment raises questions on whether Indiana is too lax on the government-related entities which authorize charter schools.[140]

The types of financial abuse already found in Arizona and Indiana can easily make their way into the INESA program. Although INESA students do not have the flexibility to spend funds on individual purchases to the degree of Arizona Empowerment Students, INESA students can contract with any Participating Entity. The potential danger arises if the Treasurer of State authorizes Participating Entities with the same lax standard that allowed Stoughton's schools to operate. When privately operated schools are opened at a quick pace with access to state school tuition payments, the system is vulnerable to fraud.[141] Once a Participating Entity is approved by the Treasurer of State, the Participating Entity only needs to provide receipts to parents, with no further obligations to submit to the Treasurer of State or the Department of Education.[142] With potentially hundreds of Participating Entities that have no obligation to report student expenditures directly to the Treasurer of State, the INESA program faces a similar threat of the kind of fraud caused by the virtual charter schools, especially if the number of Participating Entities continues to expand.

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136. Karen Campbell & Chase Houle, *4 charged in federal money laundering, wire fraud of funds at now-closed Indiana charter schools*, NBC 13 WTHR (Jan. 26, 2024, at 4:10 ET), https://www.wthr.com/article/news/local/money-laundering-wire-fraud-indictments-allege-misuse-of-charter-schools-funds-virtual-pathways-academy/531-ff7fda91-3bba-4123-8a62-f8756ceb5822 [https://perma.cc/E2CB-FT42]. *See generally* Complaint to Recover Public Funds, Indiana *ex rel*. Rokita v. Ind. Virtual Educ. Found., Inc., No. 29D05-2107-PL-004821 (Hamilton Cnty. Ct. July 8, 2021); Indictment, United States v. Stoughton, No. 1:24-cr-00014 (S.D. Ind. Jan. 17, 2024), Dkt. No. 1.

137. Karen Campbell & Chase Houle, *supra* note 136.

138. Amelia Pak-Harvey & MJ Slaby, *Former virtual charter school leaders face federal charges tied to alleged enrollment scam*, CHALKBEAT IND. (Jan. 23, 2024, at 17:52 ET), https://www.chalkbeat.org/indiana/2024/01/23/virtual-charter-school-operators-indicted-for-alleged-enrollment-scam/ [https://perma.cc/46YY-59CH].

139. *Id*.

140. *Id*.

141. Tom Davies, *Lawyers drop virtual schools leader accused of vast enrollment fraud*, STATE AFFS. (Oct. 30, 2024), https://pro.stateaffairs.com/in/courts/thomas-stoughton-online-school-lawyer [https://perma.cc/UN5S-TGB2].

142. *See supra* Part III.B (outlining obligations for Participating Entities).

B. Budgetary Burdens of ESA Programs

In the year after Arizona expanded the eligibility of its Empowerment Scholarship Account program, participation increased to 75,000 students, resulting in costs to the state of around $864 million.[143] Given the rise in popularity of the INESA program in its few years of existence, Indiana faces similar state budget issues caused by expanded eligibility.

Voucher programs like scholarship and savings accounts are touted as a way to give public school students more educational choices,[144] but these programs are increasingly utilized by families who are already paying for private schools.[145] According to *Time Magazine*, "more than 75% of initial voucher applicants [in Arizona] had never been in public school—either because they were new kindergartners or already in private school before getting a voucher."[146] Similarly, nearly 68% of Indiana students receiving a voucher have never attended a public school.[147]

In its relatively short existence compared to Indiana's other voucher programs, INESA is already following these statistical trends. Of the group of ESA participating students in the 2022–2023 school year, only 43.19% of those students had attended a public school in the previous year.[148] That number dropped to 31.67% of participating students in the 2023–2024 school year.[149]

Despite these statistics, the Indiana General Assembly is shaping its education spending to reflect a perceived statewide flight from public schools. The 2023–2025 Indiana budget directed 36% of new state tax funding for elementary and secondary education to private schools educating only about 7% of the students in Indiana, leaving 64% to public schools educating the

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143. Sullivan, *supra* note 68.

144. Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 EMORY L.J. 1037, 1055 (2019). *See also* Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 295 (2010); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2045 (2002).

145. Paige Clark, *More and more voucher students never tried public school*, STATEHOUSE FILE (Oct. 1, 2021), https://www.thestatehousefile.com/more-and-more-voucher-students-never-tried-public-school/article_01b78b25-3e8e-5692-b6da-e8f6d5cd5c6c.html [https://perma.cc/R5L5-GZ3U]. *See also* Ian Farrell & Chelsea Marx, *The Fallacy of Choice: The Destructive Effect of School Vouchers on Children with Disabilities*, 67 AM. U. L. REV. 1797, 1863 (2018).

146. Joshua Cowen, *How School Voucher Programs Hurt Students*, TIME (Apr. 19, 2023, at 7:05 EDT), https://time.com/6272666/school-voucher-programs-hurt-students/ [https://perma.cc/V2JE-HFX3].

147. Grace Salata, Cooper VanDriessche & Taylore Williams, *Voucher Dilemma: Taxpayer cost jumped from $15.5 million to more than $300 million*, INDYSTAR (Sep. 5, 2024, at 15:25 ET), https://www.indystar.com/story/news/investigations/2024/09/04/voucher-earning-limit-sta40000-a-year-today-the-same-family-could-qualify-while-making-222000-a-year/74042543007/ [https://perma.cc/NA3N-FU3F].

148. IND. DEP'T OF EDUC., *supra* note 81, at 12.

149. *Id.*

remaining 93% of students.[150] In addition, the budget bill passed in 2025 by the Indiana General Assembly will eliminate the maximum annual household income for Indiana Choice Scholarship Account eligibility starting in the 2025–26 school year.[151] Because ESA eligibility is determined by the Choice Scholarship Program's income standard, this change by the General Assembly also removes the income ceiling for ESA Eligible Students.[152] Removing the income requirements from two Indiana voucher programs will increase the amount of eligible students in both programs, resulting in more students taking their public education funding out of the public school system.

With more Indiana state education funds being shifted to private schools, public school funding is being stretched thinner to meet demands that are still significant. Expanding eligibility of the ESA program like Arizona did would exacerbate the budgetary demands upon public schools that Indiana's other/existing voucher programs have already created.

C. Lack of Academic Accountability for ESA Students

In addition to these financial issues, Indiana's laws concerning ESAs are unclear about expectations for students' long-term academic performance. An ESA eligible student is required to take either statewide summative assessments based on the eligible student's grade level or comparable assessments specified in the eligible student's IEP or equivalent plan.[153] Students are only required to *take* the required assessments, but the statute fails to communicate whether students are expected to meet state standards for the eligible student's grade level.[154]

The Indiana Department of Education must aggregate state assessment test results of ESA students according to their grade level, gender, race, and family income level and make the results available on the department's website.[155] However, ESA statutes do not specify how these test results will be used to determine the academic success of the ESA program.

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150. Grace Salata, Cooper VanDriessche & Taylore Williams, *Voucher Dilemma Part 2: Unraveling impact of school choice program on education in Indiana*, INDYSTAR (Sep. 5, 2024, at 14:32 ET), https://www.indystar.com/story/news/investigations/2024/09/05/unraveling-fiscal-impact-of-school-vouchers-on-education-in-indiana/75054166007/ [https://perma.cc/N6LR-UEGS].

151. H.B. 1001, 124th Gen. Assemb., 2025 Sess. (Ind. 2025). *Compare* IND. CODE § 20-51-1-4.3 (2023), *with* IND. CODE § 20-51-1-4.3 (2026).

152. H.B. 1001, 124th Gen. Assemb., 2025 Sess. (Ind. 2025). *See also* IND. CODE § 20-51.4-2-4(4) (2025).

153. *See* IND. CODE § 20-51.4-4-1(a)(4) (2025).

