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TRIBUTE

DOING WELL BY DOING GOOD: REMEMBERING ROBERT H. MCKINNEY

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When I started thinking about how to begin this dedication, one image kept coming to mind. It was from late 2011. Everyone in Inlow Hall had been invited to a special ceremony for a surprise announcement, held in what is now the Tuchman-Bobrick Atrium. The atrium has been the center of activity for our law school since Inlow Hall opened, so there is usually a lot of bustle there. But on that day, it was packed from top to bottom, with students hanging over the railings, waiting to hear the special news. That was the day we learned that what had been the Indiana University School of Law–Indianapolis for more than 60 years would have a new name. Because of an extraordinary act of philanthropy, we would be known going forward as the Indiana University Robert H. McKinney School of Law.

That meant a lot to us at the law school. At the time, I think we saw ourselves as a bit of an underdog. We sometimes felt in the shadow of our cousin in Bloomington, the Maurer School of Law, and our evening program did not always get the attention it deserved. So, for someone to make a legacy gift and put his name on *our* school—that meant something.

However, as was pointed out to me right away by my friend and colleague, Gene Tempel, it was not merely that the school got *a* name. It was that we would bear *Bob McKinney's* name. Gene told me that was something I would come to appreciate, and he was absolutely right.

I became dean of the McKinney School of Law in 2013 and served in that role for seven years. That gave me the privilege not only of getting to know Bob personally, but of understanding why having his name attached to our school was so meaningful and how it had the ability to transform an entire institution.

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Bob explained to me—and he said this publicly too—that his commitment was about more than just giving back. He was also making an investment—an investment in this community and state, where so many graduates of our school go on to make a difference in the lives of others.

When I was dean, I used to rattle off all the impressive roles our graduates held—from judges to legislators to U.S. vice presidents. But because of what Bob taught me, I could explain that it was much more than that. More important than dignitaries, this school educates the majority of lawyers practicing throughout Indiana. This means that for so many people, whether it's a business matter, a family or estate issue, a regulatory issue, or even a question of personal freedom, the outcome will depend on someone educated at the Robert H. McKinney School of Law. Truly, it is hard to overstate the impact this law school has on the quality of life across the community. And it is hard to overstate how much Bob's commitment meant—and continues to mean—to the school, and by extension, this city and state.

I also loved helping students understand what it means to have the McKinney name attached to their degrees. As they learn, Bob was not just an excellent lawyer and businessperson. He served his country in the U.S. Navy, and later as Chair of the Federal Home Loan Bank Board in Washington, D.C. He devoted his time to our local community through more organizations than I can name. He served our university as a member—and president—of the Indiana University Board of Trustees. He supported so many causes with his philanthropy. "*Doing well by doing good*." Bob lived by that motto, and he inspired many, many others to do the same.

Bob certainly inspired me. Part of my motivation to do my best at Indiana University was to make Bob McKinney proud, and he had high standards. I will admit, I was sometimes nervous before meeting with him. When we were both in town, we would often meet here at the school or at Meridian Hills Country Club. Each winter, I traveled to Florida to meet with him at his home there, usually with his wife, Shelley, and his daughter, Marnie. I always prepared carefully for those meetings because Bob was engaged and asked tough questions. But I left every one of those conversations feeling supported and uplifted. I always looked forward to the next opportunity to tell Bob something good about his school and to leave again with his motto fresh in my mind: doing well by doing good.

Like many others, I miss seeing and talking with Bob. But I am grateful that my life intersected with his. When I look at my professional career, I am immensely proud that a large part of it took place at an institution that bears his name. I know the same is true for the hundreds of people who packed the atrium back in 2011. It is true for the students who congregate in the atrium today, often posing for selfies with the bust of Bob in front of the library. And it will be true for generations to come. I am honored to celebrate the life of a remarkable person who made a difference in the life of a very special institution.

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ARTICLES

SUPPLEMENTAL JURISDICTION: AN ANALYSIS OF ITS EXPANSIONS AND REDUCTIONS

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> There is scarcely any case, every part of which depends on the Constitution, laws, or treaties of the United States . . . . [T]hen all the other [non-jurisdictional] questions must be decided as incidental to [the claim] which gives [the court] jurisdiction.
>
> – Chief Justice John Marshall, recognizing supplemental jurisdiction (1824)[1]

INTRODUCTION

Supplemental jurisdiction enables the federal district courts to hear cases that include non-jurisdictional claims, if they are sufficiently related to jurisdictional claims.[2] But the contours of the doctrine have been interpreted and reinterpreted so many times that it would be unrecognizable to its creators.[3] For example, just before this article was completed, the Supreme Court released its opinion in *Royal Canin U.S.A. v. Wullschleger*, in which the Court significantly reduced the scope of the supplemental jurisdictional statute.[4] *Royal Canin*, decided in 2025, signaled that the time is right for a review and appraisal of the doctrine. Therefore, this article attempts to analyze the present state of supplemental jurisdiction—or at least seeks to do so as well as possible within the length of a single writing.[5]

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1. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 820 (1824).

2. *See infra* Part II (discussing section 1367, the supplemental jurisdictional statute).

3. *See infra* Part III (describing the history of judicial decisions).

4. 604 U.S. 22 (2025); *see infra* Part III.A (discussing the *Royal Canin* case).

5. There has been some fine scholarship on the general subject of supplemental jurisdiction, but the most relevant articles were written many years ago. *See, e.g.*, *Supplemental Jurisdiction—Amount in Controversy Requirement*, 119 HARV. L. REV. 317 (2005); Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5 (1998); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A*

The history of supplemental jurisdiction is a tale of twists and turns, in which the cases have sometimes produced surprises. The courts frequently expand or diminish the scope of the doctrine. And so, Part I of this article begins the analysis by considering the judicial history of section 1367, commonly known as the supplemental jurisdiction statute, as a guide to understanding its later interpretation.[6] The courts have tended to rely on pre-statutory opinions in fashioning their decisions under the statute. In fact, this reliance is pervasive. The era of pre-statutory judicial decisions was long and complex, and it is divided here into three time periods.[7]

Part II covers the enactment of the supplemental jurisdiction statute. The legislation begins with three subsections, (a) through (c), which are, at first, a broad grant of jurisdiction, and then, in the latter two subsections, significant reductions of the jurisdiction thus granted.[8] The statutory structure has guaranteed a large number of jurisdictional puzzles.[9] Part III of the article, therefore, focuses on the limits of supplemental jurisdiction imposed by interpretation or by statute. This section considers both the *Royal Canin* decision and the restrictions in sections (b) and (c) of the statute.[10]

Part IV of the article covers the effects of removal when it is combined with supplemental jurisdiction. Removal frequently complicates actions in unpredictable ways, and it certainly does so with supplemental claims.[11] Part V analyzes mistakes that can confer jurisdiction when it was not otherwise possible. Additionally, Part V considers what might be called "jurisdiction by mistake," where mistakes by the court or by the litigants have created jurisdiction that otherwise would not have existed.[12]

Part VI covers sources of unfairness, contradiction, and confusion that arise under the supplemental jurisdiction statute.[13] Finally, the author concludes with a novel proposal for encouraging early decisions of supplemental jurisdiction questions.[14] If adopted, this addendum would reduce a major kind of unfairness produced by the statute.[15]

Constitutional and Statutory Analysis, 24 ARIZ. ST. L.J. 849 (1992); Edward A. Hartnett, *§ 1367 Producamus*, 51 DUKE L.J. 687 (2001).

6. *See infra* Part I (analyzing the judicial history of the statute).

7. *See infra* Part I.

8. *See infra* Part II (covering the statute's legislative history).

9. *See infra, e.g.*, Part III (analyzing issues raised by the statute).

10. *See infra* Part III.C (analyzing puzzles created by subsections (b) and (c) of the statute).

11. *See infra* Part IV (covering effects of removal on supplemental jurisdiction).

12. *See infra* Part V (analyzing mistakes that create jurisdiction).

13. *See infra* Part VI (considering unfairness and other problems).

14. *See infra* Conclusion (communicating the author's conclusions).

15. *See infra* Conclusion (proposing an addendum to the statute to encourage early decisions about supplemental jurisdiction).

I. JUDICIAL DECISIONS PRECEDING THE SUPPLEMENTAL JURISDICTION STATUTE

Professor Wolf divides the legislative history of supplemental jurisdiction into four different stages.[16] He provides:

> The first stage encompassed the period between the decisions of the Supreme Court in *Osborn v. Bank of the United States* in 1824 and *United Mine Workers v. Gibbs* in 1966. The second stage began with *Gibbs,* the landmark case that expanded the scope of supplemental jurisdiction, and continued until *Aldinger v. Howard* in 1976. The third stage commenced with *Aldinger,* when the Court started restricting supplemental jurisdiction, and continued through *Finley v. United States* in 1989 up to the enactment of section 1367 on December 1, 1990. The fourth stage began with the enactment of section 1367, the supplemental jurisdiction statute.[17]

Professor Wolf's categorization is useful, and this article will employ it here. These cases are important because cases decided before the statute was adopted have frequently been relied on by the courts ever since.[18]

A. The Early Era, From Osborn *to* Gibbs

From the early era to the present, the federal courts have exercised two main types of jurisdiction. There was diversity jurisdiction,[19] which existed when all parties on one side of the "v." had state citizenship that was different from all parties on the other side.[20] Additionally, there was federal question jurisdiction, which existed when the claim arose under federal law.[21] And there were other kinds of jurisdiction, all created by statute.[22]

But in their purest statutory forms, these types of jurisdictions would have functioned imperfectly.[23] One of the main reasons was the effect created by joinder of claims, particularly state-law claims, that lacked any basis for

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16. Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1 (1992). This is an impressive article, written by a professor who worked on the language of the statute while working inside the Congress.

17. *Id.* at 3.

18. *See infra, e.g.*, Part III (describing development of the "*Gibbs* values," which involve balancing four factors expressed in case law long before passage of the supplemental jurisdiction statute).

19. 28 U.S.C. § 1332.

20. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1807) (requiring complete diversity).

21. 28 U.S.C. § 1331.

22. For example, the jurisdictional statutes included 28 U.S.C. § 1343 (civil rights claims), 28 U.S.C. § 1346(b)(1) (cases in which the United States was a party), and several others.

23. *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966) (illustrating this problem).

jurisdiction in the federal courts. For example, if a plaintiff added a state-law claim to a federal claim to which it was closely related, the desirable result was their adjudication in the same court.[24] However, if the two claims were joined in a federal court, there would be no specified jurisdiction over the state-law claim without supplemental jurisdiction.

The joinder of a state claim to a federal claim was only one of several ways for this result to occur.[25] Another was the assertion of a non-jurisdictional counterclaim, such as a state-law claim without diversity, in a diversity case.[26] Likewise, there might be a counterclaim that demanded damages in an amount less than the jurisdictional amount.[27] Alternatively, a claim could be asserted between two defendants for indemnity and contribution under state law.[28] And so on.

A lack of jurisdiction over these claims was undesirable for several reasons. First, and most obviously, there was the matter of judicial inefficiency.[29] If the federal courts were to dismiss non-jurisdictional claims when they were closely related to the central issues of jurisdictional claims, the wasted court efforts would be enormous. State courts then would have to proceed for a second time through pretrial and possibly trial before adjudicating the claims dismissed by the federal court.

Second, there would be timing problems. A state court ready to hear a claim between defendants for indemnity and contribution could not proceed if the federal courts had jurisdiction over a liability or damage issue but had not yet decided it.[30] Third, res judicata questions would arise when the holder of the first-filed judgment tried to use it to preclude the remaining claims.[31]

Fourth and finally, one can infer that federal question and diversity jurisdiction would not work properly for the parties. There would be significant unfairness and perverse incentives if supplemental jurisdiction did not exist. A potential plaintiff would be discouraged from using a federal forum for a proper federal or diversity claim because other, non-jurisdictional claims could not be joined with it. A defendant might find that a counterclaim could not be brought except by a separate suit in state court, at additional cost to both plaintiff and defendant. Likewise, there might be no jurisdiction over other kinds of related claims, from indemnity to intervention.

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24. *See, e.g.*, *id.* at 715 (state-law claim together with federal question claim); *cf.* Booty v. Shoney's, Inc., 872 F. Supp. 1524 (E.D. La. 1995) (state-law claim together with diversity claim).

25. *See id.* (illustrating this problem).

26. *Cf.* Moore v. N.Y. Cotton Exch., 270 U.S. 593 (1926) (illustrating this kind of claim).

27. Ahle v. Veracity Rsch. Co., 641 F. Supp. 2d 857, 862 (D. Minn. 2009).

28. Underwriters at Lloyd's Subscribing to Cover Note B1526MACAR1800089 v. Abaxis, Inc., 491 F. Supp. 3d 506 (N.D. Cal. 2020) (dealing with indemnity and contribution in dispute involving subsection (b) of the statute).

29. Judicial efficiency is an important value in the application of the statute. *See infra* Part III.C.

30. *Moore*, 270 U.S. at 609 (allowing supplemental jurisdiction).

31. Thus, for example, a judgment by a federal court on a federal claim could preclude a closely related state-law claim that was dismissed or remanded to state court.

This state of affairs could have existed in the early years, but it did not, because the courts recognized the need for supplemental jurisdiction even then. Actually, the notion of supplemental jurisdiction goes back centuries. Chief Justice John Marshall was one of the early members of the judiciary to recognize it. In his 1824 landmark opinion in *Osborn v. Bank of the United States*, the Chief Justice wrote that there were almost always "other" claims involved in federal question cases, and those must be addressed too.[32] "There is scarcely any case, every part of which depends on the Constitution, laws, or treaties of the United States . . . . [T]hen all the other questions must be decided as incidental to [the claim] which gives [the court] jurisdiction."[33]

And so, in this early era, the federal courts permitted various kinds of supplemental jurisdiction. For example, in *Freeman v. Howe*, the Supreme Court allowed intervention in a diversity case by a party that was not diverse from the plaintiff.[34] In another diversity case, *Moore v. New York Cotton Exchange*, the court permitted a counterclaim that did not satisfy diversity jurisdiction, but there was no overarching definition of supplemental jurisdiction.[35]

The Supreme Court finally tried to make supplemental jurisdiction coherent in the case of *Hurn v. Oursler*.[36] There, the plaintiff asserted a federal copyright claim along with a state-law claim for unfair competition.[37] The unfair competition claim rested on the same acts as the copyright infringement claim.[38] The trial court heard and rejected the copyright claim on the merits, and then it dismissed the state-law claim for lack of jurisdiction.[39] The Supreme Court affirmed these holdings.[40] The Court set out a new rule for this situation: "[W]here the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground."[41]

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32. 22 U.S. (9 Wheat.) 738, 760 (1824).

33. *Id.* at 820–22; *see also* Wolf, *supra* note 16 (describing the legislative history of 28 U.S.C. § 1367). The dissenting Justice, Justice Johnson, agreed with this principle, even though he disagreed with the main decision: "No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question." *Osborn*, 22 U.S. at 884 (Johnson, J., dissenting).

34. 65 U.S. (24 How.) 450, 460 (1860).

35. 270 U.S. 593, 609 (1926).

36. 289 U.S. 238 (1933).

37. *Id.* at 239.

38. *Id.* at 239–40.

39. *Id.*

40. *Id.* at 248 (affirming with modifications not relevant to this analysis).

41. *Id.* at 246.

B. The Gibbs *Era: Pendent and Ancillary Jurisdiction*

The Supreme Court ultimately addressed the problem by a far reach of necessary interpretation. It recognized two types of court-created jurisdiction called pendent and ancillary jurisdiction.[42] These two doctrines lurked in the crevices left among the existing jurisdictional statutes.

United Mine Workers v. Gibbs was the origin of what the Supreme Court called pendent jurisdiction.[43] If a state-law claim piggybacked upon a federal claim that had a jurisdictional basis in federal court—and if the core aspects of the state-law claim overlapped the federal claim—pendent jurisdiction furnished jurisdiction over the state-law claim.[44] This idea dealt with most of the problems of lack of jurisdiction in this situation.

The Labor Management Relations Act (LMRA), more commonly known as the Taft-Hartley Act, prohibits the use of a labor strategy called a "secondary boycott."[45] This labor law violation, a secondary boycott, occurs when a union's labor weapons, including picketing, are used against a company that does business with another company with which the union has its primary dispute.[46] In other words, a secondary boycott means that the union pressures one company, with which it does not have a labor dispute, to induce the pressured company to put pressure on another company, with which the union does have

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42. As this section will indicate, pendent jurisdiction applied to a non-jurisdictional claim that was parallel to a jurisdictional, federal claim. Ancillary jurisdiction was applicable to other kinds of claims. This is the author's preferred characterization of the two types. After *Gibbs*, which referred to pendent jurisdiction, the terms were used interchangeably to some extent.

43. 383 U.S. 715 (1966).

44. *Id.* at 725.

45. Title 29 U.S.C. § 158, refers to the secondary boycott prohibition:

(b) It shall be an unfair labor practice for a labor organization or its agents—

> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> > (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

46. *Id.*

a labor dispute.[47] Gibbs claimed that the union had picketed Grundy Company to get that company to get rid of him, Gibbs: a secondary boycott.[48]

The Tennessee common-law claim was simpler to understand. Gibbs asserted a claim for intentional interference with contract.[49] He alleged that, by the same tactics as its alleged secondary boycott, the union had interfered with his business relationships and his contract of haulage.[50]

The Court began with the jurisdictional issue: that is, whether the federal courts had jurisdiction over the state-law claim for intentional interference with contract.[51] The Court cited *Hurn v. Oursler*,[52] which was one of the formative cases about pendent jurisdiction.[53] It described *Hurn* by saying, "[S]tate law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law." [54] The Court then proceeded to provide a description of pendent jurisdiction by saying, "[t]he state and federal claims must derive from a common nucleus of operative fact."[55] This language has furnished the standard in many cases, including many decided after the supplemental jurisdiction statute was adopted.[56]

The Court's conclusion was blunt: Yes, "the state and federal claims arose from the same nucleus of operative fact."[57] One can infer the reason: the conduct that allegedly amounted to a secondary boycott against Gibbs was largely the same as the actions that led to the claim for intentional interference with Gibbs's haulage contract.[58] The federal courts disposed of the former claim by deciding that there was no secondary boycott.[59] Could they then proceed to decide the second claim, the state-law claim for interference with contract? Here, the Court also perceived a special reason for jurisdiction over the state-law claim, concluding that it was preempted by the LMRA.[60] The federal courts, explained the Court, are "particularly appropriate" forums for deciding issues of federal preemption, holding that the state-law claim was preempted.[61]

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47. *E.g.*, *Secondary boycotts (Section 8(b)(4))*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4 [https://perma.cc/HF9L-TF42] (last visited September 30, 2025).

48. *Gibbs*, 383 U.S. at 720.

49. *Id.* at 720–21.

50. *Id.* at 720.

51. *Id.* at 721.

52. 289 U.S 238 (1933).

53. *See supra* Part I.A (discussing early cases, including *Hurn*).

54. *Gibbs*, 383 U.S. at 722.

55. *Id.* at 725.

56. *See infra* Part III.A–C (discussing later cases).

57. *Gibbs*, 383 U.S. at 728.

58. *Id.* at 720.

59. *Id.* at 728.

60. *Id.* at 729.

61. *See id.* at 737 (adding analysis of an exception from preemption for state-law prevention of violence).

The *Gibbs* decision has been important to the law of supplemental jurisdiction ever since, including after the adoption of the supplemental jurisdiction statute.[62] The Court also decided in *Gibbs* that a court having supplemental jurisdiction was not bound to exercise it.[63] It could dismiss a pendent claim.[64] "Its justification lies in considerations of judicial economy, convenience and fairness to litigants."[65] If these elements are not present, "a federal court should hesitate to exercise jurisdiction over state claims."[66] Today, four factors—judicial economy, convenience, fairness and comity—are still important and are known as "the *Gibbs* values."[67]

Another aspect of the *Gibbs* opinion was a suggestion by the Court that the district courts had discretion to dismiss some kinds of pendent claims.[68] In particular, the courts should dismiss if the jurisdictional claim itself was dismissed before trial or if the non-jurisdictional claims predominated.[69] When the time came for Congress to enact a statute, it codified both the *Gibbs* holding and a list of situations, similar to the *Gibbs* list, in which the district courts could decline to exercise jurisdiction.[70] And the courts since then have looked to *Gibbs* for guidance in their interpretations of this part of the statute. The *Gibbs* opinion, by Justice Brennan, was simply brilliant in recognizing the future.

Thus, pendent jurisdiction allowed the Supreme Court to clarify an important principle about labor laws. Also, *Gibbs* enabled the Court to address some questions about federal preemption. But what did Paul Gibbs, the plaintiff, get? The Justices might as well have said, "Thank you, Gibbs, for furnishing us with the vehicle to resolve some important issues of federal jurisdiction, but we're sorry; you recover zero."

Pendent jurisdiction solved a serious problem. A state-law claim could piggyback on a federal claim, so that judicial resources were not wasted, and litigants were not discouraged from choosing a federal forum.[71] But this was a single, narrow problem, and a whole range of other problems remained. What about claims that did not parallel federal claims, or claims by parties other than the plaintiff?

Specifically, what if a defendant, after being sued in a diversity case, filed a state-law counterclaim for less than the required judicial amount?[72] Or, what if two defendants both filed claims for indemnity and contribution against each other?[73] Or, what if non-jurisdictional claims furnished grounds for intervention

62. *See, e.g.*, Part III (citing cases interpreting subsections (b) and (c) of the statute).
63. *Gibbs*, 383 U.S. at 726.
64. *Id.* at 726–27.
65. *Id.* at 726.
66. *Id.*
67. *See infra* Part III.C (citing cases depending on the *Gibbs* values).
68. *Gibbs*, 383 U.S. at 726.
69. *Id.*
70. *See infra* Part II (describing the language and adoption of the statute).
71. *Gibbs*, 383 U.S. at 726.
72. *See infra* Part III.B.2 (this kind of claim was not allowed before the statute).
73. *See infra* Part III.B.2 (analyzing a case about indemnity and contribution).

by a wholly new party?[74] Pendent jurisdiction of the *Gibbs* variety did not fit any of these situations.[75] Instead, the answer was another court-created doctrine called "ancillary jurisdiction."[76] This invention enabled the federal courts to exercise jurisdiction over some types of these claims if they connected sufficiently with jurisdictional claims that were already in the case.[77]

Actually, pendent and ancillary jurisdiction were separate names for the same device.[78] They furnished a basis for the addition of non-jurisdictional claims. The Supreme Court later explained the two types:

> The terms of [the later-passed supplemental jurisdiction statute] do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction. Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are "two species of the same generic problem."[79]

And the doctrines have remained the same after passage of the supplemental jurisdiction statute. "Nothing in [the statute] indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary."[80]

For example, in *Baker v. Gold Seal Liquors, Inc.*, the Supreme Court invoked ancillary jurisdiction in a way that showed its identity with pendent jurisdiction.[81] The Court had before it a bankruptcy reorganization case involving Penn-Central Transportation Company that included multiple claims.[82] Ancillary jurisdiction arises frequently in bankruptcy proceedings because claims involving the bankrupt party can be of varied types, including non-jurisdictional claims.[83] In this case, Baker, the bankruptcy trustee, brought a claim against Gold Seal Liquors for freight charges allegedly owed to the

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74. *See infra* Part IV (dealing with the *Caterpillar* case, in which an intervention was central to the analysis).

75. These kinds of claims, unlike the supplemental claim in *Gibbs*, would not involve supplemental state-law claims piggybacked on federal claims.

76. *See infra* Part III.C.1 (concerning the *Acri* case, in which ancillary jurisdiction was involved).

77. *See, e.g.*, *infra* Part III.C.1.

78. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005) (citing Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978)).

79. *Id.*

80. *Id.*

81. 417 U.S. 467, 470 (1974).

82. *Id.* at 467–68.

83. Garrard Glenn, *Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court*, 19 J. NAT'L ASS'N REF. BANKR. 83, 83 (1945) (discussing the particulars of bankruptcy).

bankrupt, Penn Central.[84] This claim amounted to $8,256.61.[85] Gold Seal filed a counterclaim for $19,319.42 for loss and damage to shipments over the bankrupt's lines.[86] Both claims were undisputed.[87] The district court therefore allowed both claims and offset them, awarding the difference to Gold Seal.[88]

The Supreme Court held that ancillary jurisdiction extended to the counterclaim, even though it was non-jurisdictional.[89] "If a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court."[90] A counterclaim is compulsory if it arises from the same "transaction" as the original claim,[91] and the Court observed that "'transaction' is a word of flexible meaning which may comprehend a series of occurrences if they have logical connection."[92] Furthermore, the Court suggested that permissive counterclaims would also be within ancillary jurisdiction.[93] "Thus the court may dispose of all claims between the parties in one proceeding whether or not they arose in the 'same transaction.'"[94]

The Court proceeded to hold that the counterclaim was within the federal courts' ancillary jurisdiction.[95] But then, the Court disallowed it on the holding that the trial court's judgment recognizing Gold Seal's claim amounted to an illegal preference.[96] A preference is the payment of a claim to a lower-ranking unsecured creditor, in this case, Gold Seal, while other claimants, like Trustee Baker, have priority.[97] The Court explained this concept:

> There is a hierarchy of claims, the owner of the equity [i.e., stockholders] coming last. Wages owing workers running the trains have a high current priority. Secured creditors have by law a priority in the hierarchy. Unsecured creditors [such as Gold Seal] usually are pooled together [with lower priority] . . . . Allowance of a setoff that reduces all or part of the debtor's claim against them [including Gold Seal, in this case] is a form of [illegal] priority [i.e., a preference].[98]

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84. *Baker*, 417 U.S. at 468.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 468–69.
89. *Id.*
90. *Id.* at 469 n.1.
91. FED. R. CIV. P. 13 (defining a compulsory counterclaim).
92. *Baker*, 417 U.S. at 469 n.1 (citing Moore v. N.Y. Cotton Exch., 270 U.S. 593, 610 (1926)).
93. *Id.* (quoting the rule for permissive counterclaims).
94. *Id.*
95. *Id.* at 472–73.
96. *Id.* at 473.
97. *Id.*
98. *Id.*

Thus, the setoff by the district court was unlawful, and the Court reversed it.[99] And so, once again, the Justices might as well have said, "Thank you, Gold Seal Liquors, for helping us clarify an important jurisdictional principle, but we're sorry; you recover zero."

Sometimes the result under ancillary jurisdiction seems strange. In *Freeport McMoRan, Inc. v. K N Energy, Inc.*, for example, Freeport, the original plaintiff, assigned its claim to a limited partnership for business reasons unrelated to the dispute.[100] The original claim was based on diversity, but the limited partnership included partners who were of the same citizenship as defendant K N Energy.[101] The multiple citizenships of a partnership are the citizenships of all of its partners.[102] Thus, the limited partnership would have destroyed diversity if it had been the original claimant.

But the Court cited the rule that jurisdiction over a diversity case is established when the suit is originally filed.[103] The original filing was Freeport versus K N Energy, which was a sound diversity case.[104] And so, a diversity suit, followed by substitution of a different plaintiff that destroyed diversity, was (amazingly) within the ancillary jurisdiction of the federal courts.[105]

C. The Aldinger *and* Owen v. Kroger *Era: The Jurisdiction Shrinks*

Then, in *Aldinger v. Howard*, the Supreme Court began a series of retrenchments from pendent and ancillary jurisdiction.[106] There, the plaintiff filed suit after she claimed she was wrongfully discharged from her job at Spokane County in Washington State.[107] She asserted jurisdiction under 28 U.S.C. § 1343, the civil rights jurisdictional statute.[108] The Court held that Aldinger could not base jurisdiction on § 1343 because a county, like her defendant, was not a "person" under the statute.[109]

But Aldinger had also filed state-law claims against additional parties not involved in the § 1343 suit, based on statutory waivers of sovereign immunity.[110] Could a federal court have "pendent-party" jurisdiction over those additional parties? The Court said "No."[111] The statutes, it pronounced, required "a holding

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99. *Id.* at 474.

100. 498 U.S. 426, 427 (1991).

101. *Id.*

102. Carden v. Arkoma Assocs., 494 U.S. 185, 196–97 (1990).

103. *Freeport-McMoRan*, 498 U.S. at 428.

104. *Id.* at 427 ("Freeport and McMoRan were Delaware corporations with their principal place of business in Louisiana. K N was and is a Kansas corporation with its principal place of business in Colorado.").

105. *Id.* at 429.

106. 427 U.S. 1 (1976).

107. *Id.* at 3–4.

108. *Id.*

109. *Id.* at 16.

110. *Id.* at 14–15.

111. *Id.* at 19.

that the joinder of . . . the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court."[112]

Then, in *Owen Equipment & Erection Company v. Kroger*, the Court introduced a larger and more important shrinkage of ancillary jurisdiction.[113] This kind of jurisdiction, the Court held, did not extend to a claim by a plaintiff in a diversity action against a nondiverse third-party defendant impleaded by the original defendant.[114] Thus, if *A* sues *B*, and *B* uses ancillary jurisdiction to implead third-party *C*, who is of the same citizenship as *A*, *A* cannot use ancillary jurisdiction to add *C* as a party.

The Court's reasoning in *Owen v. Kroger* was based on the diversity statute itself, 28 U.S.C. § 1332(a).[115] The Court said:

> This statute and its predecessors have consistently been held to require complete diversity of citizenship . . . . Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity . . . . [T]his subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.[116]

But this explanation proves too much. The holding, if applied consistently, would prohibit every exercise of ancillary jurisdiction over a non-diverse state-law claim. Every such exercise of ancillary jurisdiction, then, would be illegal under section 1332,[117] including the third-party action in *Kroger*, which was a claim supported by ancillary jurisdiction.[118] Therefore, *Owen v. Kroger* would have destroyed ancillary jurisdiction over the third-party claim too if its reasoning had been consistently extended. Unfortunately, ancillary jurisdiction operates in a strange universe.

Finally, in *Finley v. United States*, the Court held that a plaintiff who brought a Federal Torts Claim Act (FTCA) suit could not also assert a state-law claim against other, non-diverse parties.[119] The lower courts took the hint and began denying various exercises of supplemental jurisdiction.[120] In reality, the Supreme Court's reasoning in *Owen v. Kroger* would have destroyed ancillary jurisdiction completely. With that, one commentator declared, "[s]upplemental

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112. *Id.* at 17.
113. 437 U.S. 365 (1978).
114. *Id.* at 377.
115. *Id.* at 373–74.
116. *Id.*
117. 28 U.S.C. § 1332.
118. *Owen*, 437 U.S. at 367–69.
119. 490 U.S. 545, 555–56 (1989).
120. Wolf, *supra* note 16, at 13–14.

jurisdiction, therefore, is arguably dead and surely expiring."[121] *Finley*, one might presume, led to Congress's passage of a supplemental jurisdiction statute the very next year.

II. THE ENACTMENT OF THE SUPPLEMENTAL JURISDICTION STATUTE

After *Finley*, Congress became aware of the need for a comprehensive statute authorizing supplemental jurisdiction. Professor Wolf, who was involved in the proceedings, says there were several goals:

> These goals were: to define supplemental jurisdiction as precisely as possible; to authorize such jurisdiction broadly, but stop short of the full reach of Article III judicial power; to permit the invocation of supplemental jurisdiction uniformly . . . with one narrow exception in diversity cases; to circumscribe the discretion of federal judges to entertain or dismiss supplemental claims; and to reassert the power of Congress as the principal actor in defining . . . federal court jurisdiction, including supplemental jurisdiction.[122]

But the actual statute that survived the process contained three variations from these goals. First, it broadened supplemental jurisdiction to reach the full power authorized by Article III by extending it to all "cases and controversies" under the Article.[123] Second, it limited the availability of supplemental jurisdiction in diversity cases by codifying *Owen v. Kroger*.[124] Third, it ratified and extended the discretionary power of the district courts to dismiss supplemental claims, which had been recognized in *Gibbs*.[125]

There were many changes during the legislative process. But the statute that emerged included in subsection (a) the following grant of jurisdiction, which encompassed all of the jurisdiction allowable under Article III:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States

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121. Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 248 (1990).

122. Wolf, *supra* note 16, at 20.

123. *Id.*

124. *Id.*

125. *Id.*

> Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.[126]

But in subsection (b), the statute prohibited supplemental jurisdiction if a plaintiff, in a diversity case, added a state-law claim against a non-diverse defendant brought into the case by another party:

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[127]

And in subsection (c), the statute allowed discretion in the district courts to dismiss supplemental claims in certain situations:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction . . . .[128]

The supplemental jurisdiction statute has been amended several times. Today, it says the following as its grant of jurisdiction in subsection (a):

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.[129]

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126. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367).

127. *Id.*

128. *Id.*

129. 28 U.S.C. § 1367(a).

And the statute goes on to say, "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."[130]

Several aspects of the statutory language are notable. First, the statute replaces the doctrines of pendent and ancillary jurisdiction. Supplemental jurisdiction now includes both court-created jurisdiction types.[131] Hence, a state-law claim that piggybacks on a federal claim, formerly given life by pendent jurisdiction, is now a creature of supplemental jurisdiction. Likewise, a non-jurisdictional counterclaim, third-party claim, cross-claim, or other claim, formerly covered by ancillary jurisdiction, may be supported by supplemental jurisdiction today.

Second, the statute provides that the measure of supplemental jurisdiction is claims that "form part of the same case or controversy under Article III of the United States Constitution."[132] Article III allows federal jurisdiction to extend to all "cases and controversies."[133] Congress, in the supplemental jurisdiction statute, has adopted the Constitution as the standard for the breadth of supplemental jurisdiction. Thus, the Congressional intent appears to have been to extend supplemental jurisdiction in subsection (a) as far as constitutionally possible.

Third, the statute recognizes that some supplemental claims might require the addition of parties not yet joined in the suit.[134] If there is a counterclaim, this additional extension of the statute is not necessary because the plaintiff, who becomes the counterclaim defendant, is already present in the lawsuit. But the addition of a third-party claim by the defendant usually requires joinder of an additional party: the third-party defendant.[135] This sentence in the statute, allowing joinder of additional parties, creates the jurisdictional basis in this situation.

But fourth and finally, the statute contains two big subtractions. It disallows plaintiffs' supplemental claims against new parties brought into their cases.[136] It also provides the district courts with discretion to dismiss supplemental claims in several common situations.[137] The next sections of this article will consider these provisions and certain interpretations that narrow the application of the statute.

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130. *Id.*

131. *Cf.* Thyssenkrupp Mexinox S.A. de C.V. v. United States, 33 C.I.T. 1757 (2009) (referring to supplemental jurisdiction statute in terms of pendent and ancillary jurisdiction in the analysis of a claim that really was a supplemental claim).

132. 28 U.S.C. § 1367(a).

133. U.S. CONST. art. III, § 2, cl. 1 (creating the judicial power and extending it to "cases and controversies").

134. 28 U.S.C. § 1367(b).

135. FED. R. CIV. P. 14 (authorizing third-party practice).

136. This is the effect of subsection (b) of the statute. *See infra* Part III.B (discussing 28 U.S.C. § 1367(b)).

137. This is the effect of subsection (c) of the statute. *See infra* Part III.B (discussing 28 U.S.C. § 1367 (c)).

III. LIMITS ON SUPPLEMENTAL JURISDICTION BY INTERPRETATION OR BY STATUTE

A. The Most Recent Retrenchment: The Royal Canin *Decision*

Most recently, in 2025, the Supreme Court has limited the supposedly broad jurisdiction created by section 1367. In *Royal Canin U.S.A. v. Wullschleger*, Plaintiff Wullschleger sued Royal Canin for allegedly deceptive marketing practices, asserting both federal and state-law claims.[138] Royal Canin removed the case to federal court.[139] Then, Wullschleger dismissed all of her federal claims, because she, like many plaintiffs, preferred to be in state court.[140] The district court extended supplemental jurisdiction to her state-law claims and refused to remand them.[141] The Eighth Circuit reversed, holding that supplemental jurisdiction could not exist when all federal claims had been dismissed.[142] Because of a circuit split, the Supreme Court granted certiorari and affirmed the lower court's holding that a federal court has no supplemental jurisdiction once all claims allowing federal-question jurisdiction have been dismissed.[143]

The Court reasoned that the text of section 1367 required this result because its subsection (a) extended jurisdiction only to claims sufficiently related to jurisdictional claims.[144] Citing *Gibbs*, the Court added that the relationship must be "one of fact."[145] And the jurisdictional question, it said, followed the amended claim.[146] Therefore, if a plaintiff withdraws her jurisdictional claims, leaving only state-law claims, she deprives the federal courts of supplemental jurisdiction.[147] Furthermore, this result must be the same in a removed case, because the statute does not distinguish between removed and original claims.[148] The Court also cited subsection (c), which allows discretionary dismissal,[149] but the decision depended on subsection (a) and did not treat dismissal as

138. 604 U.S. 22, 28 (2025).
139. *Id.*
140. *Id.* at 29; *see also* Part IV (discussing the *Caterpillar* case, in which the plaintiff explained his preference for state court).
141. *Royal Canin*, 604 U.S. at 29.
142. *Id.* (citing Wullschleger v. Royal Canin U.S.A., Inc., 75 F.4th 918, 924 (8th Cir. 2023)).
143. *Id.* at 29–30.
144. *Id.* at 30–31.
145. *Id.* at 31.
146. *Id.* at 32 (quoting Rockwell Int'l Corp. v. United States, 549 U.S. 457, 473–74 (2007)).
147. *Id.*
148. *Id.* at 33.
149. *Id.* at 31–33.

discretionary in this situation.[150] In accordance with the statute, the trial court should then "kick the case to state court."[151]

Still, the Court expressed approval of supplemental jurisdiction over a federal-and-state-law claim combination when the claims are factually intertwined.[152] "Under [the supplemental jurisdiction] statute, as under *Gibbs*, jurisdiction over a federal-law claim brings with it supplemental jurisdiction over a state-law claim arising from the same facts."[153] But the Court's extension in *Royal Canin* of supplemental jurisdiction over a state-law claim intertwined with a federal claim may be illusory, because the plaintiff always has the ability to dismiss all federal claims.

The *Royal Canin* holding is unfortunate in denying supplemental jurisdiction and returning the case to state jurisdiction in this situation.[154] Imagine that a plaintiff files a claim under the Federal Employers' Liability Act (FELA), which creates favorable conditions for railroad workers' suits against railroad companies.[155] The plaintiff may also files a state-law claim for negligence based on the same facts. The point of the state-law claim in this situation must be to provide a backup route to recovery in case the federal claim fails for some reason.

But imagine that the federal claim does fail. Perhaps, for example, the district court decides that the defendant is not a railroad (this has occurred in some cases).[156] Suddenly, there is no basis for federal jurisdiction. As the Supreme Court said in *Royal Canin*, "deletion of all federal claims deprived the District Court of federal-question jurisdiction. And once that was gone, the court's supplemental jurisdiction over the state claims dissolved too."[157] The Court also sent the same message in different words: "Once the plaintiff has ditched all claims involving federal questions, the leftover state claims are supplemental to nothing—and § 1367(a) does not authorize a federal court to resolve them."[158] Thus, given the reasoning and holding in *Royal Canin*, the trial court now has to "kick the case to state court,"[159] and thereby must destroy the

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150. *Id.* at 33–34.

151. *Id.* at 32. One might regard this phrase either as a refreshing turn toward informal directness or an inappropriate lapse from dignity, or perhaps both. One really should look at an opinion, at least in part, for its effect on the losing party, who is already disappointed and deserves a message that is not delivered in callous terms.

152. *Id.* at 27.

153. *Id.*

154. *Id.* at 43–44.

155. 45 U.S.C. § 51 *et seq*. For example, FELA compensation is usually many times greater than worker's compensation provided to non-railroad employees. *See, e.g.*, Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49, 50, 54 (1988).

156. *E.g.*, Brooks v. Sw. Transp. Co., 494 F.2d 1271, 1272 (6th Cir. 1974) (defendant was not a railroad although a railroad company owned all of its stock); *cf.* Montgomery v. NLR Co., No. 2:05–CV–251, 2008 WL 299555, at *1 (D. Vt. Jan. 31, 2008) (jury found that plaintiff was not employee, as required by FELA).

157. *Royal Canin*, 604 U.S. at 44.

158. *Id.* at 34.

159. *Id.* at 32.

usefulness of supplemental jurisdiction over any state-law claim asserted as a backup. Supplemental jurisdiction, then, is indeed illusory.

The Court in *Royal Canin* was so determined to rein in state-law claims that it overruled two statements in its cases saying the opposite from its holding[160]—first, in *Carnegie-Mellon University v. Cohill*, [161] and later in *Rockwell International Corp. v. United States*[162] in a footnote. In both cases, said the Court, the remarks were dictum, and they could not "bear the weight" of the defendant's argument based on them.[163] The Court even characterized the two references as "drive-by" statements.[164]

The Court's own holding, however, should bear these epithets. The decision in *Royal Canin* is as potentially disastrous as metal in a microwave. If every disappearance of federal claims requires the dismissal of supplemental parallel claims, then there is no point in adding state-law claims, rendering supplemental jurisdiction meaningless. Perhaps there is a way for the courts to avoid this disruptive interpretation of *Royal Canin*. But if so, it will conflict with the logic of *Royal Canin* and may require a significant cleanup of the decision. Additionally, the *Royal Canin* holding arguably conflicts with the statutory extension of supplemental jurisdiction to all cases and controversies within the ambit of Article III.

B. Subsection (b) of the Statute: The Codification of Owen v. Kroger

1. The Legislative Adoption of Subsection (b).—Owen Equipment & Erection Co. v. Kroger was decided before the enactment of the supplemental jurisdiction statute.[165] This decision held that a plaintiff could not assert an ancillary-jurisdiction claim against a non-diverse party brought into the case by the defendant.[166] As explained above, if *A* sues *B*, and *B* impleads third-party *C*, *A* cannot add *C* as a defendant if *C* is non-diverse from *A*.

There was no particular policy reason for the statute to include this subtraction from supplemental jurisdiction.[167] The holding in *Owen v. Kroger*, of course, contradicted the goal of the final statute drafters to reach to the limit of the Article III authorization of jurisdiction.[168] Furthermore, its practical effects were inefficient and unfortunate because it meant that a party already in the federal case could not be sued there and would need to be sued separately in

160. *Id.* at 39–40.
161. 484 U.S. 343, 357 (1988).
162. 549 U.S. 457, 474 n.6 (2007).
163. *Royal Canin*, 604 U.S. at 39.
164. *Id.* at 42.
165. 437 U.S. 365 (1978).
166. *Id.* at 374.
167. The decision was based upon statutory interpretation. The Court applied the diversity statute and decided that it denied jurisdiction here.
168. *See supra* Part II (analyzing the adoption of the statute)

state court with duplication of all proceedings.[169] But the drafters included subsection (b) in the statute, and thus they codified the holding in *Owen v. Kroger*.

Subsection (b) of the statute provides that:

> [if] the district courts have original jurisdiction founded solely on 1332 of this title, the district courts shall not have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under [third-party practice, required joinder, permissive joinder, or intervention] . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[170]

Thus, although subsection (b) does not use the exact words of *Owen*, its effect closely mimics the holding of that case.

A slew of unfortunate results follows this language. Subsection (b) is inefficient in disallowing state-law claims intertwined with federal claims and requiring duplicate proceedings in state court.[171] It also means that if the plaintiff's federal claim requires an indispensable non-diverse party, the federal claim will need to be dismissed, and the case will have to be litigated in state court, where the indispensable party can be joined.[172] And if a new, non-diverse party intervenes with a frequent kind of claim, such as that of a non-diverse insurer seeking subrogation, the plaintiff cannot sue the insurer to protect its interests in the plaintiff's primary claim against an at-fault defendant.[173] Additionally, of course, subsection (b) disallows plaintiffs from suing non-diverse third-party defendants impleaded by defendants,[174] no matter how closely related the impleader is to the plaintiff's original federal claim.

These results not only frustrate the drafters' intent to reach all possible jurisdiction under Article III, but they are also unfair to plaintiffs who want federal forums to decide their federal claims. Why would Congress have adopted this unfortunate provision?

The answer is that Congress preferred to retain the diversity jurisdiction of section 1332 intact. Specifically, Congress intended, in early drafting, to avoid creating any jurisdiction that was "inconsistent with the jurisdictional

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169. The result of the lack of jurisdiction would mean that state courts were the only possible forums.

170. 28 U.S.C. § 1367(b) (denying jurisdiction in this situation).

171. *E.g.*, Reyes v. City of New York, 141 F.4th 55, 65 (2d Cir. 2025).

172. FED. R. CIV. P. 19 (dealing with "required parties" who should be joined "if feasible," including indispensable parties, who must be joined).

173. *See infra* Part IV (discussing the *Caterpillar* case, in which such an intervention occurred).

174. *See supra* Part I.C (discussing the *Kroger* case); Part II (discussing adoption of statute).

requirements of section 1332."[175] And the intention was to retain the essence of the complete diversity requirement that derives from *Strawbridge v. Curtiss*.[176]

But as the statute twisted toward enactment, it changed. First, in spite of the early attempt to follow the complete diversity requirement of *Strawbridge v. Curtiss*, a plaintiff could now sue a non-diverse party on a state-law claim in the original complaint, creating the scenario that *Strawbridge* seemed to prohibit.[177] Second, the treatment of the complete diversity requirement was inconsistent. Although plaintiff's claims against non-diverse defendants were prohibited, defendants could sue non-diverse plaintiffs with state-law claims—an approach that was "inconsistent with the jurisdictional requirements of section 1332," to quote the statute.[178]

Third, although the original retrenchment of jurisdiction covered cases based on "diversity" under section 1332,[179] the final enactment covered cases globally under "section 1332."[180] The problem is, section 1332 covers more than diversity; subsection 1332(a)(4) also creates jurisdiction over plaintiffs' claims by foreign states.[181] Therefore, section 1367(b) would appear to abolish federal jurisdiction over foreign-state claims.[182] But this result was probably inadvertent, and the federal courts have continued to recognize this foreign-state jurisdictional provision in spite of it.[183]

One theoretical factor in favor of section 1367(b) might be that it prevents a plaintiff from colluding with a defendant to add a third party for the purpose of suing that party with a state-law claim in which the plaintiff lacks complete diversity. The defendant in an extreme case might even be a sham party against whom the plaintiff has an agreement not to pursue liability. But in such a case, the better remedy would be for the court to utilize section 1359 to recognize and dismiss claims against parties "collusively made or joined to invoke []

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175. 28 U.S.C. § 1367(b); *See, e.g.*, *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and H.R. 3898 Before the S. Comm. on Cts., Intell. Prop., & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong., 15 (1990) [hereinafter *Hearings on H.R. 5381 and H.R. 3898*] (statement of Stuart Gerson, Assistant Att'y Gen. of the U.S., Civil Division).

176. *Federal Courts Study Committee Implementation Act: Hearing on H.R. 5381 Before the S. Comm. on Cts., Intell. Prop., & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong., 7 (1990) [hereinafter *Hearing on H.R. 5381*] (statement of Judge Joseph F. Weis, Jr., 3d Cir.) (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)).

177. *Strawbridge*, 7 U.S. (3 Cranch) at 267; 28 U.S.C. § 1367(b), which excluded jurisdiction, was triggered by the addition of parties through various Federal Rules of Civil Procedure that were not mentioned in subsection (a), which granted supplemental jurisdiction to district courts; hence an original claim in the suit was not affected by the exclusion.

178. Subsection (b) affected only claims by "plaintiffs" and contains this requirement for its operation.

179. *Hearing on H.R. 5381*, *supra* note 176, at 8.

180. 28 U.S.C. § 1367(b).

181. 28 U.S.C. § 1332(a)(4).

182. 28 U.S.C. § 1367(b).

183. *E.g.*, Matimak Trading Co. v. Khalily, 118 F.3d 76, 83–84 (2d Cir. 1997).

jurisdiction . . ."[184] The alternative remedy of subsection (b), which closes the possibility of any claims against such a party, is overkill, like shooting a termite with a howitzer.

To sum these oddities up, subsection (b) of the supplemental jurisdiction statute is an unfortunate piece of legislation. Although it is true that non-diversity state-law claims would have been inconsistent with traditional requirements of complete diversity, so were various other claims that were allowed by section 1367.[185] The whole thrust of the statute was to create judicial efficiency by allowing non-jurisdictional claims to be litigated together with related jurisdictional claims, and this objective produced many supplemental claims inconsistent with the complete diversity requirement.[186] Indeed, subsection (b) seems to express a kind of hostility to diversity jurisdiction. This subtraction from supplemental jurisdiction was a preference for theoretical purity, in deference to a distant precedent, instead of sound policy, and it was unwarranted.

2. Confusion, Costs, and Delays in Interpretations of Subsection (b).—At first, subsection (b) even created confusion about whether, in a diversity case, there could be supplemental jurisdiction over related claims that did not meet the amount-in-controversy requirement. One might think that this would be an easy call in favor of supplemental jurisdiction. But no. In *Rosario Ortega v. Star-Kist Foods, Inc.*, the court reported a circuit split involving a number of courts.[187] The *Rosario Ortega* court itself decided, after an extensive analysis, that although Rosario Ortega herself had asserted a valid diversity claim, the tag-along claims of her family members did not qualify for supplemental jurisdiction.[188] Those claims sought less than the required jurisdictional amount and were excluded, said the court, by subsection (b).[189] The decision was understandable. Subsection (b) prohibited non-jurisdictional claims by plaintiffs against newly added defendants who were joined as defendants under F.R.C.P. 20, and this case seemed to fit the exclusion literally.[190] The First Circuit modified the judgment and affirmed.[191]

But the Supreme Court granted certiorari and reversed.[192] The Court held that "§ 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for

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184. 28 U.S.C. § 1359.

185. Claims such as counterclaims, cross-claims, third-party claims, and interventions and even original plaintiffs' claims all fall within section (a) and are not automatically excluded by section (b).

186. *See infra* Part III.B.2 (analyzing the *Rosario Ortega* case, which permits non-jurisdictional state-law claims by plaintiffs parallel to plaintiff's jurisdictional claims but charged in plaintiff's original complaint).

187. 370 F.3d 124, 127 (1st Cir. 2004).

188. *Id.* at 137.

189. *Id.* at 137–38.

190. 28 U.S.C. § 1367(b); FED. R. CIV. P. 20.

191. *Rosario Ortega*, 370 F.3d at 144.

192. *Sub nom*. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549–50 (2005).

less than the jurisdictional amount . . . ."[193] The Court began its reasoning by considering the legislative history. *Gibbs*, *Howard*, and *Finley* had left the pre-statutory meaning of pendent jurisdiction as disallowing supplemental claims by the plaintiff if they did not meet the jurisdictional statutes.[194]

But the supplemental jurisdiction statute was intended to change these results.[195] Specifically, subsection (a) of the statute was a broad grant of jurisdiction, intended to enable the courts to address entire Article III cases and controversies.[196] And it expressly allowed the addition of new parties to supplemental claims.[197] And then, "Nothing in the text of 1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 . . . . The natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by Rule 20 . . . plaintiffs."[198]

This decision solved one narrow question. But there have been many more cases in which subsection (b) has caused confusion, costs, and delays. In *Underwriters at Lloyd's v. Abaxis, Inc.*, for example, the original plaintiffs filed contract and tort claims, after which the defendants filed cross-claims that included tort and indemnification claims.[199] The Underwriters, the original plaintiff, dismissed their claims against two defendants, TCSL and CHR.[200] After the court denied the remaining defendants' (Abaxis and Zoetis) motion to dismiss, they filed cross-claims against TCSL and CHR.[201] Among other tort claims, Abaxis and Zoetis sought to find TCSL and CHR jointly liable for the Underwriters' breach of contract claim asserted solely against Abaxis and Zoetis.[202] Plaintiffs in the Underwriters' position, one might speculate, dislike cross-claims because they cause confusion and delay that detracts from the court's attention to resolving the plaintiffs' claims, while ballooning the time that all lawyers must spend on the cross-claims.

CHR, seeking to dismiss the defendants' cross-claims, first argued that there was no jurisdiction under subsection (a), the statutory grant of jurisdiction, because the plaintiff's claim sounded in contract and the cross-claims did not; therefore, the supplemental claims were not sufficiently related to the original suit.[203] But all of the claims were about the same loss to the same property, and

193. *Id.* at 549.
194. *Id.* at 556.
195. *Id.* at 558.
196. *Id.* (citing 28 U.S.C. § 1367(a)).
197. *Id.* at 560.
198. *Id.*
199. Underwriters at Lloyd's Subscribing to Cover Note B1526MACAR1800089 v. Abaxis, Inc., 491 F. Supp. 3d 506, 510 (N.D. Cal. 2020) (dealing with indemnity and contribution in dispute involving subsection (b) of the statute).
200. *Id.* at 509.
201. *Id.* at 509–10.
202. *Id.* at 512.
203. *Id.* at 513.

the court easily found the required "common nucleus of operative fact."[204] Supplemental jurisdiction, the court held, extended to the cross-claims.[205]

Subsection (b), however, created the more complex and novel arguments in the *Underwriters* case. This subsection, of course, excluded some kinds of claims by "plaintiffs."[206] The Underwriters and CHR argued that the cross-claimants were effectively "plaintiffs" because they were asserting claims—making them, in substance, cross-claim plaintiffs.[207] This line of reasoning would have meant that the cross-claims were prohibited by subsection (b). The court noted that "several courts of appeal have held that section 1367(b)'s use of the term 'claims by plaintiffs' only refers to the original plaintiffs and not defendants who then assert a crossclaim or third-party claim."[208] Furthermore, subsection (b) "states congressional intent to prevent original plaintiffs—but not defendants or third parties—from circumventing the requirements of diversity."[209]

The court could have added, but perhaps did not need to add, that subsection (b) codified *Owen v. Kroger*, in which the Supreme Court excluded only the original plaintiff's claims.[210] Along the way, the *Underwriters* court also had to analyze issues under F.R.C.P. 13, concerning cross-claims, and F.R.C.P. 14, third-party claims.[211] Subsection (b) indeed produces difficult questions, even though the court decided this case sensibly.

But if there is to be this kind of confusion, let it be about something other than jurisdiction. Litigants ought to have a known battlefield so that their disputes can be definitively settled.

And there are more difficulties. Class actions, with their already inherent complexity, also create conundrums under subsection (b). For example, does supplemental jurisdiction create jurisdiction over a diversity class action in which some claims seek damages that are below the required jurisdictional amount? The Supreme Court once held that all the claims have to be within the courts' jurisdiction.[212] But that was before the supplemental jurisdiction statute. Did the supplemental jurisdictional statute change this result?