154. *See* § 20-51.4-4-1(a)(6).

155. IND. CODE § 20-51.4-5-3 (2025). As a reminder, this is the Department of Education's current responsibility while the Treasurer of State administers the program.

V. PROPOSALS FOR INDIANA'S EDUCATION SCHOLARSHIP ACCOUNT PROGRAM

Current Indiana law is not structured to prevent the financial abuses that perpetuate Arizona's ESA program from impacting Indiana.[156] The existing statutory scheme also fails to ensure academic accountability for those who avail themselves of the money provided through the INESA program.[157] Therefore, Indiana's INESA statute must learn from Arizona's mistakes and address the gaps in its accountability measures. Fortunately, solutions can be found in the statutes of other states that have adopted similar ESA programs. These solutions can help craft statutory language in the Indiana Code that will prevent abuse and increase accountability.

A. Legal Solutions to Hold the INESA Program Financially Accountable

Indiana statutes should better articulate how the INESA program will hold itself accountable to prevent financial waste and abuse. It is in the public interest for the program to responsibly distribute funds to ESA students given that it is more expensive to educate a student with a special education plan,[158] and it is also in the public interest for the INESA program to be mindful of its spending since ESA funds are being taken away from public schools that could be providing the services for the student's IEP plans.[159]

Despite all the shortcomings of Arizona's ESA program, one aspect of the Arizona program that Indiana should adopt is the parent oversight committee.[160] As stated previously, Arizona has a parent oversight committee that reviews the implementation of its program, the concerns of qualified students' parents, and the work of citizens who handle complaints associated with administering the program.[161] A parent oversight committee would bring an increased level of accountability from a group of committed parents in comparison to INESA's current method of parent feedback through a satisfaction survey.[162]

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156. *See supra* Part IV.A (highlighting the potential for fraud in both programs).

157. *See supra* Part III.A (indicating the lack of academic accountability measures for students in INESA statutes).

158. *See Per Pupil Allocation for Special Education*, IND. DEP'T OF EDUC. (Dec. 2, 2024), https://www.in.gov/doe/files/APC-FUNDING-AMOUNTS-2024-2025.pdf [https://perma.cc/5REV-3NJ6] (listing the 2024–2025 Indiana state tuition support amount for differing categories of students with disabilities). The amount that Indiana allocates to each pupil with special needs ranges from $551 for students with language or speech impairments to $11,659 for students with severe disabilities such as a traumatic brain injury or orthopedic impairment. *Id.*

159. *See supra* Part IV.B (analyzing how voucher programs funnel students' funds away from public schools).

160. *See supra* Part II (describing the parent oversight committee that oversees the Empowerment Scholarship Program).

161. ARIZ. REV. STAT. ANN. § 15-2405(E) (2025).

162. *See* IND. CODE § 20-51.4-3-4(a) (2025).

Random audits of ESA account holders and Participating Entities are also an effective tool for increasing financial accountability. West Virginia's Hope Scholarship Account program has included these random audits in the program's statute.[163] The West Virginia Hope Scholarship Account Board has the authority, as part of the auditing process, "[to] remove a parent or eligible recipient from the Hope Scholarship Program and close a Hope Scholarship account for failure to comply with the terms of the parental agreement . . . , failure to comply with the applicable laws, failure of the student to remain eligible, or intentional and fraudulent misuse of Hope Scholarship funds."[164] In addition, "[i]f the board determines that an education service provider has intentionally and substantially misused Hope Scholarship funds, the board may bar the education service provider from continuing to receive payments."[165]

Taking aspects of both Arizona's and West Virginia's programs, the Indiana General Assembly should create an Indiana Education Scholarship Parent Committee ("Parent Committee"). The Parent Committee should consist of seven parents of ESA students appointed by Indiana's Governor, Secretary of Education, Treasurer of State, Speaker of the House, President Pro Tempore of the Senate, and minority leaders of both the House and Senate of the General Assembly.