After the statute passed, in *Rosmer v. Pfizer Inc.*, the Court of Appeals held that the answer was yes.[213] Rosmer filed a class action in state court on state-law claims, and Pfizer removed the case on diversity grounds.[214] Rosmer filed a

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204. *Id.* at 515.
205. *Id.* at 515–16.
206. *Id.* at 516 (discussing how other circuits have addressed "claims by plaintiffs").
207. *Id.*
208. *Id.*
209. *Id.*
210. *See supra* Part I.C (analyzing cases that shrank supplemental jurisdiction, including *Owen v. Kroger*).
211. *Underwriters at Lloyd's*, 491 F. Supp. 3d at 515–16.
212. Zahn v. Int'l Paper Co., 414 U.S. 291, 300–01 (1973).
213. 263 F.3d 110, 122 (4th Cir. 2001).
214. *Id.* at 112.

motion to remand, but the district court refused.[215] The Fourth Circuit held that subsection (a) of the supplemental jurisdiction statute was a broad grant of authority, and it was not limited by theories that did not fit the plain language of the statute.[216] However, subsection (b) applied to parties added after the commencement of the suit, not those already in the suit from its beginning.[217] Other circuits had split over this issue.[218] The Supreme Court had divided 4-4 on the same issue.[219] "Our view, respectfully," the Fourth Circuit concluded, "is that § 1367 confers supplemental jurisdiction in diversity class actions, so long as one named plaintiff has a claim giving a federal court original jurisdiction."[220] Another court described this awkward decisional law as follows:

> The question of supplemental jurisdiction in diversity-based class actions has mired not only the circuit courts of appeals in confusion and disarray, but district courts and legal commentators, as well. The dissension among circuits has played out across district court opinions, learned treatises, law review articles, and even bar review books.[221]

Again, jurisdiction ought to be clear to the parties, just as the rules of the road ought to be clear to drivers.

Finally, the Supreme Court resolved the question.[222] Yes, the supplemental jurisdiction statute does allow class actions that include members with claims below the jurisdictional amount, provided at least one named class member's claim meets the minimum.[223] The same rule applied in smaller cases that were not class actions, such as in Rosario Ortega's case.[224] In the meantime, however, no one can know how many cases before *Exxon Mobil* were affected adversely to the prevailing party or how many were settled based on confusion.

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215. *Id.* at 113.

216. *Id.* at 114.

217. *Id.* at 115.

218. *Compare* Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930–31 (7th Cir. 1996) (stating that supplemental jurisdiction applies to class actions and allows class members with claims below jurisdictional amount), *and In re* Abbott Labs., 51 F.3d 524, 528–29 (5th Cir. 1995), *aff'd by an equally divided court sub nom*. Free v. Abbott Labs., Inc., 529 U.S. 333 (2000) (per curiam) (same), *with* Trimble v. Asarco, Inc., 232 F.3d 946, 962 (8th Cir. 2000) (holding that each member of a class who does not meet the jurisdictional amount must be dismissed from the case), Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218 (3d Cir. 1999) (same), *and* Leonhardt v. W. Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998) (same).

219. *Abbott*, 529 U.S. at 333.

220. *Rosmer*, 263 F.3d at 114.

221. Allapattah Servs., Inc. v. Exxon Corp., 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting) (rejecting the majority's interpretation of 28 U.S.C. § 1367).

222. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005).

223. *Id.*

224. *Id.* at 551, 559. The Supreme Court decision did not include Rosario Ortega's name in the caption, but her family's claim against Star-Kist was decided *sub nom*. *Id.*

C. Discretionary Dismissal Under Subsection (c)

Subsection (c) of the supplemental jurisdiction statute allows the district courts to "decline to exercise supplemental jurisdiction over a claim" if—

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances . . . .[225]

By way of example, imagine that a state has just passed a major antitrust statute. Subsection (c)(1) allows the federal courts to defer to state courts, enabling them to undertake the first effort to interpret this "novel or complex issue of State law."[226] Subsection (c)(2) allows the federal courts, for example, to send a state-law product liability case to state court, although it is joined with a long-shot federal claim under a related federal statute.[227] The product claim will "predominate." Or if, as in *Royal Canin*, the federal claim disappears from the case, the federal court can also dismiss a related state-law claim.[228] The court no longer has a federal claim as an anchor, "over which it has original jurisdiction."[229]

1. Deciding Whether Supplemental Jurisdiction Really Exists.—This provision raises a broad range of jurisdictional puzzles. For example, if neither litigant raises the issue, must the district court initiate attention to the question of declining jurisdiction on its own and decide whether to remand or dismiss a supplemental claim? The possibility is real; both parties may see that there is jurisdiction over the claim, and then neither may be attentive to the possibility that jurisdiction might be declined. Or they may simply neglect the issue. Does supplemental jurisdiction exist, then? In *Acri v. Varian Associates, Inc.*, the court held that the answer was yes—supplemental jurisdiction survives and the case continues.[230] "We hold that when there is power to hear the case under § 1367(a)," said the court, "the district court may exercise supplemental jurisdiction over state law claims without *sua sponte* addressing whether it should be declined under § 1367(c)."[231]

The *Acri* case is significant for another reason. The court granted summary judgment against Acri's jurisdictional claim, which alleged violations of the federal Age Discrimination in Employment Act, and also against his

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225. 28 U.S.C. § 1367(c).
226. 28 U.S.C. § 1367(c)(1).
227. 28 U.S.C. § 1367(c)(2).
228. Royal Canin U.S.A. v. Wullschleger, 604 U.S. 22, 33–34 (2025).
229. 28 U.S.C. § 1367(c)(3).
230. 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (citation omitted).
231. *Id.*

supplemental jurisdiction claims under parallel state laws.[232] In such a situation, the Supreme Court had held in *Gibbs* that if the jurisdictional federal claim disappeared, the supplemental claims should be dismissed or remanded.[233] But the *Acri* court decided that this language did not mean what it appeared to mean. "That state law claims '*should*' be dismissed if federal claims are dismissed before trial, as *Gibbs* instructs, has never meant that they *must* be dismissed."[234] A dissenting judge charged that the majority had "essentially ignore[d] what the Supreme Court ha[d] long required of federal courts exercising supplemental jurisdiction."[235]

The *Acri* case might be characterized as one in which supplemental jurisdiction was created by neglect, or even one in which jurisdiction was conferred by mistake.[236] Likewise, subsection (c) has provided many cases in which the courts have muddled through jurisdictional puzzles in ways that seem less than satisfying.

For example, in *City of Chicago v. International College of Surgeons*, the Supreme Court upheld an extensive application of supplemental jurisdiction.[237] The Chicago Landmarks Commission designated certain properties owned by the College of Surgeons as historic landmarks.[238] An owner might initially view this recognition as an honor, only to later discover that the label significantly restricts their ability to use their property as they wish. In this case, the Commission refused efforts by the College of Surgeons to demolish all but the historic facades of two structures so that a high-rise building could be constructed.[239] The College of Surgeons sued the City in state court, seeking relief under the Illinois Constitution and administrative review of the Commission's decisions denying the permits.[240] It also asserted federal claims under the Due Process Clause, Equal Protection Clause, and Takings Clause.[241]

The City removed the action to federal district court, which ultimately granted summary judgment in favor of the City.[242] The Court of Appeals reversed and remanded, holding that the court had no jurisdiction.[243] The Seventh Circuit reasoned that a proceeding to review state administrative action under a deferential standard was not a "civil action" within a district court's "original jurisdiction" under the removal statute, and therefore it could not be removed.[244]

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232. *Id.* at 999.
233. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).
234. *Acri,* 114 F.3d at 1000.
235. *Id.* at 1002 (O'Scannlain, J., dissenting).
236. *Cf. infra* Part V (discussing jurisdiction created by mistake).
237. 522 U.S. 156, 172–73 (1997).
238. *Id.* at 159–60.
239. *Id.* at 160.
240. *Id.*
241. *Id.*
242. *Id.* at 161.
243. *Id.* (citing Int'l Coll. of Surgeons v. City of Chicago, 91 F.3d 981, 990 (7th Cir. 1996)).
244. *Int'l Coll. of Surgeons*, 522 U.S. at 162.

But then, the Supreme Court reversed the Court of Appeals' reversal.[245] There was nothing magical about review of a state administrative action, and it could be removed in the normal manner.[246] Therefore, the federal claims in this case could be removed, and the district court had jurisdiction over them.[247] But what about the supplemental claims for review of the administrative agency action? Could the district court exercise supplemental jurisdiction over them? If so, did it have the discretionary power to dismiss them?

The Court explained that, "this Court has long adhered to principles . . . by which the federal courts' original jurisdiction . . . carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact.'"[248] This was the formula that the *Gibbs* case created to judge pendent claims.[249] And the state-law claims in this case did, indeed, share a common nucleus of operative fact with the federal claims.[250] All of them were about the denial of the demolition permits sought by the College of Surgeons.[251] Supplemental jurisdiction therefore existed.[252]

The question of discretionary dismissal remained. The Court cited *Gibbs* in recognizing this power in the federal district courts.[253] "Our decisions have established that pendent jurisdiction 'is a doctrine of discretion, not of plaintiff's right,' and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons."[254] Quoting subsection (c) of the statute, including its four categories of discretion to decline jurisdiction, the Court noted that the supplemental statute "codifies" *Gibbs*.[255]

*2. The Decision to Decline Jurisdiction: The "*Gibbs *Values" of Judicial Economy, Convenience, Fairness, and Comity*.—How should a district court go about deciding whether to invoke the power to dismiss? The *College of Surgeons* court answered in generalities:

> Depending on a host of factors, then—including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims—district courts may decline to exercise jurisdiction over supplemental state law claims.[256]

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245. *Id.* at 163.
246. *Id.* at 163–64.
247. *Id.* at 166.
248. *Id.* at 164–65.
249. *Id.* at 165 (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966)).
250. *Id.*
251. *Id.*
252. *Id.* at 166–67.
253. *Id.* at 172 (quoting *Gibbs*, 383 U.S. at 726).
254. *Id.*
255. *Id.* at 173.
256. *Id.*

But the test that has since been emphasized came down to four words. When deciding whether to decline supplemental jurisdiction, "a federal court should consider and weigh . . . the values of judicial economy, convenience, fairness, and comity."[257] The courts that have used them have called these four factors "the *Gibbs* values."[258]

The Court explained that, here, "the District Court decided that those interests [i.e., the *Gibbs* values] would be best served by exercising jurisdiction over ICS' state law claims."[259] The Court considered and reserved another important but unrelated question for the Court of Appeals to address: whether the abstention doctrines applied to this case.[260]

Justice Ginsburg, joined by Justice Stevens, dissented. The review that state law provided was "on the agency's record, not *de novo*."[261] How could a federal district court mimic the kind of deferential review that a state court would provide?[262] But "the Court decides today that this standard brand of appellate review can be shifted from the appropriate state tribunal to a federal court of first instance at the option of either party—plaintiff originally or defendant by removal."[263]

The lower federal courts have implemented the *Gibbs* values. Thus, recently, in *Arroyo v. Rosas*, the plaintiff filed federal claims under the Americans with Disabilities Act and parallel claims under California's Unruh Act, which provides broad protections from discrimination.[264] The district court dismissed the supplemental state-law claims, which provided certain procedural advantages, and granted judgment on the federal claims.[265] Arroyo appealed the dismissal, which the court had issued under subsection 1367(c)(4), on the ground that "extraordinary circumstances" created "compelling reasons" for a discretionary decision to decline jurisdiction.[266] The district court explained that retaining jurisdiction would allow the plaintiff to circumvent California's procedural requirements and further contribute to the rapid influx of such cases in the federal courts.[267]

The Ninth Circuit followed a two-step process for determining whether declining jurisdiction was an abuse of discretion.[268] First, did the district court adequately explain why the case was exceptional?[269] And second, did the

257. *Id.* (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).

258. *See, e.g.*, *id.*; Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997) (referring to these considerations as the "*Gibbs* values").

259. *Int'l Coll. of Surgeons*, 522 U.S. at 173.

260. *Id.* at 174.

261. *Id.* at 175 (Ginsburg, J., dissenting).

262. *Id.* at 177, 185 (Ginsburg, J., dissenting).

263. *Id.* at 175 (Ginsburg, J., dissenting).

264. 19 F.4th 1202, 1204 (9th Cir. 2021).

265. *Id.* at 1204–05.

266. *Id.*

267. *Id.* at 1205.

268. *Id.* at 1210–11.

269. *Id.* at 1210.

"balance of the *Gibbs* values" show compelling reasons for declining jurisdiction?[270] The court had "little difficulty" in deciding that the district court had not abused its discretion, finding that these circumstances were exceptional.[271] Furthermore, retaining jurisdiction over the supplemental claims would have a "substantial adverse impact on the core *Gibbs* values of 'economy, convenience, fairness, and comity.'"[272] In particular, federal jurisdiction would pose a "very substantial threat to federal-state comity that this overall situation presents."[273]

But that factor—comity—was not determinative by itself. The whole sum of the *Gibbs* factors tugged in the opposite direction, and the court seems to have been determined to weigh all of the *Gibbs* values. "Given the very late stage at which the district court declined supplemental jurisdiction in this case, these values overwhelmingly favored *retaining* jurisdiction over Arroyo's Unruh Act claim, and the district court therefore abused its discretion in dismissing that claim."[274]

The court in *Shanaghan v. Cahill* identified several grounds that were not obvious for deciding about declining supplemental jurisdiction.[275] These issues seem to fit under the *Gibbs* factor of fairness: fairness, that is, to the plaintiff, who might have a diminished or increased ability to present the claim if it is dismissed:

> [I]t is important to consider whether the amount claimed in the complaint was made in good faith, or whether plaintiff was consciously relying on flimsy grounds to get into federal court. Another critical equitable factor is the existence of any state limitations bars to refiling in state court. Another critical equitable factor is the existence of any state limitations bars to refiling in state court. Where, as here, a plaintiff might suffer serious prejudice from the dismissal of her action, courts should be more willing to retain the case despite the smaller amount in controversy. Next, courts should account for the amount of time and energy that has already been expended, and decide whether it might be more efficient to simply retain jurisdiction.[276]

The possible considerations are open-ended and subject to close distinctions.

Some courts have found particularly strong grounds for retention of supplemental claims. For example, in *Executive Software North America, Inc. v. U.S. District Court for the Central District of California*, after consulting "the text, structure, legislative history, and apparent purpose of section 1367," the

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270. *Id.*
271. *Id*. at 1214.
272. *Id.* at 1211.
273. *Id.* at 1213.
274. *Id.* at 1216.
275. 58 F.3d 106, 110 (4th Cir 1995).
276. *Id.* at 112 (internal citations omitted).

Ninth Circuit concluded that the statute "create[s] a presumption that supplemental jurisdiction should be asserted unless one of the categories specifically enumerated in subsection 1367(c) applies."[277]

But declining supplemental jurisdiction cannot be based on just any factor. In a later iteration of *Executive Software*, the Court of Appeals found that a statement by the district court had "implie[d] that it might have remanded the state law claims solely to ease docket congestion."[278] The appellate court responded: "This clearly is impermissible."[279] So, there are limits.

D. The Tolling of Limitations Under Subsection (d)

The supplemental jurisdiction statute has in subsection (d) a provision for tolling of the state statute of limitations when a state-law claim is dismissed. This provision is important because decisions about the exercise of supplemental jurisdiction sometimes last for long periods, and they may occur after a state statute of limitations has run. Subsection (d) provides as follows:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[280]

Strangely, some cases under section (d) have raised the question whether this provision is constitutional.

Specifically, in *Artis v. District of Columbia*, the defendant attacked the statute on the ground that its connection to Congress' enumerated powers was too attenuated and because it was too great an incursion on the States' domain.[281] The Supreme Court held that the statute "is necessary and proper for carrying into execution Congress's power '[t]o constitute Tribunals inferior to the supreme Court,' . . . and to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States.'"[282]

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277. 15 F.3d 1484, 1489 (9th Cir. 1994).

278. Exec. Software N. Am., Inc. v. Dist. Ct. for C.D. Cal., 24 F.3d 1545, 1560 n.15 (9th Cir. 1994), *superseding*, 15 F.3d 1484 (9th Cir. 1994), *overruled by*, Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008).

279. *Id.*; *see also* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976), *abrogated by*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

280. 28 U.S.C. § 1367(d).

281. 583 U.S. 71, 89 (2018); *see also* Jinks v. Richland Cnty., S.C., 538 U.S. 456, 460 (2003) (arguing that 28 U.S.C. §1367(d) interfered with a State's sovereign authority).

282. *Artis*, 583 U.S. at 89–90 (quoting *Jinks*, 538 U.S. at 460).

The normal application of subsection (d) is exemplified by cases like *Baylon v. Wells Fargo Bank, N.A.*[283] There, in a federal district court, the plaintiff alleged violations of the Federal Debt Collection Act and New Mexico debt collection laws.[284] The court dismissed the federal claim with prejudice and dismissed the state-law claims without prejudice.[285] The plaintiff refiled the state-law claims in state court.[286]

The defendants removed the case on diversity grounds, then moved to dismiss on the ground that the plaintiff's state-law claims were barred by limitations.[287] They relied on state statutes and case law in making this defense. In particular, they relied on a New Mexico Supreme Court case which held that "a dismissal without prejudice operates to leave the parties as if no action had been brought at all."[288] As a result, the court explained, "following such dismissal the statute of limitations is deemed not to have been suspended during the period in which the suit was pending."[289]

But here, the federal statute controlled. The federal court quoted subsection (d) of the supplemental jurisdiction statute and cited *Artis v. District of Columbia*, to the effect that "the state limitations period is suspended during the pendency of a federal suit."[290] Plaintiff's second round of state-law, state-court claims had been filed within 30 days of the dismissal of the federal case.[291] The court held that because of § 1367(d), the plaintiff's claims had been timely filed, and it overruled the motion to dismiss.[292]

On the other hand, several other cases have held that subsection (d) did not save the claims at issue. For example, in *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Financial Corp.*, the court held that § 1367(d) will not toll supplemental state claims while the plaintiff's federal claims are being resolved if those supplemental claims had already been dismissed.[293] In *Malone v. Bayerische Hypo-Und Vereins Bank*, the court held that the tolling provision only applies when the supplemental claim is refiled in *state* court, not when it is dismissed in federal court and refiled in another federal court.[294]

Another case in which the court refused to allow tolling presented a strange question. In *Parrish v. HBO & Co.*, the plaintiff voluntarily dismissed his entire case, including both federal and state claims.[295] Did § 1367(d) apply to his later-

283. 303 F. Supp. 3d 1160 (D.N.M. 2018).
284. *Id.* at 1161–62.
285. *Id.* at 1162.
286. *Id.*
287. *Id.* at 1162–63.
288. King v. Lujan, 646 P.2d 1243, 1245 (N.M. 1982).
289. *Id.*
290. *Wells Fargo*, 303 F. Supp. 3d at 1164 (citing Artis v. District of Columbia, 583 U.S. 71, 75 (2018)).
291. *Id.* at 1162, 1164.
292. *Id.* at 1165.
293. 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011).
294. Nos. 08 Civ. 7277, 09 Civ. 3676, 2010 WL 391826 at *7–8 (S.D.N.Y. Feb. 4, 2010).
295. 85 F. Supp. 2d 792, 793 (S.D. Ohio 1999).

filed suit in federal court, which included the same types of claims? The plaintiff in this case originally filed three claims in federal court: a federal claim under the Age Discrimination in Employment Act (ADEA) and two state-law claims for age discrimination and for breach of his commission agreement.[296] The plaintiff voluntarily dismissed these claims.[297] He then refiled his claims in federal court, and this time he added a fourth claim for violation of his employment agreement.[298] The court held that all of the claims, federal and state, were barred by limitations statutes unless a tolling statute applied.[299]

The plaintiff argued that subsection (d) tolled limitations.[300] The earlier state and federal age discrimination claims, he maintained, had been dismissed—voluntarily, yes, but dismissed, so that his situation fit the statute literally and exactly.[301] The plaintiff was then in the position of arguing that subsection (d) applied "when the supplemental claim is refiled in federal court, as opposed to state court, and when it is voluntarily dismissed, . . . as opposed to having been dismissed by the court."[302] The court disagreed.[303] Instead of using the plaintiff's textual analysis, the court considered the legislative history of the tolling provision, explaining:

> Numerous authorities have recognized that the purpose of § 1367(d) was to ensure that plaintiffs did not lose their right to pursue their state law claims in *state court* in the event that the federal court failed to exercise supplemental jurisdiction over those claims.[304]

Thus, the legislative purpose did not apply to the plaintiff's voluntary dismissals. The court therefore granted the defendant's motion to dismiss the age discrimination claims, with prejudice, on limitations grounds.[305] The court dismissed the plaintiff's state-law claims without prejudice.[306]

IV. REMOVAL AND SUPPLEMENTAL JURISDICTION

Removal creates frequent problems, and it especially creates problems when it is combined with issues raised by supplemental jurisdiction. Some parties have even attempted to base removal on supplemental claims. For example, in *Ahearn v. Charter Township of Bloomfield*, a taxpayer sued the township in state

296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at 794–95.
300. *Id.*
301. *Id.* at 795.
302. *Id.*
303. *Id.*
304. *Id.* at 795–96 (emphasis in original).
305. *Id.* at 799.
306. *Id.*

court with state-law claims to avoid a special assessment related to a construction project.[307] The city removed the action on the ground that the federal court was the "best" forum to hear it.[308] The city further justified its removal by explaining that "construction grants and loans had to comply with federal laws and regulations, and the township was 'particularly concerned' that any delay in the state court might prevent it from getting grants and loans from higher levels of [the federal] government."[309]

The court held that the supplemental jurisdiction statute is not a source of original subject matter jurisdiction.[310] A removal petition, said the court, may not therefore base its subject matter jurisdiction on the supplemental jurisdiction statute, even if removal would be efficient.[311] The district court had erred when it denied the plaintiff's motion to remand.[312]

This issue may seem strange; the supplemental statute does not enable jurisdiction to exist because the defendant favors a federal forum or thinks it is "best." But then again, a West headnote attached before *Ahearn*, covering the principle that removals cannot be based on supplemental jurisdiction, indicates that over 200 cases have cited that same idea.[313] Thus, the defendant's removal in *Ahearn* must have reflected a wider belief in the defendant's arguments than might at first be supposed, and perhaps the headnote shows that the issue might not be as surprising as it appears at first glance. Many other litigants must have made similar arguments.

Likewise, removal raised jurisdictional issues in *Reneau v. Oakwood Mobile Homes*.[314] After discovering defects with their manufactured home, the plaintiffs alleged breach of implied warranty of merchantability under Alabama law and a violation of the federal Magnuson-Moss Warranty Act in state court.[315] The defendants removed the case under §§ 1331 and 1441.[316] The court concluded that it would have jurisdiction over the supplemental claim if it had been filed originally in federal court.[317] However, the court declined to exercise jurisdiction here because the plaintiffs could not demonstrate that the state-law claim is "'separate and independent' from the federal claim."[318] One can infer that the district court had uncertainty about this conclusion.

Of course, plaintiffs who file in state court and rely on federal as well as state-law claims often change their minds when defendants remove their cases.

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307. 100 F.3d 451, 455 (6th Cir. 1996).
308. *Id.*
309. *Id.*
310. *Id.* at 456.
311. *Id.*
312. *Id.*
313. *Id.* at 451 (West headnote 334k11).
314. 952 F. Supp. 724 (N.D. Ala. 1997).
315. *Id.* at 725.
316. *Id.*
317. *Id.* at 728.
318. *Id.*

Finney v. Board of Commissioners of the Port of New Orleans is an example.[319] Plaintiff Finney, a crane operator, filed his suit in state court, including both state-law claims and federal in rem admiralty claims against the ship that had collided with his crane and injured him.[320] The defendant Commissioners removed the case, relying on original federal jurisdiction over the admiralty claim and supplemental jurisdiction over the state-law claims.[321] But the light promptly dawned on Finney. He dismissed his federal admiralty claims and moved to remand.[322]

The court then decided that it did not have jurisdiction over the supplemental claims because it lacked original federal jurisdiction after the dismissal of the federal admiralty claim.[323] In effect, the dismissal of the federal claim left the state claims with nothing to supplement. In addition, the district judge gave a second basis for a holding of no jurisdiction by declining under subsection (c) of § 1367 to exercise supplemental jurisdiction over Finney's state-law claims.[324] The court remanded those claims, and they could now be brought, again, in state court.[325]

The *Finney* court's remand analysis prompts the question of whether courts really still analyze the *Gibbs* values when exercising their discretion to exercise supplemental jurisdiction. In *Taylor v. Peak Behavioral Health, Services LLC*, the court indeed considered each of the four *Gibbs* values before deciding to grant a remand order.[326] It first addressed the value of judicial economy, stating:

> Applying the *Gibbs* factors, in terms of judicial economy, this Court has not invested a "significant amount of judicial resources" and the case is very much in its early life cycle . . . . Thus, "judicial economy" favors remand.[327]

The court explained that "[t]he fairness factor," on the other hand, "[was] the Defendant's strongest argument because it believes that Plaintiff is engaging in forum manipulation to stay out of federal court."[328] The court added that "[i]n *Cohill*, the Supreme Court has warned district courts to guard against forum manipulation when deciding whether to remand pendent state-law claims . . . ."[329]

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319. 575 F. Supp. 3d 649 (E.D. La. 2021).

320. *Id.* at 653.

321. *Id.* at 653–54.

322. *Id.* at 654.

323. *Id.* at 667 ("[A]dmiralty claims do not 'aris[e] under the Constitution, laws, or treaties of the United States' for the purposes of § 1333 . . . . [U]nder Fifth Circuit precedent, in rem admiralty claims are not federal questions under § 1331.").

324. *Id.* at 668.

325. *Id.* at 669.

326. 735 F. Supp. 3d 784, 790–92 (W.D. Tex. 2024).

327. *Id.* at 790–91.

328. *Id.* at 791.

329. *Id.* (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988)).

"Lastly," said the court, "'convenience' and 'comity' weigh towards remand."[330] Federal courts "are courts of limited jurisdiction and not as well equipped for determinations of state law as are state courts."[331]

Having weighed all the factors, the court concluded that "the scales tip in favor of remand."[332] Thus, while disliking the plaintiff's "manipulation," the court decided that the law required the remand order that the plaintiff wanted.[333]

Even relatively simple cases become more complex with removal. In *Booty v. Shoney's, Inc.*, Plaintiff Mary Booty claimed injuries caused by a slip and fall in the defendant's restaurant.[334] Her husband, Wilty Booty, claimed damages for loss of consortium.[335] Mary was diverse from Shoney's and claimed more than the minimum jurisdictional amount.[336] Defendant Shoney's timely removed the case on the basis of diversity jurisdiction.[337] Wilty was also diverse, but because he claimed less than the required jurisdictional amount, he therefore moved to remand his claim to state court.[338]

The consortium suit by Wilty appeared to be a textbook supplemental jurisdiction claim. But Wilty's lawyers went to the law library, probably wore out some no. 2 pencils, and found an argument to the contrary.[339] The legislative history to § 1367 stated that "[t]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*."[340] Thus, they argued, there was no supplemental jurisdiction over Wilty's claim.[341] But there was trouble in the implications of this argument. It would have required a finding that § 1367 *did not* legislatively overrule *Zahn v. International Paper Co.*—the pre-statute case that barred ancillary jurisdiction over diversity class actions with claims below the jurisdictional amount—although the Supreme Court had already held that § 1367 *did* overrule *Zahn*.[342] And so, after all this complexity, the court held:

> [T]hat in a non-class action context, if the requirements of § 1367(a) are met and the exceptions found in § 1367(b) do not apply, then the district

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330. *Id.* at 792.

331. *Id.* (quoting Enochs v. Lampasas Cnty., 641 F.3d 155, 160 (5th Cir. 2011)).

332. *Id.*

333. *Id.* at 791–92.

334. 872 F. Supp. 1524, 1526 (E.D. La. 1995).

335. *Id.*

336. *Id.*

337. *Id.* at 1527–28.

338. *Id.*

339. They couldn't use Westlaw because the Internet wasn't well developed then. So, on to the library.

340. *Id.* at 1527 (quoting H.R. REP. NO. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875).

341. *Id.* at 1526.

342. *Id.* at 1527 (citing Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973)).

> court does have jurisdiction over the supplemental claim even though the jurisdictional amount is not met.[343]

Thus, in this simple passage, all the complexity of *Booty* disappeared, along with the fruits of the prodigious labor done by the plaintiffs' lawyers, proving once again that removal complicates issues of supplemental jurisdiction.

V. MISTAKES CAN ALSO CREATE SUPPLEMENTAL JURISDICTION

In *Caterpillar Inc. v. Lewis*, the Supreme Court approved what might be called "jurisdiction by mistake."[344] There, Lewis sued Caterpillar, and a local dealer, Whayne Supply Company, in state court for personal injuries sustained while operating a bulldozer.[345] Caterpillar was diverse from the plaintiff because it was a Delaware corporation with its principal place of business in Illinois, but Plaintiff Lewis and Defendant Whayne Supply were both citizens of Kentucky.[346] At this point, there was no diversity jurisdiction. Liberty Mutual Insurance Group, a Massachusetts corporation, intervened and asserted supplemental subrogation claims against both Lewis and Whayne Supply for workers' compensation insurance benefits that it had paid to Lewis for the accident.[347] Then, Lewis settled with Whayne Supply, arguably resolving the diversity issue and making the case removable—or at least so Caterpillar thought.[348]

With the claims in this position and the removal deadline nearing, Caterpillar removed the case with one day to spare.[349] Lewis filed a timely motion to remand, arguing that Liberty Mutual's remaining supplemental claim against Whayne Supply destroyed complete diversity.[350] The district court proceeded with the case anyway, even though the Supreme Court later assumed that the removal had been improper.[351] Finally, Liberty Mutual settled with

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343. *Id.* at 1572.
344. 519 U.S. 61, 64 (1996).
345. *Id.* at 64–65.
346. *Id.*
347. *Id.* at 65.
348. *Id.* at 65–66.
349. *Id.* at 65; *see* 28 U.S.C § 1446(b).
350. *Caterpillar*, 519 U.S. at 65–66.
351. *Id.* at 70 (treating this conclusion as a "given"). The author has always believed that this conclusion was wrong. Liberty Mutual indeed had subrogation claims against Whayne and against Lewis, but those claims were not in favor of Lewis. Rather, Liberty Mutual intervened recovery from Lewis' settlement and from Whayne Supply directly. The subrogation claim against Whayne Supply was not adverse to Lewis, who had already settled with Whayne Supply, making that claim completely irrelevant to Lewis. Liberty Mutual's subrogation claim against Lewis was indeed adverse to him, but complete diversity already existed between the two. Simply put, Liberty Mutual's claim against Whayne Supply did not destroy diversity because it did not make Whayne Supply adverse to Lewis, and Liberty Mutual's claim against Lewis, although adverse, supported diversity jurisdiction. Perhaps this is why the Supreme Court did not analyze this diversity issue but simply assumed that there was no diversity and took this conclusion as a "given."

Whayne Supply, eliminating the last impediment to diversity jurisdiction and placing the case squarely within the federal court's jurisdiction.[352] The parties tried the case to a jury.[353] Lewis lost the verdict and appealed to the Sixth Circuit.[354]

The Supreme Court accepted two findings of the lower courts as "givens."[355] First, that the district court's refusal to remand with Whayne still in the case was improper.[356] Second, that diversity was not present at the time of removal, but "[b]eyond question, . . . there was in this case complete diversity, and therefore federal subject-matter jurisdiction, at the time of trial and judgment."[357] Caterpillar argued that because jurisdiction was present at the end, the Court should affirm the district court's judgment.[358] But Lewis vigorously disagreed.[359] He argued that:

> [Caterpillar's preferred outcome] would disfavor diligent plaintiffs who timely, but unsuccessfully, move to check improper removals in district court. Further, that course would allow improperly removing defendants to profit from their disregard of Congress' instructions, and their ability to lead district judges into error.[360]

Lewis explained that he "preferred state court to federal court based on differences he perceived in, *inter alia,* the state and federal jury systems and rules of evidence."[361] He could also have mentioned greater judicial control of proceedings in federal court, and he could have indicated the court's two law clerks, who were recent graduates, were perhaps taught to project alternative outcomes, thereby producing delays and costs. Nevertheless, the Supreme Court decided in favor of Caterpillar on grounds of judicial efficiency, explaining that "[t]o wipe out the adjudication post-judgment . . . would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."[362]

The Court's ultimate response to Lewis' argument was to conjecture that litigants would not wrongfully remove because the district judge would promptly remand—and would fear removing because the judge might get angry(?!). The Court said:

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352. *Id.* at 66–67.
353. *Id.*
354. *Id.*
355. *Id.* at 70.
356. *Id.*
357. *Id.* at 70, 73.
358. *Id.* at 70.
359. *Id.* at 73.
360. *Id.* at 74–75.
361. *Id.* at 75 n.14.
362. *Id.* at 77.

> The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order, . . . attended by the displeasure of a district court whose authority has been improperly invoked."[363]

This last remark by the Court is nothing short of silly. Litigators self-select for toughness, and they are perfectly willing to ignore judicial "displeasure" whenever it is strategic to do so.[364]

The author has personally represented plaintiffs in two cases involving unmeritorious removals: one in which the defendant removed on the ground that the plaintiff's state-law, plain vanilla contract claims allegedly became "federal" because the parties were contractors of NASA and therefore the case involved an allegedly strong federal interest in space exploration;[365] and another in which similarly unvarnished state-law claims allegedly became "federal" because of a general federal interest in airlines and aviation.[366] With these kinds of arguments, almost any state-law claim becomes federal because one can conjure up a federal interest in some general aspect of any case. Both cases were remanded, but only after enormous expenses for the plaintiffs and long delays. There was no judicial expression of displeasure in either case.

Reconsideration of jurisdiction in *Caterpillar* exemplifies the metaphysical confusion inherent in supplemental jurisdiction. One can ask, then, whether proper federal jurisdiction actually extended to the entire case at the time of removal? The Supreme Court sidestepped this issue by assuming, as a "given," that the removal was wrongful.[367] But the Supreme Court's assumption of wrongful removal was perhaps itself wrong. After Lewis settled with Whayne Supply, original federal jurisdiction existed in the plaintiff's claim because the plaintiff, Lewis, was suing only one defendant, Caterpillar, which was diverse from the plaintiff.[368] Subsection (b) did not apply and did not oust supplemental jurisdiction because the plaintiff had not added any new party to its claims; its suit against Caterpillar had existed from the start. And finally, the claim in intervention asserted by Liberty Mutual was a sound supplemental claim. This

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363. *Id.* at 77–78.

364. *Cf. In re* Kramer, 282 F.3d 721, 726 n.2 (6th Cir. 2002) (lawyer attempted to defend himself against sanctions by explaining that his conduct was simply "part of being a tough litigator"); Aerochem Int'l, Inc. v. Buirkle, 767 F. Supp. 1243, 1245 (S.D.N.Y. 1991) (during settlement conference, lawyer referred to himself as a "tough East Coast litigator").

365. The issue produced no opinion and was settled too far in the past for the author to be able to locate any citation. The case is memorialized, however, in an excerpt on another subject in an online supplement to the author's civil procedure casebook. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE: 2020 SUPPLEMENT, Item 7.1 (7th ed. Carolina Academic Press 2020), https://caplaw.com/sites/cp7 [https://perma.cc/X57Y-P7UK] (discussing this case and showing discovery in the case).

366. Similarly, this issue produced no opinion and was settled too far in the past for the author to be able to locate any citation.

367. *Caterpillar*, 519 U.S. at 70.

368. *Id.* at 65.

reasoning, if credited, indicates that the removal was proper, contrary to the Supreme Court's assumption. The case was simultaneously removable and nonremovable.

But in any event, *Caterpillar* supports the rule that judicial mistakes can create federal jurisdiction, particularly if judicial efficiency is involved. And so, could a mistake about supplemental jurisdiction create federal jurisdiction? Perhaps, if a district court has overlooked the need to dismiss a supplemental claim? Perhaps, if the judge has missed a federal claim over which there is no jurisdiction?

The answer is yes, it can happen. In *Lapides v. Board of Regents*, the plaintiff was a university professor who sued the state over a personnel decision against him.[369] The state attorney general removed the case.[370] The removal waived the state's immunity from federal jurisdiction under the Eleventh Amendment, which the attorney general lacked authority to waive.[371] The Court had earlier held that a state wrongfully sued in federal court, in violation of the Eleventh Amendment, did not subject itself to federal jurisdiction.[372] But in contrast, the attorney general's positive act of removal here was a voluntary waiver of the immunity, and it created federal jurisdiction, even if by mistake.[373] Therefore, federal power remained in the court because of the mistake unless the judge exercised the discretion to remand.[374]

Furthermore, in *Executive Software*, the Ninth Circuit struggled with the question of whether it should issue a writ of mandamus to correct the district court's remand of the plaintiffs' state-law claims.[375] The district court had made it clear that it was exercising its discretion to remand, but it provided no explanation of its reasoning about which or the four factors in subsection (c) it was using.[376] The Court of Appeals held that the district courts could decline supplemental jurisdiction only "under one of the four criteria specifically enumerated in § 1367(c)."[377]

If there was any determinable valid reason to remand, "the fact that the district court applied the wrong legal standard would not require us necessarily to vacate the remand order."[378] Thus, a mistake about which reason caused the remand could still leave the district court with jurisdiction. Here, however, this principle was inapplicable because the district court had "failed to provide

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369. 535 U.S. 613, 616 (2002).

370. *Id.*

371. *Id.* at 617–18.

372. *Id.* at 618 (citing Hans v. Louisiana, 134 U.S. 1 (1890)).

373. *Id.* at 622.

374. *Id.*

375. Exec. Software N. Am., Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 24 F.3d 1545, 1548–49 (9th Cir. 1994).

376. *Id.* at 1551–52.

377. *Id.* at 1555–56.

378. Exec. Software N. Am., Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 15 F.3d at 1496 (9th Cir. 1994), *withdrawn and superseded by*, 24 F.3d 1545 (9th Cir. 1994).

reasons" for its remand.[379] Judicial efficiency concerns were important because splitting the claims between state and federal courts "would impose a significant burden on both parties."[380] Thus, a writ of mandamus was appropriate to re-create federal jurisdiction and to require the district court to reconsider discretionary remand.[381]

VI. UNFAIRNESS AND OTHER PROBLEMS

There are many contradictions, problems, and instances of unfairness in the supplemental jurisdiction process.

First, there is the problem of time delays. Sometimes the occasion for remand or dismissal of state-law claims occurs at a late stage in the litigation process, perhaps years after the case was filed.[382] The delay may mean that witnesses become unavailable or forgetful, documents are missing, and real evidence becomes tainted. The author has personally been involved in cases in which the local police property room, after long delays, simply lost important articles that should have been used as evidence at trial.

Second, delay means mistakes. Discovery and preparation of a case for trial, when the kind of court that will try the case is uncertain, requires decisions today that may be wrong when the case goes to a jury.[383] Federal courts and state courts are very different in the trial of cases.[384] Plaintiffs, especially personal injury plaintiffs, tend to prefer state court.[385] Federal judges have more power to influence juries. They can and do even comment on the evidence, whereas state judges typically are required more to remain neutral.[386] One message from an employment law defense periodical suggested a "mantra" for defendants: "federal court good; state court bad."[387] Uncertainty about how to prepare for trial, whether in state court or federal, is difficult for lawyers on both sides.

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379. *Exec. Software*, 24 F.3d at 1562.

380. *Exec. Software*, 15 F.3d at 1496.

381. *Exec. Software*, 24 F.3d at 1562. The court decided that the order was reviewable by mandamus in spite of § 1447(d) of the removal statute, which prohibits review "by appeal or otherwise." *See also Exec. Software*, 15 F.3d at 1487–88.

382. *See, e.g.*, *supra* Part V (analyzing the *Executive Software* case, which found that remand "would impose a significant burden on both parties").

383. *See supra* Part V. In that case, the question whether state or federal courts would handle the trial remained unclear long after the case had been removed.

384. *See, e.g.*, *supra* Part IV (analyzing the *Caterpillar* case and showing reasons why the plaintiff wanted state court jurisdiction because of differences in trial processes between state and federal courts).

385. *See supra* Part IV (explaining this preference).

386. *See* United States v. Aboshady, 951 F.3d 1, 11 (1st Cir. 2020) (explaining federal judge's power to comment on the evidence); *cf.* Riley v. State, 875 So. 2d 352, 358 (Ala. Crim. App. 2003) (state judge may not comment on the evidence); State v. Dykstra, 110 P.3d 758, 761 (Wash. Ct. App. 2005) (same).

387. *Wage and Hour: Fort Worth Federal Court Sends Federal Wage Claim to, Gasp, State Court*, 9 No. 6 TEX. EMP. L. LETTER (June 1998).

Third, beside those issues, one cannot know that a verdict won or lost, whether in state court or federal, will stand up on appeal. The *Caterpillar* holding appears to say that the courts will honor judgments ultimately reached, if possible, but it applies in only a narrow situation: when federal jurisdiction is present at the end of a case even though not present earlier.[388] What of a result short of trial: a holding that a federal removal of supplemental claims was wrong? Or what of the opposite situation: when a state-court holding is based on a remand, which is ultimately recognized as wrongful in a state-court or federal appeal? Uncertainty follows supplemental jurisdiction like the uncertainty that follows whether a spacecraft will fly.

Fourth, though it seems a nice way to handle a policy decision, reliance on the balance of the *Gibbs* values creates even more uncertainty for the litigants, the parties to the dispute.[389] How will a court come down on a decision that requires balancing "judicial economy, convenience, fairness, and comity?"[390] One court may emphasize judicial economy while another prefers fairness, whatever that means in this context, or comity toward state policy? This policy, calling for a vague outcome when jurisdictional guidelines ought to be clear, is ultimately unfair to one litigant or the other, even if fairness is one of the objectives.

In these situations, it may be either plaintiff or defendant who is disadvantaged. And there should be better solutions.

CONCLUSION

A. Subsection (a) of the Supplemental Jurisdiction Statute

Subsection (a) of the supplemental jurisdiction statute is the basic rule that federal jurisdiction includes a claim that is part of the same case or controversy as the original claim.[391] If it is within the constitutional power to include it, it is included.[392] This part of the statute has worked well and has little reason to be amended. The next parts of the statute, however, do not share in this accolade.

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388. *See, e.g.*, *supra* Part V (discussing the *Caterpillar* case, in which this phenomenon occurred).

389. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966); *see also supra* Part II.C.2 (discussing the *Gibbs* values).

390. *See supra* Part II.C.2.

391. *See supra* Part II.A (discussing subsection (a)).

392. *See supra* Part II.A (discussing breadth of the statute, extending to whatever the Constitution permits).

B. Subsection (b) of the Supplemental Jurisdiction Statute

Subsection (b) of the supplemental jurisdiction statute, the codification of *Owen v. Kroger*, is a bad piece of legislation.[393] It says that a plaintiff may not join a claim against another party that is present in the case but is non-diverse.[394] As illustrated above, if *A* sues *B* and *B* impleads *C*, *A* cannot join a claim against *C* unless the claim is either a federal question claim or a diversity claim.

The *Gibbs* values, if applied to this subsection, would all be negatively affected, except perhaps comity toward the states.[395] Judicial economy is not enhanced by this subsection, which splits a claim between two courts; convenience is not served by sending parts of the same case into two different judicial systems; fairness is not increased because both parties' efforts in resolving the case are unnecessarily duplicated; and comity toward the states is a mixed question because, although the federal courts theoretically are deferring to the state courts with part of the claim, the reality is that they are transferring an ungainly piece of a case to the state courts.

The basis of this subsection is said to be that Congress wanted to follow the courts in honoring the diversity statute.[396] It is true the *Aldinger* and *Owen v. Kroger* cases were based on this concept.[397] Since *Strawbridge v. Curtiss*,[398] the rule has been that diversity must be complete, and, of course, the kind of supplemental claim disallowed in subsection (b) would not fit that requirement. But every exercise of supplemental jurisdiction is just like the claims prohibited by subsection (b).[399] Supplemental claims have no basis in federal jurisdiction, and they lack complete diversity. By definition, every supplemental claim is one over which the federal courts would not otherwise have jurisdiction absent supplemental jurisdiction.[400] The rationale of keeping the diversity statute intact does not make sense because it would disallow every supplemental claim if consistently applied.[401]

Above all, subsection (b) is wasteful of both judicial and private resources. A claim that could have been decided with other claims to which it is closely related cannot be decided together with them. It will have to be asserted, if at all, separately, in a state court. The state court will have to duplicate the federal court's understanding of the background to the dispute. And the parties will need

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393. *See supra* Part III.B (discussing subsection (b).

394. *See supra* Part III.B (explaining how the statute operates).

395. *See supra* Part III.C.2 (explaining the *Gibbs* values).

396. *Hearings on H.R. 5381 and H.R. 3898, supra* note 175.

397. *See supra* Part I.C.3 (discussing these cases).

398. 7 U.S. 267, 267 (1806).

399. *See supra* Part II (discussing the basis of supplemental jurisdiction in subsection (a)).

400. 28 U.S.C. § 1367.

401. *See supra* Part II (discussing the enactment of the statute); *see also supra* Part III.B.2 (discussing limits on the statute).

to duplicate their efforts and expenses either to settle or try it. The parties will have to extend resources disputing this claim.[402]

It would be a positive development if Congress were to amend the statute and abolish subsection (b). But surely the ship has sailed on this issue, and it sailed long ago. The prospect of this improvement is nil.

C. Subsection (c) of the Supplemental Jurisdiction Statute

Subsection (c) of the supplemental jurisdiction statute contains four reasons for the federal district courts to decline to exercise supplemental jurisdiction. The first three reasons, subsections (c)(1) through (3), allow remand or dismissal because of novel or complex state law, supplemental claims that will predominate, or the disappearance of the jurisdictional claims.[403] These provisions are reasonably specific given their purpose, although the district courts will still have a somewhat mushy decision to make under any of them. Subsection (c)(4), which invokes "exceptional circumstances," is a catchall that will require more ambiguous weighing of factors.

In this regard, the clash of issues involved in the *Gibbs* values—judicial economy, convenience, fairness and comity—is particularly productive of uncertainty.[404] With these four vague factors or "values," which are to be melded together and "balanced" in no particular way, who can predict the outcome? One district court may emphasize judicial economy, while another, in an identical case, emphasizes fairness, whatever that means (fairness to which party?), and yet another district court emphasizes comity toward the laws of the states.[405]

Both subsection (b) and subsection (c) can produce lengthy time periods of judicial indecision, or non-decision. These delays by district courts can be particularly unfair if they result in decisions about remand or dismissal late in cases that surprise one party or the other. Therefore, it would be useful if Congress amended the supplemental jurisdiction statute to encourage early decision.

But this kind of amendment would raise pragmatic questions. District courts are very, very busy. Judges must—absolutely must—adopt priorities about which issues to decide now and which to leave for later because sometimes issues left for later disappear in light of what happens between now and then. A rule that forces early decisions may mean prioritizing less important issues.[406] And yet, some rules can successfully impose deadlines, such as limits on

402. *See supra* Part III.B.2 (discussing the negative effects of subsection (b)).

403. *See supra* Part III.C (discussing subsection (c)).

404. *See supra* Part III.C.2 (discussing the *Gibbs* values).

405. *See supra* Part III.C.2 (discussing these problems).

406. This is because courts may decide issues early if encouraged to do so, and these decisions may be less important than others facing the judge at the same time.

deciding time for post-judgment motions or appellate steps.[407] Rules that encourage early decision of issues about dismissal or remand would be analogous.

This kind of change in the statute, however, does not really force decisions so much as it describes the consequences of the absence of a decision.[408] Perhaps this kind of rule could work well in the context of subsection (c) of the supplemental jurisdiction statute.

Therefore, Congress might do well to adopt an amendment to subsection (c) of the supplemental jurisdiction statute like the following:

> If the district court decides to exercise discretion to decline jurisdiction over a supplemental claim, it shall do so within ninety (90) days[409] of the assertion or removal of the claim. If the district court does not enter an order declining jurisdiction during this ninety (90) day period, the court will be deemed to have decided not to decline jurisdiction and cannot decline jurisdiction thereafter except for good cause shown.[410]
>
> The court shall have power, within its discretion, to extend this time period for up to 120 days by an order issued within the ninety-day time period. If the court has not acted, then, within this 120-day period to dismiss or remand the supplemental claims, the court will be deemed to have decided not to decline jurisdiction. The court may not, after such 90-day or 120-day time, decline jurisdiction, except for good cause shown.

The drafting of such a provision will be complicated. But there will be rewards. This kind of provision will not cure all problems in the supplemental jurisdiction jurisprudence, but it will remove a significant source of unfairness.

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407. *See, e.g.*, FED. R. APP. P. 4(a)(4)–(5) (limiting time for judge to allow later filing of notice of appeal).

408. *See id.* (meaning that no decision by the judge means no later filing of notice of appeal is allowed).

409. The 90-day time limit is a guesstimate by the author, subject to revision in light of input during the legislative process.

410. Good cause is a relatively high standard. *Cf.* FED. R. CIV. P. 4(m) (restricting judge's allowance of late service of complaint by good cause requirement); *see also* Gelin v. Shuman, 35 F.4th 212, 218 (4th Cir. 2022) (holding that open records request and search of telephone records to find defendants in wrongful death case were not sufficient diligence by plaintiffs to show good cause).

ON THE BEAUTIFUL IN MUSIC AND IN LAW

DOUGLAS LIND[*] AND ADRIENNE HOLZ[**]

> Does love for art really exist and has it ever existed? Is it not a delusion? When Lenin proclaimed that he loved Beethoven's *Appassionata* above all else, what was it that he really loved? What did he hear? Music? Or a majestic noise that reminded him of the solemn stirrings in his soul, a longing for blood, brotherhood, executions, justice, and the absolute? Did he derive joy from the tones, or from the musings stimulated by those tones, which had nothing to do with art or with beauty?
>
> – Milan Kundera, *Immortality*

INTRODUCTION

Eduard Hanslick's *On the Musically Beautiful* first appeared in 1854.[1] Hanslick intended it as a work that would mark a new direction in aesthetic theory and set the understanding of music apart from all other art forms. The book is replete with references to specific composers and compositions. Ferruccio Busoni penned numerous essays and letters on music theory and aesthetics during the first three decades of the twentieth century. A celebrated pianist and composer, Busoni became renowned for his transcriptions of the works of others, most notably J.S. Bach. His principal theoretical writing, *Sketch of a New Esthetic of Music*, published in 1906,[2] investigates the aim of music, offering an account which sought to dispel some of the principal aesthetic conventions of his time. Ludwig Wittgenstein delivered his famous classroom *Lectures on Aesthetics* in 1938[3] and frequently remarked on aesthetic matters in other lectures and writings. He did not limit his remarks to a single art form like music. He did, though, regard music as "the most sophisticated art of all."[4] Like Hanslick and Busoni, he saw his approach to aesthetics as innovative, describing the subject as "very big and entirely misunderstood."[5]

Hanslick, Busoni, and Wittgenstein each approached the subject of aesthetics differently. Hanslick defined aesthetics as "the doctrine of the artistically beautiful."[6] Reasoning that the "philosophical investigation of an art

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1. EDUARD HANSLICK, ON THE MUSICALLY BEAUTIFUL (Lee Rothfard & Christoph Landerer trans., 2018).

2. Ferruccio Busoni, *Sketch of a New Esthetic of Music*, *in* THREE CLASSICS IN THE AESTHETIC OF MUSIC 73 (Dover Publ'n ed. 1962) (1907).

3. LUDWIG WITTGENSTEIN, *Lectures on Aesthetics*, *in* LECTURES AND CONVERSATIONS ON AESTHETICS, PSYCHOLOGY AND RELIGIOUS BELIEF 1 (Cyril Barrett ed., 1966).

4. LUDWIG WITTGENSTEIN, CULTURE AND VALUE (G.H. von Wright ed., Peter Winch trans., 1980) (1977).

5. WITTGENSTEIN, *supra* note 3, at 1.

6. HANSLICK, *supra* note 1, at 91.

pursues the question of the *content* of that art,"[7] he argued against the prevailing philosophical theories about the content of music. Among other things, he rejected the idea that it is fruitful to analogize music with language; he bewailed the lack of attention writers on music aesthetics gave the form of musical compositions; and he became a strident critic of the so-called 'music of the future' associated with composers like Franz Lizst and Richard Wagner. Busoni undertook a purposive inquiry into aesthetics, asking, "What are the aims of music?"[8] He maintained that most efforts to answer that question wobble between overemphasizing musical form and critical judgment, while underappreciating creative genius both in the composition and interpretation of music. A measured advocate of futuristic music, he argued that for understanding the classical masters, "contemporary pianism owes [Lizst] almost everything."[9] In his *Lectures on Aesthetics*, Wittgenstein approached the subject by investigating the language used to express aesthetic judgments. He looked at music as a language-game. Contending that the way people react intellectually and critically upon experiencing a piece of music or other artwork is the most important inquiry in aesthetics, he found it "almost too ridiculous for words" to "think Aesthetics is a science telling us what's beautiful."[10]

Despite these sharp points of disagreement in their conceptions of the nature of aesthetic inquiry and how they each took to set right the confused subject of aesthetics, Hanslick, Busoni, and Wittgenstein make a number of common points about aesthetic understanding. They each argue that: (1) the feelings or affective responses of those hearing, viewing, or otherwise experiencing a work of art do not provide the measure of the artwork's excellence or aesthetic value; (2) the doing of art, in any distinctive art form, involves engaging in a practice distinct from any other practice, even those that may be closely related; (3) works of art must be understood and evaluated from a point-of-view internal to the distinct art form of the creative artist, not according to external standards or criteria; and (4) the form and content of a work of art must be understood as merged in wholistic unity, connected inextricably in the work of art.

These points go to some of the most controversial questions in aesthetics. That Hanslick, Busoni, and Wittgenstein would agree on them suggests that the significance of the four points transcends even profoundly different approaches to aesthetic theory. And it gives rise to the provocative idea that taken together the four points offer a provisional, rough-and-ready way of looking at excellence in aesthetic practice, especially in the art form of music.

In this paper, we make that provocative suggestion. Further, we argue that the four common points have parallels within the legal practice of judicial

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7. *Id.* at 14.

8. Busoni, *supra* note 2, at 78.

9. FERRUCCIO B. BUSONI, THE WELL-TEMPERED CLAVICHORD BY JOHANN SEBASTIAN BACH: REVISED, ANNOTATED, AND PROVIDED WITH PARALLEL EXAMPLES AND SUGGESTIONS FOR THE STUDY OF MODERN PIANOFORTE-TECHNIQUE 154 (First Appendix to Volume I) (G. Schirmer, 1926) (1894).

10. WITTGENSTEIN, *supra* note 3, at 11.

decision-making. We maintain that: (1) feelings, emotive responses, or preferences regarding the result of a judicial decision do not provide the measure of the decision's excellence or rightness; (2) the doing of judging in law involves engaging in a practice distinct from any other practice, even those that may be closely related; (3) judicial decisions must be understood and evaluated from a point-of-view internal to judicial practice, not according to external standards or criteria; and (4) the form (procedure, background conditions, settled law) and content (substantive ruling, reasoning, result) of a judicial decision must be understood as merged in wholistic unity, connected inextricably in the decision.

These four points provide a strong case for recognizing intriguing parallels between music and law, and for viewing both music and legal adjudication as creative aesthetic activities or practices. We present that case in Part II. Before turning to the practice of legal adjudication, Part I examines the four common points in the aesthetic writings of Eduard Hanslick, Ferruccio Busoni, and Ludwig Wittgenstein. While this paper is a work in jurisprudence, it integrates concepts rooted in music and aesthetic theory. Recognizing that some readers versed in law may not have a background in music, the paper necessarily begins with an extensive explanation of aesthetics in music. Our preliminary study of Hanslick, Busoni, and Wittgenstein provides important theoretical insights which we argue may enhance the understanding of judicial practice, as examined in Part I.

I. COMMON POINTS IN AESTHETIC WRITINGS

A. The Feelings or Affective Responses of Those Viewing, Hearing, or Otherwise Experiencing a Work of Art Do Not Provide the Measure of the Artwork's Excellence or Aesthetic Value.

Hanslick's *On the Musically Beautiful* begins with a critical project: to dispel the prevailing standard in aesthetic theory that *feeling* is the critical factor in judgments of value in music. Throughout the Enlightenment, the predominant view was that if music as a form of art has a content, it is "the entire spectrum of human *feelings*."[11] Jean-Jacques Rousseau maintained that "the true principles of music" are to be found in how "[t]he sounds of a melody . . . act . . . as signs of our affections, of our feelings; . . . [how] they excite in us the emotions they express and the image of which we recognize in them."[12] Immanuel Kant considered music the least intellectually worthy of the fine arts, for it "speaks by means of mere sensations without concepts, and so

11. HANSLICK, *supra* note 1, at 14.

12. Jean-Jacques Rousseau, *Essay on the Origin of Languages: In Which Melody and Musical Imitation are Treated*, in ESSAY ON THE ORIGIN OF LANGUAGES AND WRITINGS RELATED TO MUSIC 289, 323 (John T. Scott trans. & ed., Dartmouth Coll. Press 1998) (1761).

does not . . . leave behind it any food for reflection."[13] G.W.F. Hegel argued that music lacks internal content as it constitutes a medium of "thorough subjectivity and particularization" wherein it "treats the sensuous as ideal."[14]

Against this background, Hanslick contended it was music theory, not music itself, that suffered from false conceptual content. He found the theoretic emphasis on feeling to be misguided, insisting that when "music is used only as a means of promoting a certain mood in us, accessorily, decoratively, it ceases to act as pure art."[15] Only when "a piece of music *is heard for its own sake*" is it viewed aesthetically as *pure art*.[16] From this, he posited "as a principle and first task of musical aesthetics that it place the usurped sovereignty of feeling under the rightful sovereignty of beauty."[17] That is, for Hanslick, inquiry into the essence of music requires an investigation into "an autonomous type of beauty . . . [t]he *musically beautiful*."[18] It is a form of beauty not prompted by sensations, affect, or subjective impressions. For the intention or ability of a piece of music to arouse feelings does not define musical beauty, nor is it its purpose. Rather, the purpose of music is none other than to represent something beautiful.

On Hanslick's account, the agency through which the beautiful in music is experienced is not feeling but "*imagination*, as the activity of pure viewing."[19] A musical piece originates in the intellect and imagination of the artist. Phenomenologically, the listener directly experiences the piece through the 'pure viewing' of imagination. Hanslick stressed this is not a viewing in the sense of passive sensation, but "a viewing with *understanding*, that is, mental representation and judgment."[20]

In advancing this aesthetic principle of music, Hanslick was not denying the obvious. Music does arouse feelings. Experiencing a melody can give rise to emotions, affects, and sentiments. It can stir feelings of joy and sadness, love and grief, well-being and woe. Hanslick readily admitted this, writing, "the affirmative expressions of feeling in practical musical life do assert too noticeable and important a role to be shrugged off through mere subordination."[21] Yet he insisted we cannot speak of the aesthetics of music if we focus only on affects and feelings. When a beautiful piece of music evokes pleasant feelings in a listener, those feelings "do not at all concern beauty as

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13. IMMANUEL KANT, THE CRITIQUE OF JUDGEMENT 193 (James Creed Meredith trans., 1952) (1790). *See also id*. at 194 (arguing that music lacks conceptual content and is "more a matter of enjoyment than culture" and of "less worth in the eyes of reason than any other of the fine arts").

14. GEORG WILHELM FRIEDRICH HEGEL, INTRODUCTORY LECTURES ON AESTHETICS 94 (Michael Inwood ed., Bernard Bosanquet trans., 1993) (1886).

15. HANSLICK, *supra* note 1, at 91.

16. *Id.* at 91.

17. *Id.* at 63.

18. *Id.* at 3 (emphasis added).

19. *Id.* at 5.

20. *Id.* at 5–6.

21. HANSLICK, *supra* note 1, at 63.

such."[22] For the feelings experienced when hearing music depend on numerous factors and conditions subjective to the listener and independent of the music itself. What *did* Lenin feel when listening to Beethoven's *Appassionata*? The piece itself did not project the content of his feelings. Music does not have that ability. It cannot effuse any particular feeling, nor any combination; though it can, as perhaps in Lenin's case, induce certain affective experiences or represent some in symbolic significance. Hanslick thought that what music can project are the dynamic properties and aspects *of music*—tone configurations, rhythm, harmony, melody, motion, intensification of tones and chords. These are experienced by the listener through the activity of imagination. Only as a secondary consequence do these aspects and properties of music induce feelings in listeners. Hence, in speaking of the musically beautiful, Hanslick was convinced, "feelings are to be engaged only secondarily, only imagination *directly*."[23] In fact, in music, "[t]he beautiful is and remains beautiful even if it arouses no feelings, indeed even if it is neither viewed nor contemplated."[24]

Both Busoni and Wittgenstein shared Hanslick's conviction that the feelings people experience when listening to music do not provide a measure or indicator of aesthetic value. They addressed this point differently, however. Busoni argued that every art aims at one end: "*the imitation of nature and the interpretation of human feelings*."[25] With this, he was identifying feeling as a singular characteristic of art forms. He was not addressing the feelings reported by people viewing art. For he had little regard for the general public's reception of art or capacity for aesthetic appreciation.[26] The feelings experienced by a person listening to a piece of music were to him of no consequence. They did not interest him.[27] What did was how the "evocative magic of music" can transmit, most vividly and powerfully, the ineffable wonders of nature and the full panoply of human feelings.[28] Music held, to Busoni, mystical powers.[29] Conveying the feelings of life was a part of the intellectual property that is intrinsic to a piece of music itself. "Feeling—like honesty," he wrote, "is a moral point of honor, an attribute . . . . in Music, which repeats the emotions

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22. *Id.* at 4.

23. *Id.* at 7.

24. *Id.* at 4.

25. Busoni, *supra* note 2, at 76.

26. *See* FERRUCCIO BUSONI, THE ESSENCE OF MUSIC 41 (Rosamond Ley trans., 1957) ("In my view the public has a thoroughly criminal attitude to the theatre . . . . For the public does not know and does not wish to know that in order to receive a work of art, half the work must be done by the receiver himself."). *Accord id*. at 184 ("If the art should become absolutely accessible to all (which I personally am against) let us at least preserve a distance. Let it be in the middle of the people and yet separated from them, as becomes a monarch.").

27. *See* Busoni, *supra* note 2, at 100 (arguing that the way music produces "feeling in man" is a "subordinate or unimportant" matter).

28. BUSONI, *supra* note 26, at 8.

29. *See* JUDITH MICHELLE CRISPIN, THE ESOTERIC MUSICAL TRADITION OF FERRUCCIO BUSONI AND ITS REINVIGORATION IN THE MUSIC OF LARRY SITSKY: THE OPERAS *DOKTOR FAUST* AND *THE GOLEM* 9–18 (2007).

of Life . . . ."[30] Extolling feeling as music's "wonderflower,"[31] he distinguished three ways in which it is an integral part of the nature of music: "feeling as Taste, as Style, as Economy. Each a whole in itself, and each one-third of the Whole. Within and over them rules a subjective trinity: Temperament, Intelligence, and the instinct of Equipoise."[32] To Busoni, these aspects of feeling are music's "highest moral qualification,"[33] on account of which "no loftier height of artistry is conceivable."[34]

Wittgenstein thought that the aesthetic appreciation of artworks presents an "immensely complicated family of cases" ranging across different ages and cultures, sometimes reflecting cultured taste, and sometimes not.[35] Among the complications is the difference between feeling and understanding a piece of music. To Wittgenstein, it is axiomatic that "[f]eelings accompany our apprehension of a piece of music in the way they accompany the events of our life."[36] The experiential content of the sensations that accompany hearing music, however, tell us only about the inner life of the experiencing agent. They do not reveal anything about the piece of music itself, or the composer. A person may feel compelled to "wobble" when listening to Brahms.[37] Yet those kinesthetic gestures do not instruct about the "*strength of the thoughts* in Brahms's music."[38] A certain minuet may evoke in another person "feelings, images, etc." of a particular sort.[39] Those sensory impressions, however, do not provide a measure of the minuet's aesthetic value. Indeed, they do not even show it to be of consequence: "And doesn't the minuet itself matter? . . . [W]ould another have done as well?"[40] Nor do the sensations mean that the listener appreciates the minuet with understanding. For to Wittgenstein, appreciating a piece of music *with understanding* does not depend on an "affective element."[41] 'Understanding' is not a sensation; nor is it a process that necessarily accompanies hearing music. Music can be heard with understanding, or without. "*Signs* of understanding may accompany hearing."[42] But understanding is not a mere accompaniment, even if it happens in point of time to accompany. Understanding is an activity of mind, a conceptual experience that follows reflection, thinking; and "thinking is not an accompaniment of the work."[43] This

30. Busoni, *supra* note 2, at 97–98.
31. BUSONI, *supra* note 26, at 178–79.
32. Busoni, *supra* note 2, at 98.
33. *Id.* at 97.
34. *Id.* at 98.
35. WITTGENSTEIN, *supra* note 3, at 10.
36. WITTGENSTEIN, *supra* note 4, at 10e.
37. WITTGENSTEIN, *supra* note 3, at 20.
38. WITTGENSTEIN, *supra* note 4, at 23e. *See* WITTGENSTEIN, *supra* note 3, at 37–38.
39. WITTGENSTEIN, *supra* note 3, at 29.
40. *Id.*
41. *Id.* at 10.
42. LUDWIG WITTGENSTEIN, ZETTEL 29e ¶162 (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1967).
43. *Id.* at 20e ¶101.

includes the activity of listening to music. When a piece of music is appreciated with understanding, the experiential content of understanding is of a thoroughly different kind than that of the feelings, affects, and gestures that accompany hearing music. The difference is that understanding depends on being "at home in the special conceptual world that belongs to these situations."[44] That is, understanding comes from being acquainted with the practice of the doing of music and of seeing what's in it. Understanding, that is, depends on the logic of practice.

B. The Doing of Art, in Any Distinctive Art Form, Involves Engaging in a Practice Distinct from Any Other Practice, Even Those That May Be Closely Related.

In an influential mid-twentieth-century retrospective on eighteenth-century classical piano composition, Allen Irvine McHose discussed Jean-Philippe Rameau's groundbreaking work in music theory, *Treatise on Harmony* (1722).[45] Rameau developed a method of writing and classifying the succession of root notes in chord progressions according to what he posited as the basic law of Western music, the "fundamental bass."[46] He theorized that his method of explaining chord progression could establish the theory of major and minor keys. Heavily influenced by Cartesian rationalism, Rameau sought to validate this by using mathematics, deductive logic, and scientific theories regarding the natural properties of sound. His approach became the cornerstone to understanding harmonic principles and the structure of music during the eighteenth and nineteenth centuries, and remains foundational today in music instruction.

McHose readily acknowledged the importance of Rameau's theory. Yet he found fault with its explanatory grounding. He reasoned:

> The error that Rameau and many theorists following him made was to become involved in mathematical and acoustical explanations to prove this theory of the key center. Furthermore, harmonic movement in relation to rhythm has been for the most part neglected. What should have been done was to continue the analysis of the music.[47]

With this, McHose was appealing to what is rightly called the logic of practice. He was insisting that music be understood from a theoretical perspective drawn from its doing. On his account, theorizing about music requires staying close to the music itself and analyzing it in action—i.e., according to the methods,

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44. *Id.* at 29e ¶165.

45. *See* ALLEN IRVINE MCHOSE, THE CONTRAPUNTAL HARMONIC TECHNIQUE OF THE 18TH CENTURY 2–19 (Appleton-Century-Crofts, Inc., 1947).

46. JEAN-PHILIPPE RAMEAU, TREATISE ON HARMONY 140 (Philip Gossett trans., 1971) (1722).

47. MCHOSE, *supra* note 45, at 5.

techniques, and practical considerations that accompany the doing of music composition and its performance, interpretation, and transcription.[48] It calls for understanding music from the standpoint of the practitioner.

McHose, writing in 1947, took a controversial stance in criticizing Rameau for using mathematics and science to explain the structure of music. Yet in this he was nearly a century behind Hanslick. In *On the Musically Beautiful*, Hanslick cautioned that excellence in the composition of music—"musical beauty" as he put it—"has nothing to do with *the mathematical aspect*."[49] While consonance, dissonance, tone vibrations, and the distance of intervals between the root notes in chord progressions can be mathematically calculated, music is not composed in contemplation of mathematical relationships. Hanslick stressed that music is created by human intellect and imagination. It rises to the rank of art as opposed to a congeries of sonic physical experiments because it requires the stirrings of imagination working with the fundamental materials of music: harmony, rhythm, tones, melody, and the manifold colors of timbre. Its essential content—"*sonically moved forms*"[50]—results from that working, from practical application of the materials in free intellectual creation. So do the laws of musical beauty. Hanslick insisted that music, like "every art must be known on its own technical terms."[51] Hence, he posited the maxim that "the laws of beauty of each art are inseparable from the characteristics of its material, of its technique."[52] As to music, "[a]ll specifically *musical* laws" are inextricably bound to the materials and techniques of musical practice.[53]

It was because he so firmly believed that the laws of musical beauty must be derived from practice that Hanslick decried the tendency among music theorists to attempt to use mathematics to explain music. He well understood that there are elements of mathematics in music. But in the practice of doing music—in compositional creation, interpretation, and such—"nothing at all is mathematically calculated."[54]

Moreover, Hanslick considered it equally inapposite to attempt to interpret music as a language or try to derive the laws of musical beauty from the nature of language. Certainly there is a relatedness between the domains of language and music. Hanslick recognized that the similarities tempt some theorists to construe music according to linguistic principles.[55] As most egregious in this regard, he singled out Rameau and Rousseau.[56] Contending that principles of language are not relevant to the nature of music, Hanslick urged that music

48. *See id.* at ix (describing his approach as emphasizing style, technique, and practice, which then generates greater interest in and understanding of theory).

49. HANSLICK, *supra* note 1, at 57.

50. *Id.* at 41.

51. *Id.* at 2.

52. *Id.*

53. *Id.* at 60.

54. *Id.* at 58–59.

55. *See* HANSLICK, *supra* note 1, at 59–61.

56. *Id.* at 61.

theory and language part ways. For he reasoned that "where it is a matter of the specific properties of an art, its differences from related domains are more important than the similarities."[57] As to music and language, the key difference is that "in language the *sound* [*Ton*] is only a sign, that is, a *means* to an end for the expression of something completely foreign to that means, while in *music* the *tone* [*Ton*] is an entity, *that is*, occurs *as an end in itself*."[58] Hence, Hanslick concluded that music and language are so fundamentally distinct that it is logically incoherent to blend them theoretically.[59] True understanding of music as an art form comes only from conceiving of its "autonomous significance and beauty of tones" from the standpoint of practice.[60]

Busoni shared Hanslick's conviction that the aesthetic of music must be derived from practice. He argued that all forms of art "are the more lasting, the more closely they adhere to the nature of their individual species of art, the purer they keep their essential means and ends."[61] We noted above that Busoni saw music as a creative enterprise aimed at transmitting through sound-media images of life, nature, and human feelings. Within the art form of music, all gifted musicians enjoy creative freedom to use temperament, intelligence, and a sense of proportion to develop their own technique, style, and forms of creativity "organically suitable to music."[62] However, there are "rules about things which everyone must avoid and others which everyone must make use of."[63] To Busoni, these rules, which go to the essence of music, arise from the form, the purposes, and the proportions of music as understood from within practice. Yet he cautioned "that our conception of the essence of music is still fragmentary and dim."[64] He granted that philosophers may intuitively grasp certain elements of music better than practicing musicians. This is "because the vision of such master-minds is less impeded by considerations of technique such as preoccupy musicians."[65] Nevertheless, he maintained that the content of the aesthetic of music must conform to those matters of technique and style that preoccupy real musicians directly engaged in the practice of music itself. For the conditions of practice offer insight into the essence of music "beside which all theoretico-practical pedantry seems bungling, and all brow-puckering cogitations of stiffly solemn professors unfruitful."[66]

We have already seen how Wittgenstein thought that appreciating music with understanding requires being versed in musical practice. This appeal to the

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57. *Id.* at 60.

58. *Id.*

59. *See id*. at 62 (writing "in matters of the specifically musical, analogies with language have no application whatsoever.").

60. *Id.* at 60.

61. Busoni, *supra* note 2, at 76.

62. BUSONI, *supra* note 26, at 6.

63. *Id.* at 35.

64. *Id.* at 193.

65. *Id.* at 194.

66. BUSONI, *supra* note 9, at 154.

logic of practice was one of the signature contributions of his later philosophy. We here address it more fully.

Across a series of works compiled from writings, notebooks, and lectures starting in the early 1930s, Wittgenstein emphasized that epistemic dispositions, e.g., understanding, knowing, believing, judging, forming concepts, using words with meaning, are inseparable from practice. For a wide range of central human activities—mathematics, music, science, art, religion, law, etc.—he argued that epistemic dispositions so tightly interweave with practice that it is not possible to disentangle the experiential content of understanding, the logical results of judgment, or the meanings of concepts and words from the practice, surroundings, techniques, and fields of their doing and their discourse. That is, Wittgenstein considered it fundamentally mistaken, a confusion amounting to a "disease,"[67] to think we can stand outside the practice of any central human activity to describe, explain, critique, evaluate, or justify the content of understanding, the results of judgment, the concepts forged, the linguistic meanings used.

Adopting a general philosophical method Hanslick would have considered ill-advised, Wittgenstein linked all central human domains to language—*language-games*. The concept of language-games became his central motif for investigating how conceptual words come to have meaning and, more generally, how to make sense of our ways of thinking, understanding, evaluating, and judging. On his account, "Language is a characteristic part of a large group of activities . . . ."[68] We use language to express the experiential content of our epistemic dispositions, as well as what we experience in our states of consciousness, e.g., seeing, hearing, imagining, dreaming. Wittgenstein was convinced that in all cases, what we express only makes sense and can only be communicated when viewed as "part of an activity, or of a form of life."[69] Language and action simply cannot be disentangled. We express what we do by way of language; and we use language meaningfully only in the context of what we do.

The concept of language-games captures this interweave of language and action. On Wittgenstein's account, words, concepts, rules come to have meaning in the context of their use, their application, in particular cases. Understanding how a proposition "is used in *this* case, and how it's used in others,"[70] however, cannot be done meaningfully by plucking it from the practical context of its use and examining it from outside. True understanding comes only from viewing

67. LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 333 (G.H. von Wright et al. eds., G.E.M. Anscombe trans., rev. ed. 1978) (1956).

68. WITTGENSTEIN, *supra* note 3, at 2.

69. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 11e (G.E.M. Anscombe & R. Rhees, eds., G.E.M. Anscombe trans., Basil Blackwell & Mott, Ltd. 1958) (1953).

70. LUDWIG WITTGENSTEIN, *The Blue Book*, *in* THE BLUE AND BROWN BOOKS 1, 23 (1958).

every proposition as a member of a "whole system of propositions,"[71] and according to the "whole practice" of the system, the language-game, wherein it is used.[72] Through "the day-to-day practice of playing,"[73] participants in a language-game demonstrate by way of action their understanding of its terms, concepts, techniques, and rules. That is, there is no more reliable measure that a person understands a rule than by their "'obeying the rule' and 'going against it' in actual cases."[74] Wittgenstein maintained that "grasping a rule" through such *application-in-practice* is importantly different from standing outside practice and offering an interpretation. For interpretation of a rule amounts to merely the "substitution of one expression of the rule for another."[75] Unconstrained by the internal rationality of practice, it is "possible to derive anything from anything according to some rule or other . . . with a suitable interpretation[.]"[76] Those applying a rule within practice, however, cannot do whatever they want. For they are constrained by the internal rationality of practice. Application within practice thus amounts to the only genuine form of rule-following:

> And hence also 'obeying a rule' is a practice. And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it.[77]

For Wittgenstein, practice thus was "the *primary* thing,"[78] the "proto-phenomenon" wherein things happen within a language-game.[79] A gap of understanding, an *epistemological distance* accordingly separates practitioners—those who are constrained by the internal rationality of *acting* within a certain language-game—from outsiders whose epistemic dispositions are not bounded by practice. This holds true, according to Wittgenstein, for all central human activities. As an insider to philosophical inquiry but an outsider to the language game of mathematics, he conceded, "With my full philosophical

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71. LUDWIG WITTGENSTEIN, ON CERTAINTY 21e ¶141 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969). *Accord* WITTGENSTEIN: LECTURES, CAMBRIDGE 1930-1933, FROM THE NOTES OF G.E. MOORE 90 (David G. Stern et al. eds. 2016) (stating, "a word has only meaning in a grammatical system.").

72. LUDWIG WITTGENSTEIN, *The Brown Book*, *in* THE BLUE AND BROWN BOOKS 75, 103, at I 48 (1958).

73. WITTGENSTEIN, *supra* note 69, at 80e, at I 197.

74. *Id*. at 81e, at I 201.

75. *Id*.

76. WITTGENSTEIN, *supra* note 67, at 389, at VII-24. On the importance of the distinction Wittgenstein drew between interpretation and understanding, *see* B.R. TILGHMAN, WITTGENSTEIN, ETHICS AND AESTHETICS: THE VIEW FROM ETERNITY 133–37 (1991).

77. WITTGENSTEIN, *supra* note 69, at 81e, at I 202.

78. *Id*. at 167e, at I 656.

79. *Id*. at 167e, at I 654.

rucksack I can only climb slowly up the mountain of mathematics." [80] Mathematicians, in turn, approach philosophical questions as outsiders unversed in the language-game of philosophy:

> [P]eople who have never carried out an investigation of a philosophical kind, like, for instance, most mathematicians, are not equipped with the right visual organs for this type of investigation or scrutiny. Almost in the way a man who is not used to searching in the forest for flowers, berries, or plants will not find any because his eyes are not trained to see them and he does not know where you have to be particularly on the lookout for them. Similarly, someone unpractised in philosophy passes by all the spots where difficulties are hidden in the grass, whereas someone who has had practice will pause and sense that there is a difficulty close by even though he cannot see it yet.—And this is no wonder for someone who knows how long even the man with practice, who realizes there is a difficulty, will have to search before he finds it.[81]

The same holds true for music. Wittgenstein remarked, "Understanding a musical phrase may also be called understanding a *language*."[82] And "[t]o understand a language means to be master of a technique,"[83] something which can only be gained through active participation. Hence, as with other central human activities, those versed in the practice of music understand the language-game of music, the techniques, rules and customs of composition, performance, interpretation, tuning, harmony, melody, rhythm, etc., differently from those who are familiar with the concepts but unversed in their practical application.

With this aesthetic understanding of music as a language, Wittgenstein adopted an aesthetic viewpoint not shared by Hanslick or Busoni. Nonetheless, his approach fully comported with their ways of seeing music from within, as a practice. All three accepted the logic of practice as the proper orientation or perspective regarding the formation of epistemic dispositions about music. The logic of practice prioritizes the internal rationality of practices. It regards the doing, the acting in the everyday practice of central human activities as the fundamental groundwork for understanding, for concept formation, and for theory construction. Throughout, the logic of practice is descriptive. Yet we often with our central human activities move beyond description to evaluation. We move, that is, from the descriptive logic of practice to the normative standpoint of internality.

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80. WITTGENSTEIN, *supra* note 4, at 2e.
81. *Id.* at 29e.
82. WITTGENSTEIN, *supra* note 42, at 30e, at ¶172.
83. WITTGENSTEIN, *supra* note 69, at 81e, at I 199.

C. Works of Art Must Be Understood and Evaluated from a Point-of-View Internal to the Distinct Art Form of the Creative Artist, Not According to External Standards or Criteria.

Internality, or the internal point-of-view, builds off the logic of practice. Whereas the standpoint of practice is descriptive, internality goes to evaluation and judgment. The logic of practice prioritizes descriptions, meanings, and understandings that abide by the internal rationality of the doing of our aesthetic practices. Internality goes to evaluating outcomes and making judgments. It goes to *excellence* in practice, moving beyond practical doing to theoretical judgment. Internality contrasts with externality.

Wittgenstein embraced the logic of practice and the internal point-of-view. We discussed above how his signature notion of language-games advances the logic of practice. He considered it unquestionable that the meaning of terms and concepts depends on their use and application in the practice of our activities and creative endeavors. Yet he recognized the confounding tendency to search, to yearn for semantically exact "real definition[s]" outside practice.[84] He wrote, "It is a queer thing that, considering language as a game, the use of a word is internal to the game whereas its meaning seems to point to something outside the game. What seems to be indicated is that 'meaning' and 'use' are not equatable. But this is misleading."[85]

Similarly, Wittgenstein thought it was misleading and a mark of confusion to think that evaluation and judgment rest on criteria external to practice. As to music, he noted that "in real life, when aesthetic judgements are made, aesthetic adjectives such as 'beautiful', 'fine', etc., play hardly any role at all."[86] People conversant with music seldom use aesthetic adjectives in evaluating a piece of music or expressing their understanding. Instead, their evaluations go to technique, style, tone-quality, etc., the full array of normative conditions found within the internal rationality of musical practice. They may say, "Look at this transition;"[87] they may judge that a piece of music complies with the rules of harmony or counterpoint.[88] A critic or theorist may opine, as Busoni did in a letter to Arnold Schoenberg, "My first qualification of your music '*as a piano piece*' is the limited range of the textures in time and space;"[89] or even aver as recently written of Busoni's transcription of Mozart's Piano Concerto in F Major:

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84. WITTGENSTEIN, *supra* note 70, at 25.

85. LUDWIG WITTGENSTEIN, *The Yellow Book*, *in* WITTGENSTEIN'S LECTURES: CAMBRIDGE, 1932–1935, at 43, 48 (Alice Ambrose ed., 2001).

86. WITTGENSTEIN, *supra* note 3, at 3. *Accord* WITTGENSTEIN: LECTURES, CAMBRIDGE 1930-1933, *supra* note 71, at 340 ("In aesthetic controversy 'beautiful' & 'more or less beautiful' are hardly ever used . . . .").

87. WITTGENSTEIN, *supra* note 3, at 3.

88. *See id*. at 5.

89. FERRUCCIO BUSONI, SELECTED LETTERS 384 (Antony Beaumont ed. & trans., 1987).

> Busoni's arrangement is even more compelling when compared with Carl Reinecke's (1824–1910) *Concert allegro*, a two-piano piece also based on the same Mozart concerto finale, but written 16 years earlier. Reinecke's version is at once more faithful to the concerto in structure and note-register, yet less faithful in its harmonic density, frequent layering of contrapuntal material, and flexible treatment of the alternating musical dialogue. As a result, Busoni achieves greater success in capturing the buoyancy of the original.[90]

Wittgenstein observed that the words used in such aesthetic judgments "are more akin to 'right' and 'correct' (as these words are used in ordinary speech) than to 'beautiful' and 'lovely'."[91] They are words meant to denote *excellence*. By contrast, he argued that calling a piece of music 'beautiful' is not to praise it, but to give it a character. To call a piece 'lovely' does not express aesthetic understanding any more than for a person listening to a piece of music to "gape . . . and say: 'Oh! How marvelous!'"[92] Aesthetic judgments require being versed in musical practice such that we would say of a person hearing a piece of music that they have "seen what's in it."[93] Wittgenstein insisted, "We use the phrase 'A man is musical' not so as to call a man musical if he says 'Ah!' when a piece of music is played, any more than we call a dog musical if it wags its tail when music is played."[94] He concluded:

> I think of a quite short phrase, consisting of only two bars. You say "What a lot that's got in it!" But it is only, so to speak, an optical illusion if you think that what is there goes on as we hear it. ("It all depends *who* says it.") (Only in the stream of thought and life do words have meaning.).[95]

By this internalist point-of-view, Wittgenstein was insisting that works of art, including music, are only genuinely understood and meaningfully evaluated when the theoretical criteria of evaluation are drawn from practice—i.e., from *the stream of thought and life* internally specific to the doing of the art-form of the creative artist—and not from external sources. The contrast between the internal and external standpoints is most pronounced in those settings where theory-making and application draw upon standards, methods, or conditions of excellence tied to more than one practice or field of creative intellectual life.

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90 . Elizabeth Joy Roe & Greg Anderson, *Forward*, *in* MOZART/BUSONI, DUETTINO CONCERTANTE FOR TWO PIANOS, FOUR HANDS 5 (Greg Anderson & Elizabeth Joy Roe eds., 2013).

91. WITTGENSTEIN, *supra* note 3, at 3. *Accord* WITTGENSTEIN: LECTURES, CAMBRIDGE 1930-1933, *supra* note 71, at 340 (noting that actual aesthetic judgments use "words like 'correct' 'right'").

92. WITTGENSTEIN, *supra* note 3, at 6.

93. *Id*.

94. *Id*.

95. WITTGENSTEIN, *supra* note 42, at 31e, at ¶173.

One familiar context of cognitive overlap is where a scholar or critic from one intellectual tradition critiques or theorizes about creative activity within another. Art or music critics, for example, frequently conjoin the standards of excellence for the creative works, productions, and performances they review with those of their own critical genres. Philosophies of law or mathematics, anthropological studies of religion, and historical accounts of intellectual life (e.g., histories of philosophy, music, science, or art) in like manner frequently draw upon one disciplinary and theoretical perspective to provide an evaluative account of another quite distinct intellectual tradition.

Where such overlap between creative and critical practices occurs, theoretical activity assumes either of these two very different forms: '*internality*' or '*externality*.' *Internality* represents the theoretical approach of staying 'close to' and using, insofar as possible, standards of evaluation and analysis drawn from an understanding linked to that of practitioners who think and act *from within* and guided by the internal rationality of the creative activity under review. *Externality*, by contrast, substitutes standards and criteria of analysis and justification found *outside* practice for the conditions of excellence that characterize it from within.

Hanslick, Busoni, and Wittgenstein all argued for the importance of theorizing like a practitioner. Workers on the inside, practitioners develop an understanding of the methods, standards, and conditions of excellence for their practices *in context*. Their understandings of excellence—of 'doing' their practice, and *doing it well*—are intricately enlaced with their understandings and skill at working within and trying to meet the internal demands and rationality of practice. Sculptors, for example, or paint artists develop a sense of mastery in their respective fields as they learn to adapt their creative ideals to the natural limitations of their media. Jazz musicians, classical pianists, rock guitarists likewise manifest, as a result of their training and experience, understandings of their musical genres' respective standards of excellence in ways interwoven with their senses of 'doing.'

This internal point-of-view of the practitioner thus weaves practice, theory, and mastery into an interactive symbiotic unity. The practitioner's understanding of excellence grows concurrently and side-by-side their sense of working within the internal demands of practice. Viewed from the standpoint of internality, the practice of an activity objectively determines its conditions of excellence, while those conditions in turn influence the direction of future practice.

Critics and scholars possess such internalist perspectives toward their own areas of theory, criticism, or scholarship. As to the target areas of their work, however—e.g., for the music critic, creative work in some musical genre—scholars and critics frequently possess understandings developed *outside* practice. How they view, analyze, and theoretically evaluate creative activity in the fields they study or review is determined by the limitations and constraints set by the conditions of excellence regulating their own areas of scholarship or

criticism, not those of the music practice they review and write about.

As outsiders to the practice of the creative activities they analyze, scholars and critics lack experiential familiarity with the internal rationality of practice, as well as the demands and limitations imposed by the activities on practitioners. They also stand removed from the forms of understanding acquired through immersion in practice. Given that practitioners understand the conditions of excellence for their creative activities in a manner experientially grounded in the internal rationality of practice, an epistemological gap dissociates the understanding of the critic/scholar from that of the practitioner. Critics and scholars nevertheless can try to narrow this gap and approach an internalist understanding by seeking to apprehend, through careful study, the manifestations of excellence that emerge in practice. Those who look no further and strictly focus (so far as possible) their theoretical evaluations on the practitioner's understanding of excellence quite genuinely adopt the internal point-of-view, even though they remain outsiders to the practice. Some few bridge practices, qualifying at once as legitimate practitioners and critics. One such was Busoni, as we will discuss below. Another, thought by some the greatest, was Jean-Philippe Rameau. In the words of a biographer, Cuthbert Girdlestone: "In Rameau alone were the two sides of 'music' united,"[96] the "one speculative, the other practical." [97] From Rameau himself we find self-realization in bridging the two distinct practices of musician and music theorist:

> With regard to practice, when I devoted myself to it on working for the stage, I was carried away by the pleasure of realizing, as artist, many pictures of which I had conceived the idea, a thing which flatters infinitely taste and imagination; but I was carried away even more so by the pleasure of seeing, as thinker, the interplay of all these phenomena of which the principle was not unknown to me, and to produce an infinity of effects whose causes I had fitted myself to know.[98]

Other critics and scholars embrace the very different standpoint of externality. This standpoint substitutes criteria of analysis and justification originating outside practice for the conditions of excellence grounded within. The external criteria usually come from the scholarly or critical domain of the reviewer and represent theoretic viewpoints more or less accepted under the practice-specific conditions of excellence for that activity. Sometimes scholars denounce practice outright. In *The Seven Lamps of Architecture* (1849), John Ruskin lamented that architecture had been long obscured behind "the confused mass of partial traditions and dogmata with which it has become encumbered during imperfect

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96. CUTHBERT GIRDLESTONE, JEAN-PHILIPPE RAMEAU: HIS LIFE AND WORK 548 (rev. ed. 1969).

97. *Id.* at 547.

98. JEAN-PHILIPPE RAMEAU, GENERATION HARMONIQUE 111–12 (1737).

or restricted practice."[99] He then set out to resolve that practice-induced weakness by reconceiving architecture theoretically as a "distinctively political art."[100] More often, scholars or critics prone to externalist evaluation proceed with indifference or oblivious to the discordant external grounding of their analyses. Wittgenstein rebuffed James George Frazer's classic anthropological study of religion and magic, *The Golden Bough*,[101] on externalist grounds:

> The very idea of wanting to explain a practice—for example, the [fictional, ceremonial] killing of the priest-king—seems wrong to me. All that Frazer does is to make them plausible to people who think as he does. It is very remarkable that in the final analysis all these practices are presented as, so to speak, pieces of stupidity. But it will never be plausible to say that mankind does all that out of sheer stupidity . . . . What a narrow spiritual life on Frazier's part! As a result: how impossible it was for him to conceive of a life different from that of the England of his time![102]

Not infrequently, externalism appears in yet another form, one where critics do not seek to abase or ignore practice, but to use their theoretic viewpoints to disclose and amplify what they take to be the true nature of the activity under review, including the sense of its practice. This form of externality includes theoretical approaches such as structuralism, deconstruction, and free-market economics, each of which aims to divulge the logical structure of the practices studied. Likewise, it is the method of Marxist criticism, where the doctrines of historical materialism, class struggle, and alienation, ideologically internal to Marxism, are used to interpret and explain fields as disparate as art and literature, architecture and law.

Hanslick and Busoni are models in contrast. They espoused dissimilar aesthetics of music. One was a professional musician and a theorist; the other was a critic and music professor. Yet they shared a firm commitment in their music aesthetics to both the logic of practice and the theoretical standpoint of internality.

Hanslick was a critic and professor of the history and aesthetics of music at the University of Vienna. His formal education was in law and philosophy. Though gifted with advanced training in music, he was not a professional musician. Nonetheless, he theorized about music from the internal point-of-view. Insisting that music be understood and evaluated according to its own conventions and internal rationality, he claimed to never have criticized a

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99. JOHN RUSKIN, THE SEVEN LAMPS OF ARCHITECTURE 3 (Sunnyside, Orpington, Kent 1889) (1849).

100. *Id.* at 2.

101. JAMES G. FRAZER, THE GOLDEN BOUGH (1890).

102. Ludwig Wittgenstein, *Remarks on Frazer's Golden Bough*, 17 SYNTHESE 234 (1967), *reprinted in* LUDWIG WITTGENSTEIN, PHILOSOPHICAL OCCASIONS, 1912-1951, at 119, 125 (James C. Klagge & Alfred Nordmann eds., 1993).

musical composition that he had not read or played.[103] As discussed above, he opposed using external fields like mathematics or science to evaluate music, or to analogize music to related domains like language. One of the most prominent nineteenth-century music critics,[104] he was known for his conservative views about music.[105] His contemporaries Franz Liszt and Richard Wagner were frequently in the ink blots of his acerbic pen.[106] The famous term, "absolute music," coined by Wagner in 1846,[107] is commonly associated with Hanslick.[108] The term serves as an expression to describe musical compositions with no accompanying text, titles, or descriptors to suggest the meaning of a work. Wagner meant it as a term of reproach. He used it disparagingly to underscore what he saw as the limitations and lack of social utility in instrumental music. To him, 'absolute music' expressed rebuke toward "any kind of music (instrumental or vocal) that was socially disengaged and existed merely for its own sake."[109]

Though Hanslick did not directly use the term 'absolute music' in *On the Musically Beautiful*, he embraced the concept. He extolled absoluteness or pureness in the art of tones ("*reine, absolute Tonkunst*").[110] He thought the absolute in the art of tones had reached its pinnacle in the form of instrumental music: "Whatever *instrumental music* cannot do, can never be said that *music* can do it."[111] Nonetheless, Hanslick strove to create an aesthetic principle of

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103. *See* EDUARD HANSLICK, VIENNA'S GOLDEN YEARS OF MUSIC 5 (Henry Pleasants III ed. & trans., 1950).

104. *See id.* at 4–20 (discussing Hanslick's career as a critic); Timothy R. McKinney, *Hanslick and Hugo Wolf*, *in* RETHINKING HANSLICK: MUSIC, FORMALISM, AND EXPRESSION 261, 267 (Nicole Grimes et al. eds., 2013) (noting that Hanslick had a "commanding critical voice" in nineteenth-century music criticism and enjoyed "much renown and authority").

105. *See, e.g.*, Lee Rothfarb & Christoph Landerer, *Introduction to Hanslick's Central Concepts*, *in* HANSLICK, ON THE MUSICALLY BEAUTIFUL, *supra* note 1, at xxxi, xxxi–xlvi.

106. *See, e.g.*, NICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE (2d ed. 1965) In an 1873 review of Liszt's *Mephisto Waltz*, Hanslick wrote, "What an irresistible subject for erotic flaggelant [sic] music of the Liszt-Wagner School! . . . The basses play for 24 bars the empty fifth, E-B, over which is struck first the fifth, F#–C#, and then two fifths, B–F# and D–A *together*; and finally rises the monstrous edifice of fifths, E–B–F#–D–A–E. Liszt simply turns all natural laws of music upside down." *Id.* at 114. Reviewing a performance of Liszt's *B-minor Sonata* in 1881, Hanslick stated, "It is impossible to convey through words an idea of this musical monstrosity. Never have I experienced . . . a bloodier battle against all that is musical." *Id.* at 116. Writing of Wagner's opera *Die Meistersinger von Nürnberg* in 1870, Hanslick wrote, "A little motive begins, but before it develops into a real melody, or a theme, it is forthwith bent over, broken up, raised and lowered through incessant modulations and enharmonic shifts . . . . With scrupulous avoidance of all closing cadences. [sic] this boneless tonal mollusk, self-restoring, swims ever on into the immeasurable." *Id.* at 234.

107. *See* MARK EVAN BONDS, ABSOLUTE MUSIC: THE HISTORY OF AN IDEA 135 (2014).

108. *See* HANSLICK, *supra* note 1, at 24 n.8.

109. BONDS, *supra* note 107, at 135.

110. HANSLICK, *supra* note 1, at 24. On Hanslick's careful and deliberate use of the expression "*absolute Tonkunst*" (absolute tones) instead of 'absolute music', *see* BONDS, *supra* note 107, at 143–46.

111. HANSLICK, *supra* note 1, at 23.

music that remained true to the internal rationality of music practice and that construed musical excellence (the *musically beautiful*) in a manner applicable to all musical styles and genres. He wrote:

> The "musically beautiful" in our assumed specific sense is not limited to the "classical" style, nor does it include a preference for that style over the "romantic." It pertains to the one as well as to the other orientation, rules over Bach as well as Beethoven, Mozart as well as Schumann. Our thesis thus does not contain even an indication of partisanship. The entire course of the present investigation does not declare any *Should Be* but rather considers only what *Is*. No particular musical ideal may be deduced from that standpoint as authentic beauty; rather, it may merely be demonstrated what beauty is in every style in the same way, even in the most opposed ones.[112]

That is, the musically beautiful, for Hanslick, represented a standard of excellence determined by the internal rationality of music practice. On this he was unequivocal: "*Aesthetic* contemplation cannot rely on circumstances that lie outside of the artwork itself,"[113] such that the "beautiful in music . . . *is a specifically musical beauty* . . . beauty that is independent and not in need of an external content."[114]

Busoni was an equally unwavering advocate of internality. A master pianist, accomplished composer, and teacher of piano and composition, Busoni retains an enduring legacy for some of his compositions (e.g., *Doktor Faust*) and his transcriptions of a number of classical masters (especially J.S. Bach, but also Mozart and Lizst). His writings on the aesthetic of music were firmly grounded in his understanding of music as a practitioner. Judith Michelle Crispin argues convincingly that Busoni's aesthetic of music was "deeply rooted in mysticism and the occult."[115] He thought music possesses a magical capacity to transcend the limitations of human perceptual experience and, through the spiritual atmosphere of sound, express the inexpressible, reveal inexplicable aspects of nature, and project the full range of human feelings. He not only, as discussed above, disregarded the general public's feelings about music, but he thought true musical understanding was restricted even among practicing musicians.[116] Only those who had achieved some level of musical mastery were to him capable of grasping music's occult properties.

While Busoni sought to fashion a new aesthetic for music, he eschewed offering anything like a universal aesthetic law. He argued against "the drawing

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112. *Id.* at 54–55.

113. *Id.* at 66.

114. *Id.* at 40.

115. CRISPIN, *supra* note 29, at 10.

116. *See, e.g.*, BUSONI, *supra* note 26, at 193 (after acknowledging that "our conception of the essence of music is still fragmentary and dim," Busoni suggested, "that only very few are able to perceive it and fewer still to grasp it, and they are quite unable to define it.").

up of general rules as being a hindrance to a free art."[117] Indeed, he deemed it dangerous to fling "hypotheses into the intellectual world . . . as conclusive principles." [118] On his account, theoretic principles fashioned to fix the imperfections and uncertainties of practice are prone to distort creative activity and lead to failure. The fallacy of intellectualism, as he saw it, comes from thinking that the mysteries of life can be resolved by hypothesizing essentialist universal principles. He described as follows why generalizing a hypothesis into a universal principle is so logically fraught with error:

> The hypothesis has originated in one brain and it is cut to the measure of that brain and is fundamentally *personal*. At times the joy of having made the discovery misleads the discoverer himself into generalising his idea, and he sees and values it as applicable universally; whilst really, first and foremost, it is part and parcel of the special brain that produced it and usually stands and falls with that brain.[119]

Busoni saw this tendency toward false generalization as the logical process undergirding externality. He considered it dangerous because externalist theories tend to override and distort the true "*excellences*" of music as understood from within.[120] That is, they conceal what makes a piece of music "pleasing [in tonal structure] and . . . significant in the sense that it hides a meaning in itself, and consequently signifies something."[121] Only from within practice can these excellences be understood and assessed. Only from the internal point-of-view can we meaningfully evaluate—put value on—the immateriality of music, its function, and even its imperfections. Thus, for example, a perfect musical temperament could be idealized from "the *technical aspects* of the art . . . . rhythm, harmony, intonation, part-leading, and the treatment of themes."[122] A universal principle of musicality honed from such subtleties could be crafted, such that "an artist who plays with perfect technical finish should be deemed the most musical player."[123] Busoni chided, however, that this judgment would merely idealize "mechanical mastery of the instrument," not excellence in creative artistry as understood by practice.[124]

Similarly, the temperament of the instrument of the piano itself is a matter for internal evaluation. To Busoni, the modern European system of music is a product of the everyday demands of practice. "What we now call our Tonal System is nothing more than a set of 'signs'; an ingenious device to grasp

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117. *Id.* at 17.
118. *Id*. at 67.
119. *Id.* at 68.
120. *Id.* (emphasis added).
121. *Id.*
122. Busoni, *supra* note 2, at 87.
123. *Id.*
124. *Id.*

somewhat of that eternal harmony; . . . artificial light instead of the sun."[125] Busoni noted how the piano and other keyboard instruments are designed to produce sounds reflective of the tonal system. Yet their design is imperfect. Busoni described how "[w]e have divided the octave into twelve equidistant degrees, because we had to manage somehow, and we have constructed our instruments in such a way that we can never get in above or below or between them."[126] The result is an "impure medium" wherein each octave contains twelve equal portions, yet no portion or interval is perfectly pure.[127] Still, Busoni celebrated it. For the twelve-semitone system—*equal temperament*—in common use since the eighteenth-century, provides a system of remarkable pragmatic value in which every interval is "impure, but fairly serviceable."[128] Busoni reasoned, "The diplomatic 'Twelve-semitone system' is an invention mothered by necessity; yet none the less do we sedulously guard its imperfections."[129]

Among the ways externalist theorists were given to distort music practice, one that particularly rankled Busoni was the proclivity of those he called "the lawgivers" to treat interpretation and especially transcription as discreditable practices.[130] This was personal for him, as these were creative musical activities at which he thrived and was widely renowned. To the lawgivers, once a musical composition has been reduced to notation, memorialized in the signs of a written score, it is complete and fixed for all time. Busoni observed that the lawgivers saw the signs themselves as of utmost importance. To them, the signs "*now stand for musical art itself*," such that were the lawgivers to have "their way, any given composition would always be reproduced in precisely the same tempo, whensoever, by whomsoever, and under whatsoever conditions it might be performed."[131] That is, for the lawgivers, reproduction is "the nearer to perfection, the more closely it clings to the signs."[132]

Busoni maintained that this idealized theory of the composition perverts music performance and the range of creative activities—"*emotional interpretation*:" playing, interpreting, transcribing—which descend from the "free heights [of] . . . Art itself . . . . [as] the part of interpretation to raise [Music] and reëndow it with its primordial essence."[133] Understood from within, the interpreter, the transcriber, the performer partners with the composer to maintain the purity of the original composition and "*resolve the rigidity of the signs* into the primitive emotion."[134] Notation is not the essence of music; it is not the art

125. *Id.* at 89.
126. *Id.*
127. *Id.*
128. Busoni, *supra* note 2, at 89 n.1.
129. *Id.*
130. *Id.* at 84.
131. *Id.* at 84–85.
132. *Id.* at 84.
133. *Id.*
134. Busoni, *supra* note 2, at 84.

of music itself. The system of signs, the writing out of compositions is nothing more than "an ingenious expedient for catching an inspiration, with the purpose of exploiting it later."[135] Even the doing of notation (the writing down) is not a perfect representation of the inspiration. Signs and words are too imprecise to perfectly express the composer's inspiration. Some part is *necessarily* lost. That is, to Busoni, "Every notation is, in itself, the transcription of an abstract idea. The instant the pen seizes it, the idea loses its original form. The very intention to write down the idea, compels a choice of measure and key[,] . . . form, and the musical agency . . . ."[136] It is the function of the interpreter, the transcriber, the performer, to interpret the secret harmonies hidden in the notation by way of an arrangement that melds the composer's intention together with the interpreter's creative agency. Busoni regarded that function as critical for holding true to, restoring, and advancing the transcendent inspiration that first moved the composer. Textbook theories advanced by lawgivers who consider transcription wrong because they cannot grasp this fundamental unity in the art of tones between the composer and the interpreter/transcriber were, to Busoni, blind to the mystical immateriality that music can achieve as a free art form. Understanding and evaluating music that way comes only from the internal point-of-view. For Busoni considered it "unvarnished truth" that when judged from within, it is "impossible for sounds to be 'wrong' in music as it is for stones, plants or formations in a forest. We just have to learn to discern harmony away from the text-book."[137]

Like Wittgenstein and Hanslick, Busoni thus steadfastly ascribed to the standpoint of internality. Building off the logic of practice, internality requires that the principles of evaluation and judgment used in an aesthetic practice like music be designed according to understandings grounded in the internal rationality of music practice itself. Internality judges *excellence* in practice, in the doing of music. Intrinsic to excellence is the unity of form and content, as understood from within the aesthetic principles of music.

D. The Form and Content of a Work of Art Must Be Understood as Merged in Wholistic Unity, Connected Inextricably in the Work of Art.

Wittgenstein once remarked, "Imagine someone pointing to a place in the iris of a Rembrandt eye and saying: 'The walls in my room should be painted this colour.'"[138] With this, Wittgenstein was articulating the idea that in aesthetic practices, form and content must be unified. To think that a color which lends beauty in portrait painting would work in the very different art form of interior design fails to appreciate the necessary unity of content and form. It shows

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135. *Id.*

136. *Id*. at 85.

137. BUSONI, *supra* note 89, at 229, at § 196.

138. LUDWIG WITTGENSTEIN, REMARKS ON COLOUR 9e (G.E.M. Anscombe ed., Linda L. McAlister & Margarete Schättle trans., 1978).

confusion and a misunderstanding of the nature of aesthetic practices. Content found agreeable in portrait painting—e.g., colors, lines, brush-strokes—work because they fit the internal conditions of the practice of that form of art. They manifest the necessary unity of form and content. Not only Wittgenstein, but Hanslick and Busoni each also saw this unity as a critical feature of aesthetic practices.

The concluding chapter in Hanslick's *On the Musically Beautiful* addresses the relationship between the concepts of form and content in music. He found them necessarily entwined, such that the content of a piece of music can only be considered when paired with its form. This is because in music, "[t]he concepts 'content' and 'form' mutually depend on and complement one another."[139] While other forms of art such as painting, sculpture, or literary art may use different forms to represent analogous ideas, Hanslick maintained that in music, "we see content and form, material and design, image and idea fused in an obscure, indivisible unity."[140] That is, music is distinct in that there is no content which diverges from the form. Hanslick reiterated this years later in his autobiography:

> The nature of music is even harder to fix within philosophical categories than painting, since in music the decisive concepts of 'form' and 'content' are impossible of independence and separation. If one wishes to attribute a definite content to purely instrumental music . . . then one must discard the precious pearls of the musical art, in which no one can demonstrate a 'content' distinct from the 'form,' nor even deduce it.[141]

It is because form and content are inextricably fused in music that composers need not employ external models to shape their compositions. When they try, their compositions fail, for as Hanslick put it, "Every attempt *in practice* to try to separate form from content in a theme leads to contradiction or caprice."[142] This is because it is the "specific idea, the form that embodies it, and the unity of the two" which are the conditions of musical beauty.[143] The beautiful in music is autonomous and does not require external content. For the content of music, according to Hanslick, is music itself. "Music consists of tone successions, tone forms" [144] —i.e., of "*sonically moved forms*" [145] and "concrete tone configurations"[146]—and these, Hanslick insisted, "have no content other than themselves."[147] Yet in this, nothing is lacking. For though as to any "piece of

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139. HANSLICK, *supra* note 1, at 111.
140. *Id.*
141. HANSLICK, *supra* note 103, at 12–13.
142. HANSLICK, *supra* note 1, at 112 (emphasis added).
143. *Id.* at 14.
144. *Id.* at 109.
145. *Id.* at 41.
146. *Id.* at 84.
147. *Id.* at 109.

music, its *content* is nothing but just the heard tone forms,"[148] those "forms constructed from *tones* are not empty but rather filled, not mere borders in a vacuum but rather intellect shaping itself from within."[149] That is, Hanslick was adamant: in music, "there is no content opposed to form, because it has no form outside of the content."[150] Hence, it is not fruitful to attempt to dissect content from form, as the beauty of music may be sustained in and of itself.

Busoni likewise thought that content and form were closely related in music, with their unity a mark of musical excellence. He wrote, "My opinion is that a work of art in which content and form are united in equal perfection is always a product of genius . . . ."[151] Achieving perfect unity is not easy, however. He addressed the challenge it presents in discussing the controversial idea of 'absolute music.' He described absolute music, as traditionally understood, as "a form-play without poetic program, in which the form is intended to have the leading part. But Form, in itself, is the opposite pole of absolute music, on which was bestowed the divine prerogative of buoyancy, of freedom from the limitations of matter."[152] In this traditional sense, the idea of absolute music focuses on musical structure and organization (i.e., forms such as binary, fugue, or rondo). That is, absolute music elevates form above content. Busoni objected. He thought that solely focusing on form is limiting because it does not allow for the expression of music's true freedom and elasticity. He argued, "that every [musical] idea fashions its own form for itself; the organism [of music practice] revolts against having one single form for all ideas."[153] The Busoni scholar Erinn Knyt explains that "Busoni especially disliked formalistic approaches because of the restrictions governing harmonic progressions, main tonal areas and overall structure."[154] This led him to react "against having motives and form systematically bound to the text or the dramatic programme."[155]

Busoni further addressed the unity of form and content in music by metaphorically likening motives to plant seeds. He reasoned that "in each motive, there lies the embryo of its fully developed form; each one must unfold itself differently, yet each obediently follows the law of eternal harmony."[156] Thus, musical ideas have the freedom to uniquely develop and evolve yet still reside within musical structures and principles of form.

Knyt highlights two additional contexts where Busoni saw the unity of form and content as critical. One was music instruction. A master piano teacher, Busoni chose for his students some compositional examples (e.g., J.S. Bach

148. *Id.* at 109.
149. *Id.* at 43.
150. *Id.* at 111–12.
151. BUSONI, *supra* note 26, at 108.
152. Busoni, *supra* note 2, at 78.
153. BUSONI, *supra* note 26, at 18.
154. Erinn E. Knyt, *Ferruccio Busoni and the Absolute in Music: Form, Nature and Idee*, 137 J. ROYAL MUS. ASS'N 35, 40 (2012).
155. *Id.* at 41.
156. Busoni, *supra* note 2, at 81.

fugues) because they illustrated the dependence of content on form.[157] Another was composition. Knyt notes that Busoni "idealized forms constructed in relation to cultural ideas rather than genres, formal moulds, harmonic progressions or rules of tonality that were central to formalist notions of absolute music."[158] That is to say, Busoni thought it appropriate for composers to draw inspiration from their surroundings that may be defined in musical forms and structures. These compositional ideas could inform both the structure and content of a piece of music. According to Knyt, this allowed Busoni to seek "systems of formal organization apart from traditional formal moulds while rejecting programmatic systems of organization."[159] Moreover, Busoni advised composers to avoid separating music based on purpose or style, arguing that they should rather synthesize various types of writing and systems to surpass traditional boundaries. While he often adopted traditional forms, he merged them in novel ways to suit musical ideas and content.