The Parent Committee should have the authority to conduct random audits on Participating Entities. The Treasurer of State should also provide a portal for ESA account holders to file complaints that can be sent to the Parent Committee. These audits may investigate whether a Participating Entity is complying with INESA laws, whether the Participating Entity is providing adequate educational or therapeutic services, and whether the Participating Entity is engaging in fraudulent practices. The Parent Committee should then have the discretion to audit the Participating Entity that is the subject of the complaint. Upon the Parent Committee's recommendation, the Treasurer of State could then choose to exercise the Treasurer's statutory obligation to revoke the status of a Participating Entity.[166] Because ESA account holders would be able to report Participating Entities to the Parent Committee, Participating Entities would continue to provide invoices to parents, but there would be no need for Participating Entities to report additional documentation to the Treasurer of State other than what is already required.[167]

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163. W. VA. CODE § 18-31-10 (2025).

164. *Id. See also* W. VA. CODE § 18-31-3(b) (2025) (defining the West Virginia Hope Scholarship Board as the West Virginia's Treasurer, Auditor, Attorney General, Superintendent of Schools, Chancellor of Higher Education, Director of the Office of Minority Affairs, and three Hope Scholarship parents appointed by the Governor with the advice and consent of the Senate).

165. § 18-31-10.

166. *See* IND. CODE § 20-51.4-5-4 (2025).

167. *See supra* Part III.B (listing the documentation that Participating Entities must submit to the Treasurer of State).

B. Legal Solutions to Promote Student Academic Achievement

The INESA statutes also demonstrate a lack of guidance for determining the program's success in promoting academic achievement. Students only have to take mandatory assessments without any need to show improvement in these assessments,[168] and Participating Entities do not need to provide the Treasurer of State with any documentation demonstrating a student's academic or therapeutic progress.[169] Instead of relying on standardized testing to gauge whether a special needs student is showing improvement, the INESA program can create a more holistic approach to ESA student assessments.

Two states provide an alternative to the mandatory state assessments, like those that Indiana requires. Under New Hampshire's Education Freedom Account program, participating students must "provide an annual record of educational attainment."[170] Similar to its counterparts in Indiana, New Hampshire's program provides students with the option of taking either "a nationally-standardized, norm-referenced achievement test" or "the statewide student assessment test."[171] However, New Hampshire also provides students with the option of maintaining a portfolio of their academic progress.[172] This portfolio can include "a log which designates by title the reading materials used; samples of writings, worksheets, workbooks, or creative materials used or developed by the student."[173] Parents who choose this form of assessment are required to give this portfolio to a certified teacher or a teacher teaching in a nonpublic school to evaluate the student's educational progress.[174] Similarly, the Utah Fits All Scholarship Program gives parents the option to submit yearly portfolios "describing the scholarship student's educational opportunities and achievements under the program for the given year."[175]

Even though INESA students are no longer receiving special education services from the public school district where they reside, each student must still reconvene every three years with the student's school corporation of legal settlement to determine whether the student is still eligible for special needs services.[176] Since the Case Conference Committee is still responsible for monitoring ESA students,[177] a yearly evaluation by a student's Case Conference

168. *See supra* Part III.A (describing ESA students' obligation to take statewide summative assessments or assessments in line with their special education plan).

169. *See supra* Part III.B (stating that Participating Entities only need to submit invoices to parents once the Entities are approved by the Treasurer of State).

170. N.H. REV. STAT. ANN. § 194-F:3(III)(d)(3) (2025).

171. § 194-F:3(III)(d)(3)(A)–(B).

172. § 194-F:3(III)(d)(3)(C).

173. *Id.*

174. *Id.*

175. UTAH CODE ANN. § 53F-6-402(3)(d)(i)(A) (West 2025).

176. 511 IND. ADMIN. CODE 7-50-4(a) (2025).

177. *Id.* § 7-50-4(d).

Committee of a student's portfolio would provide more insight into the success of the student's INESA program.