From Hanslick, Busoni, and Wittgenstein there thus emerges a way of thinking about the aesthetic of music which conditions aesthetic understanding and judgment on active familiarity and engagement with music practice. Though the three thinkers approach music aesthetics from diverse perspectives and in a broader sense offer quite different aesthetic theories, they agree on four key considerations: that feelings or affective responses to a piece of music do not provide a measure of its excellence or aesthetic value; that the doing of music, as with any art form, involves engaging in a practice distinct from any other; that works of music must be understood and evaluated from a point-of-view internal to the practice of music; and that the form and content of music are necessarily merged in wholistic unity. These four points constitute a distinct way to approach the aesthetic of music. They also provide a distinct way to think about law, specifically the practice of judicial decision-making.

II. PARALLELS BETWEEN MUSIC AND LAW

A. Feelings, Emotive Responses, or Preferences Regarding the Result of a Judicial Decision Do Not Provide the Measure of the Decision's Excellence or Rightness.

Just as Hanslick in *On the Musically Beautiful* began his inquiry into the aesthetics of music by questioning the significance of affective responses to hearing a piece of music, so too should we begin with feelings in developing an aesthetic of law. For as with music, people respond with feelings and emotions to judicial decisions. In the legal context, the affective responses are directed

157. *See* ERINN E. KNYT, FERRUCCIO BUSONI AND HIS LEGACY 12 (2017) ("One of the principles Busoni sought to illustrate using Bach fugues as examples was the close relationship between the subject and overall form.").

158. Knyt, *supra* note 154, at 46.

159. *Id.* at 47.

toward the outcome or result of a case.

As we presented above, Hanslick, Busoni, and Wittgenstein all recognized the obvious, that experiencing music naturally produces sensations—feelings/emotive responses of joy, longing, fear, hope, love, and much more. Wittgenstein noted that such affective reactions characterize the full range of our life experiences: "Feelings accompany our apprehension of a piece of music in the way they accompany the events of our life."[160] He also recognized that as to some central human activities, the purpose of practical action is to arrive at a *result*. In mathematics, for example, he wrote that in carrying out a "calculation I surely wanted from the beginning to know what the result was going to be; *that* was what I was interested in. I am, after all, curious about the result."[161] Nonetheless, neither the feelings that accompany hearing a piece of music nor feeling good about (liking) the result of a calculation provide indicators of excellence or correctness in music or in mathematics. As Wittgenstein cautioned, aesthetic appreciation does not depend on an "affective element."[162] And in mathematics, what matters is not the result *per se*, but arriving at the result mandated by correct practice:

> And the correct multiplication is the pattern of the way we all work, when we are wound up like *this*.
>
> *Experience* teaches that we all find this calculation correct.
>
> We let ourselves unwind and get the result of the calculation. But now—I want to say—we aren't interested in having . . . actually produced this result, but in the pattern of our working; it interests us as a convincing, harmonious, pattern—not, however, as the result of an experiment, but as a *path*.[163]

So is it with judging. Legal cases are not filed in disinterest. Litigants from the outset care about, predict, strive to attain, anticipate, and even wish or pray for a desired outcome. Every case at law is a competition filed and conducted to resolve a dispute with a result favorable to one side, unfavorable to the other. Emotions are often high during the proceedings, from pre-trial through trial and on to appeal. When a court announces its decision, affective responses follow. Judicial decisions produce feelings and emotions of joy, satisfaction, anger, frustration, hope, and fear, a vast array of frequently powerful visceral reactions. Still, feelings are not an indicator of excellence in a judicial decision any more than in music or mathematics. How people feel about a decision, whether they like the result or not, does not provide a measure of good judging or justice, and

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160. WITTGENSTEIN, *supra* note 4, at 10e.
161. WITTGENSTEIN, *supra* note 67, at 195, at III-69.
162. WITTGENSTEIN, *supra* note 3, at 10.
163. WITTGENSTEIN, *supra* note 67, at 195, at III-69.

says nothing about the rightness of the ruling.

In law, the position that feelings, emotions, preferences, ideological approval or liking the result of a judicial decision provides some measure of its rightness is a characteristic form of *result-orientation*. The position represents the point-of-view that the result or outcome in a case provides relevant information or perhaps even counts as the criterion of highest priority in measuring the rightness of a judicial decision.

Result-orientation in law takes two very different forms: one, internal to judicial practice, the other as an external measure of the rightness of court rulings. The first form of result-orientation refers to courts that render decisions purposefully to reach a desired outcome. In such situations, the court's reasoning is often viewed as contrived to mask the decision's predetermined result. Result-orientation in this form is widely condemned. No courts ever admit to issuing a result-oriented opinion. They use the term to reprove decisions they consider contrived to reach a certain outcome,[164] or to reproach legal doctrines they regard as developed or applied in an unprincipled results-driven manner.[165] One judge described the danger posed by result-orientation as follows: "Result orientation in the law . . . yields its own set of perverse consequences, not the least of which is the silent dilution of the consistency, predictability, and fundamental fairness which are aspirations of the American judicial system."[166]

The second form result-orientation takes is external to judicial practice. This form treats the outcome of a case as highly relevant if not the singularly most important factor in determining whether the case was decided correctly. Measuring rightness here requires going outside judicial practice to the affective reactions of those personally, politically, or ideologically moved by the decision. Depth of feeling about a decision's perceived social utility, its likely impact on individual or group self-interest, compatibility with religious beliefs, or consistency with ideological visions or commitments is the high fashion of this form of result-orientation. That is, result-orientation in this external form places the measure for determining the rightness of a case at law squarely on the affective element.

This form of result-orientation, unlike the first, is not pernicious. External

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164. *See, e.g.*, Dow Chem. Co. v. Associated Indem. Corp., 724 F. Supp. 474, 482 (E.D. Mich. 1989) (criticizing a decision where "the court did not mask its result orientation"); Hays v. Wood, 603 P.2d 19, 32 (Cal. 1979) (Mosk, J., concurring) (upbraiding two lower court decisions in the matter as "textbook illustration" of result-orientation); Alegria v. Payonk, 619 P.2d 135, 139 (Idaho 1980) (Shepard, J., dissenting) (cautioning that a court decision should be well-reasoned and written clearly "in order to demonstrate that it was reached on more than instinct or result orientation.").

165. *E.g.*, Hodge v. People, 54 V.I. 786, 799 (D.V.I. 2011) (stating that the "principal characteristic of the 'harmless error' doctrine is its 'result-orientation.'"); City of Madison v. Hyland, Hall & Co., 243 N.W.2d 422, 429 (Wis. 1976) (contending that courts have been result-oriented in applying treble-damage aspects of antitrust laws).

166. Samuel-Bassett v. Kia Motors Am., Inc., 34 A.3d 1, 64 (Pa. 2011) (Saylor, J., dissenting).

to judicial practice, it does not comprise a misuse of judicial power. Instead, its fallacy is one of misplaced emphasis. By making affective responses the critical factor in assessing the exercise of judicial power, it transposes that which is beside-the-point into the high point.

While depth of feeling is germane to the nature of justice, deep feelings experienced subjectively by individual agents or even a collective group in response to a judicial decision only tell us something about the individual agents or group, not about the decision itself. For we learn nothing decisive about the justness or excellence of a judicial decision based on how people feel about its result. Justice at law (a just judicial decision) is and remains just even if it arouses no feelings. Like judgments of musical excellence, to say, '*Ah!*' or to utter some other emotive or ideological expression of approval or happiness, joy, elation about the result in a case at law are beside-the-point in terms of the rightness of the decision. For the rightness of a court judgment, like the correctness of a musical composition or performance, is a matter of excellence. As discussed above, the criteria for determining excellence are specific to the practice of the activity. To understand excellence in judging at law, we need to consider the conditions of excellence that attend that most noble of social practices, the practice of adjudication.

B. The Doing of Judging in Law Involves Engaging in a Practice Distinct from Any Other Practice, Even Those That May Be Closely Related.

Parallel to those actively involved in the doing of music, judges, by virtue of being actively engaged in the judging of cases at law, have *practical, experiential knowledge* of the elements of law, the ends of the judicial process, and the internally legitimate procedures and means to achieve those ends. Just as Busoni argued concerning the essence of music, judicial decisions are more lasting and just, the more closely they adhere to the essential means and ends of judging. Further akin to the aesthetic of music, adjudication depends for its justification on satisfying a set of objective conditions of excellence which cannot be detached from the internal rationality of its practice. In music, excellence in the practice of what Hanslick referred to as "*sonically moved forms*" [167] are harmony, rhythm, melody, tonality, and such. Investigating judicial practice from within likewise discloses a set of objective conditions of excellence which at once constrain freedom in judicial decision-making while establishing a province for inventive genius.

Simply put, the end of adjudication is the resolving of disputes in a manner aligned with justice and the welfare of society. While the range of philosophical theories about how to characterize justice and calculate the social good are many and diverse, every jurisprudential tradition defines the end of law in terms of

167. HANSLICK, *supra* note 1, at 41.

justice and the common good. Natural law jurisprudence, from Cicero[168] to Aquinas,[169] throughout the Age of Enlightenment[170] to today,[171] treats advantaging the common good as the ultimate end of law. Jeremy Bentham[172] and John Austin[173] protested against natural law in favor of legal positivism because they thought all talk of natural law and natural justice runs counter to the true end of law, maximizing social utility. Free market jurisprudence[174] and Marxist legal philosophy theorize from opposite poles but with eyes toward the same prize, reforming law to benefit the social welfare. The same end of fostering the common good holds true for legal pragmatism,[175] sociological jurisprudence, Legal Realism, Post-Modern jurisprudences, even the farfetched

168. CICERO, DE RE PUBLICA, DE LEGIBUS 383–85, at II. V. 11–12 (Clinton Walter Keyes trans., 1928) ("It is agreed, of course, that laws were invented for the safety of citizens, the preservation of States, and the tranquillity and happiness of human life, and that . . . in the very definition of the term 'law' there inheres the idea and principle of choosing what is just and true.").

169. *See* THOMAS AQUINAS, *Summa Theologiae*, *in* ON LAW, MORALITY, AND POLITICS 1, 13–17, at q. 90, art. 2, 4, 65–66, at q. 96, art. 1, 78–79, at q. 97, art. 2 (William P. Baumgarth & Richard J. Regan eds., Hackett 1988) (positing as a necessary condition and essential objective of law that it aim to advance the common good).

170. *See, e.g.*, THOMAS HOBBES, *De Cive*, *in* MAN AND CITIZEN 87, 123, 123* (Bernard Gert ed., Peter Smith 1978) (1642) (stating that "the *law of nature* . . . is the dictate of right reason . . . [by which] I understand . . . the peculiar and true ratiocination of every man concerning those actions of his, which may either redound to the damage or benefit of his neighbours."); SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 35 (James Tully ed., Michael Silverthorne trans., 1991) (1673) (writing that "the fundamental natural law is: every man ought to do as much as he can to cultivate and preserve sociality.").

171. *E.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 125 (1980) (arguing that the basis of most legal and moral obligations is "the requirement of favouring and fostering the common good of one's communities."); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 1–20, 43–47 (2022) (advancing a return to the classic Western legal tradition that combines Roman law, canon law, and natural law, and that defines law as a rule of reason directed to the common good).

172. *See* JEREMY BENTHAM, *A Comment on the Commentaries*, *in* A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 1, 204 (J.H. Burns & H.L.A. Hart eds., 1977) (maintaining that judicial appeals to natural justice contravene and are repugnant to social utility).

173. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 37–63, 74–118 (Weidenfeld & Nicholson 1954) (1832).

174. *E.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 115 (1981) (arguing for a "criterion for judging" that asks whether actions "maximize the wealth of society.").

175. *See, e.g.*, BENJAMIN NATHAN CARDOZO, *Growth of the Law*, *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 211, 220 (Margaret E. Hall ed., 1947) (1924) (contending that in "the genesis and growth of the law, . . . social welfare is the final test."); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 87 (1921) (reasoning that law, "like every other social institution, has a social function to fulfill," i.e., serving "the common good"); JOHN DEWEY, *My Philosophy of Law*, *in* 14 JOHN DEWEY, THE LATER WORKS, 1925–1953, at 115, 122 (S. Ill. Univ. Press 1988) (1941) (arguing that in law, "the standard [of judgment] is found in consequences, in the *function* of what goes on socially.").

suggestions that rolling dice[176] or rolling with robo-judges[177] could make legal decision-making more efficient and socially just.

Given that the end of law is universally understood in terms of justice and the common good, the practice of adjudication, as a part of law, likewise must aim toward the common good. Courts satisfy that end (or not) through their decisions. Whether a case meets the end of judging depends on whether its result is just and conforms to the well-being of society. Yet this does not mean that the practice of adjudication succumbs to result-orientation. For while the end of judging is reaching a just result consonant with the social welfare, the result in and of itself is not the measure of whether the case was decided rightly. To borrow from Wittgenstein when speaking of mathematical calculations, in the judging of cases at law, "we aren't interested in having . . . actually produced this result, but in the pattern of our working; it interests us as a convincing, harmonious, pattern."[178]

Rightness in adjudication is not found in the result of a case, but in *the pattern of the court's working*. The path taken by the court to reach the result, not the result *per se*, determines the rightness of a judicial decision. To say that a decision is right is to speak of excellence. A case exhibits judicial excellence if it produces a just outcome compatible with the common good by way of a decision which convincingly harmonizes with the internal rationality of judicial practice. From their experiential understanding of that practice and its internal demands and necessities, courts have marked out the pattern of right working. The pattern is expressed through a set of conditions of excellence—or, to paraphrase Hanslick, *justice moved forms*—meant to keep the activity of judging true to its functional end. The conditions are not rules derived *a priori* in contemplation of justice as an abstract ideal. Rather, they are conditions forged in the doing of judging, developed and affirmed over time in the furnaces of everyday judicial practice.

Judicial decisions are the engravings that bear the imprint of the conditions of judicial excellence. They further are the primary source material for learning and understanding those conditions. They are analogous to musical compositions, to performances and sound recordings. The sonically moved forms of musical aesthetics are the elements (melody, harmony, rhythm, etc.) that determine excellence in the doing of music practice. They are not imposed on music from outside, but are produced and determined by the internal demands and rationality of engaging in the practice of music. We learn and

176. *See* NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING 145 (1999) (suggesting that "use of randomizing techniques [in legal decision-making could] have positive effects on people's incentives and might also, on occasions, turn out to be cost-efficient and (more controversially) just.").

177. *See* MAX TEGMARK, LIFE 3.0: BEING HUMAN IN THE AGE OF ARTIFICIAL INTELLIGENCE 106 (2017) (arguing that should robo-judges someday replace human judges, legal decision-making could "be both more efficient and fairer, by virtue of being unbiased, competent and transparent.").

178. WITTGENSTEIN, *supra* note 67, at 195, at III-69.

develop an understanding of them, more or less, either as practitioners in the doing of music or through experiencing music by listening to performances, reading scores, or studying the output of music creation.

The aesthetic of adjudication follows the same pattern. The justice moved forms of the legal aesthetic are the conditions that determine excellence in the doing of judging. They are not imposed on adjudication from outside. They embody the internal demands and rationality of engaging in the practice of adjudication. We learn and develop an understanding of them either as judges actively engaged in the practice of judging, or from outside judicial practice by reading opinions, studying the law, or otherwise experiencing the output of judicial decision-making. Just as the elements of excellence in music are best (perhaps only) learned by engaging with music, learning and developing some understanding of the conditions of adjudicative excellence requires engaging with judicial decisions.

Fortunately, courts over time have reflected often on the patterns of their working. There is no shortage of judicial opinions which give commentary on the nature of the judicial process and the forms of sound legal judgment. While there may be others, we find in the law reports a set of conditions of judicial excellence that courts recurrently cite as the lodestars of their right working. Strictly directed towards advancing the end of law through the just resolution of legal controversies, these conditions demand, first, that judicial decisions be the product of impartial deliberation and unbias.[179] Considered by some the highest ideal of the judicial process,[180] acting impartially is arguably the most fundamental promise judges make when taking the judicial oath of office.[181]

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179. *See* Liteky v. United States, 510 U.S. 540, 541 (1994) (noting that by statute, federal judges must recuse themselves whenever their "impartiality might reasonably be questioned"); Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (reasoning that biased judgment on part of a trial judge impairs the process and is never harmless error); Marshall v. Jerrico, 446 U.S. 238, 247 n.9 (1980) (holding that subsequent "trial *de novo* before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired" (citing Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972))); *In re* Murchison, 349 U.S. 133, 136 (1931) (disqualifying a judge because of a non-pecuniary interest in trial outcome); Tumey v. Ohio, 273 U.S. 510, 535 (1927) (holding that reversal is required if a judge had a financial interest in conviction, even if there is no evidence that bias influenced the outcome); Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) ("Essential to a fair hearing is the right to an unbiased judge.").

180. *See* PATRICIA SMITH, FEMINIST JURISPRUDENCE 211 (1993) ("Impartiality is the highest ideal toward which judges can aspire."). *See also* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 175, at 112 ("One of the most fundamental social interests is that law shall be uniform and impartial.").

181. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 104 (2006) (Stevens, J., dissenting) ("The citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted."); Williams v. Anderson, 460 F.3d 789, 814 (6th Cir. 2006) (ruling that judicial authority "greatly depends" upon the ideal embodied in judges being "sworn to administer impartial justice" (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986))); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 109–10 (1909) ("The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs . . . .").

Excellence in judging further calls upon judges to support their decisions with logically sound reasoned explanations.[182] This condition reflects the universal postulate that judicial rulings should be rational, transparent, and not-arbitrary.[183] Excellence in judicial practice also requires that decisions, so far as possible, set comprehensible boundaries for future applications.[184] Especially in common law jurisdictions, the force and effect of individual decisions carries over to future cases as precedent. In addition, adjudicative excellence is

182. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 921 (2018) (recognizing that whether a decision was "well reasoned" is a crucial factor in whether it should be reconsidered); Montejo v. Louisiana, 556 U.S. 778, 793 (2009) (recognizing that the precedential weight of a case depends in part on "whether the decision was well reasoned"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."); Paulson v. State, 28 S.W.3d 570, 571–72 (Tex. Crim. App. 2000) (reasoning that a previous decision that was "poorly reasoned" need not be followed).

183. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 722 (2008) (Stevens, J., dissenting) (arguing that a judicial judgment should occur "within a framework . . . which makes its exercise transparent."); June Med. Serv., LLC v. Phillips, 22 F.4th 512, 519 (recognizing that the "public has an interest in transparent court proceedings" (quoting *In re* Gee, No. 19-30953, 2019 WL 13067384, at *4 (5th Cir. Nov. 27, 2019))); United States v. Holy Land Found. for Relief & Dev., 624 F.3d 685, 690 (5th Cir. 2010) (stating that transparency "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." (quoting Littlejohn v. BIC Corp., 851 F.2d 673, 682 (3d Cir. 1988))); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 413 (1932) (Brandies, J., dissenting) (stating that judicial authority will "depend altogether on the force of the reasoning by which it is supported." (quoting The Passenger Cases, 7 How. 283, 470 (1849))); People v. Sandoval, 161 P.3d 1146, 1160 (Cal. 2007) (averring that "'all exercises of legal discretion must be grounded in reasoned judgment and' . . . exercised in a manner that is not arbitrary . . . ." (quoting People v. Russel, 443 P.2d 794, 800 (Cal. 1968))). *See also* A.P. D'ENTRÈVES, NATURAL LAW 78 (2d ed. 1970) (stating "that only inasmuch as action can be measured in terms of reason does it properly come under the heading of law.").

184. *E.g.*, Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 563 (1991) (Kennedy, J., concurring & dissenting) (criticizing a decisional test as "altogether malleable . . . with no principled basis"); Saffle v. Parks, 494 U.S. 484, 505 (1990) (Brennan, J., dissenting) (criticizing the Court for speaking in "generalities . . . [and] offer[ing] no guidance despite its concession that the 'precise contours of the exception may be difficult to discern.'"); First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (criticizing the Court's regulatory takings jurisprudence for being "open-ended and standardless"); Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (suggesting that the boundaries the Supreme Court must draw in its due process analysis are "not a series of isolated points . . . [but lines along] a rational continuum.").

conditioned on judges satisfying objectives of coherence[185] and workability.[186] Judging cases at law, and doing it well, is measured according to these several conditions of excellence.

As with music, being versed in the practice of judging produces a distinctive experiential understanding of these factors that determine excellence in adjudication. In our inquiry into the aesthetic of music, we found that Hanslick, Busoni, and Wittgenstein all viewed the logic of practice as the proper orientation for forming epistemic dispositions about music. Practice also gives the right vantage point for adjudication. The several conditions of adjudicative excellence are derived by way of the logic of practice. As noted above, that logical perspective treats acting in the everyday practice of a central human activity as providing the fundamental groundwork for understanding the activity, and for constructing concepts and theories pertinent to it.

With the practice of judging, it is principally the writings of judges that provide the grist for accessing and developing epistemic dispositions about adjudication's internal rationality. Each judicial decision, in a sense, reads as a diary of the pattern of the court's working. Judicial opinions accordingly provide valuable, primary material for understanding the doing of judging. Hammering that material in the furnaces of the logic of practice produced the conditions of adjudicative excellence. Yet those conditions, like the fundamental elements of music, are only descriptive. When we move to the mode of *evaluating* judicial decision-making—when we move, that is, to the

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185. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 407, (2024) (rejecting earlier decision because "[f]or its entire existence, [it] has been a 'rule in search of a justification,' if it was ever coherent enough to be called a rule at all." (citation omitted) (quoting Knick v. Twp. of Scott, 588 U.S. 180, 204 (2019))); Ramos v. Louisiana, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part) (noting that in considering whether to overrule a prior decision, courts "examine the quality of the precedent's reasoning, consistency and coherence with other decisions"); Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991) (identifying "doctrinal coherence" as a judicial goal); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (writing that a "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law"); United States v. Simms, 914 F.3d 229, 250 (4th Cir. 2019) (arguing that coherence, along with stability and consistency, contributes to the integrity of the judicial process).

186. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 280–81 (2022) (Alito, J.) (recognizing that an "important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner"); *id.* at 363 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (recognizing that whether a rule "has proved workable in courts across the country" is a criterion for whether it should be overruled); *Janus*, 585 U.S. at 921 ("[R]elevant consideration in the *stare decisis* calculus is the workability of the precedent in question, . . ."); *Montejo*, 556 U.S. at 792 (noting that "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it"); Hudson v. United States, 522 U.S. 93, 102 (1997) (criticizing earlier case that "has proved unworkable"); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (overruling earlier case which issued rule that proved to be "unsound in principle and unworkable in practice"); Rochin v. California, 342 U.S. 165, 179 (1952) (Douglas, J., concurring) (approving rule adopted by majority because it set "an unequivocal, definite and workable rule of evidence for state and federal courts").

aesthetic of adjudication's normative mode—we move, again as with music, from the descriptive logic of practice to the normative vantage-point of internality.

C. Judicial Decisions Must Be Understood and Evaluated from a Point-of-View Internal to Judicial Practice, Not According to External Standards or Criteria.

In Part I.C., we discussed the contrast between the theoretic standpoints of internality and externality. Internality involves theorizing from the perspective of practice. It requires that theories be intertwined, insofar as possible, with the techniques, methods of reasoning, and ways of seeing followed by practitioners as they think and act according to the internal rationality of the creative enterprise in which they participate. Externality overlays those practice-centric norms and standards of justification with alternative norms and standards drawn from sources outside practice.

In law, externality represents the position that sources (theories, practices, authorities) *outside* judicial practice should be deferred to as providing the norms, standards, or measures for determining the rightness of a judicial decision or the meaning of legal terms. Externalist legal thinkers diminish or even disregard outright the importance of the conditions of excellence found within judicial practice. They do not regard the internal rationality of the practice as providing essential information about how to evaluate the rulings of judges. As such, the perspective of externality stands not just in contrast to judicial practice. It stands in opposition.

Externalist legal theories take different forms. We will briefly consider three general tendencies in legal externalism. For want of better terms, we call them categorical externality, ethical externality, and historical externality. These are not separate and distinct categories of externalism. They are normative tendencies, somewhat overlapping, that share the pluralistic idealism that drives externality. Many (though not all) externalist theories espouse positions that bridge two or even all three of these tendencies.

Categorical externalism presents an existential challenge to the distinctiveness of judicial practice. The challenge goes to one of the most basic precepts of adjudicative practice: the independent decision-making authority of courts as the final arbiter of legal meaning.

In the common law context, it is well established that the court of highest standing within a jurisdiction has the final say regarding questions of legal interpretation and meaning. Notably, this is true of the United States Supreme Court.[187] Categorical externality challenges this doctrine of finality. The claim

187. *E.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution . . . ."); S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945) (Supreme Court is "final arbiter" of questions arising under the Constitution);

is that judicial finality is a mythic legal fiction.[188] As such, courts should not be treated as having the last word on legal meaning.[189] This categorical challenge appears most frequently in theoretical debates over how to construe the United States Constitution. Jurists sympathetic to categorical externality argue that interpretations of the Constitution by non-judges who assume an appropriate attitude toward the Constitution should be accorded equal authoritative weight to judges who apply the Constitution case-by-case according to the internal rationality of judicial practice.[190] That is, categorical externality recognizes no distinction in reading the law between those who do so by exercise of personal will for any reason and from any proclivity, and those who do so out of professional necessity and according to established techniques and limits of practice to resolve concrete legal disputes.

Ethical externality prioritizes normative theory over judicial practice. It overlays judicial decision-making with normative theoretical postulates extracted for legal interpretation from domains external to judicial decision-making. Borrowing principles, norms, methods of analysis, and standards of judgment from intellectual fields such as political science,[191] philosophy,[192] and

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Williams v. North Carolina, 317 U.S. 287, 302 (1942) (Court is "final arbiter" of questions involving full faith and credit clause); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

188. *See* LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY xii (2019).

189. *See id.* ("The doctrine of judicial finality often attains the status of myth: a belief widely held to be true but lacking any factual basis . . . . The purpose of this book is not to obliterate this doctrine from judicial canons . . . . My objective is to explain with concrete examples why the doctrine is plain error."). *Accord* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014). *See also* Donald E. Lively & Ellen S. Podgor, *Reckoning with the Bluster of Apolitical Jurisprudence*, 19 HASTINGS CONST. L.Q. 715, 716 (1992) (arguing that the Supreme Court, under Chief Justice Marshall, "arrogated" constitutional development and meaning in the early nineteenth century).

190 . *See, e.g.*, GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION 95–137 (1986); KRAMER, THE PEOPLE THEMSELVES, *supra* note 189, at passim; SANFORD LEVINSON, CONSTITUTIONAL FAITH 46–53 (1988); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 144–52 (1990); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 95–96 (1987); Lively & Podgor, *supra* note 189, at 736.

191 . *See, e.g.*, HENRY J. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS (4th ed. 1977); SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986); MACEDO, LIBERAL VIRTUES, *supra* note 190; MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190; GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982).

192. *E.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977) ("Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."); JEFFRIE G. MURPHY, *Cruel and*

critical studies,[193] externalist legal theories in this ethical mode characteristically assume a three-step analytical path. First, they adopt a standpoint of special fidelity to the law. Again, the realm of constitutional interpretation receives the most attention. Some ethical externalists present the special standpoint as a model to be adopted by judges.[194] Others seek to neutralize judicial practice by arguing it is a person's mindset, not the judicial office, that gives interpretive legitimacy in constitutional law. For these latter theorists, ethical externality overlaps with categorical. They argue, for example, that anyone who possesses a "genuinely constitutional attitude"[195] or sharp "jurisprudential vision"[196] satisfies the necessary condition for authoritative constitutional interpretation. The requisite attitude or vision takes several forms. Usually, it is presented as a general, though vague, normative characteristic—possessing the right attitude,[197] appropriate vision,[198] or correct moral values.[199]

Working from these normative perspectives, ethical externalists then posit a formal method of interpretation based on principles of social/political morality and hermeneutic rules of textual reading. The moral principles typically are

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Unusual Punishments, *in* RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 223, 223 (1979) ("[I]f one can mount a good argument that to treat a person in a certain way is gravely unjust or would violate some basic human right of his, this is also and necessarily a good argument that it is unconstitutional to treat him in this way."); W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFFS. 269, 282 (1983) ("My purpose is to show how contemporary privacy jurisprudence could have benefited from the use of disciplined philosophical analysis.").

193. *E.g.*, DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT (1992) (deconstruction); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 285, 288–89 (Sanford Levinson & Steven Mailloux eds., 1988) ("My approach to contract doctrines owes much to traditions of scholarship outside of law, and shares much with other attempts to bring these traditions to bear on legal materials and issues . . . . I have drawn on another critical tradition, described loosely as poststructuralism.").

194. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 176–275 (1986) (providing a model judge, 'Hercules', for judges to emulate in practice).

195. BARBER, *supra* note 191, at 10.

196. Lively & Podgor, *supra* note 189, at 735.

197. *See, e.g.*, HADLEY ARKES, BEYOND THE CONSTITUTION 21 (1990) (ability to grasp the "reasoning spirit" of the Constitution); BARBER, *supra* note 191, at 10 (a "genuinely constitutional attitude"); LEVINSON, *supra* note 190 (having "constitutional faith"); MACEDO, LIBERAL VIRTUES, *supra* note 190, at 189–200 (attitude of "principled activism"); MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190, at 5, 49–85 (same).

198. *E.g.*, BARBER, *supra* note 191, at 11 (advancing vision of "moral aspiration"); JACOBSOHN, *supra* note 190 ("constitutional aspiration"); Lively & Podgor, *supra* note 189, at 735, 742–43 (sharp "jurisprudential vision" of "cultural awareness").

199. *E.g.*, JOHN ARTHUR, THE UNFINISHED CONSTITUTION: PHILOSOPHY AND CONSTITUTIONAL PRACTICE 2–3, 296–97 (1989) (possessing the moral value of "charity"); MACEDO, LIBERAL VIRTUES, *supra* note 190, at 170–71 (being a morally "conscientious interpreter" of the constitution); MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190, at 23, 46, 50, 54, 85, 95 (same); DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989) (exhibiting "toleration"); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986) (same).

drawn from abstract theories of constitutional democracy,[200] natural or higher law,[201] justice,[202] or rights.[203] They come from a number of sources. Some are derived from the theorist's reading of the Constitution. Others are extra-constitutional, originating in theoretical principles of social or political morality. The ethical externalists contend in either case that their normative standards allow them to apprehend what the Constitution "actually" means, not just what courts *say* it means.[204]

Finally, ethical externalists use their self-proclaimed insight into the 'actual meaning' of the Constitution to expose judicial error, the "derelicts of constitutional law."[205] Their privileged visions permit them to identify specific cases and sometimes even entire bodies of constitutional doctrine which, according to their theoretical analysis, have been wrongly decided, such that the courts, usually the Supreme Court, is said to have "undermined" the 'true' meaning of the Constitution.[206]

The most significant figure writing from this vantage point of ethical externality was Ronald Dworkin. Across a long series of books and articles,[207]

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200. *E.g.*, ARKES, *supra* note 197; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 49 (1992) (recommending "ideal" of "democracy in legal interpretation"). *Cf.* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 314 (1988) (advocating "an implicit inchoate vision of a society as commonwealth, inhabited by citizens who seek to promote the common good rather than individual interests.").

201. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715 (1975) (higher law); MACEDO, LIBERAL VIRTUES, *supra* note 190, at 203–53, 263–74 (appealing to moral concepts such as natural law, dignity, and autonomy); MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190, at 57, 82–83, 91–92 (same); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 97–101, 113–14, 121, 125, 138, 143, 154 (1982) (American civil religion reflected in evolving moral beliefs); Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 507–12 (1993) (moral vision informed by principles of natural law).

202. *E.g.*, RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM, *supra* note 199, at 211 (moral autonomy and toleration); RICHARDS, TOLERATION AND THE CONSTITUTION, *supra* note 199, at 71–91, 133, 154, 237–42 (same); DAVID A.J. RICHARDS, THE MORAL CRITICISM OF LAW 57–59, 72, 89–95, 175, 201, 208, 215 (1977) (Rawlsian principles of justice and autonomy).

203. *See, e.g.*, ARKES, *supra* note 197 (natural rights); DWORKIN, *supra* note 194.

204. *E.g.*, BARBER, *supra* note 191, at 6–11 (claiming to possess a "genuinely constitutional attitude" from which to construct "a general theory of what the Constitution actually means.").

205. *See* PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 186 (1970); MCDOWELL, *supra* note 191, at 129 (quoting Kurland). *Cf. id*. at 10 (charging the Supreme Court with "distortion" in its constitutional interpretation).

206. ARKES, *supra* note 197, at 75.

207. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993); Ronald Dworkin, *The Center Holds!*, 39 N.Y. REV. 29 (Aug. 13, 1992); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992); Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALTA. L. REV. 324 (1990); Ronald Dworkin, *Bork's*

Dworkin constructed an influential normative theory of judicial decision-making that he called "Law as integrity"[208] or "principled integrity."[209] A heroic vision of adjudication, law as integrity did not categorically challenge the authority of judges. Rather, it challenged them to emulate an imaginary super-judge, 'Hercules.' Dworkin characterized Hercules as possessing a prescient ability to arrive at the right outcome in every case. Hercules' adjudicative method involved following two interpretive dimensions: "fit" and "justification."[210] The dimension of fit called for historical consistency in legal decision-making. It instructed judges to follow precedent,[211] unless overridden by considerations falling under the dimension of justification. By that dimension, Dworkin directed judges to consider which available "interpretation shows the legal record to be *the best it can be* from the standpoint of *substantive political morality.*"[212] That is, law as integrity determined a constitutional decision to be "right"[213] if it coheres historically with the whole record of constitutional law, *unless* that dimension of historical fit is overridden by considerations of social or political morality. The dimension of justification put in play the ultimate end Dworkin sought to achieve with his theory of the Constitution: the "fusion of constitutional law and moral theory."[214] On his account, that fusion should be directed toward what he considered the highest moral value in constitutional law, the priority of rights. Dworkin argued that individual rights "trump" all other factors influencing governmental policy.[215] While his justification for this rights thesis rested primarily on his own political philosophy, Dworkin maintained it is found as well in "the abstract moral command[s] of the Constitution."[216] Noting that certain constitutional provisions raise "profound questions of political morality"[217] which necessarily require "value judgments,"[218] Dworkin insisted that constitutional adjudication is of necessity "in the last analysis . . . responsive to [the judge's] political

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Jurisprudence, 57 U. CHI. L. REV. 657 (1990); DWORKIN, *supra* note 194; RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); DWORKIN, *supra* note 192.

208. *See* DWORKIN, *supra* note 194 at 176–275.

209. Dworkin, *The Center Holds!*, *supra* note 207, at 31. *Accord id*. at 32 ("integrity of principle").

210. *See* DWORKIN, *supra* note 194, at 255–57.

211. *See id. Accord*, Dworkin, *The Center Holds!*, *supra* note 207, at 31–32.

212. DWORKIN, *supra* note 194, at 248 (emphasis added).

213. Dworkin insisted that for every legal issue, there is a single "right answer." *See* DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *in* A MATTER OF PRINCIPLE, *supra* note 207, at 119–45.

214. DWORKIN, *supra* note 192, at 149.

215. DWORKIN, *supra* note 194, at 381–82. *See also* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

216. Dworkin, *The Center Holds!*, *supra* note 207, at 32.

217. DWORKIN, LIFE'S DOMINION, supra note 207, at 120.

218. Dworkin, *The Center Holds!*, *supra* note 207, at 32.

judgment."[219]

Writing in an ethical fashion similar to Dworkin, a number of other legal theorists have aimed to set right what they see as the jumbled practice of judicial decision-making by arguing that the content of law should be grounded in abstract principles of moral and political theory. Richard Wasserstom advanced a general theory of adjudication based on a "careful restricted utilitarianism."[220] He proposed a formal procedure of legal justification where courts would decide cases by following "the legal rule that is . . . justified on utilitarian grounds."[221] David A.J. Richards argued that the federal Constitution should be "interpreted in a normative way," such that courts would incorporate within it the values found in the "best moral and political theory."[222] By Richards' account, that best theory is a composite of John Locke and John Rawls.[223] Advocating a "principled activism,"[224] Stephen Macedo has maintained that not just judges but all "conscientious interpreters"[225] should read the Constitution in order to make it "the best it can be."[226] Similar to Dworkin, Macedo argues that achieving that best read comes by way of "fusing constitutional interpretation and moral theory."[227] For Randy Barnett, the required fusion melds the Constitution and natural rights theory.[228] Barnett argues that the Constitution's legitimacy depends on it being interpreted with a "presumption of liberty,"[229] i.e., to protect the rights all humans share by nature. On his account, the realm of natural rights has one basic postulate: "natural rights define a private domain within which persons may do as they please, provided their conduct does not encroach upon the rightful domain of others."[230] If there is one consistent undercurrent here, it is the lasting influence of John Stuart Mill. Barnett's principle of natural rights strikingly resembles Mill's famous 'harm principle.'[231] Wasserstrom's restricted utilitarian principle of judicial decision

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219. DWORKIN, *supra* note 194, at 257. *See also* ARTHUR, *supra* note 199, at 2–3, 24 (following Dworkin in arguing that constitutional interpretation "reflects deep moral and political tensions" and includes two interpretive "aspects," "fit" and "charity.").

220. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 138 (1961).

221. *Id.* at 122.

222. RICHARDS, TOLERATION AND THE CONSTITUTION, *supra* note 199, at 30.

223. *See* RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM, *supra* note 199; RICHARDS, TOLERATION AND THE CONSTITUTION, *supra* note 199; RICHARDS, THE MORAL CRITICISM OF LAW, *supra* note 202.

224. MACEDO, LIBERAL VIRTUES, *supra* note 190, at 189–200; MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190, at 5, 49–85.

225. MACEDO, LIBERAL VIRTUES, *supra* note 190, at 170–73, 181; MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190, at 23, 50, 54–55, 67, 84–85, 95, 98, 112.

226. MACEDO, LIBERAL VIRTUES, *supra* note 190, at 170, 189.

227. MACEDO, THE NEW RIGHT V. THE CONSTITUTION, *supra* note 190, at 5.

228. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

229. *Id.* at 152.

230. *Id.* at 58.

231. *See* JOHN STUART MILL, ON LIBERTY 21–22 (2d ed., John W. Parker & Son 1859).

is Mill's rule-utilitarianism.[232] That Millian understanding of the principle of utility also undergirds the consequentialist ("best it can be") jurisprudences of Dworkin and Macedo.

Several other legal theorists, those we classify as historical externalists, reject the direct appeals to moral and political theory that characterize ethical externality. The historical externalists are no less normative and theoretical, however. They differ from the ethical externalists in their theoretical grounding. Drawing from the Constitution's text, structure, and history, historical externalists craft theories of the Constitution that represent their personal understandings of its intentional structure. Declaring that their respective theories depict the Constitution's true design and meaning, they argue that judicial decisions are correct insofar as they match their theoretical account.

Writers in the vein of historical externality commonly identify their approach as 'originalist' or 'intentionalist.' Even now, several decades after his influential writings, Robert Bork remains the standard-bearer for historical externality. Borrowing from Herbert Wechsler[233] the idea that constitutional theory should be "principled," [234] Bork contended that courts may never legitimately embrace values deduced from moral philosophy. He reasoned that since no moral theories can be shown to be demonstrably true, there is no principled way to prove they belong in the Constitution. Instead, Bork maintained that judges should decide cases by appealing to the political philosophy of the Constitution's framers. They should relate "the framers' values to today's world."[235] On his account, those values take a form he characterized as Madisonian majoritarianism.[236] By that theory, the American constitutional system pivots on two fundamental principles: representative democracy and a "counter-majoritarian premise."[237] The latter is a narrow category of social life wherein individual rights override the will of the majority. Principled constitutional interpretation, on Bork's account, implements this political philosophy of the Constitution. Courts should nearly always defer to the lawmaking preferences of the democratic process. If they fail to do so by, say, recognizing individual rights derived from other normative considerations, Bork insisted their decisions are unprincipled and should be overturned.[238]

Similar to Bork, John Hart Ely, while not claiming to be an 'originalist', maintained that two fundamental values are at the core of the Constitution: "the protection of popular government . . . and the protection of minorities from denials of equal concern and respect."[239] Maintaining that these values "aris[e]

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232. *See* JOHN STUART MILL, UTILITARIANISM 22–23 (Hackett 1979) (1861).

233. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

234. Bork, *supra* note 200, at 2, 7.

235. ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 10 (1984).

236. Bork, *supra* note 200, at 2–3.

237. *Id.* at 3.

238. *See id.*

239. ELY, *supra* note 200, at 86–87.

from a common duty of representation,"[240] Ely contended that constitutional cases are decided correctly if they depict a "participation-oriented, representation-reinforcing approach to judicial review."[241] Gary Jacobsohn, like Bork and Ely, argued that judges should read the Constitution to "retrieve . . . the constitutional aspirations of the framers." [242] For Jacobsohn, retrieval requires contemplating the "fuzzy concepts of natural justice"[243] that can be extracted from the Declaration of Independence,[244] the accessible intentions of the framers of the Constitution,[245] and the speeches and writings of Abraham Lincoln.[246] Timothy Sandefur similarly argues for an originalist understanding of the Constitution premised on the fundamental value of liberty, especially as advanced in the Declaration of Independence.[247] Jack Balkin argues that the Constitution was originally intended by its drafters to be read as a living, evolving document.[248] Combining political and categorical externality, Balkin avers that not just judges, but all Americans are participants in the ongoing process of "constitutional construction" through democratic politics. [249] Accordingly, he reasons that, "In every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time."[250]

The contrast between these externalist theories and the practice of adjudication is sharp. Though the externalist descriptions of constitutional vision and method vary, they share a few foundational assumptions. One-by-one, these assumptions mark the clear-cut contrast between externalist jurisprudence and judicial practice.

First, externalist legal theory and judicial practice differ in evaluative methodology. Jurists who evaluate judicial decisions according to criteria external to judicial practice assume the standpoint of jurisprudential *externality*. From this point-of-view, legal decisions are right or wrong according to whether they satisfy a standard of rightness that is independent of the practice of judging. As we noted, externalist jurists posit standards grounded in ethical or historical theories and supported by their analytic powers of argument. By contrast, judges

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240. *Id.* at 87.

241. *Id.*

242. JACOBSOHN, *supra* note 190, at 140.

243. *Id.* at 139.

244. *See id*. at 1, 20–21, 102–03, 108–12. Jacobsohn regards the Declaration of Independence "as providing the core meaning to the Constitution." *Id.* at 103. He writes that, "those who in their official responsibilities are sworn to uphold the Constitution . . . are not misguided should their interpretive judgments rely upon the natural rights precepts of the Declaration." *Id.*

245. *Id.* at 14–36, 60–73, 76–86.

246. *Id.* at 8, 95–114. *See also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992) (looking back to Abraham Lincoln to resolve questions of constitutional interpretation).

247. *See* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY (2013).

248. *See* JACK M. BALKIN, LIVING ORIGINALISM (2011).

249. *Id.* at 55.

250. *Id.* at 11.

work within a system that demands the mindset of *internality*. Here too the power of argument prevails. Yet unlike the legal theorist, the judge is not free to choose the standard they find to be the best or most principled. Internality corrals judges. It confines judicial argument to the internal rationality of practice. That is, it represents a way of seeing law and doing judging that makes the internal rationality of practice the singular norm that sets the balance between freedom and restraint in judicial decision. It constitutes the nature of the judicial process as understood by Benjamin Cardozo:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness . . . . He is to exercise a discretion informed by tradition, methodized by analogy disciplined by system, and subordinated to "the primordial necessity of order in the social life."[251]

Second, externalist theories and judicial practice diverge in their orientation. Externalist jurisprudence is *result-oriented*; judging is *practice-oriented*. The objective in externalist legal theory is to design a comprehensive account of legal meaning by which the outcomes reached in judicial practice can be critically evaluated. Given that externalist jurists personally choose the standards of judgment they posit, externality ultimately makes determinations of judicial rightness turn on the subjective preferences, predilections, or feelings of the theorist, whether grounded in firm ideological commitment or caprice. From the standpoint of internality, judicial decisions are legitimate and justified not on account of their results, but by virtue of whether they satisfy the practice-specific conditions of adjudicative excellence—impartiality, reasoned explanation, comprehensible boundaries, workability, and coherence. It is, to borrow again from Wittgenstein, "the pattern of [the court's] working" that matters, i.e., whether the result is produced by following the *path* of judicial practice.[252]

Third, externalism presupposes a *rationalist paradigm* whereas adjudication is fundamentally a pragmatic, *empirical enterprise*. Typically, externalist jurists present their normative standards of judgment as pre-established truths of inflexible validity. They employ them as major premises in deductive arguments to reach necessarily true case outcomes. From this perspective, every legal issue, as Dworkin famously argued, has a distinctly *right answer*.[253] The process of externality is thus happy, clean, and confident, unsullied by the bric-a-brac and warts of everyday concrete cases. Judicial practice, by contrast, is untidy. The process of common law decision-making is

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251. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 175, at 141.

252. WITTGENSTEIN, *supra* note 67, at 195, at III-69.

253. *See* DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *supra* note 207, at 119–45.

primarily empirical. It is fact-intensive and evidence driven. Its logic is principally inductive. Rules, principles, and doctrines of law do not originate in *a priori* theorizing but in the organic process of case-by-case decision-making. That process is empirical and pragmatic, producing rules and principles which are better understood as working hypotheses than fixed absolutes. As the process goes on, case-by-case, the contingent precepts are tested and retested under new factual scenarios. Those that work well by contributing harmoniously to justice and the common good are reinforced and reaffirmed. Those that do not work well, that render the law discordant and unjust are re-examined and become subject to being abandoned or overruled.

Finally, externality treats inquiry into the meaning of legal propositions as an *interpretive activity*. Internality, by contrast, understands legal meaning to emerge through day-to-day *application-in-practice*. This distinction is crucial. Externalist legal theorists view adjudication (again, especially in constitutional law) as an activity pursued for the purpose of *constructing* meaning.[254] They assume that judges (or others with the right attitude or vision) approach the reading of legal materials as an exercise in interpretation. That this exercise happens to take place in the context of deciding specific cases-at-law is incidental. Legal controversies merely provide a convenient setting for the real work of interpreting law.

Understood from the standpoint of internality, the real work of judging is resolving individual cases or controversies. What legal propositions mean is a consequence of that work. It is not the stimulus, however. Forging legal meaning is incidental to judicial decision-making, even if unavoidable. "The common-law method," according to Supreme Court Justice Anthony Kennedy, "presumes that rules will emerge from the course of decisions."[255] That presumption is fulfilled every day. Rules do emerge from the course of judicial decision-making. Ideally, they unfold with content that is coherent, workable, and supported by sound reasoning. Yet it is mistaken to infer from that common-law presumption, that the resultant rules are the product of purposive acts of judicial will. Resolving cases-at-law is not metaphysics. It is a discursive process informed by policy and social norms, regulated by shared conventions and the internal logic of practice, and dependent on the contextual nature of language. The nature of language is such, as Wittgenstein recognized, that the meaning of words is determined by their use within a linguistic community or system of discourse—in Wittgenstein's terms, a 'language-game.' How a word is "*actually used*,"[256] how it is *applied* within the practice of a language-game is

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254. *E.g.*, Ronald Dworkin, *Law as Interpretation*, *in* THE POLITICS OF INTERPRETATION 249 (W.J.T. Mitchell ed., 1983) ("I shall argue that legal practice is an exercise in interpretation . . . ."). *Accord* Drucilla Cornell, *Two Lectures on the Normative Dimensions of Community in the Law*, 54 TENN. L. REV. 327 (1987); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

255. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 596 (1994) (Kennedy, J., concurring).

256. WITTGENSTEIN, *supra* note 70, at 27 (emphasis added).

what "gives the word its meaning."[257] This Wittgensteinian understanding of the nature of language matches how meaning emerges in judicial practice. Legal rules and principles acquire meaning, however determinate or indeterminate, as a consequence of their *application* by courts in deciding concrete cases.[258] This contrasts with the externalist assumption that judging is foremost a matter of interpretation. For again as Wittgenstein pointed out, an "unbridgeable gulf" separates interpretation from application.[259] Interpretation, as a linguistic practice, involves searching for the essence or real definition of a word or concept.[260] Wittgenstein characterized it as conceiving of meaning as if it were "a calculus proceeding according to exact rules."[261] However exact it may be, interpreting law by the external method differs from judicial application of law in two respects. Interpretation is unconstrained by the background conventions, internal conditions, and logic of judicial practice; and it is disassociated from the communal discourse of litigation and the contingencies found in the facts and circumstances of everyday concrete cases. As such, it is possible from the standpoint of externality "to derive anything from anything according to some [legal] rule or other . . . with a suitable interpretation[.]"[262] Not so the aesthetic practice of adjudication. For as Justice Samuel Alito recently commented, "'You don't have to be Ludwig Wittgenstein . . . to know that successful communication depends on meanings shared by' . . . 'members of a relevant linguistic community [who] apply shared background conventions for understanding how particular words are used in particular contexts.'"[263]

These sharp differences between internality and externality, between the practice of adjudication and the practice of legal theory, bring to mind Hanslick's cautionary observation that the differences between an aesthetic practice and closely-related domains are more important than the similarities. Wittgenstein was bemused by the person who would want their walls painted to match the color in the iris of a Rembrandt eye. Likewise, it bewilders to imagine a judge pointing to a passage in a work by Immanuel Kant (or John Stuart Mill, John Locke, John Rawls) and saying: 'The decision in this case should be based on this philosophical theory.' Yet that is the method of externalist jurisprudence. In calling for the fusion of constitutional law and moral theory, Dworkin cited Rawls. Richards called for constitutional meaning to incorporate the philosophies of Rawls and John Locke. Barnett's natural rights criterion renews

257. *Id*. at 69.

258. *See, e.g.*, Burnet v. Coronado Oil Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting).

259. LUDWIG WITTGENSTEIN, PHILOSOPHICAL REMARKS 198, at § 164 (Rush Rhees ed., Raymond Hargreaves & Roger White trans., 1975).

260. *See* WITTGENSTEIN, *supra* note 69, at I-54.

261. WITTGENSTEIN, *supra* note 70, at 25.

262. WITTGENSTEIN, *supra* note 67, at 389, at VII-24.

263. Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 705 (2020) (Alito, J., dissenting) (quoting Continental Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003)).

Mill's harm principle. Bork and other historical externalists may not cite political philosophers, but their interpretive theories still are exercises in political philosophy. Bork's Madisonian majoritarianism is just as much a theory of political morality as Dworkin's rights thesis. For Bork, just like Dworkin, posited a formal standard of "principled" legal interpretation meant to illuminate 'right' answers in legal controversies before they ever come before courts. The only difference is the grounding of the predetermined principle of political morality.

D. The Form (Procedure, Background Conditions, Settled Law) and Content (Substantive Ruling, Reasoning, Result) of a Judicial Decision Must Be Understood as Merged in Wholistic Unity, Connected Inextricably in the Decision.

Our discussion of the aesthetic of music ended by observing how Hanslick, Busoni, and Wittgenstein all emphasized that 'form' and 'content' are inextricably connected in aesthetic practices. That characteristic extends to the practice of adjudication.

Within judicial practice, 'form' refers to the background conventions and conditions of excellence, along with the procedural rules and settled law (precedent) that set the boundaries for a court's deliberative discretion. The 'content' is a court's decision in a specific case: the result the court reached, its reasoning, and how the decision fits within the limits of form. Excellence within judicial practice is achieved when, as Busoni wrote regarding the aesthetic of music, "content and form are united in equal perfection."[264]

This ideal of unity of form and content is perhaps best illustrated by the contrast between jurisprudential externality and adjudicative internality. Externalist legal theory is result-oriented. Jurists evaluate judicial decisions by asking whether the result in a case aligns with a standard or principle determined antecedent and independent of the judicial process. As shown by the regular appeal to normative terms and concepts,[265] externalist legal theory treats the development of law (especially constitutional law) as a grand normative enterprise. Ronald Dworkin stated it most directly: judging (in constitutional cases) is a matter of interpretation which ideally produces the "*fusion* of constitutional law and moral theory."[266]

The standpoint of internality also calls for fusion, but of a different sort. It requires the *fusion* of form and content in indivisible unity in judicial practice. This is reflected in judicial decisions where courts recognize that legal meaning is "derived from considerations that are *fused* in the whole nature of . . . judicial process."[267] Viewed as an aesthetic practice, the judicial process strives to

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264. BUSONI, *supra* note 26, at 108.

265. *See* notes 190–227 and accompanying text *supra*.

266. DWORKIN, *supra* note 192, at 149 (emphasis added).

267. Rochin v. California, 342 U.S. 165, 170 (1952) (emphasis added).

achieve just outcomes consonant with the common good, under the regulative guidance of what we call the conditions of adjudicative excellence. Those conditions—impartiality and nonbias, reasoned explanation, comprehensible boundaries, workability, and coherence—are implicit within the internal rationality of judicial practice. As noted above,[268] when courts reflect on the patterns of their working, these conditions predominate. Notably, courts abide by them in the most challenging of situations, i.e., cases where they must reconsider precedent. That context powerfully illustrates the unification of form and content in judicial practice.

The doctrine of precedent or stare decisis is the practice of courts in common law jurisdictions to treat rules or principles fashioned in previous cases as binding authority. It reflects the twin ideals central to the rule of law, that similar cases should be decided alike, and that courts should avoid unsettling that which is established. As Henry de Bracton stated in the thirteenth century: "[I]f any new and unwonted circumstances . . . shall arise, then if anything analogous has happened before, let the cases be adjudged in like manner (*si tamen similia evenerint per simile iudicentur*), since it is a good opportunity for proceeding from like to like (*a similibus ad similia*)."[269]

While the doctrine of stare decisis prioritizes consistency and predictability in the law,[270] courts regularly encounter challenges to existing law from cases containing new, often unforeseeable facts and circumstances. Common law rules, principles, and doctrines continually come under pressure to adapt to changing factual circumstances, new technologies, and often bitter disagreements about how to conceive of justice and the common good. Not infrequently, the federal Supreme Court is asked to reconsider precedent. While the requests are obviously result-driven, the Court, working within the conventions of its practice, delivers opinions written with the aim of avoiding even the appearance of result-orientation.

Fully cognizant that "the evenhanded, predictable, and consistent development of legal principles" is the bedrock of "the actual and perceived integrity of the judicial process,"[271] the Supreme Court strives to carefully limit deliberation in cases challenging precedent to the conditions of adjudicative excellence. The Court examines the quality of the reasoning in a precedent case under review, recognizing that the soundness of the reasoning is an important

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268. *See* notes 179–87 and accompanying text *supra*.

269. HENRY DE BRACTON, BRACTON'S NOTE BOOK: A COLLECTION OF CASES DECIDED IN THE KING'S COURTS DURING THE REIGN OF HENRY THE THIRD fol. 1b (F.W. Maitland ed., William S. Hein & Co. 1999) (1887).

270. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) (emphasizing the importance of "evenhanded, predictable, and consistent development of legal principles"); Fla. Dep't of Health and Rehabilitative Servs. v. Fla. Nursing Home Ass'n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (stability is "an essential thread in the mantle of protection that the law affords the individual.").

271. *Payne*, 501 U.S. at 827.

factor for whether it should be reconsidered.[272] It inquires whether the decision set comprehensible boundaries that have been followed, or if its application over time has proven to be difficult, perhaps even arbitrary.[273] Relatedly, the Court considers what reliance interests the decision may have established.[274] Stare decisis takes on "added force" if overruling "would dislodge [individuals'] settled rights and expectations."[275] Moreover, the Court asks whether the decision was coherent;[276] and it carefully looks at the workability of the rule it established.[277]

Sometimes internal debate among the justices becomes contentious. In overruling *Roe v. Wade*[278] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[279] the Supreme Court in *Dobbs v. Jackson Women's Health Organization*, declared, as one factor for overruling, that "*Casey*'s 'undue burden' test has proved to be unworkable."[280] The dissent disagreed, responding, "In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated."[281] Notably, the dissent went beyond disagreeing with the majority on workability and its treatment of the other standard conditions in stare decisis analysis. The dissenting justices intimated that the majority stepped outside the internal logic of judicial practice by taking a "cavalier approach to overturning . . . precedents," and failing to honor its "obligation to faithfully and impartially apply the law."[282] With this, the dissenters took the extreme step, perhaps justified, of reproving the majority for being result-oriented. This criticism goes to the heart of judicial decision-making. For the very integrity of the practice of adjudication rests on courts applying the law impartially and abiding by the conditions of excellence. Following precedent has been described as "the nucleus of [the] judicial system," the principle which "binds the whole [of the system] to all its parts and

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272. *See* Ramos v. Louisiana, 590 U.S. 83, 106 (2020); Knick v. Twp. of Scott, 588 U.S. 180, 203 (2019); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 917 (2018).

273. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 408 (2024) (quoting Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988)).

274. *See Ramos*, 590 U.S. at 106; *Loper Bright*, 603 U.S. at 407; *Knick*, 588 U.S. at 203.

275. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 404 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (alteration in original) (quoting Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991).

276. *See, e.g.*, *Loper Bright*, 603 U.S. at 407.

277. *See, e.g.*, *id.* at 407–08; Montejo v. Louisiana, 556 U.S. 778, 792 (2009); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

278. 410 U.S. 113 (1973).

279. 505 U.S. 833 (1992).

280. *Dobbs*, 597 U.S. at 286 (Alito, J.).

281. *Id.* at 394 (Breyer, Sotomayor, & Kagan JJ., dissenting).

282. *Id.* at 363–64. For an insightful analysis of the *Dobbs* majority's stare decisis analysis, see Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 749–56 (2024).

the parts to each other."[283] Within adjudication understood as an aesthetic practice, the system maintains integrity only if the bond between the nucleus and the system holds firm, i.e., if "content and form are united in equal perfection."[284]

CONCLUSION

Eduard Hanslick recognized that, "*Every* true work of art will enter into some kind of relationship with our feelings, but *none* in an exclusive relationship."[285] He argued that we do not say anything "at all decisive about the aesthetic principle of music if we characterize it only very generally based on its effect on feeling, just as little, say, if we wanted to grasp the nature of wine by getting drunk."[286] What matters is *how* a piece of music produces affective responses in those who hear it. To determine how music evokes feelings and holds such power over listeners we must, Hanslick maintained, understand it, as we must every central human activity, by seeking to "penetrate to the interior of works and explain the specific power of their impression based on the laws of their own internal organization."[287] That is, we must take the point-of-view of internality and examine music on its own terms, attuned to the internal rationality of its practice. It is in that way that we grasp music with aesthetic understanding.

So too, we have argued, should we understand legal adjudication as an aesthetic practice. Drawing upon the shared aesthetic principles of Eduard Hanslick, Ferruccio Busoni, and Ludwig Wittgenstein, we have argued that there are important parallels between musical aesthetics and legal adjudication. Just as musical excellence is best assessed through internal criteria, independent of emotional responses, so too must judicial decisions be evaluated according to the internal logic and conditions of excellence that regulate judicial practice. Further, we have suggested that evaluating judicial decisions based on external standards or theories, moral or historical, may undermine the internal demands and rationality of judicial practice.

For judicial decisions are not right because we feel they are right, because we like the result, or because the result is consistent with an external theory of political morality or sound governmental structure. To say that a case was decided 'right' is to say it was decided well according to the conditions of adjudicative excellence. Of course, the result matters to us. Achieving a just result that serves the common good is the purpose and end of adjudication. But achieving justice through judicial practice is not just a matter of producing the

283. State *ex rel*. Wash. State Fin. Comm. v. Martin, 384 P.2d 833, 845 (Wash. 1963).
284. BUSONI, *supra* note 26, at 108.
285. HANSLICK, *supra* note 1, at 7.
286. *Id.* at 7–8.
287. *Id.* at 8.

'right' result. "[T]he pattern of [the court's] working" matters fundamentally.[288] The internal rationality of judicial practice demands the unity of content and form. It requires reaching a just outcome by way of the "convincing, harmonious, pattern"[289] that comes from complying with the conditions of excellence. Akin to music, excellence in judging surfaces from the inextricable union of form, such as procedure and precedent, and content, the reasoning and result in specific cases. In recognizing the parallels between judicial practice and music aesthetics, legal practice can perhaps be acknowledged as an aesthetic undertaking that necessitates creativity, skills, and internal insights that cannot be supplied by external and detached visions.

With apologies to Milan Kundera, we close with this thought—Does love for justice really exist and has it ever existed? Is it not a delusion? When people proclaim that they approve a judicial decision—that they determine it was decided correctly—what is it that they really approve? What do they see? Justice? Or a majestic noise that reminds them of solemn stirrings in their souls, a longing for protection of property, maximizing wealth, religious affirmation, cultural advantage? Do they derive joy from the reasoning of the decision, or from musings stimulated by the decision's outcome, which has nothing to do with judicial excellence or with justice?

288. WITTGENSTEIN, *supra* note 67, at 195, at III-69.
289. *Id.*

RHETORIC OVER REALITY: EXAMINING ETHICAL OBLIGATIONS OF CONFIDENTIALITY WHEN INFORMATION IS PUBLICLY AVAILABLE

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INTRODUCTION

Confidentiality between a client and an attorney is a well-known characteristic of the client-attorney relationship. The attorney-client privilege has limited exceptions,[1] and Rule 1.6 of the ABA Model Rules of Professional Conduct (Model Rules) concerning the confidentiality of client information is broad and encompassing.[2] However, attorneys can extinguish client confidentiality expectations.[3] Attorneys can even make public information of opposing counsel's clients. For example, under Model Rules 3.6 and 3.8, a prosecutor may disclose information "contained in a public record,"[4] such as defendant's prior arrest history.[5]

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1. The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance . . . ." Fisher v. United States, 425 U.S. 391, 403 (1976) (citing 8 JOHN HENRY WIGMORE ET AL., EVIDENCE IN TRIALS AT COMMON LAW § 2292 (4th ed. 1961)). One example of an exception is the crime fraud exception. The attorney-client privilege protects the confidences of clients as to prior wrongdoings but not as to future wrongdoings. *See* United States v. Zolin, 491 U.S. 554, 562–63 (1989).

2. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018) ("A lawyer shall not reveal information relating to the representation of a client . . . ."). Comment three to Model Rule 1.6 explains the breadth of this rule: "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (A.B.A. 2018).

3. As just one example, under both the attorney-client privilege and ABA Model Rule 1.6 exceptions, in certain circumstances, an attorney may reveal a client's plan to commit future wrongdoings. *See, e.g.*, *Zolin*, 491 U.S. at 562–63; MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) (A.B.A. 2018).

4. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018) ("Notwithstanding paragraph (a), a lawyer may state . . . (2) information contained in a public record . . . ."). Rule 3.8 concerns prosecutors and states in comment five: "Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c)." MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 5 (A.B.A. 2018).

5. Consider this continuing legal education information suggested for prosecutors in Massachusetts:

> When addressing the court for the first time, take the opportunity to . . . provide as much detail about the allegations and the nature of the Commonwealth's evidence as possible . . . . The defendant's criminal history, past incarcerations, and defaults are relevant to the issue of bail and become part of the public court proceedings. Remember: If you did not say it in open court, you should not say it later if it is barred by Mass. R. Prof. C. 3.6.

Kevin M. Mitchell & Max D. Stern, *The Media, the Open Courtroom and High-Profile Cases*, *in* MASS. CONTINUING LEGAL EDUC., MASS. SUPER. CT. CRIM. PRAC. MANUAL § 10.8.1 (2014). For further discussion, see *infra* Part III.B.

In other situations, however, information in the public record is given more protection. Model Rule 1.6 does not have a publicly available or public record exception and has been interpreted as preventing disclosure of client information, even if it is in the public record.[6] Also, Model Rule 1.9, as to former clients, and Model Rule 1.18(b), as to prospective clients, require confidentiality as to these clients consistent with Model Rule 1.6, meaning that publicly available information can also not be revealed.[7] These rules are significantly broader, protecting more client information, than the previous Model Code of Professional Responsibility confidentiality rule that some states retain[8] and the current confidentiality rule in The Restatement (Third) of the Law Governing Lawyers (Restatement),[9] resulting in different rules in different jurisdictions.[10] There is a lack of consistency in the Model Rules, as well as between the Model Rules, the Restatement, the case law, ethics opinions, and scholarly literature, as to when publicly available information[11] remains confidential.[12]

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6. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) ("Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.").

7. Under ABA Model Rule 1.9(c)(2), "[a] lawyer who has formerly represented a client . . . shall not thereafter: . . . (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." MODEL RULES OF PRO. CONDUCT r. 1.9(c)(2) (A.B.A. 2018). Thus, under Model Rule 1.9(c)(2), Model Rule 1.6 governs when a lawyer can reveal former client information. *Id.* Rule 1.18(b) states, "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018).

8. *See infra* note 21, listing states. The Model Code of Professional Responsibility Rule 4-101(B)(1) & (2) prohibited a lawyer from revealing a confidence or secret or using a confidence or secret to the disadvantage of a client. MODEL CODE OF PRO. RESP. DR 4-101(B)(1), (2) (A.B.A. 1983). Confidences were defined as "information protected by the attorney-client privilege under applicable law," and secrets were defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE OF PRO. RESP. DR 4-101(A) (A.B.A. 1980).

9. ABA Model Rule 1.6 protects all information learned during the representation of a client regardless of its source, while the Restatement protects confidential information only and states, "Confidential client information does not include information that is generally known." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000). For an in-depth discussion of Model Rule 1.6 and The Restatement of Law Governing Lawyers rule, see *infra* Parts I.A & I.E.

10. *See infra* Part II.

11. "Publicly available information," as this phrase is used in this paper, is defined consistent with the Restatement (Third) of the Law Governing Lawyers definition of "generally known," as information that is accessible to anyone without substantial barriers, such as difficulty or expense. For a discussion of The Restatement (Third) of the Law Governing Lawyers definition, see *infra* Part I.E.

12. See *infra* Part II for a discussion of current state decisions and ethics opinions.

It should be clear whether client information that is publicly available remains confidential. Further, given that the internet and social media allow for quick and easy public dissemination of information, this paper examines whether the Model Rules have kept up with the current information-rich environment. It concludes that the Model Rules have not and that, when policy concerns are addressed, the best approach is a narrower confidentiality standard for publicly available information that considers several competing policy considerations, including consistency in the Model Rules.

This paper sets forth the information supporting this position in the following manner. Part I discusses the confidentiality rules in the Model Rules and in the Restatement, including stated policy goals behind those rules. Part II gives a detailed discussion of various state ethical rules and comments in jurisdictions with judicial and/or ethic opinions concerning the confidentiality of public information. Part III discusses policy implications. Part IV states the arguments for and against the broad confidentiality rules that the Model Rules and many states follow. It then gives two options that would create consistency in the Model Rules regarding publicly available information. It recommends the narrower confidentiality standard option, which is generally followed by states that follow the Restatement confidentiality scheme, because it better addresses valid policy concerns and, with added recommendations, should result in the consistent treatment of client information that is publicly available.

I. RULES: HISTORY & POLICY

A. ABA Model Rule of Professional Conduct 1.6

Model Rule 1.6 is a broad rule that prohibits attorneys from revealing client information.[13] In this rule, and in other Model Rules, there are stated exceptions to this prohibition.[14] Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client . . . ."[15] It then gives three exceptions: "unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[16] Section 1.6(b) gives seven exceptions to the confidentiality requirement in 1.6(a). Under any of these seven exceptions, the attorney may, but is not required to, reveal client information.[17] So, a client may give an attorney consent to reveal client information, but in Model Rule 1.6, there are eight other exceptions allowing the attorney to reveal client information without client consent. For example, Model Rule 1.6(b)(6) allows an attorney to reveal

13. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018).

14. *Id*. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 2018) (explaining that a lawyer may be required to disclose to the tribunal information protected by Rule 1.6 if the lawyer knows she has offered false evidence).

15. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2018).

16. *Id*.

17. MODEL RULES OF PRO. CONDUCT r. 1.6(b) (A.B.A. 2018).

information "to comply with other law or a court order . . . ."[18] Comment one to Model Rule 1.6 explains that the rule must be read in conjunction with other rules.[19] It states that Model Rule 1.18 governs use or disclosure of prospective client information; Model Rule 1.9 governs use or disclosure of former client information; and Model Rule 1.8(b) governs "use" of current client information.[20] Confidentiality requirements extend to all clients, whether alive or dead, whether prospective, current, or former clients.

The earlier confidentiality rule in the Model Code of Professional Responsibility was based on confidences and secrets, and some states retain this version of the rule.[21] It prohibited a lawyer from revealing a confidence or secret or using a confidence or secret to the disadvantage of a client.[22] Confidences were defined as "information protected by the attorney-client privilege under applicable law," and secrets were defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[23] The current Model Rule 1.6 is much broader, protecting any information learned during the course of client representation, including information that might lead to disclosure of protected information.[24] It protects information that would not be detrimental or embarrassing to the client if disclosed. The policy behind the confidentiality rules is that confidentiality is required so that the client will freely and fully disclose information to the attorney, allowing the attorney to effectively represent the client.[25]

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18. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) (A.B.A. 2018).

19. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 1 (A.B.A. 2018).

20. *Id*.

21. *See, e.g.*, ALASKA RULES OF PRO. CONDUCT r. 1.6 (ALASKA BAR ASS'N 2025); D.C. RULES OF PRO. CONDUCT r. 1.6 (D.C. BAR 2025); ME. RULES OF PRO. CONDUCT r. 1.6 (STATE OF ME. BD. OF OVERSEERS OF THE BAR 2025); MICH. RULES OF PRO. CONDUCT r. 1.6 (STATE BAR OF MICH. 2025); N.Y. RULES PRO. CONDUCT r. 1.6 (N.Y. STATE BAR ASS'N 2025). These states have not altered the "secret" definition to match more closely with Model Rule of Professional Conduct Rule 1.6's broad definition. Some states retain the confidence and secrets model but have modified the definition of "secret" to include all information relating to the representation, whatever its source. *See, e.g.*, CAL. RULES OF PRO. CONDUCT r. 1.6 (STATE BAR OF CAL. 2023).

22. MODEL CODE OF PRO. RESP. DR 4-101(B)(1), (2) (A.B.A. 1983). It also prevented a lawyer from using a confidence or secret for the lawyer's advantage or advantage of a third party without client consent. *Id.* at (B)(3).

23. MODEL CODE OF PRO. RESP. DR 4-101(A) (A.B.A. 1983).

24. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (A.B.A. 2018) ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

25. Model Rule 1.6 comment two states, "The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2018).

B. The Attorney-Client Privilege

The attorney-client privilege is often confused with the ethical duty of confidentiality, but the two are distinct. Generally, the attorney-client privilege is narrower than the duty of confidentiality. It only protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance . . . ."[26] "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys."[27] A client who believes that an attorney will be forced to divulge a client's secrets may not confide in the attorney, which then hinders the attorney's ability to properly serve the client.[28] However, the fundamental premise of the privilege is the client's expectation of confidentiality. The privilege only attaches where the client discloses information in confidence. The client waives the privilege when the client reveals information to a third party.[29] The privilege is waived because if a client divulges the information to a third party, it is likely that the client would have also divulged the information to the attorney, "even without the protection of the privilege."[30]

As to the attorney-client privilege regarding information known or available to the public, the Second Circuit succinctly explained why the client communication to the attorney would be protected but the underlying facts would not:

> In so concluding we do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information. Thus, [the holder of the privilege] may be examined as to any fact but may not, absent a waiver, be compelled to say whether or not he communicated that fact to his counsel. Likewise, his counsel may not be examined as to communications from [the holder of the privilege] and may not be examined as to facts he learned only from such confidential communications.[31]

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26. Fisher v. United States, 425 U.S. 391, 403 (1976) (citing WIGMORE, *supra* note 1, § 2292).

27. *Id.* (citing WIGMORE, *supra* note 1, §§ 2291, 2306, at 590).

28. *Id.*; Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's [sic] being fully informed by the client.").

29. *See* Blattman v. Scaramellino, 891 F.3d 1, 4 (1st Cir. 2018).

30. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126–27 (9th Cir. 2012) (quoting Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982)).

31. United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982). *See also Upjohn*, 449 U.S. at 389.

Thus, where the attorney learned the information only from the client in a circumstance where the privilege would attach, the attorney cannot reveal the information that the client communicated, even if it is publicly available.[32]

The information protected by the attorney-client privilege is a subset of the information protected by a lawyer's duty of confidentiality. This idea is easier to understand under the Model Code's "confidences and secrets" formulation of the confidentiality rule.[33] The Model Code formulation states that the duty of confidentiality applies to both confidences and secrets. Confidences are defined as information protected by the attorney-client privilege, while secrets are defined as other information learned during the representation that might be embarrassing or detrimental to the client.[34] Thus, the information protected by the attorney-client privilege is one part of the information protected by the duty of confidentiality. The attorney-client privilege is an evidentiary rule that applies when an attorney is asked to disclose confidential client information.[35] The duty of confidentiality is not so limited and always governs as to all clients unless an exception applies.[36]

C. ABA Model Rule of Professional Conduct 1.8(b)

Under the Model Rules, there is a difference between disclosure of confidential client information and use of that information. Unless an exception applies, Model Rule 1.6 prevents disclosure of client information.[37] Model Rule 1.8(b) concerns "use" and states that "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."[38] Implicit in Model Rule 1.8(b), as clarified by comment five to the rule, is that a lawyer is allowed to "use" client information if it will not disadvantage the client.[39] The example given states that "a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients."[40]

Model Rule 1.8(b) applies only to current clients.[41] So as to current clients, Model Rule 1.6(a) prevents disclosure of current client information unless the

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32. *In re* WB Bridge Hotel LLC v. 11 Apple LLC, 656 B.R. 733, 754 (Bankr. S.D.N.Y. 2024) (attorney-client privilege not nullified because information is in the public record).

33. *See supra* text accompanying notes 22–23.

34. *Id.*

35. *See generally* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (majority and dissent engaged in lengthy discussion regarding the attorney-client privilege).

36. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.6, 1.8(b), 1.9, 1.18(b) (A.B.A. 2018).

37. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018).

38. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

39. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 5 (A.B.A. 2018) ("The Rule does not prohibit uses that do not disadvantage the client.").

40. *Id.*

41. The title of Model Rule 1.8 is "Conflict of Interest: Current Clients: Specific Rules."

client consents or an exception applies,[42] and Model Rule 1.8(b) prevents use of current client information to the disadvantage of a current client without client consent.[43] Thus, the lawyer does not necessarily keep all current client information cloistered. Current client information can be used, if it is not disadvantageous to the client, and it can be revealed if it falls into a Model Rule 1.6 or other exception. But relevant to this discussion, there is no exception to Model Rule 1.6 that allows the attorney to reveal client information if it is "publicly available."[44] Model Rule 1.8(b) has been interpreted similarly as preventing a lawyer from using information that is publicly available if it would be detrimental to the client.[45]

D. ABA Model Rules of Professional Conduct 1.9 and 1.18(b)

Prospective and former client information is generally afforded less protection than current client information under the Model Rules. Model Rule 1.9(c), concerning former clients, has a "generally known" exception. Rule 1.9(c) states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.[46]

The reveal/use dichotomy is evident, and addressing 1.9(c)(2) first, an attorney may not *reveal* former client information unless an exception applies, just like current client information.[47] But different from Model Rule 1.8(b), an attorney

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42. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2018).

43. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

44. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) ("Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.").

45. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 417, at n.13 (2000) ("The Committee notes that a more stringent rule applies against the use of information during a current representation. The rules do not permit the use of this information to the disadvantage of the client, even if it has become generally known.").

46. MODEL RULES OF PRO. CONDUCT r. 1.9(c) (A.B.A. 2018).

47. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(2) (A.B.A. 2018); *see also* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017). Comment eight to Model Rule 1.9 confuses the matter by stating that "[p]aragraph (c) provides that information acquired by the lawyer in the

may *use* former client information if it is "generally known," even if it is disadvantageous to the former client.[48]

Model Rule 1.18(b) concerning prospective clients is similar. It states that when a person consults with a lawyer "about the possibility of forming a client-lawyer relationship," [49] "a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."[50] This prohibition applies even if no client-lawyer relationship is formed.[51] Thus, whether client information is "generally known" is relevant to an analysis of whether an attorney can use client information in both the prospective and former client analysis.

"Generally known" is not defined in Model Rule 1.9 or its comments, or in Model Rule 1.0 with the other defined terms. The ABA defined the term in a 2017 ethics opinion as follows:

> [I]nformation is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media.[52]

The opinion clarifies that information that the public can find is not information that is generally known. It stated:

> Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.[53]

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course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client." MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (A.B.A. 2018). Comment eight implies that the lawyer could reveal information if it was not disadvantageous to the client. However, Model Rule 1.9 only has the limitation regarding disadvantage to the client as to use of information. It does not have that limitation as to disclosure of client information.

48. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (A.B.A. 2018).

49. MODEL RULES OF PRO. CONDUCT r. 1.18(a) (A.B.A. 2018).

50. MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018).

51. *Id.*

52. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

53. *Id.*

It further stated, "[T]he phrase 'generally known' means much more than publicly available or accessible. It means that the information has already received widespread publicity."[54]

Thus, as to a former and prospective client, an attorney cannot use information that is publicly available or accessible unless the information has gained public or industry-wide notoriety, or it is not disadvantageous to the client. There is no definition for this notoriety standard, and it seems contrary to a common understanding that if a layperson could find the information it would be "generally known."[55]

A different definition is used in a Model Rule 1.9(a) conflicts analysis involving a former client and confidential information. A lawyer is not able to represent a new client in a matter that is "the same" or "substantially related" to the former client matter when the new client's interests are materially adverse to the former client.[56] According to Model Rule 1.9 comment three, matters are substantially related if there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the [new] client's position in the subsequent matter."[57]

Confidential factual information is not defined, but the comment states that "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."[58] As to organizational clients, the comment states that "general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."[59] Thus, in a Model Rule 1.9(a) conflicts analysis, as opposed to an analysis involving use of former client information in Model Rule 1.9(c), public information and general organizational information are not confidential types of information.

Perhaps this dichotomy can be explained by the policy behind each subsection of Model Rule 1.9. The stricter public notoriety standard in Model Rule 1.9(c) prevents a lawyer from using former client information. The

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54. *Id.* (quoting ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017) (discussing former comment 4A to New York Rule 1.6)).

55. *See generally*, Suzanne Lever, *Myth Busters: What Is Generally Known About the Lawyer's Duty of Confidentiality?*, 26 N.C. STATE BAR J., no. 4, Winter 2021, at 38 (discussing popular opinion that publicly available information is generally known). As a side note, the ABA Model Rules on conflicts have several terms of art, such as "directly adverse," "materially adverse," and "substantially related," each with its own unique meaning to which "generally known" is now added, making conflicts analysis even more challenging.

56. MODEL RULES OF PRO. CONDUCT r. 1.9(a) (A.B.A. 2018).

57. MODEL RULES OF PRO. CONDUCT r. 1.9(a) cmt. 3 (A.B.A. 2018).

58. *Id.*

59. *Id.*

lawyer's use of former client information may only serve the lawyer's interests and not necessarily serve any public interest, although there are several scenarios in which the lawyer's use could serve the public interest.[60] The confidential information standard in Model Rule 1.9(a), although it benefits the lawyer's employment interest, also benefits the public's interest in allowing people to select and retain their attorney of choice while protecting a former client's information that is nonpublic. Neither the rule nor the comments, nor ABA Opinion 17-479 that created the disparity, discuss the policies behind the rule that support this inconsistency.[61] All Model Rule 1.9 states is that "[t]he provisions of this Rule are for the protection of former clients . . . ."[62]

Although stated only in the context of lawyers who end a relationship with a firm, Model Rule 1.9 comment four discusses competing policy concerns:

> First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association . . . . If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.[63]

Thus, in this context, Model Rule 1.9 is not to be applied with "unqualified rigor" because that would inhibit lawyers' ability to change jobs and limit clients' reasonable choice of counsel. If this policy reasoning is applied to Model Rule 1.9 as a whole, it would further explain the narrower confidentiality standard regarding publicly available information in a conflicts analysis where access to counsel and lawyers' opportunities to move firms are at issue.

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60. For example, where a lawyer is using former client information to rectify a wrong. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000) (discussing times when secrecy is disadvantageous to society where a person's plight is more sympathetic than the client's whose secrecy is being protected or where a great public harm could be avoided or a great public good accomplished). Further, lawyer education and the public's interest in information about the legal system are other beneficial uses of former client information. Michael D. Cicchini, *On the Absurdity of Model Rule 1.9*, 40 VT. L. REV. 69, 100–02 (2015).

61. ABA Formal Opinion 479 does not mention Model Rule 1.9 comment three. *See* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

62. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 9 (A.B.A. 2018).

63. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).

E. The Restatement of the Law Governing Lawyers, Sections 59 and 60

The "generally known" requirement in Model Rule 1.9 is different from the definition in the Restatement (Third) of the Law Governing Lawyers. Initially, the Restatement definition does not require notoriety. The relevant Restatement provision states that confidential information "includes information that becomes known by others, so long as the information does not become generally known."[64] It defines "generally known" as follows:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense.[65]

Under this definition, information that a member of the public could find without "special knowledge or substantial difficulty or expense" is information that is generally known. Further, unlike the Model Rules that use the term "generally known" only for the use of former or prospective client information, the Restatement applies the term "generally known" to all confidential client information.[66] With this definition, the Restatement prevents a lawyer from using or disclosing confidential client information "if there is a reasonable prospect" that use or disclosure "will adversely affect" a client's material interest, and the lawyer must take reasonable steps to prevent use or disclosure by the lawyer's agents.[67] Thus, the Restatement definition is narrower. First, the client information must be confidential. If the client information is easily accessible to the public, it is not confidential and can be used or disclosed, even if such use or disclosure is adverse to a material client interest.[68] Even if the information is confidential, it can be used or disclosed if that use or disclosure would not adversely affect a client's material interest.[69] Model Rule 1.6 prevents disclosure of all client information even if it is publicly available and even if the

64. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b (A.L.I. 2000).

65. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

66. The Restatement essentially applies the ABA position on confidentiality for former and prospective clients to all clients. Thomas Spahn, *Lawyers' Duty of Confidentiality, Part V: Obligations to Former Clients*, BLOOMBERG L. (Aug. 27, 2014), https://news.bloomberglaw.com/legal-ethics/lawyers-duty-of-confidentiality-part-v-obligations-to-former-clients [https://perma.cc/8K55-VXUG].

67. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1) (A.L.I. 2000).

68. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

69. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1) (A.L.I. 2000).

disclosure would not disadvantage the client, unless it falls within a stated exception.[70] However, similar to the Restatement, Model Rule 1.8(b) prevents use of publicly available information that is adverse to the client.[71] Also, similar to the Restatement, if the client requests that information not be used or disclosed, then under the Model Rules the lawyer must keep that information confidential.[72]

The policy behind the Restatement's rule is a balancing of the attorney's free speech interests along with the costs of the secrecy to society when a person whose "personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed" versus the need for lawyers to have client information to accomplish the clients' lawful objectives.[73] This recognizes that "[t]here is no important social interest in permitting lawyers to make unconsented use or revelation of confidential client information for self-enrichment in personal transactions."[74]

Similarly, the asserted policy reason behind the broad confidentiality rules in the Model Rules is that an attorney must keep client information confidential so that a client will trust the lawyer and fully disclose even detrimental information because such disclosure is necessary for effective legal representation.[75] The Restatement lists the same policy consideration with a narrower confidentiality rule. Thus, the policy consideration regarding the necessity of client disclosure of information to an attorney under the cloak of confidentiality does not necessarily mandate the broad confidentiality rules in the Model Rules. The question is whether this policy concern touted as requiring the broad confidentiality rules in Model Rules 1.6, 1.9, and 1.18(b) remains valid when the client information is easily accessible, when the information serves other valid purposes, and/or when other competing policy purposes outweigh the prohibition. The Restatement's position is that it does not.

F. ABA Model Rule of Professional Conduct 3.6

Other Model Rules also provide exceptions to the disclosure and use prohibitions, and these rules have policy justifications of their own. As mentioned in the Introduction, Model Rule 3.6, concerning trial publicity, allows for a lawyer to disclose information in the public record. Initially, Model Rule 3.6(a) states that "[a] lawyer who is participating or has participated in the

70. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018).

71. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

72. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 59 cmt. d, 60(1)(a) (A.L.I. 2000). Model Rule 1.6 discusses this point in the inverse. Unless an exception applies, the lawyer must keep information confidential unless the client gives informed consent allowing the lawyer to reveal it. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2018).

73. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000).

74. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. j (A.L.I. 2000).

75. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2018).

investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[76] Model Rule 3.6 section (b) contains exceptions to section (a). Relevant to this paper, Model Rule 3.6(b)(2) states, "Notwithstanding paragraph (a), a lawyer may state: . . . information contained in a public record . . . ."[77]

Model Rule 3.6's competing policy concerns are protecting the right to a fair trial for the litigants while safeguarding the right to free speech and having transparency regarding the judicial process.[78] Comment one to Model Rule 3.6 explains these policy concerns:

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at securing its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.[79]

Attorney free speech and Model Rule 3.6 have a long history currently represented by the United States Supreme Court decision in *Gentile v. Nevada State Bar*.[80] *Gentile* concerned the discipline of a criminal defense attorney, under Nevada Supreme Court Rule 177, for a prepared statement that he made to the press.[81] He stated generally that the evidence showed his client's

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76. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2018).

77. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018). Model Rule 3.6 comment four explains that section (b) statements are not prohibited by section (a) because they "would not ordinarily be considered to present a substantial likelihood of material prejudice . . . ." MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 4 (A.B.A. 2018).

78. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (A.B.A. 2018).

79. *Id.*

80. 501 U.S. 1030 (1991).

81. *Id.* at 1033. Nevada Supreme Court Rule 177, at the time, "prohibit[ed] an attorney from making 'an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.'"

innocence, that the likely thief was a police detective, and that witnesses, who were drug dealers or convicted criminals, had only accused the defendant in response to police pressure.[82]

The case was characterized as concerning the punishment of "classic political speech" aimed at "public officials and their conduct in office."[83] The divided decision started by discussing the important policy interests at issue, repeating a statement that the Court had made in 1966 that "[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[84] It further stated that "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."[85]

The Court also explained in a discussion regarding balancing First Amendment rights against the State's interest in regulating an activity that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."[86]

So, despite the First Amendment, attorney speech can be regulated in the courtroom during a proceeding. An often-quoted statement from the Court in *Seattle Times Co. v. Rhinehart*[87] expresses that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' . . . on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant."[88]

The *Gentile* court stated that it was not determining the constitutionality of ABA Model Rule of Professional Conduct 3.6 because its "substantial likelihood of material prejudice standard is not necessarily flawed."[89] Instead, the Court determined that it was the Southern Nevada Disciplinary Board of the State Bar's interpretation of the Nevada Rule 177 that was unconstitutional because it violated the First Amendment.[90]

Based on the record, the Court determined that there was no support for the Nevada court's conclusion that the speech presented a substantial likelihood of

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82. *Id.* at 1045.

83. *Id.* at 1034 (Kennedy, J.) (plurality opinion). There were two majorities in this decision. Justice Kennedy's opinion as to Parts III and VI was joined by Justices Marshall, Blackmun, Stevens, and O'Connor, and his opinion as to Parts I, II, IV and V was joined by Marshall, Blackmun, and Stevens. Justice Rehnquist's opinion in Parts I and II was joined by White, O'Connor, Scalia, and Souter, and his dissenting opinion as to Part III was joined by White, Scalia, and Souter. O'Connor filed a concurring opinion.

84. *Id.* at 1035 (Kennedy, J.) (plurality opinion) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

85. *Id.* at 1034 (Kennedy, J.) (plurality opinion).

86. *Id*. at 1075 (Rehnquist, J.) (plurality opinion).

87. 467 U.S. 20, 32–33 (1984).

88. *Id*. at 32 n.18 (quoting *In re* Halkin, 598 F.2d 176, 186 (D.C. Cir. 1979)).

89. *Gentile*, 501 U.S. at 1036 (Kennedy, J.) (plurality opinion).

90. *Id.* at 1033 (Kennedy, J.) (plurality opinion).

material prejudice,[91] in part, because the attorney's statements were made six months before the trial and because they were in response to a barrage of newspaper articles[92] that the attorney believed would prejudice the jury pool and were harmful to his client's health. Relevant to this paper, the Court determined that "[m]uch of the information," the lawyer stated, "had been published in one form or another, obviating any potential for prejudice."[93]

Model Rule 3.6 is an attempt to balance competing rights—the attorney's right to free speech and the defendant's right to a fair trial. The safe harbor provision in Model Rule 3.6(b) represents the Model Rule's current balancing of those interests. Under Model Rule 3.6(b), information that is in the public record is not confidential.[94] Thus, as to information in the public record, Model Rule 3.6(b) is an exception to Model Rule 1.6 based, in part, on the idea that repeating information in the public record does not create a substantial likelihood of material prejudice.

As a result of the *Gentile* opinion, Model Rule 3.6 was amended to include a retaliation provision, which states, "Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[95] Such a statement is required to be limited to only the information necessary to answer the publicity.[96] The rule allows an attorney to breach confidentiality to respond to negative publicity.

Thus, unlike the confidentiality rules in the Model Rules, Model Rule 3.6(b) allows disclosure of information in the public record, referencing other policy concerns that compete with the premise that client information must be broadly protected to allow full discourse between clients and lawyers.

G. ABA Model Rule of Professional Conduct 3.8(f)

Relatedly, Model Rule of Professional Conduct 3.8(f) states that:

> The prosecutor in a criminal case shall . . . (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a

91. *Id.* at 1039 (Kennedy, J.) (plurality opinion).

92. *Id.* at 1039–41, 1044 (Kennedy, J.) (plurality opinion). The attorney stated he was aware of at least seventeen articles in major local newspapers and numerous local television news stories. *Id.* at 1042.

93. *Id.* at 1046 (Kennedy, J.) (plurality opinion) (quoting ANN. MODEL RULES OF PRO. CONDUCT 243 (A.B.A. 1984), which states that the "extent to which information already circulated significant factor in determining likelihood of prejudice.").

94. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018).

95. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2018).

96. *Id.*

> substantial likelihood of heightening public condemnation of the accused . . . .[97]

Model Rule 3.8 comment five explains this rule's relationship to Model Rule 3.6. It states:

> Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused . . . . Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).[98]

The comment states that Model Rule 3.6's safe harbors apply to prosecutors, and thus prosecutors can make statements regarding information in the public record. There is no definition of "information in the public record" in the Model Rules.

H. ABA Model Rule of Professional Conduct 5.6

Model Rule 5.6(b) relatedly prohibits "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[99] This rule was the subject of ABA Formal Opinion 00-417, which concluded that a settlement agreement that prohibited an attorney from *using* information learned during the current controversy in a subsequent controversy against the same defendant, restricted the lawyer's right to practice in violation of Model Rule 5.6(b).[100] The reasoning is that when a lawyer cannot use information that the lawyer would otherwise be able to use under the rules, then the lawyer cannot adequately represent a client.[101] A rationale behind Model Rule 5.6 is that "permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals."[102] Agreements that prohibit an attorney from *disclosing* information, however, are allowed.[103]

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97. MODEL RULES OF PRO. CONDUCT r. 3.8(f) (A.B.A. 2018).

98. MODEL RULES OF PRO. CONDUCT r. 3.8(e) cmt. 5 (A.B.A. 2018).

99. MODEL RULES OF PRO. CONDUCT r. 5.6(b) (A.B.A. 2018).

100. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 417 (2000).

101. *Id.*

102. *Id.* (quoting A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 371 (1993)). *See also* D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006) (explaining the balancing of the policy issues, states, "This is a policy choice that the value to future clients of the ability to choose the best lawyer to represent them exceeds the harm to the current client of not being able to trade for consideration her lawyer's ability to sue the settling defendant in the future.").

103. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 417 (2000).

Disclosure can be prohibited, but use cannot be prohibited where it would impede an attorney's right to practice, limit clients' choice of attorney, and where the attorney would otherwise be able to use the information under the Model Rules.[104]

Specific to public information, several state ethics opinions interpreting Rule 5.6 determined that where client information has become public or is in the public record, an agreement restricting a lawyer's use or disclosure of that information violates Rule 5.6.[105] These opinions did not require public notoriety as a condition of use or disclosure.[106] As explained in a Chicago ethics opinion, drawing the line to prohibit a settlement agreement that prevents use or disclosure of public information "strikes an appropriate balance between the genuine interests of parties who wish to keep truly confidential information confidential and the important policy of preserving the public's access to, and ability to identify, lawyers whose background and experience may make them the best available persons to represent future litigants in similar cases."[107]

Thus, several model rules are implicated when discussing confidentiality and publicly available information. These rules contained different standards for current client information versus prospective and former client information, and a distinction between disclosure versus use of confidential client information. However, these distinctions do not explain why a prosecutor can reveal information in the public record about a defendant under Model Rule 3.8 and public information cannot be restricted under Model Rule 5.6, but that same information is confidential under Model Rules 1.6 and 1.9. Policy reasons can help explain these differences, but not explicitly or convincingly, as will be discussed in Part III. Further, no policy reasoning has been officially given for why publicly available information is treated differently in Model Rule 1.9(a) versus Model Rule 1.9(c). The next section demonstrates that courts and disciplinary committees balance these policy concerns differently resulting in

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104. *Id.*

105. D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006) ("A settlement agreement may provide that the terms of the settlement or other non-public information may be kept confidential, but it may not require that public information be confidential."); Md. State Bar Ass'n Comm. on Ethics, Formal Op. 07 (2016) ("Maryland Rule 5.6 prohibits a lawyer from agreeing (or asking another lawyer to agree) never to use or disclose public information regarding a matter."); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 730 (2000) (settlement agreement violated ethics rule where it prohibited the lawyer from disclosing public information); State Bar Ass'n of N.D. Ethics Comm., Formal Op. 05 (1997) ("Under Rule 5.6(b) an attorney may not agree—even at a client's request: . . . [t]o keep confidential information that is not confidential client information under Rule 1.6, for example, information that is a public record . . . ."); Chi. Bar Ass'n Comm. on Pro. Resp., Informal Op. 2012-10 (2013) ("[E]thics authorities have found that a settlement agreement may not prohibit a party's lawyer from disclosing information that is publicly available . . . .").

106. The case at issue in D.C. Ethics Op. 335 had received "substantial media attention." However, the committee's reasoning was not based on the public notoriety but instead on the fact that information restricted in the agreement was in the public record once the complaint was filed. D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006).

107. Chi. Bar Ass'n Comm. on Pro. Resp., Informal Op. 2012-10 (2013).

states taking different positions on when publicly available information remains confidential.[108]

II. COURT, DISCIPLINARY, AND ETHICS DECISIONS

This section first discusses states that follow the Restatement rule or an equivalent narrow rule that exempts publicly available information from the confidentiality rules. It follows with a discussion of the state courts that have endorsed the narrow rule, but the state ethics opinions follow the broad notoriety standard. Next, it discusses states that have moved to a broad confidentiality rule or have always used the broad rule. Opinions concerning the public record exception in Rule 3.6 follow, and this section concludes by discussing the use of confidential information.[109] This section demonstrates that although it might be possible to predict how some states will treat the confidentiality of publicly available information, for other states that is not possible, and there is a lack of consistency among states.

A. States Where Publicly Available Information May Not Be Confidential

1. Narrow Rule 1.6: Illinois, Louisiana, Missouri, New Jersey, & Washington.—In a 2010 disciplinary case, where an attorney called a client's wife and told the wife of the client's affair after a third party mentioned the affair in open court, the Illinois Review Board interpreted both Illinois Rule 1.6 and 1.9.[110] As to Rule 1.6, at the time of this decision, Illinois's confidentiality rule followed the confidence and secret format.[111] Under this rule, the Review Board determined that the client's affair was not a secret because the affair was mentioned by a third party in open court.[112]

As to public records, in 1996, the Louisiana Supreme Court stated that information in the public record is not confidential under Rule 1.6.[113] In this case, based on the client's request, the attorney did not inform the client's nephew, who was purchasing property from the client (his aunt), that there was a mortgage on the property. The court determined that "[b]ecause the mortgage was filed in the public record, the disclosure of its existence could not be a

108. *See also* People v. Muhr, 370 P.3d 677, 695 (Colo. 2016) ("[A]uthorities differ as to whether a lawyer is permitted to reveal information generally known to all members of the public . . . .").

109. Interpretations of Rule 5.6 are consistent regarding publicly available information, so they were only discussed in Part I. The rules discussed in Part II have differing interpretations regarding publicly available information.

110. *In re* Murawski, No. 6243546, 2010 WL 2007961, at *16–19 (Ill. Att'y Registration & Disciplinary Comm'n May 12, 2010).

111. *Id.* at *16–17.

112. *Id.* at *17. Further, the client's testimony that the revelation was detrimental to his marriage was not credible. *Id.* at *16.

113. *In re* Sellers, 669 So.2d 1204 (La. 1996).

confidential communication, and was not prohibited by Rule 1.6."[114] Both Missouri and Washington courts have determined that the attorneys had not violated Rule 1.6 when revealing information that was already in the public record.[115]

In 1982, the Supreme Court of New Jersey determined that the New Jersey disciplinary committee had not provided by clear and convincing evidence that a former prosecutor violated New Jersey Disciplinary Rule 4–101(B)(1), New Jersey's precursor to Rule 1.6, prohibiting an attorney from "[r]eveal[ing] a confidence or secret of his client."[116] The information that the attorney mentioned—that the defendant had agreed but then refused a lie detector test and had turned down a plea bargain—had already been publicly revealed.[117] New Jersey subsequently adopted the Model Rules,[118] but different from Model Rule 1.6, New Jersey's Rule 1.6 has an exception that allows a lawyer to reveal information that is "generally known."[119] The official comment from September 1, 2018, states that the rules follow the Restatement (Third) of the Law Governing Lawyers on confidential information,[120] which means generally that publicly available information that is not difficult to obtain is generally known and not confidential.[121]

In Michigan and New York, courts recognize an exception for publicly available information, but ethics opinions do not, creating uncertainty as to whether publicly available information remains confidential under Rule 1.6 in those states.[122] The situation is also uncertain in Alabama where the court stated

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114. *Id.* at 1206. The attorney was charged with violating Louisiana Rule of Professional Conduct 4.1(b) for "failing to disclose a material fact to a third person when disclosure was necessary to avoid assisting in a criminal or fraudulent act." *Id.* at 1205.

115. *In re* Lim, 210 S.W.3d 199, 201 (Mo. 2007) (en banc) (client outstanding debt publicly available due to collection action); *In re* Schafer, 66 P.3d 1036, 1042 (Wash. 2003) (en banc) (information was in deeds, probate file, and gambling commission records, and therefore all publicly available).

116. *In re* Rachmiel, 449 A.2d 505, 513 (N.J. 1982) (quoting New Jersey Disciplinary Rule 4-101(B)(1)).

117. *Id.*

118. *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A. (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.

119. N.J. RULES OF PRO. CONDUCT r. 1.6(a)(2) (N.J. STATE BAR ASS'N 2020) ("(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d).").

120. N.J. RULES OF PRO. CONDUCT r. 1.6, official cmt. (N.J. STATE BAR ASS'N Sep. 1, 2018).

121. *See* N.J. Advisory Comm. on Pro. Ethics, Op. 738 (2020). This ethics opinion concerned responding to negative online reviews and reiterated that the official comment to New Jersey Rule 1.6 adopting the Restatement (Third) of the Law Governing Lawyers definition of confidentiality governs. *Id.* at n.1.

122. *See infra* Parts II.B.1 and 2.

a broad rule but applied it narrowly in a situation where public information was one factor.[123] These states' decisions are discussed in Part B.

2. Narrow Rule 1.9: Florida, Hawaii, Minnesota, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, & West Virginia.—Some states have determined that publicly available information regarding a former client can be used or disclosed under Rule 1.9. For example, North Carolina's Rule 1.9 excepts public information in both Rule 1.9(c)(1) regarding use and its Rule 1.9(c)(2) regarding disclosure if the information is not embarrassing or detrimental if disclosed.[124] North Carolina's Rule 1.9 comment 8 clarifies by stating:

> To reveal is to make public something that was secret or hidden. A lawyer cannot reveal that which has already been revealed via public disclosure. Accordingly, the prohibition on a lawyer revealing information pursuant to Rule 1.9(c)(2) does not extend to information that has been made public because public information by its nature is no longer capable of being revealed.[125]

Tennessee Rule 1.9 comment 8a also adopts the Restatement definition of generally known stating that publicly available information that does not require special knowledge or substantial difficulty or expense is not confidential.[126] Referencing this comment, a 2014 Tennessee ethics opinion determined that a will or other testamentary documents in the public record are generally known and can be revealed by the lawyer.[127]

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123. *See infra* Part II.B.3.

124. N.C. RULES OF PRO. CONDUCT r. 1.9(c)(1), (2) (N.C. STATE BAR 2022). Both subsections exempt information contained in the public record, disclosed at a public hearing, or information otherwise publicly disseminated. Rule 1.9(c)(2), although exempting the information, only allows disclosure if the information is not embarrassing or detrimental to the client if disclosed.

125. N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (N.C. STATE BAR 2022) (citation omitted).

126. TENN. RULES OF PRO. CONDUCT r. 1.9 cmt. 8a (TENN. BAR ASS'N 2023).

127. Tenn. Bd. Pro. Resp., Formal Op. 2014-F-158 (2014) (citing TENN. RULES OF PRO. CONDUCT r. 1.9 cmt. 8a).

Courts in Florida, [128] Hawaii, [129] and Minnesota [130] addressing disqualification in criminal cases have determined, without much analysis, that under Rule 1.9, concerning whether an attorney could "use" information from a prior representation, that criminal charges are a matter of the public record and consequently, are "generally known" and not disqualifying. [131] In another disqualification case in a criminal matter, where the defense attorney had previously represented a potential government witness, and concerning whether the matters were substantially related under Rule 1.9, a Utah district court ruled that disqualification was not necessary because the matters were not substantially related, and the witness's prior drug activity was a matter of public record.[132] The court did not discuss whether the information was "generally known."[133]

The West Virginia Supreme Court stated its policy rationale when addressing West Virginia's Rule 1.9 in a criminal context. In a 2002 West Virginia Rule 1.9 case, the court overturned the disqualification order of the defense counsel where a prospective client (co-defendant) hired a different attorney, but his wife had disclosed information to the defense counsel's paralegal.[134] The West Virginia Supreme Court determined that the disclosed

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128. Freund v. Butterworth, 165 F.3d 839, 864–65 (11th Cir. 1999). Florida's rule 1.9 at that time stated, "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." *Id.* at 865 (emphasis omitted). Previously, Florida had a Rule 1.9 comment that defined generally known as "information of the type that a reasonably prudent lawyer would obtain from public records or through authorized processes for discovery of evidence." Amend. to Rules Regulating the Fla. Bar, 820 So.2d 210, 214 (Fla. 2002) (Pariente, J., concurring in part and dissenting in part). Currently, Florida's Rule 1.9 comment retains this language but added the Model Rule language. The comment now defines generally known as "[i]nformation that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonable prudent lawyer who had never represented the former client . . . . The essential question is whether, but for having represented the former client, the lawyer would know or discover the information." FLA. RULES OF PRO. CONDUCT r. 1.9 cmt. (FLA. BAR 2025).

129. State v. Mark, 231 P.3d 478, 511 (Haw. 2010).

130. State v. Mancilla, No. A06-581, 2007 WL 2034241, at *1 (Minn. Ct. App. July 17, 2007). In this case, the criminal defendant stated that his counsel's conflict of interest resulted in his counsel not using a witness' two prior convictions to impeach the witness because she misunderstood the scope of Minnesota Rule of Professional Conduct 1.9(c). The Minnesota Court of Appeals stated that prior convictions are a matter of public record and fall within the Rule 1.9(c) generally known exception and that defense counsel may have had strategic reasons for not using the prior convictions to impeach the witness. *Id*. at *2–3.

131. *Freund*, 165 F.3d at 864–65.

132. United States v. Valdez, 149 F.R.D. 223, 225 (D. Utah 1993).

133. The court did not state whether it was relying on Rule 1.9, comment three or the "generally known" exception in Rule 1.9, but the court quoted all of Rule 1.9, including the generally known exception in Rule 1.9(b) and did not mention any comments to Rule 1.9. *Id*. at 225–26.

134. State *ex rel.* Youngblood v. Sanders, 575 S.E.2d 864, 872–73 (W. Va. 2002).

information was generally known because it was in police reports.[135] The court stated it was balancing the defendant's constitutional right to counsel versus a fundamentally fair trial process and that the right to choice of counsel can only be overcome by a serious and actual conflict.[136] An Oregon ethics opinion interpreting "generally known" in Oregon's Rule 1.9(c)(1) adopted the Restatement definition and gave more specific examples stating that information in "magazine[s] . . . , newspaper articles, court pleadings, published court decisions, and public records in government offices [is] generally known, while pleading filed under seal and records of an international court are not."[137] The opinion stated that not all public information is generally known if obtaining it "would require substantial difficulty or expense."[138] But that criminal convictions are generally known "because they are part of the public record that require no expertise or expense to access them."[139]

Interestingly, none of these disqualification cases in this section stated that they were relying on comment three to Rule 1.9, which states: "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."[140] Instead, the courts' disqualification analysis mainly concerns whether the information is generally known.

Outside of criminal activity, in a civil breach of fiduciary duty case concerning public records, the Pennsylvania Supreme Court used the Restatement definition of confidential information to interpret Rule 1.9 and duties owed to former clients.[141] However, it denied a summary judgment motion stating that there was an issue of fact as to whether an affidavit that was inadvertently attached to a filed document in an unrelated criminal matter was publicly available.[142] The court stated that even though the document was available on PACER for several years, there was a question as to whether it was generally known because the document was not "'indexed' under Appellant's name and that a person interested in the FBI Affidavit 'could obtain it only by means of special knowledge.'"[143] Whether this information was confidential

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135. *Id.*; *see also* State v. Rogers, 744 S.E.2d 315, 324 (W. Va. 2013) (court refused to disqualify attorney when attorney stated that only information that would be used to impeach a witness was in the public record).

136. *Youngblood*, 575 S.E.2d at 872 (quoting United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982), *rev'd on different grounds*, 465 U.S. 259 (1984)).

137. Or. Bar Ass'n Bd. of Gov., Formal Op. 110, at n.2 (2005, rev. 2016) (citing Cohen v. Wolgin, Civ. A. No. 87-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993)).

138. *Id.* (citing *In re* Adelphia Commc'ns. Corp., No. 02-41729REG, 04 Civ. 2192DAB, 2005 WL 425498 (S.D.N.Y. Feb. 16, 2005)).

139. *Id.* (citing State v. Mancilla, No. A06-581, 2007 WL 2034241, at *8 (Minn. Ct. App. July 17, 2007)).

140. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).

141. Dougherty v. Pepper Hamilton LLP, 133 A.3d 792 (Pa. Super. Ct. 2016).

142. *Id.* at 800.

143. *Id. See also* Cohen v. Wolgin, Civ. A. No. 87-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993), where the court adopted the Restatement definition and gave an in-depth discussion of

was relevant to whether the law firm breached its fiduciary duties to its former client.[144]

The above states take a consistent position regarding the confidentiality of public information either with both Rule 1.6 and 1.9 or at least a consistent position as to one rule or the other. Below are states where that consistency is absent.

B. States Where Case Law Has Determined that Publicly Available Information May Not Be Confidential, but State Ethics Opinions Protect Publicly Available Information

1. Rules 1.6 & 1.9: Michigan.—In a 2008 disqualification case from the Sixth Circuit, the court, in interpreting Michigan Rules of Professional Conduct 1.6, 1.9, and the definition of "generally known," followed the Restatement's definition of confidential information that does not include information that the public can easily access.[145] It further stated, "Rule 1.9, by exempting information that is generally known, suggests that generally known information is similarly exempt from Rule 1.6's bar from disclosure."[146] The court then quoted State Bar of Michigan Formal Ethics Opinion R-4, which discussed when information may not be a confidence or a secret, stating, "[f]or example, where the only information acquired by the lawyer was a copy of a filed complaint forwarded to the defense firm by the client, since a filed complaint is, by its nature, both a public and a published document, there would thus be nothing confidential or secret."[147] Policy reasons discussed in Opinion R-4 were preventing junior associates or other firm members from being beholden to their original firms due to their handling of confidential information.[148]

Further, in a 2019 unreported disqualification case, the Eastern District Court of Michigan stated, "Although Rules 1.6 and 1.9 bar the disclosure of information obtained by a lawyer representing a client, 'documents or information that are public or published are not considered confidential under

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various sources, concluding that information published in a magazine article, two published Third Circuit Court opinions, pleadings in an Eastern District of Pennsylvania case, and information filed in the Corporate Bureau of the Secretary of the Commonwealth of Pennsylvania were generally known. *Id.* at *2–3. However, sealed pleadings and information in the Italian or American Embassy, and in an Italian court were not generally known. *Id.* at *3.

144. *Dougherty*, 113 A.3d at 800.

145. CenTra, Inc. v. Estrin, 538 F.3d 402, 422 (6th Cir. 2008).

146. *Id.* Michigan retains the Model Code of Professional Responsibility's confidences and secrets version of Rule 1.6. MICH. RULES OF PRO. CONDUCT r. 1.6(a) (STATE BAR OF MICH. 2025).

147. *CenTra*, 538 F.3d at 422 (quoting Mich. Bar Comm. on Pro. Ethics, Formal Op. R-4 (1989)).

148. Mich. Bar Comm. on Pro. Ethics, Formal Op. R-4 (1989) (citing *Bernstein, Bernstein, Wile & Gordon v. Ross*, 177 N.W.2d 193 (Mich. Ct. App. 1970)).