Therefore, INESA statutes should provide the authority for Case Conference Committees to review a portfolio of the ESA student's work. The portfolio should contain a log of the student's major assignments, projects, creative materials, or any other academic output that is appropriate given the ESA student's age level and disability. This portfolio should be accompanied by any assessments and reports from Participating Entities that provide academic services to the ESA student. Since an ESA student's parent is a member of the Case Conference Committee,[178] the committee can decide with that parent if the student has progressed academically in a satisfactory manner, and it can determine whether individual academic services are satisfactorily provided by a Participating Entity. The Case Conference Committee does not need to re-evaluate an ESA student's IEP plan every year, but the committee can provide recommendations to parents for improvements to the parent's use of Participating Entities.

C. Adding to Indiana's Special Education Regulations

Finally, Indiana should adopt regulations that would fill the statutory gaps in the INESA program. Currently, Indiana's special education regulations in Title 511, Article 7 only cover three limited topics regarding the INESA program. These sections include the development of ESA service plans,[179] the evaluation of an ESA student's special needs eligibility,[180] and the termination of an ESA student's account if the student enrolls in a public school.[181] If the Indiana General Assembly is going to keep the wording in the INESA statute vague, then more Article 7 rules could address the gaps in the statute for Participating Entity accountability and a means to measure student achievement under the program. For instance, the Indiana State Board of Education can use rulemaking to develop procedures for the Indiana Department of Education to provide parents with information about how to choose Participating Entities.[182]

However, the General Assembly recently took more control of the rulemaking process, including adding a second notice and comment period and

178. 511 IND. ADMIN CODE 7-42-3(b)(5) (2025).

179. 511 IND. ADMIN. CODE 7-50-3 (2025).

180. § 7-50-4.

181. 511 IND. ADMIN. CODE 7-50-5 (2025).

182. *See* IND. CODE § 20-19-2-8 (2025) (granting rulemaking authority to the Indiana State Board of Education); IND. CODE § 20-19-3-4(a)(2) (2025) (stating the Department of Education's obligation to implement the State Board's policies and procedures). *See also supra* Part III.C (describing the Department of Education's obligation to give advice to ESA account holders about services covered by an ESA account).

requiring the rulemaking agency to publish a regulatory analysis.[183] If the General Assembly has chosen to take more control of the rulemaking process, it should take the responsibility to craft specific language in the ESA statutes if additional ESA regulations are slowed by the additional steps in the rulemaking process.

CONCLUSION

The Indiana Education Scholarship Account program is emblematic of the rise in the popularity of education savings account programs, which Arizona trailblazed by enacting its Empowerment Scholarship Account program in 2011. The INESA program provides flexibility for Indiana special education students who opt not to have their IEP or similar plan fulfilled by their public school. This flexibility comes at the cost of a lack of oversight and accountability for Participating Entities, a possibility of overreach that includes students who may not need the program, and a lack of statutory clarity or guidance to monitor students' academic achievement.

This Note compares Indiana's INESA program with Arizona's Empowerment Scholarship Program with the goal of enacting accountability measures in the program's statutes. With an increased call for school choice among Indiana's citizens, it is important to revisit the program that has provided over a decade's worth of progression and that served as the prototype for the INESA program. Arizona delivered on its promise to expand its program to all K-12 students, but that has also opened the door for abuse from participants and opportunities for fraud. Indiana will be subject to the same issues if it broadens the eligibility of the INESA program. If this broadening is inevitable, Indiana should focus on holding the program accountable through statutory and regulatory reforms. If the INESA program continues to grow and add more eligible students, Indiana can better serve this student population by providing a safe and reliable school choice program.

183. H.E.A.1623, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023). *See also* Casey Smith, *Indiana Senate Approves Sweeping Administrative Rulemaking Overhaul*, IND. CAP. CHRON. (Apr. 18, 2023), https://indianacapitalchronicle.com/2023/04/18/indiana-senate-approves-sweeping-administrative-rulemaking-overhaul/ [perma.cc/8LJU-R9QQ].