Michigan's Rules of Professional Conduct.'"[149] And in a 2021 unreported disqualification case, the Eastern District Court determined that the attorney had not violated Rule 1.9(c) when the attorney put an OWI guilty plea into evidence in a summary judgment motion.[150] The court stated that "the guilty plea . . . is a public record and the comments to MRPC 1.9 explain that nothing 'preclude[s] [a] lawyer from using generally known information about [a former] client when later representing another client.'"[151] The court determined that the "heavy burden to prove disqualification under MRPC 1.9(c)" had not been met.[152]

However, a 2018 Michigan ethics opinion, discussing the "generally known" exception in Michigan's Rule 1.9(c), adopted the public notoriety definition of "generally known" requiring that the information be "widely recognized by members of the public in the relevant geographic area, or . . . widely recognized in the former client's industry, profession, or trade."[153] Without referring to the previous Formal Opinion R-4 or the 2008 Sixth Circuit case, this informal opinion stated that "there is consensus among legal authority that information is not generally known merely because it is publicly available or might qualify as a matter of public record."[154] The majority of cases cited, however, were older than the Sixth Circuit case mentioned above and were not from Michigan.[155] Citing an unreported 2006 New Jersey case, the committee stated that "[t]he information must be within the basic understanding and knowledge of the public."[156] It concluded that "generally known 'does not mean

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149. State Farm Mut. Auto. Ins. Co. v. Elite Health Ctrs., Inc., No. 2:16-cv-13040, 2019 WL 2576360, at *3 (E.D. Mich. June 24, 2019) (quoting *Centra*, 538 F.2d at 423). The court stated:

> Moreover, as the parties well know from the extensive record in this heavily litigated case, State Farm has likely had multiple sources, including some publicly available ones, from which it was able to piece together the history of Katke's corporate dealings, without access to Miller Canfield's files. The accusation being leveled against Miller Canfield is a serious one, and very loose inferences will not suffice to convince the Court that the law firm's ethical integrity has been breached.

Id. at *3.

150. Allen v. Handover Ins. Grp., No. 2:19-cv-12024, 2021 WL 607101, at *3 (E.D. Mich. Jan. 14, 2021).

151. *Id.* (alteration in original).

152. *Id.*

153. Mich. Bar Comm. on Pro. Ethics, Formal Op. RI-377 (2018).

154. *Id.* (citing Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 572–73 (2d Cir. 1973); Law. Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995); Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 435 (Ohio 2004); Comm. on Legal Ethics v. Walker, 358 S.E.2d 234 (W. Va. 1987); Fla. Bar v. McCain, 330 So.2d 712 (Fla. 1976); EF Hutton & Co., Inc. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969)).

155. *See supra* note 154. The court cited the following cases later in the opinion: a 2013 Virginia bankruptcy case, *In re* Gordon Props, LLC, 505 B.R. 703 (Bankr. E.D. Va. 2013), and a 2010 Indiana case, *In re* Anonymous, 932 N.E.2d 671 (Ind. 2010). Both cases are not from Michigan.

156. Mich. Bar Comm. on Pro. Ethics, Formal Op. RI-377 (2018) (alteration in original) (citing Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854, at *1, *7 (D.N.J. Aug. 24, 2006)). Although New Jersey follows a narrow confidentiality rule in a Rule 1.6 analysis, it follows a broad confidentiality rule in a Rule 1.9 analysis. See *infra* Part II.C.2.

information that someone can find' in 'public sources.'"[157] Offering an example, the committee stated that "[g]enerally known does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the court house."[158]

2. Rules 1.6 & 1.9: New York.—New York Rule of Professional Conduct 1.6(a) states that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . ."[159] Confidential information as defined "does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."[160]

Previously, comment 4(A) to Rule 1.6 concerning the generally known exception in New York's Rule 1.6, stated, "Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process."[161] The comment was amended in 2010.[162] Comment 4(A) now states, "Information is not 'generally known' simply because it is in the public domain or available in a public file."[163]

In 2013, interpreting New York's confidentiality rules 1.6, 1.8, and 1.9, a New York ethics opinion stated that only information "known to a sizable percentage of people in 'the local community or in the trade, field or profession to which the information relates'" is generally known, determining that where "hundreds or thousands of homes are in foreclosure in any locale at any given time, we do not believe that the identity of particular properties that would make sound investments is 'generally known' within the meaning of Rule 1.6(a)."[164] It then determined that because the information was confidential under Rule 1.6,

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157. Mich. Bar Comm. on Pro. Ethics, Formal Op. RI-377 (2018) (citing *Anonymous*, 932 N.E.2d at 674).

158. *Id.* (citing *Gordon Props*, 505 B.R. at 707 n.6).

159. N.Y. RULES OF PRO. CONDUCT r. 1.6 (N.Y. STATE BAR ASS'N 2025).

160. *Id*. ("'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.").

161. SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED § 1.6:49 (2024).

162. *Id.*

163. N.Y. RULES OF PRO. CONDUCT r. 1.6 cmt. 4(A) (N.Y. STATE BAR ASS'N 2025).

164. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 991 (2013) ("This legislative history strongly suggests that information in the public domain may be protected as confidential information even if the information is not 'difficult or expensive to discover' and even if it could be obtained without 'great effort' and without a Freedom of Information request or other formal process.").

it could not be used under Rule 1.8 and remained confidential even if the lawyer switched firms under Rule 1.9.[165]

Subsequently, a 2015 ethics opinion applying the current comment 4(A) determined that if the information was reported in the public media or widely publicized by the client, it would fall within Rule 1.9(c), but that papers filed in a separate federal case did not fall within the exception without being widely publicized.[166] Recently, in a 2024 ethics opinion concerning whether a lawyer could publish an article that discussed legal issues that had arisen in the representation of a former client, the opinion referenced New York Rule of Professional Conduct Rule 7.1(r).[167] This rule "encourages lawyers to speak publicly and write for publication on legal topics that help lay persons identify legal problems."[168] In determining whether client information was "generally known" as to not be confidential under New York's Rule 1.6, the opinion referenced the 2013 and 2015 opinions mentioned above and stated, "We continue to believe that pleadings and other documents filed in a court case are not 'generally known' within the meaning of Rule 1.6" and thus, were not generally known under New York's Rule 1.9.[169] The opinion concluded that the lawyer could publish the article only if it did not reveal confidential information, which would not include the lawyer's "legal knowledge or legal research" but would include information available in court files.[170]

These ethics opinions did not cite any case law in support of the broad confidentiality standard. Instead, the 2015 ethics opinion only cited and recognized a 1998 case that reached the opposite conclusion. In 1998, the New York Court of Appeals interpreted DR 5-108(A)(2), which provided that "an attorney may not use 'any confidences or secrets of the former client except as permitted by DR 4-101 (C) or when the confidence or secret has become generally known.'"[171] The court held that information is generally known when it "was readily available in such public materials as trade periodicals and filings with State and Federal regulators."[172]

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165. *Id.*

166. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1057 (2015); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1125 (2017) ("[I]nformation is not 'generally known' simply because it is in the public domain or available in a public file" and consequently, lawyer could not discuss a former client's will); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1088 (2016) (information on client's website stating firm is representing the client may make the fact of representation generally known, but then the committee stated, "More broadly, if the fact that the law firm represents its co-op board clients is widely known in the local real estate industry than the information would be considered to be generally known.").

167. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1268 (2024).

168. *Id.* (citing N.Y. RULES OF PRO. CONDUCT r. 7.1(r)).

169. *Id.*

170. *Id.*

171. Jam. Pub. Serv. Co. Ltd. v. AIU, Ins. Co., 92 N.Y.2d 631, 636 (N.Y. 1998).

172. *Id.* at 637–38. The ethics opinions could have cited to Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), a New York case where an attorney was disqualified because

Notably, after the ethics opinions discussed above, in a 2019 unreported case, where the defendants sought dismissal of the case because the complaint relied on confidential information, the Southern District of New York adopted the Restatement definition of "generally known" for New York's Rule 1.6 in absence of a definition of "generally known" in the New York rules.[173] The court opined that New York courts would apply the Restatement definition of confidential information, holding "that where information is publicly filed (and the party seeking to protect it does not take immediate steps to do so), the information no longer qualifies as 'confidential.'"[174] In applying this rule as to the information in the complaint, the court stated, the court concluded that the information was no longer protected and stated that "the cat [wa]s out of the bag."[175]

The New York case law cited above only referenced Rule 1.6 and not Rule 1.9. New York, therefore, like Michigan, has case law reaching a different conclusion on Rule 1.6 than the ethics opinions. But as to Rule 1.9, in the absence of case law, the New York ethics opinions indicate that New York follows a broad confidentiality rule.

3. Rule 1.6: Alabama.—In a 1981 disqualification case based on the Alabama Code of Professional Conduct, the Alabama Supreme Court determined that there was a substantial relationship between the current quiet title matter and the matter that the defense lawyer had previously represented the intervenor, but the court did not disqualify the attorney because the only information the defense attorney had was a matter of public record and in the small town there was a limited number of available attorneys.[176] The intervenor accused the defense attorney of violating Disciplinary Rule 4-101(B), which prevented the lawyer from revealing a client's confidences or secrets.[177] The court stated that "once an attorney-client relationship is established all information coming to the attorney from his client, whether it be from public

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the current matter was substantially related and adverse to a former client. That court dismissed the argument that relevant confidential information of the former client was widely known throughout the industry, stating that confidential information disclosed to an attorney by a former client remains confidential even if "part of a public record" or if " there are other available sources of such information" or if "the lawyer received the same information from other sources." *Emle Indus.*, 478 F.2d at 572–73 (quoting H. DRINKER, LEGAL ETHICS 135 (1953)). More recent cases are used in this section on New York's rules.

173. Fischman v. Mitsubishi Chem. Holdings Am., Inc., No. 18-CV-8188 (JMF), 2019 WL 3034866, at *5 (S.D.N.Y. July 11, 2019).

174. *Id.* (citing Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 (2d Cir. 2004)).

175. *Fischman*, 2019 WL 3034866, at *5 (internal citation omitted). The *Fischman* court cited to a 2004 Second Circuit decision concerning the unsealing of court documents, which as to publicly available information used another euphemism and stated, "The genie is out of the bottle . . . . We have not the means to put the genie back." *Gambale*, 377 F.3d at 144. The Second Circuit court further stated in a footnote, "Once [information] is public, it necessarily remains public." *Id*. at 144 n.11.

176. *Ex parte* Taylor Coal Co. Inc., 401 So.2d 1, 8–9 (Ala. 1981).

177. *Id.* at 5–6.

records or not, is confidential.[178] However, the court determined that the situation was "very close to the exception that allows a lawyer to sue a former client where both have employed him with reference to the same business transaction," especially because the only legal information given was prepared from public documents, and thus, "in a legal sense is known to the whole world."[179] The court then balanced "the weighty considerations of those Canons against the need of the public to obtain counsel of its choosing" and concluded there was no violation of the Disciplinary Rules and refused to disqualify the attorney.[180] Thus, although this case concerned disqualification, the analysis concerned the confidentiality of information under the state's confidences and secrets rule. In this situation, the court referenced a broad rule but applied it narrowly based on policy.

4. Rule 1.9: Arizona.—In a 1995 disqualification case concerning Rules 1.9 and 1.10, the Arizona appellate court held that disqualification of the prosecutor was not necessary, when another prosecutor in the same office had previously represented the defendant's victim, because the trial court limited the government's impeachment of the victim to matters in the public record.[181] However, Arizona ethics opinions have held that information in the public record remains confidential.[182] Further, in response to a question about Rule 1.9, the FAQ section of the Arizona Bar website states that "[i]nformation is not generally known simply because it is publicly available. This exception contemplates information widely recognized by members of the public in the geographic area or widely recognized in the former client's industry, profession, or trade. *See* ABA Formal Op. 479."[183]

5. Rule 1.9: Illinois.—As mentioned previously, in a Illinois 2010 disciplinary case, where an attorney called a client's wife and told the wife of the client's affair after a third party mentioned the affair in open court, the Illinois Review Board interpreted both Illinois Rule 1.6 and 1.9.[184] As to Illinois's Rule 1.9, the Board recognized that there was no case precedent

178. *Id.* at 9.

179. *Id.*

180. *Id.*

181. *State v. Sustaita,* 902 P.2d 1344, 1347 (Ariz. Ct. App. 1995). The court later in discussing the appearance of impropriety claim stated that "no allegation that the public defender obtained confidential information about the victim from the public defender office's files that would be used to the victim's detriment." *Id.*

182. State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 22 (1987) ("The fact that the client's name and address may appear in a public record does not mean that the information should not be regarded as confidential."); State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 13 (1990) ("Even after filing suit . . . and [it becoming] a matter of public record, it may not have been sufficiently generally known . . . .").

183. *Best Practices from the Ethics Advisory Group: ER 1.9 Duties to Former Clients*, STATE BAR OF ARIZ., https://www.azbar.org/for-legal-professionals/ethics/best-practices/er-1-9-duties-to-former-clients [https://perma.cc/FDW4-F2V2] (last visited Feb. 20, 2025).

184. *In re* Murawski, No. 6243546, 2010 WL 2007961, at *1 (Ill. Att'y Registration & Disciplinary Comm'n May 12, 2010).

defining "generally known." [185] The administrator noted that "the only information given to Respondent about [the client's] sexual relationship with [the third party] was [her] public statements in court and the documentation [she] brought to court."[186] The Board determined that the woman's testimony during a public proceeding that she had engaged in an affair with the client "caused this information to become generally known." [187] The opinion recognized that an Illinois Court of Appeals case in interpreting the Canons of Professional Responsibility, which Illinois followed at that time, had stated that "the client's privilege in confidential information disclosed to his attorney is not nullified by the fact that the circumstances to be disclosed are part of a public record," but distinguished that case because the attorney had not learned the information from the client but from a third-party statement in court.[188] For these reasons, the charges were dismissed.[189]

Subsequently, however, in a 2022 Illinois ethics opinion concerning disqualification under Rule 1.9, the committee referenced the ABA's definition of "generally known," requiring that information be "widely recognized," stating that availability in public repositories or a discussion "in open court does not, alone, mean that the information is 'generally known.'"[190] This opinion did not concern a situation involving information stated in court or in the public record, but this definition was given when the committee pointed out that even if there is no conflict under Rule 1.9, the attorney still cannot use or reveal certain former client information. There is a question as to the value of this opinion because the opinion stated that Illinois Rule of Professional Conduct 1.9 comment three only allows disqualification to be avoided when information is generally known.[191] However, Illinois's Rule 1.9 comment three does not mention the term, "generally known" but instead states that public information is not disqualifying. This error is the only way to reconcile Rule 1.9 comment three with the ABA definition of generally known.

In summary, in Michigan as to Rule 1.6 and 1.9 and in Arizona and Illinois as to Rule 1.9, the case law does not support the broad notoriety standard that the state ethics opinions or rules are taking, making it unclear which standard

185. *Id.* at *18.

186. *Id.* at *17.

187. *Id.* at *19.

188. *Id.* at *17 (quoting Skokie Gold Standard Liquors v. Joseph, 452 N.E.2d 804, 813 (Ill. App. Ct. 1983)) The confidentiality discussion regarding matters in the public record was dicta because the court determined that the two matters were substantially related and consequently, confidential information is presumed.

189. *Id.* at *19.

190. Ill. State Bar Ass'n Comm. on Pro. Conduct, Advisory Op. No. 01 (2022). An earlier ethics opinion also concerning disqualification under Illinois Rule 1.9 had defined 'generally known' as "common knowledge in the community." Ill. State Bar Ass'n Comm. on Pro. Conduct, Advisory Op. No. 01 (2005). This opinion also did not concern publicly disclosed or available information.

191. Ill. State Bar Ass'n Comm. on Pro. Conduct, Advisory Op. No. 01 (2022).

courts will adopt in the future.[192] New York is similar as to Rule 1.6, but an absence of case law on Rule 1.9 indicates that the ethics opinions would govern, and New York would determine that publicly available information was disqualifying and must be kept confidential.[193] It is also not clear what position governs in Alabama concerning Rule 1.6 because the court cited a broad 1.6 rule but did not disqualify counsel based, in part, because the information was a matter of public record.[194]

Thus, among the states that have adopted the narrower rule in some form, there are states where an attorney may be able to predict the state's position on the confidentiality of publicly available information as to the state's Rule 1.6 or Rule 1.9. However, in other states, such a prediction is not possible. Below is a discussion of states that have adopted or consistently applied a broad confidentiality rule.

C. States Where Publicly Available Information is Confidential

The ABA has taken the position in Formal Opinion 04-433 that Model Rule 1.6 has no publicly available exception.[195] It stated, "Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer."[196] Consequently, under Model Rule 1.9(c)(2) there would be no publicly available exception because that section is governed by Model Rule 1.6. As discussed previously, as to use of former client information in Model Rule 1.9(c)(1), a 2017 formal opinion created the broad rule for "generally known" requiring notoriety.[197]

1. Broad Rule 1.6: Arizona, California, Colorado, D.C., Iowa, Massachusetts, Nevada, Ohio, Oregon, Pennsylvania, West Virginia, Wisconsin & Wyoming.—Several states have determined that information in the public record is confidential under Rule 1.6.[198] For example, a 2000 Arizona

192. *See supra* Parts I.B.1, B.4 & B.5.

193. *See supra* Part II.B.2.

194. *See supra* Part II.B.3.

195. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 433 (2004).

196. *Id.*

197. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

198. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 765–66 (Iowa 2010) (disclosure of information in a media interview regarding client's previous litigation violated Rule 1.6 even though information was publicly available and attorney had ended the representation); Colo. Bar Ass'n Ethics Comm., Formal Op. 130 (adopted Apr. 3, 2017, revised Nov. 17, 2018) ("There is no exception for disclosing information in public records or those public records themselves."); *In re* Herron, 441 P.3d 24, 46 (Kan. 2019) (where attorney revealed to court that client cheated on urinalysis test, court determined, despite attorney's argument test was publicly available, "duty of confidentiality survives the disclosure of the information through other sources."); State Bar of Nev. Comm. on Ethics & Pro. Resp., Formal Op. 41 (2009) (citing GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS § 9.15 (3d ed.

ethics opinion concluded that under Arizona Rule 1.6 "a lawyer is required to maintain the confidentiality of all information relating to representation, regardless of the fact that the information can be discovered elsewhere."[199] Later in 2017, in an attorney discipline case, the Arizona Supreme Court stated, "Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available."[200] Specifically, neither "[a] client's prior disclosure of information relating to her custody representation to friends nor availability of information in police reports and other public records . . . absolve[s] a lawyer of a violation of Rule 1.6."[201]

The West Virginia Supreme Court of Appeals compared its current Rule 1.6 with the older Model Code of Professional Conduct confidentiality rule, explaining that its current Rule 1.6 protects "*information* relating to representation of a client," which is broader than just protecting confidences and secrets.[202] Consequently, under this broad rule, in an attorney discipline case where the attorney revealed client information to a third party, the court determined that regardless of whether the information is publicly available, either through the public record or other available sources, the attorney would not be able to disclose it because the attorney learned of it during the representation.[203] Further, the court was not swayed by the fact that the information may be subject to public inspection under a FOIA request.[204]

Ohio had, and California and D.C. have, Rules 1.6 similar to the Model Code of Professional Conduct confidentiality rule, which references

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2005)) (public information is confidential under Rule 1.6 and "[t]elling a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case" violates Rule 1.6); *In re* Harman, 628 N.W.2d 351, 359–361 (Wis. 2001) (attorney disciplined under Rule 1.6 and 1.9(b) because the attorney revealed medical records once when the client was a current client and again when client was a former client even though medical records were in the public record). In *Harman*, the court stated, "Regardless of whether S.W.'s medical records lost their 'confidentiality' because they had been made part of the Wood County medical malpractice action, the fact remains that Attorney Harman obtained those records while he was representing S.W. and he then disseminated those records without her consent." *Id*. at 361. *See* State Bar of Wis. Comm. on Pro. Ethics, Formal Op. EF-17-02, at 3 (2017) ("Thus the Wisconsin Supreme Court has recognized that whether information has been previously publicly disclosed does not prevent the information from being protected by the Rule."); *In re* Merry, 5 N.W.3d 285, 291–92 (Wis. 2024) (generally known exception does not apply unless information is "widely recognized by members of the public").

199. State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 11 (2000) (citing State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 05 (1997) (citing *Ex parte* Taylor Coal Co., 401 So.2d 1 (Ala. 1981))).

200. *In re* Yosha, No. PDJ 2017-9071, 2017 WL 9480270, at *4 (Presiding Disciplinary J. of the Sup. Ct. of Ariz. Oct. 23, 2017).

201. *Id*. at *4. *See also In re* Johnson, No. 97-O-11791, 2000 WL 1682427, *10 (Cal. Bar. Ct. Oct. 26, 2000) (review committee determined attorney violated California's rule against revealing confidential information when the attorney told a client that another client was a convicted felon, even though the client's conviction was a matter of public record).

202. Law. Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861 (W. Va. 1995).

203. *Id.* at 856, 860.

204. *Id.* at 862.

confidences and secrets, but still interpreted their Rule 1.6 broadly.[205] In a California 2016 ethics opinion, the question was whether a lawyer owed current and former clients a duty of confidentiality as to potentially embarrassing or detrimental client information that is publicly available. It determined that a lawyer violated her client's confidentiality when she forwarded to her friends a blog previously published by someone else about her current client, even though the blog was publicly available.[206] The opinion, in a footnote, defined "publicly available" as information available "outside the attorney-client relationship, although it must be searched for (e.g., in an internet search, a search of public court file, or something similar)."[207] Separately, it defined "generally known" as information most people know without having to look for it.[208] Similarly, in a 2004 Ohio case concerning its Rule 1.6, which at the time followed the Model Code's confidences and secrets format, and an attorney telling a current client of a former client's criminal convictions, the Ohio Supreme Court explained that "an attorney is not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records."[209] D.C. follows the confidence and secrets version of Rule 1.6 and determined that information is not protected as a confidence or a secret if it is "generally known" and adopted the ABA definition of generally known requiring wide recognition.[210]

Massachusetts's Rule 1.6 is different from both the Model Code of Professional Responsibility and the current Model Rules of Professional Conduct. It defines confidential information and states:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research

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205. Ohio now follows the Model Rules version of Rule 1.6. OHIO RULES OF PRO. CONDUCT r. 1.6 (OHIO SUP. CT. 2024). California's Rule 1.6 mentions confidences and secrets. CAL. RULES OF PRO. CONDUCT r. 1.6 (STATE BAR OF CAL. 2023).

206. State Bar of Cal. Comm. on Pro. Resp. & Conduct, Formal Op. 195 (2016). The opinion quoted from California's Rule 1.6, which quotes "Business and Professions Code section 6068, subdivision (e)(1) [that] states that it is the duty of an attorney '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.' . . . As this Committee has explained, 'Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.'" *Id.* (quoting Cal. Bus. & Pro. Code § 6068(e)(1)); State Bar of Cal. Comm. on Pro. Resp. & Conduct, Formal Op. 133 (1993)).

207. State Bar of Cal. Comm. of Pro. Resp. & Conduct, Formal Op. 195, at 3 n.4 (2016).

208. *Id.*; *See also In re* Johnson, No. 97-O-11791, 2000 WL 1682427, *10 (Cal. Bar Ct. Oct. 26, 2000) (attorney violated California confidentiality rule by revealing client was a convicted felon, even though the client's conviction was a matter of public record).

209. Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 435 (Ohio 2004).

210. D.C. Bar Legal Ethics Comm., Formal Op. 383, at n.8 (2022).

> or (B) information that is generally known in the local community or in the trade, field or profession to which the information relates. [211]

Massachusetts's Rule 1.6, comment 3A further clarifies:

> Information that is "generally known in the local community or in the trade, field or profession to which the information relates" includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not "generally known in the local community."[212]

In 2022, the Massachusetts Supreme Court addressed "the role of the 'generally known' analysis in deciding whether an attorney" had improperly disclosed confidential information.[213] As part of its analysis of comment 3A, the court stated:

> As this comment makes clear, the rule is concerned with whether information is known, not whether it is knowable. That the information is available in a public record is not dispositive; rather, the focus is on how many people in the relevant community, trade, field, or professional actually have learned the information.[214]

Where the attorney stated that he had learned about the arrests of his former client in the local newspaper, it became the Board's burden to establish that the information was not generally known, and it did not do so. The court stated, "We do observe, however, that information in a local newspaper of record might well be the sort of information that we would consider to be generally known, especially when the information is printed within a short time of the disclosure."[215] Similarly, in a 2011 ethics opinion, concerning a probate matter, interpreting what is "generally known" and consequently not confidential under Massachusetts Rule 1.6, it was determined that whether a probate proceeding has started is easily attainable from the public record, such that a lack of probate could be disclose; and that the decedent's death was "generally known" because

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211. MASS. RULES OF PRO. CONDUCT r. 1.6 (MASS. SUP. JUD. CT. 2025).

212. MASS. RULES OF PRO. CONDUCT r. 1.6 cmt. 3A (MASS. SUP. JUD. CT. 2025). Another example was given: "a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews." *Id.*

213. *In re* Kelley, 182 N.E.3d 949, 951 (Mass. 2022).

214. *Id.* at 953.

215. *Id.* at 954 n.1.

"[h]is obituary appeared in the newspapers and remains easily findable on the internet."[216] But recently, a 2024 ethics opinion also interpreting comment 3A clarified that "a lawyer must have evidence other than the fact of publication to show that the [judicial] opinion was widely known in the local community . . . ."[217]

Wyoming Rule 1.6 generally follows the Model Rule 1.6 format and not Massachusetts's rule 1.6 and consequently Wyoming Rule 1.6 does not have the equivalent of Massachusetts's comment 3A.[218] Despite this difference, the Wyoming Supreme Court quoted the above mentioned 2022 Massachusetts court's discussion regarding Massachusetts's comment 3A and determined that whether information is confidential is based on whether it is generally known and that whether "the information is available in a public record is not dispositive; rather, the focus is on how many people in the relevant community, trade, field, or profession actually have learned the information."[219] The Wyoming court concluded that the attorney had revealed confidential information in her motion to withdraw because even though the client had contacted a realtor about selling property involved in the lawsuit, the information was not generally known and therefore confidential.[220]

Confidentiality under various states' Rule 1.6 has been discussed recently in the context of online attorney reviews.[221] For example, in a 2022 Oregon ethics opinion regarding an online negative review, the committee stated that the attorney could not respond using information in the public record because even "confirming embarrassing information" is likely detrimental to the

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216. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 04 (2011). *See generally* Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 01 (2012) ("The mere fact that information disclosed by a client to a lawyer is a matter of public record does not mean that it may not fall within the protection of this rule.").

217. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2 (2024) (concerning publication of judicial opinions).

218. WYO. RULES OF PRO. CONDUCT r. 1.6 (WYO. JUD. BRANCH 2025).

219. Bd. of Pro. Resp., Wyo. State Bar v. Austin, 538 P.3d 653, 662–63 (Wyo. 2023) (quoting *In re* Kelley, 182 N.E.3d at 953).

220. *Austin*, 538 P.3d at 662 ("[K]nowledge by 'a' member of the public does not make confidential information public.").

221. *See, e.g.*, People v. Isaac, 470 P.3d 837, 840 (Colo. 2016) (irrelevant that information in posting in response to online negative review was already public); People v. Waters, 438 P.3d 753, 761 (Colo. 2019) (even if information available from another source, confidentiality rule applies); Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Formal Op. 200 (2014) (citing Iowa Sup. Ct. Att'y Discipline Bd. v. Marzen, 779 N.W.2d 757, 765–67 (Iowa 2010)) (Rule 1.6 breached "even if [the] information is otherwise publicly available."); *In re* Calpin, No. DRB 19-172 (N.J. Sup. Ct. Disciplinary Rev. Bd. Dec. 17, 2019) (public record information is not generally known). The board did not reference the Restatement (Third) of the Law Governing Lawyers, which is used in New Jersey's Rule 1.6 comment 3A; the opinion referenced ABA Formal Op. 479 and the notoriety standard. *Id.*

client.[222] Oregon follows the Model Rule version of Rule 1.6[223] but defines "information relating to the representation of a client" in Oregon Rule 1.0 as "denot[ing] both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[224] This opinion determined, "Under the broad definition of this term, 'information' can include even basic information such as the client's name or information in the public record."[225] Further, the committee stated:

> A response based solely on the public record can also be an embarrassing or detrimental disclosure, including when the client has already disclosed information that would be embarrassing. If the attorney's response is likely to reach more members of the public than the client's post, the attorney risks revealing embarrassing information to individuals that the client's disclosure would not otherwise have reached.[226]

The opinion stated that "the fact that an attorney includes information about a client in response to a negative review may in itself suggest that the information is intended to discredit because it is embarrassing or detrimental to the client."[227]

In the 2021 disciplinary proceeding concerning an attorney's response to a negative online review cited in the above ethics opinion, the Oregon Supreme Court determined that although the self-defense exception in Rule 1.6 could apply, when the attorney revealed the former client's full name along with his criminal conviction, the attorney did not limit his response to necessary information as required by the exception.[228] Under Oregon's Rule 1.6 and the definition discussed above, the court determined that even though the information—the client's name and criminal convictions—were a matter of public record, the attorney had revealed this information. The court reasoned that although people reading the attorney's post could have gathered the information on their own, they were unlikely to do so because "they would have had difficulty determining which of the millions of criminal records on file

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222. Or. State Bar Bd. of Governors, Formal Op. 201, at 7, 8 n.25 (2022) (citing *In re* Heinzelman, 33 Or. Disciplinary Bd. Rptr. 6, 24 (2019) (holding that lawyer "may not accurately report that the client lied to the attorney during the representation, as this would reveal information relating to the representation of the client that would be embarrassing or detrimental to the client.").

223. OR. RULES OF PRO. CONDUCT r. 1.6(a) (OR. STATE BAR 2025).

224. OR. RULES OF PRO. CONDUCT r. 1.0(f) (OR. STATE BAR 2025).

225. Or. State Bar Bd. of Governors, Formal Op. 201 (2022).

226. *Id.*

227. *Id. See also* Or. State Bar Bd. of Governors, Formal Op. 204 (2024) (lawyers may not tell war stories based on information that is public because "Oregon does not have an exception that allows disclosure of information that is generally known or publicly available.").

228. *In re* Conduct of Conry, 491 P.3d 42, 55 (Or. 2021).

around the nation referred to the author of the reviews."[229] Similar conclusions have been reached in states that have adopted a Model Rules' version of Rule 1.6.[230]

In summary, several states have determined that there is no publicly available exception in Rule 1.6 under a variety of circumstances. Some opinions have simply concluded that all information learned during the representation is confidential even if it later becomes public. Others have engaged in a broad interpretation of the words, "embarrassing," and "detrimental," or "information," or distinguishing between information that is known and information that is knowable.

2. Broad Rule 1.9: Alaska, Indiana, Kansas, New Jersey, Ohio, Texas, Virginia & Wisconsin.—Similar to Rule 1.6, some states have moved to interpreting confidentiality under Rule 1.9 broadly. For example, in 1974 in a Kansas eminent domain proceeding regarding use of a report prepared for a former client, the court determined, under the governing Kansas rule based on the Model Code of Professional Responsibility, that the report could be used because it was accessible to the public and therefore not a client confidence.[231] Conversely, in a 2003 attorney discipline based on Kansas's version of the Model Rules, an attorney revealed the existence of his defamation suit against his former client in documents involving a motion to sever the former client from a case with his current client and then claimed that because this information was previously disclosed in court pleadings, it was not confidential.[232] The Kansas Supreme Court rejected the argument relying on Kansas's Rule 1.6, holding that the rule of confidentiality applied to all attorney-client communications, even if the information is otherwise available.[233]

New Jersey has reached the same conclusion regarding its Rule 1.9. Initially, in a 1995 disqualification case, an attorney had been counsel for General Motors for several years handling lemon law cases, then moved to different firms and handled different matters.[234] But two years later, the attorney went to work for a firm and represented plaintiffs against General Motors in

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229. *Id.* at 53.

230. *See, e.g.*, State Bar of Wis. Comm. on Pro. Ethics, Formal Op. EF-23-01, at 2 (2023) (Wisconsin's confidentiality rule protects publicly available information and information previously disclosed to others, preventing use in a response to an online criticism); *See also supra* note 222.

231. City of Wichita v. Chapman, 521 P.2d 589, 591 (Kan. 1974). The court stated that the report's "existence and contents were made available to various agencies and to opposing counsel. Such public exposure of the information negates its 'secret' or 'confidential' character." *Id.* at 596.

232. *In re* Bryan, 61 P.3d 641, 645, 656 (Kan. 2003).

233. *Id.* at 656, 658. The court referenced two older cases as standing for the proposition that the ethical duty of confidentiality survives even if the information is available from other sources—*NCK Org. Ltd. v. Bregman,* 542 F.2d 128 (2d Cir. 1976) and *Kaufman v. Kaufman,* 405 N.Y.S.2d 79 (N.Y. App. Div. 1978). Both cases held that neither attorney-client privilege nor ethical duty are nullified where information is part of a public record. *Id.*

234. Steel v. Gen. Motors Corp., 912 F. Supp. 724, 727 (D.N.J. 1995).

lemon law cases.[235] The court stated that the former General Motor counsel made a

> strong argument that much of the information "relating to the representation" of GM is generally known. Advice and information about how to conduct lemon law litigation against various manufacturers, including GM, along with form pleadings and interrogatories, proliferate in legal periodicals, practice manuals, law review articles, textbooks, and through bar association conferences and publications . . . . The fact that this type of information is publicly available does not make "information relating to the representation" of GM "generally known."[236]

Ultimately, the court disqualified the firm, determining the screen was inadequate and that the former counsel had specialized confidential information ("playbook theory") about General Motors.[237] Then in a 2006 unreported disqualification case, the New Jersey federal district court specifically adopted the broad rule stating:

> Rule 1.9(c) does not apply to information that is "generally known[,]" [and] "[g]enerally known" does not only mean that the information is of public record . . . . The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information "generally known" within the meaning of Rule 1.9(c).[238]

Similarly, a 2007 Ohio ethics opinion discussed the generally known exception in Ohio's Rule 1.9 in the context of a public defender cross examining a former client.[239] Recognizing the absence of a definition for "generally known" in the Ohio or Model Rules, it referenced the Restatement definition.[240] Specifically,

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235. *Id.*

236. *Id.* at 739.

237. *Id.* at 746.

238. Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854, at *7 (D.N.J. Aug. 24, 2006) (internal citation omitted). A 2019 disciplinary case involving a former client and Rule 1.9 concerning a negative online review, cited this 2006 case and determined that even though information in the review was available in the public record, it was not generally known. *In re* Calpin, No. DRB 19-172, (N.J. Dec. 17, 2019) Instead of referencing the Restatement (Third) of the Law Governing Lawyers, which is used in New Jersey's Rule 1.6 comment 3A, the opinion referenced ABA Formal Op. 479 and the notoriety standard. *Id.*

239. Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Formal Op. 2013-4 (2013).

240. *Id.* at 7 (citing 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2001).

as to a former client's criminal conviction, the opinion stated that courts view a former client's criminal conviction as generally known because it is a matter of public record.[241] It provided as its rationale supporting non confidentiality, stating:

> In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information . . . . [T]he Board's view is that as long as the public defender's cross-examination of the former client is limited to the existence of the prior conviction for impeachment, the public defender can satisfy the "generally known" exception in Prof.Cond.R. 1.9(c)(1).[242]

As to other information in the public record, the opinion focused on the portion of the Restatement definition that states, "[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public."[243] After citing numerous cases, some of which determined that information in the public record does not lose its confidentiality, the opinion stated, "As evidenced by these cases, particularly in civil matters, whether information in a public record is generally known may require a review of the applicable facts and circumstances."[244]

But later, in a 2016 ethics opinion regarding whether a lawyer could testify against a criminal defendant, who had been a potential client of the lawyer and told a story with other potential clients present, the committee stated that "[t]he presence of information 'in the public record does not necessarily mean that the information is *generally known* within the meaning of Rule 1.9(c).'"[245] "As a result, a lawyer may only reveal information related to a prospective client if the client provides informed consent confirmed in writing or if the information is generally known," meaning that the information is known to the relevant sector of the public.[246] This subsequent opinion only mentioned the second part of the earlier opinion that quoted the Restatement definition regarding the continued

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241. *Id.* (citing *State v. Rogers,* 744 S.E.2d 315 (W. Va. 2013); *United States v. Valdez,* 149 F.R.D. 223 (D. Utah 1993); *State v. Sustaita,* 902 P.2d 1344 (Ariz. Ct. App. 1995); *State v. Mancilla,* No. A06-581, 2007 WL 2034241 (Minn. Ct. App. July 17, 2007)).

242. *Id.* at 7–8.

243. *Id.* at 8 (alteration in original) (quoting 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2001)).

244. *Id.* at 9.

245. Ohio Bd. of Pro. Conduct, Formal Op. 2016-10 (2016) (quoting BENNETT, COHEN & WHITTAKER, *ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* 175 (7th ed. 2011)) (citing Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854 (D.N.J. Aug. 24, 2006); Steel v. Gen. Motors Corp., 912 F. Supp. 724 (D.N.J. 1995); *In re* Anonymous, 932 N.E.2d 671 (Ind. 2010)).

246. *Id.* at 3.

confidentiality of information that becomes known to others. It made no mention of the earlier part of the decision regarding the public record.[247]

Consequently, in Ohio, as in Kansas and New Jersey, the more recent opinions indicate that there is no publicly available exception for Rule 1.9. Other states, including Indiana and Wisconsin, have reached the same conclusion.[248] These opinions give little guidance as to what constitutes generally known. Virginia has adopted the broad generally known standard,[249] and a judge, in a 2013 Eastern District of Virginia case, captured the vague nature of the notoriety standard, stating that a divorce settlement "file[d] in the courthouse where anyone could go, find it and read it," is not generally known; the court stated that "publication on the front page of a tabloid" is not required but generally known is "more than merely sitting in a file in the courthouse."[250]

Although Texas's confidentiality rule differs by combining the confidentiality of current and former clients in one rule, Texas now also interprets its confidentiality rule broadly. Texas Rule of Professional Conduct 1.05(b)(1) addresses confidentiality for both current and former clients and states that a lawyer shall not knowingly reveal "confidential information of a client or a former client . . . ."[251] Section 1.05(3) states that a lawyer cannot "[u]se confidential information of a former client to the disadvantage of the former client . . . unless . . . the confidential information has become generally

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247. *Id.*

248. *Anonymous*, 932 N.E.2d at 675 (prospective client information is protected even if it is known by third persons or in the public record). The Indiana Supreme Court stated that "the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources." *Id.* at 674. *See also* State Bar of Wis. Bar Comm. on Pro. Ethics, Formal Op. EF-20-02, at 6 n.17 (2020) (citing *In re* Petition to Modify SCR 20:1.9(c), No. 15-04 (Wis. July 21, 2016), *available at* https://wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=172500) (rejecting that information is generally known if previously disclosed or available in public record unless "widely disseminated and recognized"). This Wisconsin Formal Opinion quoted the petition, stating, "The Wisconsin Supreme Court rejected a request to expand the [generally known] exception to include information available to the public or that has been previously revealed and declined to modify the language of the rule and ABA Comment." *Id.*

249. Turner v. Commonwealth, 726 S.E.2d 325 (Va. 2012). The Virginia Supreme Court determined that the lower court's admission of the testimony of defendant's former counsel regarding what an unavailable witness had testified at a preliminary hearing was an abuse of discretion. *Id*. at 331. In a concurring opinion, Justice Lemons concluded as to former client information that "[w]hile testimony in a court proceeding may become a matter of public record . . . and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'" *Id*. at 333 (Lemons, J. concurring).

250. *In re* Gordon Props., 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) (citing Va. State Bar Comm. on Legal Ethics, Formal Op. 1609 (1994)) ("information regarding a judgment obtained by a law firm on behalf of a client, 'even though available in the public record, is a secret, learned within the attorney-client relationship.'").

251. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.05(b)(1) (STATE BAR OF TEX. 2025).

known."[252] As to the generally known standard, in a 2010 ethics opinion where the lawyer was planning to sue a former client for an unpaid bill, the committee adopted the broad interpretation of "generally known," stating:

> Information that is a matter of public record may not be information that is "generally known." A matter may be of public record simply by being included in a government record . . . whether or not there is any general public awareness of the matter. Information that "has become generally known" is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found.[253]

In a 2016 Texas breach of fiduciary duty case, a client sought disgorgement of fees from a former attorney because the attorney issued a press release, revealing some information that was in the pleadings but some information that was not public.[254] The court engaged in an in-depth discussion of confidentiality under the Texas Rules of Professional Conduct, and as to the issue of revealing a former client's confidential information that was publicly available, the court stated that Texas Rule 1.05(b)(1) does not contain an exception for generally known information.[255] Consequently, the attorney violated that rule by revealing both public and non-public information.[256] In support, the court stated, "Even if third parties might have found the information on their own, the Attorney had a continuing fiduciary duty not to be the conduit or source of others learning about that information."[257] The court characterized the attorney as revealing

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252. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.05(3) (STATE BAR OF TEX. 2025).

253. State Bar of Tex. Comm. on Pro. Ethics, Formal Op. 595, at 1 (2010); *see also* State Bar of Tex. Comm. on Pro. Ethics, Formal Op. 693 (2022) ("Some of the client confidential information in this public entity context may be 'generally known' due to some members of the public attending these open session or from media accounts of the meetings; however, that fact does not make the entire body of client confidential information relating to the lawyer's representation of the public entity 'generally known.'").

254. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *1, *8, *17 (S.D. Tex. May 4, 2006).

255. *Id.* at *15. In dicta and in a footnote, the court discussed the "generally known" exception. *Id.* at *16 n.51. It stated that there was no Texas authority relevant to whether information in a public record was generally known. *Id.* It quoted the Restatement (Third) definition that information is generally known if it can be obtained "through publicly available indexes and similar methods of access." *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000)). But the court determined that the attorney had not established that "a person could have learned of the existence of the State Suit from databases generally available to the public. Thus, the Court does not decide whether the information in the public record was 'generally known.'" *Id.*

256. *Id.* at *14.

257. *Id.*

confidential client information for the attorney's "self-promotion and potential financial gain."[258]

The attorney had argued that because the information was "generally known" he had not violated the rules.[259] The court stated that "generally known" only applies to use of client information, and the attorney had revealed client information in the press conference.[260] But in a footnote, in dicta, discussing the definition of generally known assuming it could apply to revealing information, the court stated that there was no Texas authority relevant to whether information in a public record was generally known but there was support for both parties' positions.[261] It quoted the Restatement (Third) definition that information is generally known if it can be obtained "through publicly available indexes and similar methods of access."[262] But the court stated that the attorney had not established that "a person could have learned of the existence of the State Suit from databases generally available to the public. Thus, the Court does not decide whether the information in the public record was 'generally known.'"[263]

However, subsequently the Texas Court of Appeals, in an unreported 2019 case, determined that marital status was confidential information because the rule protects all information learned during the representation even when that information is discoverable by third parties because "an attorney has a continuing fiduciary duty not to be the conduit or source of others learning about that information."[264] Consequently, under Texas law, publicly available information is not generally known.

Thus, several states have taken the position that client information that is publicly available is confidential under Rule 1.6, 1.9, and 1.18 and cannot be used or revealed. But interestingly, courts and ethics committees generally do not make a use versus reveal distinction and instead engage in a "generally known" analysis.[265] The court or ethics committee could take the position that there is no publicly available exception in Rule 1.9(c)(2) as to revealing former client information. Model Rule 1.9(c)(2) states that a lawyer cannot reveal

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258. *Id.* at *19.

259. *Id.* at *1, *15.

260. *Id.*

261. *Id.* at *16, n.51 (citing Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 603 n.19 (Tex. App. 1998)) (Cantu, J. dissenting) ("[T]he fact that some of the documents may be public records does not necessarily make them 'generally known.'").

262. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000)).

263. *Id*.

264. *In re* Liebbe, No. 12-19-00044-CV, 2019 WL 1416637, at *1, *5 (Tex. App. Mar. 29, 2019) (citing *Sealed Party*, 2006 WL 1207732, at *14). The marital status had been revealed to third parties in a "release of judgment lien, a general warranty deed, a special warranty deed, a Texas Home Equity Security Instrument, and a warranty deed with Vendor's lien," *id.* at *4, n.2, but the court stated that these documents were not presented to Respondent and thus the court could not consider them in this proceeding. *Id.* at *4.

265. See *supra* Part II.C.

former client information except as allowed or permitted in other rules.[266] Instead, a "generally known" analysis is used even though 1.9(c)(2) does not mention the words, "generally known."[267] Texas is the exception because the court recognized the use versus reveal distinction and did not apply the generally known exception to disclosure of confidential information.[268]

D. Use of Information to a Client's Detriment

As to current clients, Model Rule 1.8(b) allows use of information if it does not harm the client, and many states have the same or similar rule.[269] Specifically, Model Rule 1.8 comment five states, "The Rule does not prohibit uses that do not disadvantage the client."[270]

As to former clients, Model Rule 1.9(c)(1) prohibits use of information to the disadvantage of the former client or when the information is not generally known.[271] A Colorado ethics opinion stated:

> Neither Rule 1.9 nor any of its comments addresses a lawyer's use of information relating to the representation of a former client when the use of the information would not disadvantage the former client. The Committee construes this silence as signaling that a lawyer generally may use former client information, regardless of whether it is generally known, so long as the use of that information will not be harmful to the former client.[272]

Although mentioning the Restatement's definition of "generally known," the Montana Supreme Court determined that the attorney had violated Montana's Rule 1.9(c), when the attorney used former client information that was publicly known for self-enrichment to the client's detriment.[273] In this 2017 attorney discipline case, the attorney filed an attorney lien on clients' property for unpaid attorney's fees and subsequently obtained a writ of execution causing a sheriff's

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266. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(2) (A.B.A. 2018).

267. *See, e.g.*, Ohio Bd. of Pro. Conduct, Formal Op. 2016-10 (2016). "As a result, a lawyer may only reveal information related to a prospective client if the client provides informed consent confirmed in writing or if the information is generally known." *Id.* at 3. Ohio Rules of Professional Conduct follow the Model Rule 1.9(c)(2) rule.

268. *See Sealed Party*, 2006 WL 1207732.

269. MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018); *Jurisdictional Rules Comparison Charts, Rule 1.8*, A.B.A. (Mar. 2024), https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.

270. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 5 (A.B.A. 2018).

271. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (A.B.A. 2018).

272. Colo. Bar Ass'n Ethics Comm., Formal Op. 130, at n.1 (adopted Apr. 3, 2017, revised Nov. 17, 2018) (citing Marshall Tucker Band, Inc. v. M T Indus., Inc., 209 F. Supp. 3d 854, 861–62 (D.S.C. 2016)).

273. *In re* Tennant, 392 P.3d 143 (Mont. 2017).

sale during which the attorney bid on the property.[274] The clients eventually redeemed the property.[275] The court cited the Restatement "generally known" definition under which publicly available information is generally known, but stated, "We will not interpret the 'generally known' provision of Rule 1.9(c) to allow Tennant [the attorney] to take advantage of his former clients by retroactively relying on public records of their information for self-dealing."[276] Thus, the Montana court was unwilling to allow the attorney self-enrichment despite the information being publicly available and not confidential under its rules.[277] A similar result was reached in a 2024 Tennessee attorney discipline case, where an attorney was charged with violation of Rule 1.9(c) because the attorney had filed a response to a motion for sanctions and in a footnote revealed that his former client had sent sexually graphic emails that were the subject of a previous lawsuit.[278] Tennessee has adopted the Restatement definition of "generally known."[279] Consequently, the attorney argued that this information was generally known because it came from a public record.[280] The Tennessee Supreme Court, in determining that the attorney had violated Rule 1.9(c), stated that information that is "publicly available is not necessarily 'generally known,' [and that] [t]he exception in Rule 1.9(c) is not intended to let lawyers reveal information relating to a former representation to the detriment of the former client simply because 'a diligent researcher could unearth it through public sources.'"[281] Instead, "[t]he information must be within the basic understanding and knowledge of the public."[282]

Similarly, in dicta, a Florida court, in a case concerning admissible testimony, recognized that under Rule 1.9 a lawyer could use information against a former client if the information is generally known,[283] but stated, "We are not prepared to state that all information contained in any public document

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274. *Id.* at 145, 148.

275. *Id.* at 145.

276. *Id.* at 148–49.

277. *Id.* at 149. The attorney was publicly censored. *Id.*

278. Manookian v. Bd. of Pro. Resp. of Sup. Ct. of Tenn., 685 S.W.3d 744, 793 (Tenn. 2024).

279. TENN. RULES. PRO. CONDUCT r. 1.9 cmt. 8a (TENN. BAR ASS'N 2023).

280. *Manookian*, 685 S.W.3d at 793.

281. *Id.* (quoting *In re* Anonymous, 932 N.W.2d 671, 674 (Ind. 2010)).

282. *Manookian*, 685 S.W.2d at 793 (quoting Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854 (D.N.J. Aug. 24, 2006)). The court also cited to Tennessee Rule of Professional Conduct Rule 1.9 comment 8a that states that a lawyer may not reveal or use former client information adversely "simply because the information has become known to third persons . . . . Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily." *Id.* at 794 (quoting TENN. SUP. CT. r. 8; TENN. RULES OF PRO. CONDUCT r. 1.9(c) cmt. 8a).

283. Florida's Rule 1.9 comment defines generally known as "[i]nformation that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonable prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information." FLA. RULES OF PRO. CONDUCT r. 1.9 cmt. (FLA. BAR 2025).

is 'generally known' within the meaning of the rule. It seems to us highly questionable that an attorney could attack, embarrass, and malign a former client with matters on which he represented and counseled that client . . . ." using publicly available information.[284] Thus, these states would discipline attorneys for using publicly available information to the client's detriment despite the information not being confidential under their rules.

Even where the information may not be detrimental to the client, a court determined that the attorney could not use public information without client permission.[285] The Alaska Bar Association Ethics Committee decided that even where settlement amounts are part of the public record, a lawyer must obtain client informed consent to use those amounts in an advertising campaign reasoning that "[a] final judgment may be public information, but the judgment amount may not be widely disseminated . . . ."[286]

In a New Hampshire case, the court distinguished between confidential information and nonconfidential information in meting out attorney discipline when an attorney used former client information for his own purposes.[287] The attorney was interviewed for a newspaper article and voiced his opinion against a former client's plan to build a shopping mall abutting the attorney's property.[288] The Supreme Court of New Hampshire did not define "generally known" under New Hampshire Rule 1.9 but determined that information such as "traffic and related impacts, and taxes and related benefits . . . are commonly known effects of any large commercial development," and were not confidential.[289] Further a petition filed with the city council indicating a former client's rezoning strategy was not confidential information.[290] However, the attorney received a public reprimand because even though the attorney did not name the developer in his comments, he gave the impression that he was referring to his former client as the developer and information regarding the developer's interest in a different site (which had been the basis of the attorney's work for the former client) was not generally known.[291] The court determined that the attorney used his law firm's prestige to the former client's disadvantage in the former client's desire to build a shopping mall abutting the attorney's property.[292] Thus, despite not using the former client's name, a technique that is

284. King v. Byrd, 716 So.2d 831, 835 (Fla. Dist. Ct. App. 1998).
285. Alaska Bar Ass'n Ethics Comm., Formal Op. 02 (2020).
286. *Id.*
287. Case of Wood, 634 A.2d 1340 (N.H. 1993).
288. *Id.* at 1341.
289. *Id.* at 1344.
290. *Id.*
291. *Id.*
292. *Id.*

generally seen as protecting confidentiality,[293] the committee concluded that discipline was warranted.[294]

Thus, even if the state has adopted the narrower confidentiality standard regarding publicly available information where an attorney uses client information to the client's detriment, a disciplinary committee or court may act contrary to its own rules, as in the Montana[295] or Florida[296] cases, or may stretch to find a reason to discipline, as in the New Hampshire case,[297] given the distaste for such behavior. Or as in the Alaska opinion, even if not detrimental to the client, a disciplinary committee might require consent before the attorney can use the information for personal reasons.[298] This distaste for attorneys using client information for personal gain might explain, although not stated specifically, why states, mentioned in the previous section, adopt a broad definition for "generally known." For example, in the 2016 Texas case mentioned above, the court characterized the attorney as revealing confidential client information for the attorney's "self-promotion and potential financial gain."[299] Although the court stated it was not deciding whether information in the public record was generally known,[300] it quoted the Restatement (Third) definition that information is generally known if it can be obtained "through publicly available indexes and similar methods of access"[301] but determined the attorney had not established that "a person could have learned of the existence of the State Suit from databases generally available to the public."[302] However, it seems that it would have been easy to determine whether, and in fact quite likely that, the state suit was in a public database. The result might be explained by the distaste for the attorney's use of the former client's information for personal gain.

E. Public Records and Rules 3.6 & 3.8

Model Rule 3.6(b)(2) public records safe harbor provision is consistent with the Restatement (Third) of the Law Governing Lawyers definition of

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293. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 4 (A.B.A. 2018) (recommending a lawyer use hypotheticals if third persons could not learn confidential information); *See also* Alaska Bar Ass'n Ethics Comm., Formal Op. 1, at n.3 (1995) (public record documents can be exchanged for purposes of "shop talk" between lawyers if not harmful to clients, recommending names be removed).

294. Case of Wood, 634 A.2d 1340, 1345 (N.H. 1993).

295. *In re* Tennant, 392 P.3d 143 (Mont. 2017).

296. King v. Byrd, 716 So.2d 831, 835 (Fla. Dist. Ct. App. 1998).

297. *Wood*, 634 A.2d at 1340.

298. Alaska Bar Ass'n Ethics Comm., Formal Op. 02 (2020).

299. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *19 (S.D. Tex. May 4, 2006).

300. *Id.* at *16, n.51.

301. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000)).

302. *Id.*

confidential client information because client information that is publicly available is not confidential.[303] Information in public records is not confidential under the Restatement (Third) definition of confidential information if special expertise or expense is not required for access.[304]

The Model Rules do not define "public record." In a case concerning whether a prosecutor's statements fell within the public record safe harbor, the Maryland Court of Appeals grappled with how to define "information in a public record," in Maryland's Rule 3.6, which was identical to Model Rule 3.6 at the time.[305] The court determined that there was no settled definition of "information contained in a public record."[306] It opted to define it broadly for the case[307] but then limited the definition for future cases to best balance the interests of a fair trial with freedom of expression.[308] For future cases, the court defined "information contained in the public record" in Maryland's Rule 3.6 to apply only to "public government records—the records and papers on file with a government entity to which an ordinary citizen would have lawful access."[309] The court relied heavily on U.S. Supreme Court cases, in weighing "the most fundamental of all freedoms"[310]—a defendant's Sixth Amendment right to a fair trial guaranteed to the states by the Fourteenth Amendment juxtaposed with the First Amendment right to free expression.[311] In reaching its determination of the definition of "information in a public record," the court stated that the right to a fair trial incorporates the right to an impartial jury and requires that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[312] The court recognized that statements from attorneys involved in the case are more likely to influence the public and potential jury

303. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018).

304. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

305. Att'y Grievance Comm'n of Md. v. Gansler, 835 A.2d 548, 566 (Md. 2003).

306. *Id.* at 567.

307. The court stated that in its broadest form, "information in a public record" includes "anything in the public domain, including public court documents, media reports, and comments made by police officers." *Id.*

308. *Id.* at 569.

309. *Id.* (stating that this limited public record exception prevents the exception from "swallowing the general rule of restricting prejudicial speech").

310. *Id.* at 559 (quoting Estes v. Texas, 381 U.S. 532, 540 (1965)).

311. *Id.* at 561–63.

312. *Id.* at 558 (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

members[313] and therefore attorney speech can be regulated more stringently than ordinary citizen speech.[314]

Subsequently, the Indiana Supreme Court adopted the Maryland court's limited definition of "public record," stating however that "'on file' does not mandate such formalities as file stamping or entry on a case docket."[315] The court determined that a probable cause affidavit would be a public record but that a prosecutor must clearly state that the information is the content of the probable cause affidavit or otherwise identify the public document.[316] However, the court stated, "A more expansive concept of a public record that includes the unfiltered and untested contents of all publicly accessible media would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech."[317] Similarly, in a 2011 case involving whether an attorney should be granted pro hac vice, the Massachusetts Supreme Court stated that there was no violation of Rule 3.6 when an attorney's remarks that were quoted in the National Law Journal were "words generally identical to those used in the complaint,"[318] and where other public court filings contained the information the attorney gave, stating that the "court filings are matters of 'public record.'"[319] This decision that information in public records can be revealed under Rule 3.6 is contrary to Massachusetts Rule of Professional Conduct 1.6 comment 3A, which states that information in public records remains confidential unless it has received wide spread publicity.[320]

Perhaps in recognition of this disparate treatment of information in the public record under the rules, a 2019 Colorado ethics opinion limited disclosure of information under its Rule 3.6. The committee stated, "Even when the public statements or posting of materials is allowed under Colo. RPC 3.6(b) or (c), a lawyer must comply with Colo. RPC 1.6 and 1.9 when the statements or posting

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313. *Id.* at 561 (quoting Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966)) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . ."). *Sheppard* was the leading case to initially address this issue and as recognizing that the trial court has the power to minimize prejudicial publicity.

314. *Gansler*, 835 A.2d at 564 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)).

315. *In re* Brizzi, 962 N.E.2d 1240, 1247 (Ind. 2012). *See also* People v. Stanley, 559 P.3d 697, 740 (Colo. 2024), where the Colorado Supreme Court also adopted the *Gansler* definition of public record.

316. *Brizzi*, 962 N.E.2d at 1247. *See also* Muex v. State, 800 N.E.2d 249, 252 n.5 (Ind. Ct. App. 2003), where the Court did not decide whether the probable cause affidavit was a public record but noted that the Indiana Supreme Court had stated that "[w]hen the prosecutor files an affidavit or obtains an indictment it becomes a public record, unless in the case of an indictment, the person has not yet been taken into custody or given bail." *Id.* at 252 n.5 (alteration in original) (quoting State *ex rel.* Atkins v. Juv. Ct. of Marion Cnty., 247 N.E.2d 53, 56 (Ind. 1969)).

317. *Brizzi*, 962 N.E.2d at 1247.

318. PCG Trading, LLC v. Seyfarth Shaw, LLP, 951 N.E.2d 315, 321 (Mass. 2011).

319. *Id.*

320. MASS. RULES OF PRO. CONDUCT r. 1.6 cmt. 3A (MASS. SUP. JUD. CT. 2025).

would reveal information related to the representation of a client or former client."[321] Colorado has broadly interpreted Rule 1.6 to protect publicly available information.[322] Consequently, Colorado's Rule 3.6(b) disclosures would be limited.

Other states have not limited the Rule 3.6 public record exception. In a 2018 Montana case concerning the Rule 3.6 public record exception, the defendant challenged statements in newspaper articles attributed to plaintiff's law firm and other sources that discussed "the Montana Supreme Court's new Asbestos Claims Court, as well as general information regarding asbestos claims and the course of litigation."[323] The defendant argued that the statements prevented a fair trial while the plaintiff argued that the statements did not concern the current litigation and therefore, there was no material prejudice to the defendant.[324] The court determined that the information fell within the safe harbors of Rule 3.6, including the public record, and that because the information was published in remote newspapers and fifteen months before trial, a protective order was not needed.[325] This ruling is consistent with Montana's narrow confidential rule but inconsistent with the Montana case mentioned above that refused to allow the attorney to use former client information that was in the public record for the attorney's self-benefit.[326]

In a 2013 Missouri case, the court recognized that the prosecutor's Twitter posts concerned facts "contained in the felony complaint and probable cause statement and, as such, are part of the public record."[327] But the court was concerned about the posts during the trial stating:

> [E]xtraneous statements on Twitter or other forms of social media, particularly during the time frame of the trial, can taint the jury and result in reversal of the verdict. We doubt that using social media to highlight the evidence against the accused and publicly dramatize the plight of the victim serves any legitimate law enforcement purpose or is necessary to inform the public of the nature and extent of the prosecutor's actions. Likewise, we are concerned that broadcasting that the accused is a "child rapist" is likely to arouse heightened public condemnation. We are especially troubled by the timing of Joyce's Twitter posts, because broadcasting such statements immediately before and during trial greatly magnifies the risk that a jury will be tainted by undue extrajudicial influences.[328]

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321. Colo. Bar Ass'n Ethics Comm., Formal Op. 130 (adopted Apr. 3, 2017, revised Nov. 17, 2018).

322. See *supra* Part II.C.1.

323. Underwood v. BNSF Ry. Co., 359 F. Supp. 3d 953, 955 (D. Mont. 2018).

324. *Id.* at 957.

325. *Id.* at 958.

326. *See supra* Part II.D and discussion of *In re* Tennant, 392 P.3d 143 (Mont. 2017).

327. State v. Polk, 415 S.W.3d 692, 695 (Mo. Ct. App. 2013).

328. *Id.* at 695–96.

The court, however, did not determine whether these posts violated Rule 3.8 because the defendant could not prove that they caused substantial prejudice as to warrant the defendant's motion to strike the jury panel.[329] Thus, despite the public record exception in Rules 3.6 and 3.8, some courts have limited this exception or will also consider the timing of the publication of the information to help safeguard a defendant's constitutional right to a fair trial.

A manual published by the Prosecutor Center for Excellence, which gives practical advice to help prosecutors stay within ethical boundaries, recognizes that prosecutors can only comment on matters that are in the public record.[330] The manual advises that "[i]f a prosecutor intends to comment about particular facts in an investigation or arrest, those facts should be included in the charging document."[331] It points out that in Rule 3.6, "[t]he comment to ABA Rule 3.6 specifically states that the prosecutor cannot mention a statement made by the defendant. However, if a public document references the statement, then the prosecutor can call attention to that document without repeating the statement."[332] The manual is replete with advice cautioning prosecutors to think carefully about public statements, but the point is that Model Rules 3.6 and 3.8 allow prosecutors or other attorneys to make statements regarding the defendant when that information is in the public record even if it is the prosecutor who created the public record.

F. Part II Summary

The research in Part II shows that although it may be possible to predict how one state will treat the confidentiality of client information that is publicly available information or perhaps how a state might treat it consistently under one rule yet treat it differently but consistently under another, there is a lack of consistency among states. Further, in some states, it is not possible to predict whether client information that is publicly available remains confidential, and it may depend on whether the issue is decided by a court as opposed to being concluded at the disciplinary stage. Given limited case law in some states and given that ethics opinions often cite other state ethics opinions,[333] the difference among states creates uncertainty for attorneys even in states that have consistently ruled one way.

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329. *Id.* at 696.

330. Kristine Hamann & KC Steckelberg, *Prosecutors and the Press: Ethical and Practical Guidance*, PROSECUTOR'S CTR. FOR EXCELLENCE 47 (2022), https://pceinc.org/wp-content/uploads/2022/10/20221013-Prosecutors-and-the-Press-Ethical-and-Practical-Guidance-PCE-and-PAAM.pdf [https://perma.cc/2BKP-UHFS].

331. *Id.*

332. *Id.* at 48.

333. *See supra* notes 220–21 discussing the Wyoming Supreme Court quoting and relying upon a Massachusetts's case despite Wyoming and Massachusetts having different versions of Rule 1.6.

Several states have concluded that client information that is publicly available is not confidential under Rule 1.6.[334] Some states that reach this conclusion follow the narrower confidences and secrets format for Rule 1.6, but not all of them. So, retention of the confidence and secret format for Rule 1.6 does not definitively explain why these states have adopted a narrow interpretation for their Rule 1.6 equivalent. In some states, the ethical code, opinions, or court decisions reference the Restatement rule,[335] but others have simply concluded that if the information is public, it is not confidential.[336]

As to Rule 1.9, Model Rule 1.9 comment three states that publicly available information will generally not be disqualifying.[337] Part of the rationale in the conflicts analysis is that Model Rule 1.9 should not be read with rigor to allow attorneys to move freely to new firms and for client choice of counsel.[338] Given that some cases have stated that the conflict must be serious to overcome a client's choice of counsel,[339] possession of publicly available client information can be seen as not creating a serious conflict. However, based on the above research, states generally do not rely on comment three in their conflict analysis. Instead, a Rule 1.9(c) "generally known" analysis is used.[340] In doing so, the states that adopt the ABA "generally known" definition that protects client information that is publicly available information and use it in the Rule 1.9(a) conflicts analysis are rigorously applying Rule 1.9. Interestingly, states that have adopted the narrower confidentiality rule mainly rely on the Restatement definition of "generally known" or the idea that publicly available information is not confidential as opposed to using either Rule 1.9 comment three or the Rule 3.6 exception for public records to support this conclusion.[341] Also, states tend to ignore the use/reveal distinction in Rule 1.9(c) and engage in a "generally known" analysis, even in situations that clearly involve the revelation of client information governed by Rule 1.9(c)(2), which does not mention the "generally known" standard.[342]

As to the public record exception in Rules 3.6 and 3.8, prosecutors can put client information into the public record and subsequently discuss it, but some courts have limited what constitutes a public record or will also consider the timing of the publication of the information to help safeguard a defendant's

334. *See supra* Part II.A.1.

335. *See, e.g.*, N.J. RULES OF PRO. CONDUCT r. 1.6, official cmt. (N.J. STATE BAR ASS'N Sep. 1, 2018); *supra* Part II.A.1.

336. *See, e.g.*, *In re* Murawski, No. 6243546, 2010 WL 2007961, at *1 (Ill. Att'y Registration & Disciplinary Comm'n May 12, 2010); *supra* Part II.A.1).

337. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).

338. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).

339. *See, e.g.*, State *ex rel.* Youngblood v. Sanders, 575 S.E.2d 864, 893 (W. Va. 2002).

340. *See supra* Parts II.A.2 and II.C.2.

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

342. *See, e.g.*, Ohio Bd. of Pro. Conduct, Formal Op. 2016-10, at 3 (2016); *See supra* Part II.C.2.

constitutional right to a fair trial.[343] But other than Colorado,[344] these opinions do not consider how client information that is publicly available is treated under the state's confidentiality rules in their analysis.

As to the "use" of client information that is publicly available, even if the state has adopted the narrower confidentiality standard determining that publicly available information is not confidential, where an attorney uses public client information for the attorney's benefit at the client's expense, disciplinary committees or courts have ruled against the attorney given the distaste for this behavior. They have done so even if it is contrary to their own confidentiality rules, as in the Montana[345] or Florida[346] cases; or they may stretch to find a reason to discipline, as in the New Hampshire[347] or Texas[348] cases; or they may require consent as in the Alaska ethics opinion even when the use may not be detrimental to the client. [349]

The next section looks at the policy rationales stated in the rules or opinions and the arguments given to possibly explain the state's disparate treatment of publicly available information.

III. POLICY RATIONALES

A. Frank Communication

Model Rule 1.6 comment two states the reason for client attorney confidentiality—"The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct."[350] The Restatement similarly states that "[t]he law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication."[351] This rationale applies equally under Model Rule 1.9 as most current clients at some point become former clients who want their confidential information to stay confidential, and equally under Model Rule

343. *See supra* Part II.E.

344. Colo. Bar Ass'n Ethics Comm., Formal Op. 130 (adopted Apr. 3, 2017, revised Nov. 17, 2018).

345. *In re* Tennant, 392 P.3d 143 (Mont. 2017).

346. King v. Byrd, 716 So.2d 831, 835 (Fla. Dist. Ct. App. 1998).

347. Case of Wood, 634 A.2d 1340 (N.H. 1993).

348. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *1, *19 (S.D. Tex. May 4, 2006).

349. Alaska Bar Ass'n Ethics Comm., Formal Op. 02 (2020).

350. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2018).

351. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 5, intro. note (A.L.I. 2000).

1.18(b) regarding prospective clients because these clients would also want their confidential information to remain confidential.

This policy rationale is premised on the information being confidential. If the client does not believe that the information is confidential, then the client would not be concerned about the protection of confidentiality before revealing it.[352] This conclusion is evident in the attorney-client privilege where generally the client waives the privilege if the client reveals information to a third party.[353] The privilege is waived because if a client divulges the information to a third party, it is likely that the client would have also divulged the information to the attorney, "even without the protection of the privilege."[354] The reason supporting a broad confidentiality rule is absent when the information is not confidential. It seems unlikely that individuals believe that information easily accessible to the public, for example, through an internet search, is confidential.[355] Thus, where the individual does not believe the information is confidential because it is publicly available, this rationale is irrelevant.[356] Further, studies have shown that individuals would confide information to a lawyer "even if secrecy were limited,"[357] and that the effect of confidentiality on client disclosure to attorneys "may not be as strong as most lawyers believe."[358]

Of course, not all information that is publicly available is easily accessible. The Restatement rule states that information that requires special skill, knowledge, or expertise remains confidential.[359] "Special knowledge" is defined as "information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known."[360] But where a client's name is known and an internet search provides information about the client representation, that information is not

352. *But see* State Bar of Nev. Comm. on Ethics & Pro. Resp., Formal Op. 41 (2009) (even if the client does not consider the information confidential, Rule 1.6 applies automatically).

353. *See* Blattman v. Scaramellino, 891 F.3d 1, 4 (1st Cir. 2018); Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003) ("[W]aiver occurs when a party . . . shows disregard for the privilege by making the information public.").

354. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126–27 (9th Cir. 2012).

355. *See generally*, Lever, *supra* note 55 (discussing popular opinion that publicly available information is generally known).

356. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 428 (2019) ("[I]t is hard to see how information could be deemed confidential if its owner shares it freely.").

357. Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 176–79 (2007) (citing Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 378 (1989) ("[W]hile a preference for nondisclosure rules exists, a substantial majority of laypersons would continue to use lawyers even if secrecy were limited.")). Ms. Leong's paper discusses a 1962 Yale study. *Id.* at 176–79.

358. Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . And Its Exceptions . . .*, 81 NEB. L. REV. 1320, 1325 (2003) (citing Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1261–73 (1962)); Fred C. Zacharias, *supra* note 358, at 352).

359. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

360. *Id.*

confidential and likely not considered to be so by a client. Arguably, such information meets the notoriety standard as anyone can know it. As stated by one court concerning information in the public record, it "is known to the whole world,"[361] and several states have concluded that publicly available information is not confidential.[362]

However, many other states have determined that client information that is publicly available is confidential unless it meets the notoriety standard.[363] This requirement that someone else must disseminate the information widely, for example, through the evening news, as dictating whether there was an expectation of confidentiality ignores the person whose expectation drives the policy rationale behind the broad confidentiality rule. Also problematic, the rationale is premised on the idea that if confidentiality is ensured, the client will fully divulge all relevant embarrassing information. No one likes to rehash poor choices, and people forced into the judicial system often do not trust the system or their lawyers; consequently, people lie to their lawyers.[364] Often, people do not divulge information to their attorneys for various reasons, even when they believe such information would be confidential. The issue is what is the optimal level of confidentiality for publicly available information when there are other valid and competing policy concerns and the policy reason given in support of a broad confidentiality rule falters.

As detailed by the Maryland Supreme Court, commentators have discussed the unnecessary breadth of Rule 1.6 and Rule 1.9, stating that "read literally and in isolation, the rule [1.6] is so stringent as to approach the unworkable and the unrealistic."[365] The court also stated:

> [T]o prohibit innocuous talk about a client would be senseless, would create morbid secretiveness among overscrupulous lawyers, and, by trivializing it, would detract from the soundness of the confidentiality

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361. *Ex parte* Taylor Coal Co., Inc., 401 So.2d 1, 9 (Ala. 1981); *see also* Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Formal Op. 2013-4, at 7 (2013) ("In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information.").

362. *See supra* Part II.A.

363. *See supra* Part II.C.

364. Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 347 (2014) (arguing that clients withhold information and lie to their attorneys regularly diluting this stated policy purpose). Stevenson cited to many sources for the proposition that clients lie to their attorneys. *Id.* at 347, n.40. *See, e.g.*, Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1164 (1985) ("It also is highly debatable whether the rule of confidentiality results in fuller disclosure than would occur without it. Lawyers have reported both client reluctance to tell the lawyer all, and client lying."); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO J. LEGAL ETHICS 125, 152 (1987) ("[T]hat clients lie to their lawyers is well-known now, as the great volume of literature on client perjury reflects.").

365. Harris v. Baltimore Sun Co., 625 A.2d 941, 946–48 (Md. 1993) (quoting 1 G. HAZARD, JR. & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 96 (1985)).

> principle. Instead, MR 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client.[366]

Consequently, the Maryland Supreme Court held, "There must be the potential for some harm to the client's interest before an attorney will be considered to have violated the prohibition of MR 1.6(a) and to be subject to discipline, for having revealed 'information relating to representation of a client.'" [367] "Whether there is a risk or potential for harm to the client's interests turns on the facts and circumstances of the particular case."[368] The court then remanded the case for a determination of whether revelation of the information requested by the newspaper would harm the client.[369] Preventing harm to the client from dissemination of publicly available information is discussed next.

B. Harm

Harm should be a concern, but only the Model Rules concerning use take harm to the client into consideration. Under Model Rules 1.6(a), 1.9(c)(2), and 1.18(b), as to disclosure, all information related to the representation from any source cannot be revealed without regard to whether its disclosure will be harmful to the client. Model Rule 1.8(b), as to current clients, only prevents use that is harmful to the client,[370] and Model Rule 1.9(c)(1), as to former clients, prevents use only when it is harmful to the client. But a harm standard does not apply to the public record exception in Rule 3.6(b), where there can be serious harm.

Specifically, a prosecutor can put information in a probable cause affidavit or other pre-trial documents and then that information is part of the public record.[371] When the information is part of the public record, then under Rule

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366. *Id.* at 947 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.2, at 301 (1986)).

367. *Id.*; *see also* Alaska Bar Ass'n Ethics Comm., Formal Op. 1 (1995) (Rule 1.6 should be limited by whether harm occurs).

368. *Harris*, 625 A.2d at 947.

369. *Id.* at 948.

370. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

371. Consider this continuing legal education information suggested for prosecutors in Massachusetts:

> When addressing the court for the first time, take the opportunity to outline the strength of the Commonwealth's case, and provide as much detail about the allegations and the nature of the Commonwealth's evidence as possible. Include any of the defendant's statements, as well as the results of any scientific evidence. The defendant's criminal history, past incarcerations, and defaults are relevant to the issue of bail and become part of the public court proceedings. Remember: If you did not say it in open court, you should not say it later if it is barred by Mass. R. Prof. C. 3.6 . . . . Do not agree to delay bail hearings . . . because you will lose your opportunity to create a public record . . . . The press is often present only for the arraignment and the verdict, so consider

3.6(b), the prosecutor can discuss it. Probable cause affidavits, by their nature, contain damaging information regarding the alleged criminal defendant. For example, the Indiana Supreme Court discussed information that was in the filed probable cause affidavit.[372] It stated that the defendant was suspected of killings in other jurisdictions and "that 'the evidence found in his truck including a .22 caliber weapon, all point to Mendenhall [the defendant] as the killer.'"[373] It discussed "DNA testing and the law enforcement officials' discovery of such a large amount of blood that they were able to determine that Ms. Purpura [the victim] was no longer alive."[374] The court concluded that statements reiterating this information "were based on publicly available information and protected by the safe harbor provision in Rule 3.6(b)."[375] The potential harm is obvious and likely the goal of the prosecutor's disclosure. And although an attorney is allowed to counter such information under Model Rule 3.6's retaliatory exception, a lawyer must tread carefully against the confidentiality presumption.[376]

Corporate defendants, on the other hand, as more sophisticated users of legal services, routinely obtain protective orders, stipulations, and/or other tools to maintain secrecy, including secret settlements. An infamous example is the Ford/Firestone litigation, during which protective orders protected information learned in discovery, and the parties agreed to a secret settlement.[377] One scholar stated as to the Firestone/Ford litigation that "it seems obvious that the secrecy agreements and orders worked to delay the recall of these tires for years. In those years, 271 people died in accidents linked to Explorer/Firestone tire failure, and more than 800 people were seriously injured."[378] Further, in the clergy sexual misconduct cases, dioceses settled lawsuits involving members of the church who allegedly sexually abused minor plaintiffs, "conditioned upon the parties agreeing that the settlements and any information regarding the claims would

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> preparing, prior to the defendant's arraignment, a statement of the case to be filed with the court. This statement may completely outline the nature of the Commonwealth's case against the defendant, as well as refer to any other matters that would be appropriate to argue at a bail hearing. Filing this statement with the court will permit you to create a "public record" should defense counsel succeed in preventing a bail argument.

Mitchell, *supra* note 5, at § 10.8.1.

372. *In re* Brizzi, 962 N.E.2d 1240 (Ind. 2012).

373. *Id.* at 1246.

374. *Id.*

375. *Id.* at 1246–47.

376. *See, e.g.*, United States v. McGregor, 838 F. Supp. 2d 1256 (M.D. Ala. 2012). In this case, a religious organization had sent out a mass-mailing criticizing gambling, discussing its corruptive effects, and referencing the trial, the court determined that although defense counsel had a right to respond, the "comment that government witnesses could not be rehabilitated by 'God himself,' . . . [was] an opinion [and] not the type of factual information protected by Rule 3.6 . . . ." *Id.* at 1265–66.

377. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002).

378. *Id.* at 785.

remain confidential, [while] [t]he defendant priests were sometimes transferred to another parish without informing parishioners, law enforcement authorities, or the communities in which they reside."[379] Thus, perhaps the harm analysis should not just focus on harm to the client, as Model Rule 1.8(b) and 1.9(c) regarding use do, but a broader harm analysis weighing harm to the client from disclosure or use against the harm to others if the information remains secret. This article takes no position on the contested issue of secret settlements other than to recognize that public record information can prevent harm to people outside of the litigation and that secret settlements are generally only available to defendants who have financial leverage to engineer them.

Thus, some defendants can better protect themselves from information being made public while others cannot protect themselves from disclosure and attenuating harm. There is a disparity in the treatment of publicly available information in the Model Rules that cannot be accounted for based on harm to the client, which is the only harm that is considered. Instead, disclosure is allowed under the Rule 3.6(b) public records exception, where the most harm can occur, because incarceration and perhaps even death are a possibility, while public records are protected in Model Rules 1.6, 1.9 and 1.18(b) from disclosure even if disclosure would result in no harm to the client. Further, the Model Rules do not consider harm to people other than the client.

C. Transparency

As discussed, Model Rule 3.6 has been the subject of Supreme Court litigation, and unlike Model Rules 1.6 and 1.9, contains detailed commentary regarding the weighing of the public policy interests. The interests implicated by Model Rule 3.6 concern the right to a fair trial versus the right to freedom of expression, which can promote transparency in and information about the legal system as well as the safety of the public.[380] Transparency in the judicial process can guard against the miscarriage of justice by police, prosecutors, and the judiciary.[381] Therefore, there is a cost to protecting information in the public record. As stated by the Seventh Circuit in regard to civil suits:

> [I]n our present society many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not

379. Walter W. Heiser, *Public Access to Confidential Discovery: The California Perspective*, 35 W. ST. U. L. REV. 55, 57 (2007).

380. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (A.B.A. 2018).

381. Gentile v. State Bar of Nev., 501 U.S. 1030, 1035 (1991) (Kennedy, J.) (plurality opinion).

> be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities. Often non-lawyers can adequately comment publicly on behalf of these institutions or governmental entities. The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.[382]

Transparency in criminal cases is equally important. As the D.C. Circuit Court recently stated in a case concerning President Trump's comments outside of the court proceedings, "To sum up, the Constitution requires robust protection of speech about criminal trials and the government's effort to deprive a defendant of liberty."[383] However, the court also recognized that the litigant's right to a fair trial must be protected and stated, "At the same time, the Constitution requires courts to ensure that outside speech and influences do not derail or corrupt the criminal trial process."[384]

But as to publicly available information, the United States Supreme Court has stated, in case concerning whether newspaper employees could be punished for contempt, that

> [a] trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity.[385]

The Court recognized that

> [c]ourts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public

382. Chi. Council of Laws. v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975).

383. United States v. Trump, 88 F.4th 990, 1007 (D.C. Cir. 2023), *reh'g denied*, No. 23-3190, 2024 WL 252746 (D.C. Cir. Jan. 23, 2024).

384. *Id.* ("The Supreme Court has instructed courts that when they are imposing orders restricting speech about judicial proceedings, they must in all cases consider both 'the imminence and magnitude of the danger' to the judicial process that flows from the speech and 'the need for free and unfettered expression.'") (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

385. Craig v. Harney, 331 U.S. 367, 374 (1947).

> comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.[386]

However, the Court also stated that "the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice."[387]

Further, other mechanisms in judicial proceedings that limit transparency, such as gag orders, protective orders, and closed courtrooms, are preferable to a broad attorney confidentiality rule because a judge exercises discretion and balances the numerous interests involved before employing them. In discussing the need for protective orders to protect litigant confidentiality and as a counter to the point that protective orders can keep confidential information about a public hazard or danger, it has been argued that because "the complaint and all subsequent pleadings, filings, and court proceedings are open, and the public and the press can therefore obtain more information about the alleged danger as the litigation progresses," protective orders need not be limited.[388] Instead, protective orders should remain within the court's discretion without a public access to information presumption preventing them.[389] Where the information has not been sealed and is publicly available, there is a presumption that this information is available to the public. If confidentiality is needed, these tools wielded using a judge's discretion to balance the issues reduce the need for a broad confidentiality rule.

Thus, transparency in the judicial and other government processes is a valid policy rationale against a broad confidentiality rule. Reasons supporting transparency include protecting against corruption and allowing the public access to information concerning matters of general public concern. Trials are public events, and the information belongs to the public. Secrecy in the judicial process is the antithesis to transparency.[390] Despite the recognized importance of transparency, as to disclosure of information under the Model Rules 1.6, 1.9, and 1.18(b), there is no balancing of transparency concerns or consideration of other mechanisms available that judges can implement when needed to protect information. The only policy rationale considered is the one regarding full and frank communication. But even if transparency was considered, it must be balanced against the litigant's right to a fair trial.

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386. *Id.* at 373 (quoting Pennekamp v. Florida, 328 U.S. 331, 347 (1946)).

387. *Craig*, 331 U.S. at 373. Elsewhere the Court had used the "clear and present danger" to the administration of justice standard. *Id.* at 371.

388. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 479 (1991).

389. *Id.* at 490–94.

390. Stevenson, *supra* note 364, at 343. Professor Stevenson argues for eliminating confidentiality rules. This paper argues instead for amending the rules to more closely reflect the policy concerns and to do so equitably in light of the imbalance of resources. *See infra* Part IV.B.2.

D. Freedom of Speech & The Right to a Fair Trial

In 2013, the Virginia Supreme Court delved into the competing interests, with a focus on freedom of speech, in a case concerning an attorney using public information to blog about completed cases.[391] The court stated, "It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a *pending* case."[392] The court stated that the Virginia State Bar concern that allowing an attorney to post truthful public information would stifle client communications and reduce public confidence in the legal profession had no evidentiary support.[393] The court held that the Virginia State Bar's interpretation of Rule 1.6 violated the First Amendment and that "[t]o the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."[394] The court had concluded that the blogs were commercial speech and that because the blog posts could be potentially misleading, the Virginia State Bar could require that the attorney include disclaimers on his blog post.[395]

In a 2024 case, the Tennessee Supreme Court distinguished between information in a public record and information stated in the courtroom concluding that when information is discussed in a courtroom, it becomes generally known.[396] It further distinguished the Virginia case by stating that the

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391. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 620 (Va. 2013). This case concerned "blog posts [of] cases that had been concluded . . . . [A]ll of the information that was contained [in the] blog was public information and would have been protected speech had the news media or others disseminated it." *Id.* The dissent characterized the blog posts as follows:

> Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

Id. at 622 (Lemons, J., McClanahan, J., dissenting in part).

392. *Id.* at 619 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1076 (1991)). The court further stated, "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Id.* at 620 (alteration in original) (quoting *Gentile*, 501 U.S. at 1054).

393. *Id.*

394. *Id.*

395. *Id.* at 618–19. The dissent characterized the blog posts as political speech protected by the First Amendment and as such, the Virginia State Bar should not have been able to require a disclaimer. *Id.* at 622 (Lemons, J., McClanahan, J., dissenting in part).

396. Manookian v. Bd. of Prof. Resp. of Sup. Ct. of Tenn., 685 S.W.3d 744, 790 n.65 (Tenn. 2024).

Virginia case concerned commercial speech while the Tennessee attorney acted to embarrass a previous client "to gain unfair tactical advantage."[397]

There is much to a First Amendment protection discussion. As to this paper, attorney freedom of expression as commentary on the judicial system and other related government processes, particularly on the need for reform in the judicial system, is an important policy consideration balanced against the equally important need for fair trials.

In summary, the policy rationale for a broad confidentiality rule and a broad interpretation of the term "generally known"—that unless confidentiality is protected, clients will not divulge information to their attorneys—does not withstand scrutiny when applied to publicly available information. This policy rationale is premised on clients believing that the information is confidential. Most people do not believe that information that can easily be found on the internet or in public records is confidential and consequently would divulge the information to their attorneys even if they knew that the attorney could reveal it.[398] The broad confidentiality standard regarding public information does not account for the client's expectations and study results challenging the premise that broad confidentiality rules are needed to ensure clients will tell their attorneys needed information.[399]

Further, the failure to consider other valid policy reasons that compete with a broad confidentiality rule is equally problematic. The United States Supreme Court and other courts have commented on the need for transparency of government processes, including trials and matters leading up to trial to prevent corruption.[400] "A trial is a public event," often concerning matters of interest to the public. [401] Mandating confidentiality of public records decreases transparency of the judicial system at a cost. Additionally, an attorney is an expert who is a witness to these judicial matters of public interest and is uniquely positioned to comment on them. The attorney's right to freedom of speech should not be curtailed absent a compelling reason, such as the defendant's right to a fair trial. There are mechanisms in place for limiting the dissemination of information, such as protective orders that are issued by a judge who weighs the competing interests. The constitutional issue of competing fundamental rights has its own analysis honed over many years of weighing those competing interests in a litigation setting.[402]

In Model Rules 1.6(a), 1.9(c)(2), and 1.18(b), there has been no weighing of competing interests concerning the reveal of information. Confidentiality is protected broadly based on a false narrative. No consideration is given as to the client's expectations or whether the client is harmed by the disclosure. No

397. *Id.*
398. *See supra* Part III.A.
399. *See supra* notes 358–59.
400. *See supra* Part III.C.
401. Craig v. Harney, 331 U.S. 367, 374 (1947).
402. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

consideration is given as to whether cloistering the information, although perhaps protecting the client, harms the public either directly or through a lack of transparency.

A weighing of public policy interests has occurred in other Model Rules. In Model Rule 3.6, a retaliation exception, which allows an attorney to retaliate to respond to information that others have publicized, was added after the *Gentile* case.[403] Further, Model Rule 3.6 comment one discusses the competing policy interests and mentions public safety.[404] So, a weighing of public policy concerns occurred as to the Rule 3.6 public records exception concerning the public's need for information regarding criminal defendants' or other defendants' actions that may affect the community versus the defendant's right to a fair trial.

The rationale that the public should have broad access to legal representation was weighed against the need for confidentiality in Model Rules 1.9(a), 1.9(b), and 5.6. Model Rule 1.9 comment three states that "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying,"[405] in a Rule 1.9(a) analysis. This policy is mentioned in Model Rule 1.9 comment four that Model Rule 1.9(b) "should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel [and] . . . the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association."[406] Model Rule 5.6 prevents settlement agreements that restrict a lawyer's right to practice based on limiting the lawyer's availability to other clients.[407] Thus, where a weighing has occurred as in Model Rules 3.6, 1.9(a), 1.9(b) and 5.6, the result has been less secrecy.

As to use in Model Rule 1.8(b) and Rule 1.9(c), an attorney can only use client information where there is no disadvantage to the client. The Model Rules do not define disadvantage.[408] Under the Restatement rule, confidential information cannot be revealed if "there is a reasonable prospect that doing so will adversely affect a material interest of the client . . . ."[409] The Restatement states that whether there is an adverse effect "depends on the circumstances," but that "the relevant inquiry is whether a lawyer of reasonable caution, considering only the client's objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client."[410] The Model Rules do not require the use to impact a client's material interest as the Restatement does. Further,

403. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2018).
404. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (A.B.A. 2018).
405. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).
406. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).
407. MODEL RULES OF PRO. CONDUCT r. 5.6 (A.B.A. 2018).
408. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 5 (A.B.A. 2018) provides an example of harm to the client, which indicates that acting in competition with the client would be considered acting to the client's disadvantage.
409. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. (c)(i) (A.L.I. 2000).
410. *Id.*

the Model Rules do not state the policy reasons behind the limitation, other than in Model Rule 1.9, that the rules are for the benefit of the former client.[411] Protecting client information promotes goodwill towards the profession. But again, there has been no weighing of other policy concerns. For example, disclosure may cause limited harm to the client, especially where the information is publicly available, while secrecy may cause greater harm to many people.[412]

A balancing of competing and valid policy rationales as to publicly available information supports a change in the Model Rules.

IV. ANALYSIS AND SOLUTIONS

A. Analysis of Arguments and Policy

The internet has equalized access to information, while cell phones and other small electronic devices have made this information readily available. Despite the availability of information, the ABA and most states, either in court or ethics opinions, take the position that lawyers may not reveal prospective, current, or former client information learned during the representation or potential representation even if the information is publicly available, unless it falls under a different stated exception.[413]

1. Rhetoric over Reality.—

a. Rhetoric.—This position puts rhetoric over reality. It has been stated that "client confidentiality is sacrosanct,"[414] an "absolute, critical value," and "a nonnegotiable element of our judicial system that must not be overridden except in cases so dramatic that reporting should occur in spite of any rule."[415] A dissenting judge in the 2013 Virginia First Amendment case discussed previously, which held that an attorney can post truthful public trial information, referenced the comment to Virginia's Rule 1.6, which states that "[a] fundamental principle in the client-lawyer relationship is that the lawyer

411. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 9 (A.B.A. 2018).

412. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000) (There is a cost to secrecy when a person whose "personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed.").

413. *See supra* Part II.C. *See also* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) (Information "contained in a public document or record is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6.").

414. Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75, 82 (2013).

415. *Id.* at 85 (quoting Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 448–49 (1997)).

maintain confidentiality of information relating to the representation."[416] The judge then stated, "I fear the consequence of the majority's weakening of the attorney's obligation of confidentiality may be a substantial undermining of the attorney-client relationship, as well as the further erosion of the respect and esteem accorded attorneys by their clients and the public." [417] When confidentiality is the desired result, this type of rhetoric is invoked without mention of the many exceptions that allow an attorney to extinguish client confidentiality without client consent.[418]

b. Reality.—The reality is there are numerous exceptions to the confidentiality rule with some that benefit attorneys.[419] Many of the exceptions available in Model Rule 1.6 concern situations where the public would benefit from disclosure, such as Rule 1.6(b)(3), which allows the lawyer to reveal confidential client information that

> rela[tes] to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[420]

This exception is similar to others in the rule regarding client wrongdoing is purposefully narrow with numerous elements that must be met.[421]

However, some exceptions concern the attorney's self-interest. For example, the attorney may reveal information:

> to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .[422]

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416. Harris v. Baltimore Sun Co., 625 A.2d 941, 952–53 (Md. 1993) (Chasanow, J., concurring in part and dissenting in part) (alteration in original) (quoting MD. RULES OF PRO. CONDUCT r. 1.6 cmt.).

417. *Id.* at 953 (Chasanow, J., concurring in part and dissenting in part).

418. *See, e.g.*, the exceptions in ABA Model Rule 1.6, Model Rule 3.3, and Model Rule 3.6.

419. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6(b)(7) (A.B.A. 2018) (allowing an attorney to reveal client information "to detect . . . conflicts of interest arising from the lawyer's change of employment . . . .").

420. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(3) (A.B.A. 2018).

421. *Id.* Rightfully, a lawyer might question whether the whistleblowing activity the lawyer wishes to engage in will meet all the elements in the narrow exception, deterring the lawyer from divulging the information.

422. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (A.B.A. 2018). The comment states that the lawyer may respond to the extent reasonably necessary. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (A.B.A. 2018).

Where the lawyer can protect against a claim;[423] secure legal advice regarding the lawyer's compliance with professional conduct rules;[424] and detect and resolve conflicts from an employment change[425] using information that the client expected to remain confidential, the argument against an exception allowing revelation of information that is already public makes little sense, especially if there is no harm to the client. Thus, a valid analysis requires looking beyond the confidentiality rhetoric to assess whether publicly available information should be kept confidential.

2. Arguments for a Broad Confidentiality Rule.—

a. Gossip about and humiliation of clients.—An argument against allowing attorneys to use or reveal publicly available information is that lawyers could "embarrass and humiliate former clients with impunity as long as they use confidential information that is in the public records"[426] and lawyers can "freely gossip about their clients at cocktail parties and entertain dinner companions with amusing stories about their clients, identifying the clients by name, as long as they believe their anecdotes have no risk or potential for harm to their clients' interests."[427] This concern does not consider that much attorney business comes from former clients through repeat business or referrals and attorneys who embarrass former clients are cutting off a source of potential income and would be acting against their own self-interest. Further, it does not take into consideration that the listeners, whether an individual, group, or larger audience through social media or the press, would likely not hire or recommend an attorney who spills former client secrets. A deterrent is already in place to limit this concern.

b. Difference between information being available and being known.—Another argument advanced is that there is a difference between information being available to the public and the public knowing it is there. The argument is that the attorney should not be the conduit for publicizing the client's information.[428] A helpful example concerns negative online reviews of an attorney's services.

An ABA opinion stated that an attorney may not divulge any confidential client information to respond to negative online reviews, even if the information

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423. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (A.B.A. 2018).

424. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(4) (A.B.A. 2018).

425. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(7) (A.B.A. 2018).

426. Jacobowitz & Jesson, *supra* note 414, at 93 (quoting David L. Hudson, Jr., *Commercial Ahead: Virginia Supreme Court Holds that Advertising Rules May Be Applied to a Lawyer's Blog*, 99 A.B.A. J. 20, 21 (2013)).

427. Harris v. Baltimore Sun Co., 625 A.2d 941, 952 (Md. 1993) (Chasanow, J., concurring in part and dissenting in part).

428. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *14 (S.D. Tex. May 4, 2006).

is in the public record.[429] Instead, the ABA and other states recommend a response that states that the lawyer is prevented from responding substantively because of professional obligations.[430] However, as has been demonstrated through U.S. Supreme Court decisions, there is a strong public policy favoring public information regarding attorney services.[431] In this situation, a disgruntled client is allowed to provide one side of the story and dissuade the public from using an attorney who may be the best attorney. Online negative reviews are one example that show there are competing policy reasons justifying an attorney revealing publicly available information and being the conduit to that information.

However, a disgruntled attorney, as a matter of revenge, could further disseminate embarrassing client secrets that are publicly available generally or beyond what is needed to respond to a negative online review.[432] Recognizing that if the information is publicly available, it might already be known, but for argument's sake, perhaps the attorney is the conduit bringing this information to the public's attention. Even so, for the reasons stated above, that attorney would be alienating the former client and many potential clients with such behavior. Where attorneys respond to a negative online review or otherwise

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429. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021). Such an approach ignores the substantial harm to the attorney. Negative online reviews can have a substantial effect on an attorney. *In re* Conduct of Conry, 491 P.3d 42, 51 (Or. 2021) (citing Angela Goodrum, *How to Maneuver in the World of Negative Online Reviews: The Important Ethical Considerations for Attorneys, and Changes Needed to Protect the Legal Profession*, 24 INFO. & COMM. TECH. L. 164, 168–71 (2015), which cited a 2014 study that concluded that 83% of respondents first looked to online feedback when searching for an attorney).

430. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021). *See, e.g.*, Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Formal Op. 200 (2014) (recommending that "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."); *but see* Ariz. Sup. Ct. Att'y Ethics Advisory Comm., Formal Op. EO-19-0010 (2019) (allowing in certain circumstances a response with confidential information to online comments stating that "the lawyer acted incompetently or dishonestly or refused to follow instructions.").

431. *See, e.g.*, the seminal case of Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

432. A recent Oregon disciplinary case listed egregious attorney behavior from a professional responsibility textbook:

> Professor Wolfram cites as examples an attorney who reported a client for tax violations after a fee dispute arose. (*In re Nelson*, 327 N.W.2d. 576, 578–79 (Minn. 1982); an attorney who threatened to report a client for having received payments "under the table" unless the client withdrew a bar complaint against him (*Bar Assn. of Greater Cleveland v. Watkins*, 68 Ohio St. 2d 11, 12, 427 N.E.2d 516, 517 (1981)); and an attorney representing adoptive parents who threatened to reveal his clients' identity to the natural mother unless they paid the mother's hospital bill (*In re Strobel,* 271 S.C. 61, 244 S.E.2d 537 (1978)).

In re Conduct of Conry, 491 P.3d 42, 51 (Or. 2021) (citing Charles W. Wolfram, *MODERN LEGAL ETHICS* § 6.7.5, at 303 (1986) (footnote omitted). However, these cases did not involve information that was already publicly available. Further, they are older cases, where unlike in today's information-rich environment, it would be difficult to publicly let others know what the attorney did.

bring attention to embarrassing client information as opposed to more measured responses, the attorneys act contrary to their own financial interests. An attorney's choice to respond in this matter could escalate the situation and the client could then write a negative online review (or another) or otherwise easily publicize the attorney's behavior with additional true or even false information. It is quite a reputational risk to take.

c. Collusion with the press.—Perhaps, recognizing these disincentives, it has also been argued that a publicly available exception would encourage attorneys to collude with the press to publish client secrets.[433] Currently, prosecutors can similarly work the system, and no alarm bells have been sounded.[434] In the Massachusetts Superior Court Criminal Practice Manual, it was recommended that attorneys

> [w]hen addressing the court for the first time, take the opportunity to outline the strength of the Commonwealth's case, and provide as much detail about the allegations and the nature of the Commonwealth's evidence as possible. Include any of the defendant's statements, as well as the results of any scientific evidence. The defendant's criminal history, past incarcerations, and defaults are relevant to the issue of bail and become part of the public court proceedings.[435]

As an example mentioned above, in a 2012 Indiana case, the probable cause affidavit included damaging statements, such as that the defendant was suspected of killings in other jurisdictions, and "that 'the evidence found in his truck including a .22 caliber weapon, all point to Mendenhall as the killer.'"[436] Under Model Rule 3.6, the defendant attorney can retaliate after the prosecutor's use of public information, but such a path has pitfalls. First, any mitigation response must be limited.[437] Attorneys have faced discipline for retaliating with too much information.[438] Second, the attorney must consider whether bringing more attention to the information is in the defendant's best interest or whether it will further taint the jury pool or defendant's trial.

Thus, as to criminal defendants, prosecutors can strategically place information in the pretrial documents so that it fits into the Rule 3.6(b) public record exception. Further, in the states where it was determined that information in the public record was not confidential, it was often regarding criminal

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433. Harris v. Baltimore Sun Co., 625 A.2d 941, 952–53 (Md. 1993) (Chasanow, J., concurring in part and dissenting in part).

434. *See* Mitchell, *supra* note 5, at § 10.8.1.

435. *Id.*

436. *In re* Brizzi, 962 N.E.2d 1240, 1246 (Ind. 2012).

437. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2018) ("A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.").

438. United States v. McGregor, 838 F. Supp. 2d 1256, 1265–66 (M.D. Ala. 2012).

convictions.[439] Notably absent from the discussion regarding the disclosure of criminal defendant information is the rhetoric regarding keeping client information confidential as a pillar and foundation of the attorney-client relationship. Additionally, Model Rule 3.6(b)(2), regarding trial publicity, applies to all clients, not just criminal defendants. As such, where the information is in the public record, attorneys can work with the press to provide this information. No collusion is necessary. A narrow confidentiality rule would not change the information that can be provided to the press.

3. Arguments Against the Broad Confidentiality Rule: Policy Concerns.— The risk of attorneys acting against their own self-interest or covertly scheming with the press to reveal publicly available information should be balanced against other competing policy considerations. Several policy concerns discussed earlier weigh against broad confidentiality rules.[440] Summarily treated here, information in the public record belongs to the public.[441] Further, the ability to use information in the public record can help identify failings or needed reform in the legal system[442] and can be used for lawyer education.[443] Lawyers' expert opinions on these and other legal matters are particularly relevant and suppressing them is a detriment to the public.[444] Further, secrecy of client information can harm others outside of the litigation.[445]

Additionally, where client information is available with a couple of keystrokes to anyone who has the client's name and access to a computer and the internet, clients do not expect this information to be kept confidential. Instead, the focus should be on attorneys having conversations with the client regarding what confidential information must remain confidential,[446] and obligating attorneys to attempt to protect the information that clients want protected through avenues available in the judicial system because judges have discretion to facilitate such requests and weigh competing policy concerns. Instead, the current rules operate as if it is the attorney's obligation to put the cat back in the bag by not being able to reveal information that is publicly

439. *See supra* Part II.A.

440. *See supra* Part III.

441. Craig v. Harney, 331 U.S. 367, 374 (1947).

442. Chi. Council of Laws. v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975).

443. Alaska Bar Ass'n Ethics Comm., Formal Op.1, at n.3 (1995) (public record documents can be exchanged for purposes of "shop talk" between lawyers if not harmful to clients, recommending names be removed).

444. Cicchini, *supra* note 60, at 100–02.

445. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000).

446. Where a client requests that an attorney keep client information confidential, the attorney must do so. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (A.L.I. 2000); D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006) ("We emphasize, however, that if a client withholds permission for her lawyer to disclose public information, the lawyer should comply with his client's wishes."); Md. State Bar Ass'n Comm. on Ethics, Formal Op. 07 (2016) ("This conclusion, however, focuses solely on what an attorney may agree to or request in a settlement agreement. To the extent that Rule 1.6 otherwise may permit a client to require that an attorney maintain certain information in confidence, Rule 5.6 does not limit a client's ability to do so or an attorney's obligation to abide by such a request."); *see supra* Part I.E.

available or use it unless it is notorious. Broad confidentiality rules protecting public information ignore these available mechanisms and policy concerns.

Beyond not considering these policy concerns or judicial protections, broad confidentiality rules have been subject to criticisms due to their breadth because they create an unworkable standard.[447] Also, studies have shown that this breadth is unnecessary because clients would share information with the attorney under a narrower confidentiality standard.[448]

4. Arguments Against a Narrow Generally Known Exception.—

a. Vagueness of the notoriety standard for generally known.—An argument can be made that where anyone can access the information, the information satisfies the generally known standard. However, no state has taken that position, and instead, where the generally known standard is used, the standard can only be reached where the information gains public notoriety. The argument could be that the notoriety standard does take the information-rich environment into consideration because with more information available to more people, it is more likely that information will gain notoriety standard. But the notoriety standard is vague and varies between states and sometimes within a single state. For example, a 2011 Massachusetts's ethics opinion, interpreting what was not confidential under Massachusetts Rule 1.6, determined that a probate proceeding easily obtainable as a matter of public record and an obituary in a newspaper were not confidential.[449] But then recently, a 2024 ethics opinion stated that "a lawyer must have evidence other than the fact of publication to show that the [judicial] opinion was widely known in the local community . . . ."[450] But court decisions do not answer the question as to what beyond publication is needed. They instead give unhelpful parameters. For example, a judge, in a 2013 Eastern District of Virginia case, stated that a divorce settlement "file[d] in the courthouse where anyone could go, find it and read it," is not generally known,[451] and as a way of supposed clarification, stated that "publication on the front page of a tabloid" is not required but generally known "is more than merely sitting in a file in the courthouse."[452]

Beyond prolonged media attention through various media outlets (but perhaps that is not enough where the media coverage was in a different city or state), what type of publication is required? If the information is covered for ten minutes on one news channel, does that establish notoriety? If it is published in one local newspaper? Determining notoriety based on social media presents even more of a challenge. If a non-attorney with a hundred followers publishes the information on social media, does that reach the notoriety standard? 1,000

447. *See, e.g.*, Harris v. Baltimore Sun Co., 625 A.2d 941, 946–48 (Md. 1993).
448. *See supra* Part III.A.
449. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 04 (2011).
450. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2 (2024).
451. *In re* Gordon Props., 505 B.R. 703, 707 n.6 (Bankr. E.D. Vir. 2013).
452. *Id.* (citing Va. State Bar Comm. on Legal Ethics, Formal Op. 1609 (1994)).

followers, 5,000 followers, 50,000 followers, 100,000, a million followers? No useful standard has been given.[453]

b. Impeding clients' choice of counsel.—An additional competing policy concern is mentioned in Model Rule 1.9 comment four that Model Rule 1.9

> should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel [and] . . . the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association . . . . If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.[454]

Thus, as a general matter, Rule 1.9 should not be applied with "unqualified rigor" where it would inhibit lawyers' ability to change jobs.[455] As applied, however, interpreting "generally known" to require notoriety does just that because in most of the disqualification cases mentioned in Part II states engaged in a "generally known" analysis,[456] and where the state has adopted the notoriety definition of generally known, it results in a rigorous application of Rule 1.9(a) because the attorney would be disqualified even when the information the attorney knew was publicly available, limiting clients' choice of counsel where the conflict is illusory or not severe because the information that the lawyer has is publicly available.

5. Summary.—The rhetoric often espoused when confidentiality is the desired result does not reflect reality, as there are numerous exceptions to the confidentiality rule. Further, this rhetoric clouds the complex issue of whether publicly available information should be confidential, preventing a discussion of other valid and competing policy concerns. As to revealing client information, the policy rationale offered that there must be broad confidentiality to support clients communicating with their lawyers is weak at best regarding publicly available information.[457] It does not consider whether the client believes that the information is confidential[458] or recognize the studies that show that if clients were to disclose information to the attorney, which they might choose not to do for various reasons, the disclosure would occur even with a narrow confidentiality standard.[459] Further, there is no balancing of other valid

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453. Cicchini, *supra* note 60, at 81 (asking similar questions and concluding that the standard is so indefinite as to be impossible to satisfy, resulting in "an absolute ban on speech").

454. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).

455. *Id.*

456. *See supra* Part II.C.2.

457. *See supra* Part III.A.

458. Cicchini, *supra* note 60, at 93 (arguing that clients do not believe that an attorney must keep public information confidential).

459. *See supra* Part III.A.

competing policy considerations, such as whether the client would be harmed by the disclosure of the information, whether others are harmed by the information remaining confidential, the attorney's right to freedom of expression, and the need for transparency in the legal system. These policy considerations, along with ensuring that clients have access to attorneys of their choice and fair trials, are equally applicable to an attorney's use of information. Harm to the client is considered in the "use" of current client information but again there is no balancing of other policy considerations, such as whether the secrecy, although harmful to the client, would cause a greater harm to others.

As to the attorney's use of information of former clients, more of a balancing occurs. Harm is required (likely to protect people's choice of counsel) or if the former client would be harmed, the information could be used if it had gained notoriety.[460] The notoriety standard, however, is vague. Further, the arguments asserted against a standard that allows public information to be used do not recognize that there are already financial disincentives in place to prevent attorneys from revealing or using public information to the detriment of their clients.

B. Potential Solutions to End the Disparate Treatment of Publicly Available Information

Distilled, there is a disagreement between states and sometimes within a state as to whether publicly available information is confidential and whether publicly available information is generally known. Arguably, this disparity exists because the policy rationale supporting a broad confidentiality rule falters when applied to publicly available information and because there are other competing policy concerns that have not been addressed. Although not stated, perhaps the underlying rationale for this broad protection of confidentiality is the distaste for, and the need to protect against, attorneys who reveal client information either for their own financial gain or to otherwise harm or disparage the client.

1. Broad Protection of Publicly Available Information.—One way to protect against attorneys using client information for financial gain or to otherwise harm or disparage a client is to adopt broad confidentiality rules consistently across the Model Rules. The Model Rules could explicitly state in the rules or comments to Model Rules 1.6(a), 1.8(b), 1.9, and 5.6 that there is no public record or publicly available exception. It would also require eliminating the public record exception in Model Rule 3.6(b). Eliminating this exception in Model Rule 3.6(b) would address concerns regarding a defendant's right to a fair trial. The public record exception in Model Rule 3.6(b), which carries over to Model Rule 3.8, is particularly problematic where prosecutors put the damaging information in the public record so that they can then later use it to bolster their case to the detriment of the defendants, at the expense of the

460. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (A.B.A. 2018).

defendant's reputation and freedom.[461] Eliminating the public document exception in comment three to Rule 1.9(a) may not be problematic because courts do not rely on it and instead focus on whether the information is generally known as embodied in Rule 1.9(c).[462] Consistency between Model Rule 1.9(a) and 1.9(c) would help eliminate uncertainty and reduce differing opinions on the treatment of publicly available information. However, Rule 1.9 comment eight, which implies that former client information can be revealed if it is not harmful to the client, should be fixed because, under the current rules, the information cannot be revealed even if it would not harm the client.[463] Modifying Model Rule 5.6 would also appease commentators who have argued for eliminating the public document exception in Rule 5.6[464] because the rule is "an anachronism, illogical and bad policy."[465]

This approach would come at a cost to the public. It would curtail transparency of the judicial system. Attorneys, as experts in the judicial system, with a right to freedom of speech would not be allowed to speak of the inequities, failures, and corruption that they witness, which often requires revealing client information. Further, it would disregard the presumed weighing of the public's need for information regarding criminal defendants that occurred in Model Rule 3.6. However, these changes would create consistency regarding publicly available information in the Model Rules, and certainly, there is much rhetorical support for such a position,[466] such that these changes for consistency would likely be met with little resistance.

2. Narrow Protection of Confidential Information.—Instead of doubling down based on rhetoric that clouds the complexity of whether publicly available information should be confidential, another option is to recognize the current ease of access to information and create consistency in the Model Rules based on valid policy rationales. The Restatement (Third) of the Law Governing Lawyers' position is that publicly available information is not confidential and can be used or revealed.[467] The relevant Restatement provision states that confidential information "includes information that becomes known by others, so long as the information does not become generally known."[468] It defines "generally known" as information that is in the public domain and can be acquired without special knowledge or substantial difficulty or expense.[469]

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461. *See supra* Part IV.A.2.c.

462. *See supra* Parts II.A.2 & II.C.2.

463. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (A.B.A. 2018); *see supra* Part I.D.

464. *See, e.g.*, Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(B)*, 33 SW. U. L. REV. 1 (2003) for an in-depth critique.

465. Stephen Gillers, *A Rule Without Reason: Let the Market, Not the Bar, Regulate Settlements that Restrict Practice*, 79 A.B.A. J. 118, 118 (1993).

466. *See supra* Part IV.A.1.a.

467. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

468. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b (A.L.I. 2000).

469. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

The policy behind the Restatement's confidentiality rules is a balancing of the attorney's free speech interests along with the costs of the secrecy to society versus the need for lawyers to have client information to accomplish the client's lawful objectives.[470] The policy reason in the Model Rules focuses only on the attorneys' interest versus the clients' interests, determining that the clients' interests in protecting their information outweigh attorneys' interest in use or disclosure. Balancing additional valid policy rationales lends support to the Restatement's narrow confidentiality rules that do not protect client information that is publicly available. Thus, a solution is to recognize other valid policy concerns by adopting the Restatement's confidentiality position.

Similar to what some states have done, a method to incorporate the Restatement's narrow confidentiality position into the Model Rules is to create a definition for confidential information, either in Model Rule 1.6 or in Model Rule 1.0, exempting publicly available information or at a minimum information that is in the public record.[471] The word, "confidential" would then need to be added before the word "information" in Model Rules 1.6(a) and 1.8(b). Further consistent with the Restatement's narrow confidentiality position, a material harm limitation should be added to Model Rule 1.6(a).[472] For example, Model Rule 1.6(a) could be changed to state: "A lawyer shall not reveal *confidential* information relating to the representation of a client *to the material disadvantage of the client* unless . . . ." Then material harm would be a limitation to both use in Model Rule 1.8(b) and disclosure in Model Rule 1.6(a), as it is under the Restatement's confidentiality position.

As to Model Rule 1.9, the beginning of Model Rule 1.9(c) would stay the same and state, "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . ."[473] But then the following phrase could be added: *use or reveal confidential information relating to the representation to the material disadvantage of the former client except as these Rules would permit or require with respect to a client.* This suggested rule combines Model Rule 1.9(c)(1) and (2) and adds the word "confidential" before the word "information." It also adds the material harm requirement to both disclosure and use, consistent with the Restatement position.[474]

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470. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000). As to the cost of secrecy, the Restatement states that a situation could occur where a person whose "personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed." *Id.*

471. Limiting public records to public government records would be consistent with court decisions in Maryland, Indiana, and Colorado. *See supra* Part II.E.

472. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1) (A.L.I. 2000).

473. MODEL RULES OF PRO. CONDUCT r. 1.9(c) (A.B.A. 2018).

474. *See, e.g.*, Harris v. Baltimore Sun Co., 625 A.2d 941 (Md. 1993). There must be harm to the client before an attorney will violate Rule 1.6. *Id.* at 947.

If the word, "confidential" is added before the word, "information," in Model Rule 1.9(c), then Model Rule 1.9 comment eight, which states that the information can be used or revealed if it is not disadvantageous,[475] would then be accurate and no longer confusing. Further, Model Rule 1.9 comment three concerning 1.9(a) and public information not being disqualifying[476] would also be accurate. Model Rule 1.18(b) would follow accordingly as it states that it incorporates Model Rule 1.9 by stating "a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."[477]

Under these changes to both Rule 1.6(a) and Rule 1.9(c), publicly available information (or it could be limited to information in the public record) could be disclosed or used regardless of detriment to the client, but confidential client information could only be used or disclosed if it was not detrimental to the client.

As to Model Rules 3.6 and 3.8 under the Restatement's confidentiality position, if the information was not confidential, it could be revealed under Model Rules 3.6 and 3.8 if it was in the public record.[478] Model Rule 5.6 would also stay the same. This method of incorporating the Restatement's confidentiality rules into the Model Rules creates consistency among the rules and considers other public policy concerns advanced beyond the need for client disclosure to the attorney.

However, it does not fix the problem in Model Rules 3.6 and 3.8 regarding prosecutors putting information in the public record so that they can later reveal it to a defendant's detriment with loss of freedom and fair trial implications. The *Gentile* court stated that the extent to which the information was already circulated was a significant factor in determining the likelihood of prejudice and that in the case, "[m]uch of the information . . . had been published in one form or another, obviating any potential for prejudice."[479] However, when freedom of expression is balanced against a defendant's right to a free trial, the U.S. Supreme Court has stated that the balance should "never [be] weighed against the accused." [480] Where prosecutors are allowed to purposefully publish derogatory information to later publicize against accused individuals who often do not have the resources to protect the information, the balancing has been weighed against the accused.

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475. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (A.B.A. 2018).

476. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).

477. MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018).

478. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2018).

479. Gentile v. State Bar of Nev., 501 U.S. 1030, 1042–47 (1991) (Kennedy, J.) (plurality opinion).

480. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.").

A possible solution to this Model Rule 3.6 and Rule 3.8 problem is to view all disclosures of public information under Model Rule 3.6(b) under the Model Rule 3.6(a) requirement, which prohibits disclosures that would have a substantial likelihood of materially prejudicing an adjudicative proceeding.[481] The same result could be achieved by adding the "materially prejudicing an adjudicative proceeding" standard to the public record exception in Model Rule 3.6(b). Then, the timing of the public record disclosure could be considered as it was in *Gentile*[482] and other cases.[483]

Incorporating the Restatement's confidentiality scheme also does not prevent an attorney from using public information for the attorney's personal use, such as financial gain, which can be distasteful. But, arguably no more distasteful than exceptions for attorney self-preservation already available in the Model Rules. Not all uses for personal gain are distasteful. For example, an attorney could use this information to rebut a negative online review. This ability prohibits a one-sided story against an attorney who might be the best attorney for a subsequent client.[484] Lastly, in ABA Formal Op. 18-480, it was stated that although "Rule 1.8(b) could be read to suggest that a lawyer may use client information if it *does not* disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer's ethical obligations."[485] Thus, perhaps there is a fiduciary requirement that could be enforced to deter lawyers from profiting at the expense of the client.

CONCLUSION

The Restatement confidentiality scheme incorporated into the Model Rules is a preferable option because it considers other valid policy concerns, creates consistency among the Model Rules, and considers the modern information

481. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2018).

482. *Gentile*, 501 U.S. at 1042–47 (Kennedy, J.) (plurality opinion).

483. *See, e.g.*, State v. Polk, 415 S.W.3d 692 (Mo. Ct. App. 2013).

484. Negative online reviews can have a substantial effect on an attorney. *In re* Conduct of Conry, 491 P.3d 42, 51 (Or. 2021) (citing Goodrum, *supra* note 430, at 168–71, which cited a 2014 study that concluded that 83% of respondents first looked to online feedback when searching for an attorney)).

485. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) (A.L.I. 1998)). The opinion cited to the Restatement, which is problematic under the current Model Rules because the Model Rules and the Restatement define confidential information differently. But if the rules are changed as suggested to align with the Restatement, then the position in this ABA Formal Opinion would hold more weight. Perhaps the standard in Rule 1.8(b), because it relies on the Restatement (Third) section 60(2), is that information easily accessed by the public can be used if does not disadvantage the client, which is this paper's position. Section 60(2) states that "a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) (A.L.I. 1998).

landscape. When the recommended solution to Model Rule 3.6 is added, the disproportionate impact of a public record exception on defendants is reduced while still protecting disclosures necessary for public safety.

MEDIEVAL ROOTS, MODERN INSIGHTS: THE ORIGINS OF COMMON LAW CONTRACT

MATTHEW J. BAKER*

Common law contract is described as the body of law dealing with legally enforceable promises, with its basic principles originating from judicial decisions. What underpins this method of lawmaking is an understanding of the past, such that prior judicial decisions guide the resolution of present legal disputes. Yet despite this ostensibly historical process serving as a vehicle for legal development, there is a general absence of recognition among lawyers, scholars, and students of the origins of this body of law in medieval English law.

This Article posits that understanding the origins of common law contract, particularly as it developed around the writs of debt and covenant during the medieval period, provides lawyers and students with a more nuanced and contextualized view of a body of law that has gradually, but significantly, expanded its scope since its inception a millennium ago.

An understanding of early common law contract forces one to go back to first principles of contract dispute resolution. While modern contract law tends to focus on substantive rules and doctrines, the early history of common law contract is primarily based on formal and procedural rules. The shift in focus to substantive rules raises questions about the fundamental aspects of contract law and its purpose. Such questions are liable to be ignored if one does not consider how early common law contract arose, and why formal rules and requirements once dominated a lawyer's thinking about how to best resolve contract disputes.

INTRODUCTION

"[T]he English law of contract has not evolved lineally . . . ."[1]
–John Baker

A basic narrative of modern contract law begins with the proposition that a contract is "a promise or a set of promises for the breach of which the law gives

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1. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 338 (5th ed., Oxford Univ. Press 2019) (1971).

a remedy, or the performance of which the law in some way recognizes as a duty."[2] Beyond this proposition sits a series of formal and substantive rules which buttress and clarify an otherwise circular starting point. The prime vehicle for the creation and formation of these rules, at least traditionally, is the common law. In this system, judicial decision-making and the concept of precedent provide a "body of accumulated wisdom and a system of thought" regulating contractual transactions.[3] In essence, this idea of precedent is simply that it "has always been usual for one court to yield to the customs of another" earlier court when dealing with similar cases.[4] Since the nineteenth century, lawyers and commentators have generally viewed these processes as evolutionary in nature.[5] The body of knowledge stemming from these processes incentivizes lawyers and judges to have some understanding of what has come before.

From these remarks one can see that an understanding of what has preceded—of history—is necessary to understanding modern contract law. If this is true, can an understanding of the inception and early development of common law contract provide insights for modern contract law? Did the institutional frameworks, rules, and available remedies of medieval contract law influence modern contract law? Such questions are important, particularly if one accepts that (a) modern contract law evolved out of medieval contract law following the Norman Conquest,[6] (b) these medieval beginnings had direct and indirect impacts on modern contract law, and (c) that modern accounts of contract law largely ignore these early developments.

This Article seeks to answer these questions by looking at three aspects of medieval contract law and its relevancy today. The first aspect is conceptual. In other words, have lawyers always conceptualized contract law in the same way? This aspect shows that the concept of contract, and therefore contract law's potential scope, expanded significantly following the transition from Latin to English as the language of learning. Secondly, this Article will provide an overview of early contract at common law, principally through a selection of primary sources. These sources show a body of contract law that relied far more on formal rules, which obviated the need for complex substantive doctrines that

2. RESTATEMENT (SECOND) OF CONTS. § 1 (A.L.I. 1981).

3. BAKER, *supra* note 1, at 207.

4. Slade v. Morley (1602) 4 Co. Rep. 91 (KB), *reprinted in* JOHN H. BAKER, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 470 (John H. Baker & S.F.C. Milsom eds., 2d ed. 2010).

5. This approach begins with the contributions of Henry Maine, whose seminal work in legal history was published in 1861, only two years after Charles Darwin's *On the Origin of Species* was published. *See* HENRY S. MAINE, ANCIENT LAW 113–170 (1st ed. 1861).

6. There is debate whether English law before the Norman Conquest had a body of law which we would recognize as 'contract law.' *See, e.g.*, FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 26 (James F. Colby ed., 1915) (questioning whether Anglo-Saxon contract law was really contract law at all).

arose as contract law later evolved into a more modern guise.[7] Finally, this Article will give an account of the extraneous factors, such as rules of pleadings and the methods of court reporting, which explain why early common law contract developed as it did.

Taken together, these stages of analysis bring several fundamental issues to the fore. For instance, the modern Restatement definition[8] that contract at law is essentially enforceable promises sits in tension with the fact that such a broad definition did not exist in early contract law, and the concept of a promise did not feature prominently in recorded litigation or treatises on the common law until the sixteenth century.[9] Moreover, if common law contract relies on the accumulated wisdom of judges passed down to later generations of lawyers, then what impacts do changes in the means of transmission have on how well that wisdom is captured and transferred?[10] In an age of artificial intelligence and digital communications, these are hardly idle questions.

These issues and aspects of early common law contract are explored in this Article in six parts. Part I explains why simply ignoring the origins of contract law and its development in the medieval period is a problem. Part II explains the conceptual development of key concepts in contract law, particularly the notion of 'contract' itself, between the eleventh and sixteenth centuries.[11] This conceptual landscape was one of two important factors which framed how lawyers viewed legal disputes. The second of these factors was the writ system, which provided a means to enliven a common law court's jurisdiction and remedial enforcement. This system is discussed in Part III, and sets the scene for Part IV, which looks directly at the main common law contractual actions in

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7. For instance, while there were notions of quid pro quo in medieval contract law, and the common law never recognized mere promises, even in the sixteenth century there did not exist the complicated doctrine of consideration. *See, e.g.*, Sidenham v. Worlington (1585) 2 Leon. 224, pl. 286, *reprinted in* BAKER, *supra* note 4, at 530–31.

8. *See* RESTATEMENT (SECOND) OF CONTS. § 1 (A.L.I. 1981).

9. *See* Pykering v. Thurgoode (1532) K.B. 27/1083, m. 20., *reprinted in* 93 PUBLICATIONS OF THE SELDEN SOCIETY 4 (John H. Baker ed.,1977); *see also* CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT 174–75 (William Muchall ed., 1874) (1518).

10. For example, the relatively arduous task of transcribing and distributing the outcomes of cases may, in part, explain why Year Book cases seem so foreign to a contemporary lawyer's eyes (even after accounting for translation from the original Latin). To the modern eye, these Year Books have a conspicuous absence of judicial reasoning, which as I shall discuss in this Article, is also partly attributable to civil procedure rules. In a practical sense it seems difficult to believe that the ubiquity (or lack thereof) of means to transmit legal knowledge does not bear some relationship with its substantive development, although this is an argument best left for other historical legal scholars better versed in such things. For a discussion on the changing role of court reporting, *see, e.g.*, THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 268–84 (Little, Brown & Co. 1956) (1929).

11. What is also fascinating about this development is that it shaped how lawyers practically approached and compartmentalized the law. For instance, it was not until the late-eighteen century, long after the conceptual changes in an understanding of contract, that one sees a treatise that deals exclusively with contract law. *See, e.g.*, *id.* at 363; *see also* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 134–36 (1991).

this writ system, namely, the actions of covenant and debt. This Part examines some more notable cases to show how courts resolved contractual problems in the early common law and provides some specific lessons for today. Part IV raises some fundamental questions about the form and substance of contract law. For example, how is it that early common law contract operated with so few substantive legal rules and principles? Why is it that the factual basis of problems presented to courts seem essentially familiar, and yet the record of their adjudication contains little or no evidence of judicial reasoning? The remaining two parts of this Article provide answers to these issues.

Part V shows how litigation procedure and processes reinforced a reliance on formalism over substance, and how a balance between these two aspects of contract law shifted—just as today the legal system grapples with the pressures of formalism in automated and standardized contractual transactions. Finally, Part VI explores the relationship between early contract law development and its transmission through the Year Books, which were akin to a professional newspapers that combined cases and matters of technical interest with the lighter side of lawyering.[12] Their changing use shows both a constant sentiment in contract law that accepted principles ought not outweigh individual opinions, but also the enduring difficulties that courts face when this sentiment meets a judicial reluctance to repeat past errors.

I. DEFINING THE PROBLEM

A. The Absence of Early Common Law Contract

As one first-year contract law textbook puts it, the "[c]ommon law is judge-made law" and "contract law is predominately judge-made."[13] Implicit in this simple description of contract law is the idea that contract law is contingent on historical processes. Yet the text in this example does not mention the origins of contract in the common law. And this example is hardly unique; even some of the more voluminous introductory texts on contract law only mention early common law contract in passing—if it is discussed at all.[14] While one can recognize that accounts of contract law can, and do, leave out the origins and early developments of that body of law,[15] a problem with that approach is that

12. PLUCKNETT, *supra* note 10, at 273.

13. ROBERT A. HILLMAN, CONCISE HORNBOOKS: PRINCIPLES OF CONTRACT LAW 12 (4th ed. 2019).

14. *See, e.g.*, ARTHUR L. CORBIN, CORBIN ON CONTRACTS (Joseph M. Perillo ed., rev. ed. 2013). For a text that is perhaps exceptional in this regard, see EDWARD A. FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 1.01 (4th ed. 2020).

15. The tendency to see greater relevancy in more recent developments has always existed in the common law—just as it exists in many other areas of inquiry. For instance, the early Year Books, which were quasi-journalistic in nature, tended to prefer more recent cases over earlier ones that established rules and principles. A result of this approach meant that an early case establishing a particular rule might be forgotten, despite continued retention of the rule. For a discussion on such matters, see, e.g., PLUCKNETT, *supra* note 10, at 273.

it leaves one liable to forget how or why contract law developed as it did, and why it operates the way it does today. As philosopher Alisdair MacIntyre observes, if one deprives "rules of their original context . . . they at once are apt to appear as a set of arbitrary prohibitions."[16]

One sees this even when it comes to defining the subject itself as legally enforceable promises[17] because a promise was peripheral rather than central to early contract law.[18] The point here is not to say that in early common law contract parties did not make promises to one another when forming contracts. As a purely factual matter, parties did make promises to one another when contracting.[19] The tension stems from using this concept to describe the essence of the subject and the starting point for legal liability in contract when "the shift toward liability based on promises" took place in the sixteenth century.[20] This tension also flows into other key doctrines associated with contract law, such as consideration. After all, if a court's attention focuses more on the substantive agreement and promises exchanged to determine liability, then there must be a greater emphasis on the criteria through which courts can distinguish promises that are binding from those that are not. A substantive doctrine of consideration provides one such criterion.

One further issue is that, if one adheres to the proposition that promises are central and essential to contract law and contractual liability, one is either left questioning whether the modern definition needs to be rethought, or alternatively whether medieval common law contract is even contract law at all.[21] However, what the historical record shows is a relationship that is evolutionary, and the distinctions between modern contract law and medieval contract law based largely on incremental rather than categorical changes over time.[22]

The absence of early common law contract in discussions of contract law is not limited to matters of doctrine. For example, consider the proliferations of

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16. ALASDAIR MACINTYRE, AFTER VIRTUE 112 (3d ed. 2007).

17. This notion is not only contained in the RESTATEMENT (SECOND) OF CONTS. § 1 (A.L.I. 1981). One can also see it doctrinal and theoretical literature as well. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE (2d ed.2015).

18. *See* 93 SELDEN SOCIETY, *supra* note 9, at 4–6; *see also* Warren Swain, *Contract as Promise: The Role of Promising in the Law of Contract—An Historical Account*, 17 EDINBURGH L. REV. 1, 8 (2013).

19. DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 141–42 (1999).

20. *Id*.

21. Contemporary legal historians take the view that the writs of debt and contract are appropriately categorized as 'contract law.' Simpson, for example, denies "the ridiculous conclusion that no law of contract then existed." *See* ALFRED W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 5–6 (1st ed. 1975).

22. The idea that there are categorical differences between these writs and modern contract law would, for example, make it more difficult for this Article to argue that there are common threads in common law contract that can be traced back to the early common law. As Simpson notes, if this line of reasoning is correct, then historical inquiry into early common law contract would be perfectly futile. *See id.* at 6.

new theories of contract law over the past several decades.[23] Of these, there are the more well-known promissory theories,[24] reliance theories,[25] transfer theories,[26] and critical theories that exist.[27] There are also important distributive justice theories,[28] theories about the death of contract,[29] and even theories used to explain contract theories.[30] Yet none of these theories, as far as this author is aware, accounts for the development of early common law contract out of the writ system. It is perhaps unsurprising then that there is no universally agreed theory of contract given these theories fail to account for the practice of contract law over a five-hundred-year period.[31]

II. DEFINING CONTRACT

A. Modern Concepts of Contract

To the modern lawyer, contract law conjures up notions of agreement supported by consideration, involving promises of some kind, and within which the idea of an agreement is analyzed in terms of offer and acceptance.[32] While some writers have speculated that there are perhaps almost as many definitions of contract as there are writers on the subject,[33] defining such a ubiquitous area of law is a difficult task. As one leading introductory text notes when discussing the idea that contract law is essentially the law of legally enforceable promises:

> This definition is not particularly useful, and may be positively misleading. It, along with definitions such as "legally enforceable agreement," attempts to squeeze, often with a shoehorn, and sometimes

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23. For a recent example, *see, e.g.*, PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (2019). For a discussion on the growth of contract law theory generally, *see* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).

24. *See, e.g.*, PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 405–08 (1979); *see also* FRIED, *supra* note 17, at 22–23.

25. *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 274–76 (1986); *see also* STEPHEN A. SMITH, CONTRACT THEORY 78 (2004).

26. *See* SMITH, *supra* note 25, at 97.

27. *See, e.g.*, Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803 (2022).

28. *See, e.g.*, Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

29. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT (2d ed. 1995).

30. *See e.g.*, Steven P. Croley, *Libertarianism as Critical Theory*, 1 MICH. L. & POL'Y REV. 179 (1996).

31. The failure in theoretical discussions on even defining contract law is problematic in the sense that it limits one theoretician's ability to engage with another. However, the doctrinal and practical implications appear to be more limited than one might otherwise imagine. As Corbin observes, the theoretical disagreement about defining contract only "occasionally leads to an unjust decision and to uncertainty in the law." CORBIN, *supra* note 14, at § 1.3.

32. *See* SIMPSON, *supra* note 21, at 5.

33. Another prominent use of the concept of a 'contract' is to refer to the written document which provides a record of the parties' agreement. *See, e.g.*, CORBIN, *supra* note 14, at § 1.3.

> with a crowbar, the complexity of the topic into the pigeonholes of "promise" or "agreement." There are at least two difficulties with equating contract with promise. First, much of contract involves judicial imposition of solutions to problems the parties have not addressed or which they have addressed in illegal or unconscionable ways . . . . Another difficulty with the equating of contract with promise is that it ignores the array of consensual transactions that can be termed "executed contracts." The notion that a contract must be a promise stems from the old writ of assumpsit under which the making of a promise was a necessary allegation. But assumpsit is not the sole progenitor of contract.[34]

For present purposes, one interesting aspect of the above excerpt is that the remaining parts of the treatise largely do not account for common law contract.[35]

As Stephen Smith points out, defining a 'contract' is also difficult for theorists.[36] To circumvent this definitional difficulty, "[c]ontract law theorists rarely discuss this issue" of what key concepts mean.[37] Even where a theory does discuss the issue, the early common law is invariably overlooked. This author is not aware of any major contract theory which accounts for early common law, which is perhaps less surprising when one considers that the main philosophical influences for these theories are Enlightenment or post-Enlightenment figures who lived in periods characterized by a rejection of the medieval world in which early common law jurisprudence developed. For example, Charles Fried relies on David Hume and Immanuel Kant to say that contract and contract law is fundamentally about obligations arising from promises.[38] Richard Posner relies on Thomas Hobbes and Adam Smith to provide an economic analysis of contract law.[39] Peter Benson relies on John Rawls to say that contract (or at least contract formation) is about "transactional acquisition."[40] Patrick Atiyah relies on Samuel von Pufendorf as a basis for reliance theory of contract.[41] Jay Feinman relies on critical theorists to say that contract law as it developed during this post-Enlightenment period is artificial.[42] These are of course not the only examples available, but they show how both doctrinal and theoretical discussions about what contract law is and how to define it can easily overlook early common law contract.

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34. *Id*.
35. *Id.*
36. SMITH, *supra* note 25, at 4–6.
37. *Id.* at 9.
38. FRIED, *supra* note 17, at 1, 134.
39. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 n.9, 94 (7th ed. 2007).
40. BENSON, *supra* note 23, at 13, 20.
41. For a discussion on this, see, e.g., LARRY A. DIMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT 8–9 (1998).
42. *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 831–32 (1983).

Why does this matter? For one, defining something when the thing to be defined is the product of drawn-out historical processes requires recourse to those processes. Secondly, early common law contract is instructive because it does not contain the contemporary difficulties both in doctrine and theory of defining contract law. This second point stems partly from the expanded scope of contract law today based on broad conceptual definitions that are put forward, which are then supplemented with reference to substantive (rather than formal) legal criteria. In this context, a 'formal' requirement is simply a procedure or practice under which litigation can be commenced and pursued,[43] and which typically does not permit evaluative judgments or the weighing of factors as a substantive rule would.[44] For example, a rule that required a written contract—without regard to the substance of that written contract—as a precondition to enforceability would be one example of a formal rule.[45]

A rule of 'substance,' by way of contrast, refers to the body of abstract rules flexibly applied to the various of factual circumstances presented to courts.[46] In this sense, there is a degree of evaluation and discretion in the application of such rules not present in formal rules. For example, the rule that a court should take a plain reading of the words in a signed written agreement, with limited recourse to parol evidence to clarify ambiguity, would be an example of a substantive rule.[47] In this example, the courts are going beyond the formal requirement mentioned above, where the formal rule serves more like a jurisdictional consideration.

As Atiyah observes,[48] there are different types of reasoning involved with questions of form versus substance in contract law:

> [A] contract required to be in writing, may be declared void or unenforceable if the formalities are not observed. In such cases we do not stop as a rule (though there may be exceptions) to ask whether the failure to comply with the formal requirements is outweighed by some other substantive reason in favour of giving legal force to the will or contract. Once the legal rule of ineffectiveness for lack of form is clearly established, the application of that rule shuts out from consideration the substantive arguments in favour of validity or enforcement.[49]

The line between form and substance can, of course, blur at times. For instance, the doctrine of precedent could fall into either category, depending on how

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43. *See, e.g.*, BAKER, *supra* note 1.

44. PATRICK S. ATIYAH, ESSAYS ON CONTRACT 94 (1986).

45. Plea Roll of the Berkshire Eyre of 1248 (Esthanney v. Drayton), *reprinted in* 90 PUBLICATIONS OF THE SELDEN SOCIETY 119 (M. T. Clanchy ed., 1973).

46. *See, e.g.*, ATIYAH, *supra* note 44, at 93.

47. *See, e.g.*, Codelfa Constr. Pty. Ltd. v St. Rail Auth. of New S. Wales (1982) 149 CLR 337, 352 (Austl.) (Mason J.).

48. *See* ATIYAH, *supra* note 44, at 93.

49. *Id.* at 93–94.

strictly a judge sought to apply the precedent.[50]Nonetheless, there is a difference between rules of form and substance, and it is the former which was the focus for the concept of contract in the early common law. It is the focus on the latter in modern contract law which coincides with definitional confusion. If this is the case, is there anything in early common law contract's emphasis on form over substance which might explain why there is no universally agreed definition of contract law today?

B. Pre-Modern Use of the Term 'Contract'

In the earliest accounts of common law contract, a contract "did not mean a mere consensual agreement or an exchange of promises, but denoted a *transaction*—such as a sale or loan—which transferred property or generated a debt."[51] John Baker points out that the "word 'contract', in particular, possessed a more confined meaning for medieval common lawyers than it now does."[52] This meaning is closer to the Latin *trahere*, which when combined with the prefix *con*, simply means a drawing together of multiple parties.[53] In this sense, the concept retained a closer affinity to its Latin roots when Latin was the language of learning and the law.[54] A broader use of the term, away from its etymological origins, coincided with the increasing use of English in common law jurisprudence and the consequent abandonment of Latin.

One surprising aspect of early common law contract for a modern reader is that courts and commentators never expressly define contract law in a universal or abstract sense—no such attempts appear until the sixteenth century. Prior to that time, the situation was similar to Roman law, in which jurists and commentators view 'contract' as an umbrella term denoting a group of fixed types of "transaction[s]—such as a sale or a loan—which transferred a property or generated a debt."[55] In other words, the notion of 'contract' was more like a genus with particular transactions forming species underneath that genus. One reason for this state of affairs is that early common law lawyers were "practical administrators . . . not given to metaphysical speculations." [56] As such, "[t]welfth-century lawyers in the King's Court . . . proposed no theory of obligation; they said nothing about mutual grants, consent, consideration or any other theory of contract."[57] The residual effects of this aversion to theorizing are still evident in Christopher St. Germain's description of contract in the sixteenth century: "[I]t is not much argued in the laws of England what diversity is

50. *See id.* at 94.

51. BAKER, *supra* note 1, at 338.

52. *Id*.

53. *Trahere*, CASSELL'S LATIN AND ENGLISH DICTIONARY 583 (J. R. V. Marchant & Joseph F. Charles eds., Funk & Wagnalls Co. 1959).

54. *See, e.g.*, BAKER, *supra* note 1, at 94–95.

55. *Id.* at 338.

56. PLUCKNETT, *supra* note 10, at 363.

57. *Id*.

between a contract, a concord, a promise, a gift, a loan, or a pledge, a bargain, a covenant, or such other. For the intent of the law is to have the effect of the matter argued, and not the terms."[58] At one level this should not be surprising. The absence of an all-encompassing coherent system of contract law (or even attempts to create one) is less obvious if one is impervious to its absence.[59] As the history of Roman law shows, legal systems can function even for more than a millennium without expressly needing to provide a comprehensive or broad theoretical conception of contract and contractual obligations.[60]

Why did early common law contract think about the very notion of a contract in this way? The similarity in the early common law's approach relative to Roman contract law is perhaps less surprising if one looks at the writing of Ranulf de Glanvill, the author of the earliest extant treatise on the laws of England.[61] Glanvill's notion of contract is far more constricted than modern ideas of legally enforceable promises. In his view, when the law of contract is considered, it is in the context of debt actions.[62] The approach of Glanvill at this point is analogous to the approach in Roman law, where one catalogues sets of fixed obligations actionable at law. This is rather different than a conceptual understanding of what a contract is in universal terms.[63] Ibbetson describes Glanvill's treatment of contract as one where "[t]here was no such general principle in the earlier Common law, typified by Glanvill's treatise, where there was a limited list of named contracts that generated debts."[64]

The next major treatise in the early common law that deals with contract is Bracton.[65] Bracton's thirteenth century notebook of cases also provides a window into the meaning of contract in early common law jurisprudence.[66] As with Glanvill, Bracton focuses on remedies and means of relief through writs rather than substantive aspects of contract. To the extent that something we might call contract law comes up at all, it is only through brief references to a convention or agreement (*conventus*) or pact (*pactum*).[67] The language used reflects Ibbetson's point that the "common features of contractual liability may

58. GERMAIN, *supra* note 9, at 174–75.

59. *See* BAKER, *supra* note 1, at 8.

60. *See, e.g.*, HERBERT F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (2d ed. 1961) (reprt. 1967).

61. *See* RANULF DE GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE (John Beames trans., John Byrne & Co. 1900).

62. *Id.* at bk. X.

63. *Id.*

64. IBBETSON, *supra* note 19, at 82.

65. A four-volume scholarly translation of this work was undertaken by Samuel Thorne in the mid-twentieth century: HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., 1997).

66. *See* 2 HENRY DE BRACTON, BRACTON'S NOTE BOOK: A COLLECTION OF CASES DECIDED IN THE KING'S COURTS DURING THE REIGN OF HENRY THE THIRD, ANNOTATED BY A LAWYER OF THAT TIME, SEEMINGLY BY HENRY OF BRATTON 284–85 (Frederic W. Maitland ed., William S. Hein & Co. 1999) (1887).

67. *See* BRACTON, *supra* note 65.

have existed, but each remedy had its own rules, each had its own conceptual underpinning. The technicalities of each form of action reflected back onto the situations in which they applied, progressively remoulding the way in which common situations were analysed."[68]

The concept of 'contract' in the early common law was therefore ancillary. The starting point was the system of writs and actions. In one Year Book example from the reign of Eward III,[69] the plaintiff argued that part of a claim for debts owed could be satisfied by the existence of a bond, and the remainder by a form of proof known as a suit (because the written bond could only establish part of the claim). The written evidence of the bond is mentioned, but at no point in the recorded pleadings or judgment do the parties look to the substance of what was agreed. Instead, the record shows a technical discussion on procedure and whether the action can be made out partly by relying on the written bond and partly by another form of proof.[70] In other words, the court's focus is exclusively on questions around formal rules rather than the substance of the agreement. This, in turn, precludes consideration of whether a broader conceptual and more coherent understanding of contract was required to resolve the matter as pleaded. In this regard, Ibbetson is right to observe that "it was a long time before the Common law could begin to generate any coherent theory" on the nature of contract.[71] As Pollock states in his history of the common law:

> We have seen how in the ancient view no contract was good (as indeed no act in the law was) unless it brought itself within some favoured class by satisfying particular conditions of form, or of evidence, or both. The modern view to which the law . . . has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.[72]

Given that 'contract' really served as an umbrella term for sale of goods and debt transactions, Stroud Milsom suggests 'covenant' is a better approximation of what we would now call 'contract.'[73] The use of 'covenant' in the early common law did emphasize consent and agreement to a greater degree than 'contract.' For instance, in a 1543 case, Judge Bromley stated that each "covenant impl[ies] agreement."[74] Ibbetson looks to earlier sources and notes

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68. IBBETSON, *supra* note 19, at 31.

69. Canon Warren's Case, (1343) Y.B. 17 & 18 Edw. III, Rolls Series, at 73 (Eng.), *reprinted in* BAKER, *supra* note 4, at 234.

70. *Id*.

71. IBBETSON, *supra* note 19, at 36.

72 . FREDERICK POLLOCK, PRINCIPLES OF CONTRACT: A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND 143 (10th ed. 1936).

73. S.F.C. Milsom, *Law and Fact in Legal Development*, 17 U. TORONTO L.J. 1, 6 (1967).

74. JACQUES DYER, REPORTS DES DIVERS SELECT MATTERS & RESOLUTIONS DES REVEREND JUDGES & SAGES DEL LEY 57 (1688).

that 'covenant' in medieval jurisprudence began as shorthand for an agreement.[75] There is one (extra-judicial) source from the fourteenth century which says 'covenant' and 'contract' are largely indistinguishable.[76] However, where the terms are clearly distinguishable is that 'covenant' was also a form of writ which enlivened the court's jurisdiction. This points to a general epistemological problem Alasdair MacIntyre points out, namely, that understanding a concept cannot occur "apart from its exemplifications."[77] Therefore, approximating covenant with contract in a modern sense creates difficulties because a covenant came to be understood at law in relation to the forms and procedures which developed around that action. When those procedures ossified and restricted who may bring an action in covenant (discussed in detail in Part IV below), litigating contractual matters was largely done through framing the action as one of debt up until the sixteenth century.[78] In other words, a contract involved transactions which may be actionable either through the action of debt or covenant (or, potentially, detinue where specific goods were concerned).

When lawyers started to use the concept of contract in a broader and more modern sense in the sixteenth century, courts turned to etymology. Consider for instance the judgment of Judge Peryam (with whom Judge Rodes agreed) in *Sidenham v. Worlington*.[79] The plaintiff had promised to act as surety and provide bail for a third party for £30.[80] The plaintiff was forced to pay the £30, after which time the defendant promised he would repay the plaintiff.[81] The defendant argued that there was no consideration at the time of the agreement, and therefore the action could not be maintained.[82] At the time the judgment was handed down, assumpsit was becoming (but had not fully become) the popular contractual action it would later be, and the notion of a promise began to play a more prominent role in common law contract because it was an element of assumpsit when that action was being used for contractual claims.[83] The detailed history of assumpsit is beyond the scope of this Article, but for present purposes it is necessary to say that assumpsit was effectively a tort claim, and as part of an assumpsit claim a breach of promise was necessary.[84] By the mid-sixteenth century, assumpsit claims were increasingly used as a means to bring what were ostensibly contractual claims. It was in this context that conceptual shifts in the concept of a contract and contract law accelerated. Courts, trying to grapple with

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75. IBBETSON, *supra* note 19, at 18–22.
76. *Id.* at 22.
77. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 10 (1988).
78. *See, e.g.*, BAKER, *supra* note 1, at 346.
79. BAKER, *supra* note 4, at 530–31.
80. *Id.* at 530.
81. *Id.* at 530–31.
82. *Id.* at 531.
83. 93 SELDEN SOCIETY, *supra* note 9, at 4–6.
84. *See, e.g.*, Charles W. Fornoff, *Actions in General Assumpsit*, 23 OHIO ST. L.J. 401, 407 (1962).

this shift, turned to etymology, as the following judgment of Judge Peryam indicates:

> For there is a great difference betwixt contracts and this case. For in contracts upon sale the consideration and the promise and the sale ought to meet together; for a contract is derived from *con-* and *trahere*, which is a drawing together, so as in contracts everything which is requisite ought to occur and meet together.[85]

In *Slade v Morley*, a later sixteenth-century assumpsit case (and one of the most important contract law cases of all time), the etymology of 'contract' also arose.[86] *Slade's Case* involved the plaintiff grain merchant claiming that the defendant had bargained with him to purchase £16 worth of the wheat and corn—then growing on the plaintiff's land—but later reneged on the agreement.[87] The case ran over five years, by which time the matter had been referred to all the justices of England and the Exchequer Chamber.[88] John Dodderidge, who appeared with Francis Bacon against Edward Coke, traced sources as far back as the thirteenth-century treatise writer, Bracton, to plead that the matter was contractual rather than tortious, that the contract involved a bare stipulation, that "the stipulation is the contract, which is said of *contraho,*" and that this would not give rise to a wrong requisite to successfully argue assumpsit.[89]

What is interesting in Doddridge's argument is that the section of Bracton relied upon is not Bracton's note books, which contain the relevant jurisprudence from the thirteenth century, but rather his general treatise on the laws of England.[90] Moreover, the passage cited discusses the Roman law of *stipulatio* (i.e., a unilateral contract created through a formal question and affirmation),[91] which was never favored in English contract law.[92] This undoubtedly was not lost on Dodderidge. As Blume notes in his discussion of Bracton:

> [A]n oral stipulation . . . never was a contract in vogue in England . . . . He took the law on the subject [of contract] from the Roman law—much of it from Azo. He did not, however, succeed in fastening his system

85. BAKER, *supra* note 4, at 531.
86. *Id.* at 466.
87. *Id.* at 460.
88. *Id.*
89. *Id*. at 466.
90. 2 BRACTON, *supra* note 65, at 284–85.
91. *Id*.; *see also* GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW 214 (2012).
92. Fred H. Blume, *Bracton and His Time*, 2 WYO. L.J. 43, 52–53 (1947).

> upon the common law. Part of it did not fit at all. Oral stipulations have already been mentioned.[93]

Consider also the following words in the seventeenth century from barrister William Sheppard, in a treatise where he seeks to comprehensively explain English law: "a contract, taken largely, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other. But more strictly it is taken for an agreement between two or more, for the buying and selling of some personal goods, whereby property is altered."[94] Sheppard's words, written when assumpsit had expanded substantive contract law to a more recognizable form, show that the profession recognized the shift in the meaning of 'contract' from the historically more constrained sense to a modern broader sense.

This Part shows that the early common law had a concept of contract in law different from modern contract law in at least three respects. First, the concept of contract in the early common law was constrained and more closely aligned with the term's etymology. Secondly, the concept's use primarily related to questions of form rather than substance. Thirdly, when the notion of a contract was used in legal discussions, it was primarily used as a label for transactions described as contracts. There was no broad conceptual definition or all-encompassing theory of what a contract is, which meant that there was less room to dispute the contours of that definition. Yet observing these differences still begs the question only partly answered by the above analysis: Why was contract law originally so confined? One answer, as Theodore Plucknett observes, is that the "formulary system was too rigid to take in the whole field [of contract], and the only contracts which were furnished with appropriate forms of action were of such a simple nature that speculation was unnecessary."[95] In other words, it is necessary to consider the context of the early common law system further—particularly the system of writs.

III. THE ORIGIN AND DOMINANCE OF THE WRIT SYSTEM

It is impossible to understand the early common law without an understanding of the writ system. Writs shaped the scope of a court's jurisdiction and remedial powers, and therefore molded proceedings from beginning to end. One can see the centrality of writs to the early common law in two of the earliest treatises on the common law—Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae*, cited above,[96] and Bracton's *De*

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93. *Id*.

94. WILLIAM SHEPPARD, FAITHFUL COUNCELLOR: OR THE MARROW OF THE LAW IN ENGLISH 93 (1651).

95. PLUCKNETT, *supra* note 10, at 649.

96. GLANVILL, *supra* note 61.

legibus et consuetudinibus Angliæ.[97] These texts are, in large part, discourses on writs and the procedures related to them. For example, Glanvill's Book I begins, following some introductory remarks, with a discussion on a writ of summons as the basis to discuss the common law.[98] Bracton, writing in the mid-thirteenth century, summarizes the writ system as follows:

> A writ is formed in the likeness of a rule of law, since it briefly and in a few words expounds and explains the *intentio* of him who puts it forward . . . Some writs are formed on specified cases and are of course. They are granted and approved by the counsel of the whole realm and can in no way be changed without their consent and agreement. There are also writs following from them, called judicial writs, which are often varied according to the variety of pleas of the propounder, the demandant, and the variety of answers of the respondent, the exceptor. There are also writs called magistral, which are often varied according to the various kinds of cases, deeds and plaints. Actions are different and diverse, for some are personal, some real and some mixed, there will be as many formulas for writs as there are kinds of actions, for no one may sue without a writ, since without a writ the other is not bound to answer, unless he wishes to do so.[99]

This passage raises several points worth reflecting on. First, the reference to approval "by the counsel of the whole realm" alludes to the fact that the writ system was common to the whole realm,[100] and that the common law was an exceptional system to the local laws and customs which preceded the common law. Secondly, "since without a writ the other [party] is not bound to answer,"[101] the writs functioned as a commission on a court to respond to the writ's command (e.g., by hearing a case). Thirdly, the role of damages as a remedy in lieu of specific performance traces its origins to the summons or demand in the writ; some writs and actions related to matters "personal, some real and some mixed."[102] Finally, while in certain limited circumstances a party could rely on an alternative mechanism to obviate the need for a writ, even in those circumstances the logic of the writ system influenced how parties framed their arguments to common law courts.

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97. BRACTON, *supra* note 65.
98. GLANVILL, supra note 61, at 5.
99. 2 BRACTON, *supra* note 65, at 285–86.
100. *Id*. at 285.
101. *Id*. at 286.
102. *Id.*

A. The Exceptional Nature of Early Common Law

Nineteenth century English legal historian Henry Maine summarized the history of legal progress as the gradual triumph of contract.[103] In English law, what preceded this development was expansion of the common law itself. This is evident in the name—the 'common law.' What made the common law 'common' at first was as much a geographic point as it was a jurisdictional one. That is to say, the common law distinguished itself from local means of obtaining justice; the 'common' law applied across the realm following Norman Conquest in 1066.[104] Here, the differences between common and local law were not primarily around different applications of substantive law. Rather, it was more a question of who was best placed to determine the matter.

Glanvill, writing in the century after the Norman Conquest, alludes to such factors in the preface to his *Tractatus*, when he states that the laws and customs of the realm have their origins in reason, have been maintained for a long time, and that in such a system the monarch needs to be carefully guided by his most learned subjects as to when and how to exercise his jurisdiction.[105] What appears to be key here is that the monarch needed to at least provide a veneer of stability and continuity as means to maintain legitimacy, and in this context a monarch's interest in exercising jurisdiction should be limited to matters that impact the monarch and the realm as a whole. It therefore is unsurprising that common law contract first appears as an aspect of common law which will only apply in exceptional circumstances within a jurisdiction that is itself enlivened exceptionally. As Book X of Glanvill states, the monarch has no interest in determining disputes about private or quasi private agreements.[106]

An additional factor here is that when the Normans arrived, there already existed an alternative to adjudicate such disputes, namely, the Anglo-Saxon county courts.[107] Given that the monarch's jurisdiction, at least initially, was more likely to be personally exercised, as a practical administrative matter it made sense to have a more restricted common law. Only over time, as commissions to administer the monarch's justice expanded, would it make sense for plaintiffs to go to the Common Pleas or King's Bench.[108]

This origin of the common law as an exceptional avenue for obtaining justice shaped its trajectory. For instance, as the royal courts expanded the sorts of disputes they would hear, they limited their jurisdiction through the system of writs (i.e., a 'breve' in Latin or 'brief' in French).[109] In addition to setting up

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103. MAINE, *supra* note 5, at 319. Note that, as with any generalization, Maine's thesis is open to criticism. *See, e.g.*, Katharina Isabel Schmidt, *Henry Maine's Modern Law: From Status to Contract and Back Again*, 65 AM. J. COMP. L. 145 (2017).

104. *See, e.g.*, BAKER, *supra* note 1, at 15.

105. GLANVILL, *supra* note 61, at xxxvii.

106. *Id.* at 208–09.

107. *See, e.g.*, BAKER, *supra* note 1, at 61.

108. *Id.* at 60–61.

109. 4 BRACTON, *supra* note 65, at 285; *see also* BAKER, *supra* note 1, at 64.

the system of writs, the early common law courts encouraged resolution of contractual disputes elsewhere—both privately and through the local courts. Consequently, fewer cases were heard in the royal common law courts, and there were fewer opportunities for the development of substantive common law contract. As Kevin Teeven observes:

> The contract jurisdiction of Medieval English courts was spread over a variety of forums. Although the royal courts were the courts in which a modern form of contract law ultimately took shape during the later Tudor period, the greatest volume of contract litigation during the Medieval period was in the non-royal courts. The local courts were preferred because of these courts' greater flexibility as contrasted with the rigidity of the royal courts' writ system.[110]

As the monarch's jurisdiction expanded to cover a larger range of disputes, including in matters of contract, the courts frequently borrowed from the two sources of law best known: Anglo-Saxon and Roman law. As Ibbetson notes, both common law contract and tort law are examples of bodies of law that arose "out of the intermingling of native ideas and sophisticated Roman learning."[111] Roman and Anglo-Saxon law simultaneously provided a basis to expand the common law and conceptually how far such expansion could occur. The limits of using Roman and Anglo-Saxon stem from the fact that both bodies of law approached legal issues with an emphasis on questions of form over substance. For example, Anglo-Saxon law (and early common law) did not view a written will as a contract; the will was not dispositive of a party's intentions. Rather, a will merely recorded pre-existing intentions and agreements.[112] This was also the original position in Roman law.[113] By way of contrast, a modern contract is dispositive in that it attempts to capture the agreement of parties. On sees this difference reflected in distinctions in grammatical structures; while modern contracts (including wills) use present tense to express the intention of the parties, Anglo-Saxon wills used past tense as the written document serves only to solemnize an earlier oral will.[114]

So why do these points about the origins of the common law as a jurisdiction of exception matter when it comes to discussing writs? What this section seeks to demonstrate is that the legal and conceptual framework provide the context and historical basis for issuing writs in the first place. It was the exceptional

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110. Kevin M. Teeven, *The Contract Jurisdiction and Procedure of Medieval Courts*, 5 GLENDALE L. REV. 35, 49 (1983).

111. IBBETSON, *supra* note 19, at 1.

112. Burton F. Brody, *Anglo-Saxon Contract Law: A Social Analysis*, 19 DEPAUL L. REV. 270, 288 (1969).

113. *See* JOLOWICZ, *supra* note 60. The Greeks provide a rare exception to this approach in ancient legal systems. It was Greek influence that caused later Roman to adopt a dispositive understanding of some written agreements.

114. Brody, *supra* note 112, at 288.

nature of the common law which initially limits its scope, despite in theory being the only law common to the realm. As litigants increasingly seek relief from the monarch, the monarch must delegate to what would later become expert judges, who must then resolve disputes and do so based on the two legal traditions known best to them—native Anglo-Saxon law and Roman law. In doing so, they rely on a body of law which constrains common law contract, in particular, because such sources of law focus more on questions of form rather than substantive considerations. Writs, particularly originating writs, provide the basis on which to focus on questions of form over substance, as these writs categorize the types of claims the royal courts recognize as actionable.

B. Originating and Other Writs

There are several ways one can try to categorize writs. One way is through the types of disputes they seek to address. At a higher level, one can also categorize writs based on which part of the litigation process they regulate. Originating writs, for instance, commenced court proceedings. Plaintiffs sought intermediate (i.e., 'mesne') writs to ensure the appearance of a defendant in court. Finally, there were judicial writs used to execute judgments. In this way, writs set the tone for each stage of the litigation process.

In addition to questions of when a writ should be sort, it was also important for litigants (and their lawyers) to know who could issue each type of writ. In the early stages of the common law, originating writs came from Chancery, which had not yet developed a jurisdiction of its own.[115] Chancery therefore still played an integral function to the system of writs in the early common law, and functioned as an administrative department of state with the power to issue originating writs with the great seal. These originating writs operated like a pass that permitted a plaintiff to seek justice in the common law courts.[116] The development of Chancery in this manner is analogous to the way in which the praetor in Roman law originally operated as a jurisdictional gatekeeper, and only later morphed into an independent potential source of relief to counterbalance rigidity in the law.[117] It is in the context of discussing originating writs that Bracton speaks of them being "granted and approved by the counsel of the whole realm and can in no way be changed without their consent and agreement."[118] These originating writs, emanating from Chancery, could be distinguished with the intermediate writs and judicial writs, as the royal courts (and not Chancery) issued the latter species of writs to the sheriff, who then had responsibility for enforcement.[119]

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115. PLUCKNETT, *supra* note 10, at 675–707.
116. *See, e.g.*, BAKER, *supra* note 1, at 61.
117. *See generally* JOLOWICZ, *supra* note 60.
118. 4 BRACTON, *supra* note 65, at 285.
119. *See, e.g.*, BAKER, *supra* note 1, at 71–72.

After a plaintiff obtained an originating writ from Chancery and it was returned into the Court of Common Pleas or King's Bench, the next question was what to do if a defendant refused to attend court. In such a situation, a judicial officer could issue a writ by the mesne process, returnable in the respective court, to the sheriff to seize a defendant's goods or even the defendant's person.[120] The intermediate and judicial writs, in particular, relied heavily on the discretion of the sheriff, and this reliance was also a source of weakness.[121] The lack of accountability on the sheriff was such that he could not be examined as to whether he complied with the writ. [122] This limited the means for punishing a delinquent sheriff. Moreover, the sheriff could not claim compensation complying with the writ,[123] and could be liable if a mistake was made (e.g., the wrong person was apprehended). [124] These factors hardly incentivized the sheriff to execute the writ, which could in turn cause considerable delay. Another problem for plaintiffs was that writs were returnable only one day a week for much of the medieval period, and even during the sixteenth century the courts at Westminster only sat 99 days in a year.[125] These factors exposed plaintiffs to the risk of significant delays for reasons out of their control. A plaintiff could wait more than a year before a defendant would even appear for the first time, after which a timetable could be set to bring the matter to a full hearing.[126]

Even after the hearing, further writs were sometimes necessary to enforce judgment, which risked further delays for many of the same reasons.[127] The delay with these processes meant that, until the sixteenth century, the local city and borough courts were used chiefly by tradespeople seeking swift remedies for local (typically smaller) trade disputes that they would not obtain through the common law courts.[128] Local courts, such as those which arose during local fairs, applied the 'law merchant' and could provide same-day decision-making.[129] While Gladstone may have been the first to expressly state the maxim "justice delayed is justice denied" in the nineteenth century,[130] many plaintiffs in the early common law felt the truth of this statement first-hand.

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120. *See, e.g.*, *id.* at 72. It should be noted that for seizures of persons this only applied through a series of statutes that came into effect after 1351 (in actions of debt) and 1531 (in cases of covenant).

121. *Id.*

122. *Id*.

123. Which could be expensive depending on how far the sheriff had to travel to comply with the writ.

124. BAKER, *supra* note 1, at 72.

125. *Id.* at 73.

126. *Id*.

127. *Id.*

128. *Id.* at 30.

129. *Id.*

130. *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service, no. 954*, BARTLEBY, https://www.bartleby.com/lit-hub/respectfully-quoted/william-ewart-gladstone-180998-4/ [https://perma.cc/HTN5-PME7] (last visited Sep. 25, 2025).

While writs were relevant at each stage of litigation, originating writs were most important in shaping the trajectory of the law because they were the executive passes which framed how plaintiffs would present their claims. Of these originating writs, those which ordered someone to do something (*praecipe* writs) and those which demanded inquiry (*quare* writs) are worth of further consideration.

C. Praecipe and Quare Writs

While the previous section focused on categorizing writs, this section focuses on categorizing originating writs. At a high level, originating writs allowed a plaintiff to either claim something one was entitled to as of right, or redress a wrong. This distinction is seen in the differences between *praecipe* and *quare* writs, which respectively derive from the Latin *praecipere* (meaning 'to instruct or command')[131] and *quare* (meaning 'wherefore' or 'why').[132] The early *praecipe* writs in particular tended to read like executive commands of a final nature—final in the sense that they read as though there was already a decision made on a matter before the matter arrived at a court.[133]

The *praecipe* writs sought primarily to claim some entitlement rather than compensation for conduct.[134] These *praecipe* writs were prospective rather than retrospective, and therefore grammatically were in the subjunctive rather than indicative mood and present rather than past tense.[135] The remedial effect of this language is that, where a plaintiff was successful relying on a *praecipe* writ, the result was a specific recovery by a writ to hand over a thing demanded or to allow what was asked.[136] This language differed from the *quare* writ, which ordered someone to do something 'justly.'[137] The implication of this command was that something more was required; courts needed to determine 'justness,' which was "first established by due enquiry."[138]

Within this bifurcation, originating writs could be used to seek relief in a wide range of matters. Those types of matters came to be known as forms of action.[139] For example, debt and covenant were forms of action for which there were specific writs available. Bracton, talking about the relationship between writs and type of action, states that the "writ must agree with the action and must be impetrated in an appropriate case, otherwise it will be valueless . . . . A writ also falls if it is impetrated as to the means and quality of an act, where it ought

131. CASSELL'S LATIN AND ENGLISH DICTIONARY, *supra* note 53, at 430.
132. *Id.* at 461.
133. BAKER, *supra* note 1, at 61, 65.
134. *See, e.g.*, *id.* at 65.
135. *Id*.
136. *Id.*
137. *Id.* at 61.
138. *Id*.
139. BAKER, *supra* note 1, at 64.

to be impetrated as to the act itself."[140] In other words, the task of the lawyer bringing a claim for a plaintiff required a task analogous to the biologist finding a new organism, who must fit the particular into a broader classification system of species and genus. One can see how in such a system the concept of contract could be secondary, as 'contract' was not its own form of action with its own type of writ. Rather, 'contract' was a transaction which could be the basis of a legal dispute that could fit into one of a number of writs and actions (e.g., debt or covenant).

Up until the time of Bracton, there was still an apparent push for new writs from Chancery to allow new types of claims to be brought. However, it was not long after Bracton that the liberal approach to issuing new writs began to receive considerable pushback. Baker suggests that there is evidence of this pushback in the reference to "the law of the land" in the due process provision of Chapter 39 of Magna Carta—the point being that changes to the common law of the realm should not result from Chancery's discretion in issuing new writs.[141]. A further example comes from a case from 1267, where the defendant argued that unless a new writ sought is approved by Parliament, then he (i.e., the defendant) did not have a case to answer.[142] Whether intentional or not, the defendant's argument in this case effectively challenges Chancery's exercise of discretion.

Once this system began to solidify around fixed writs and forms of action, novel claims became more difficult to bring to court. Plaintiffs then instead sought to shoehorn their claims within the scope of an existing writ, which explains why later medieval contract law saw contractual claims brought in the form of torts.[143] A paradox of this development is that it gave the common law stability and regularity which made it attractive to parties, however it did so in a fixed framework that is intolerably inflexible to modern eyes. The writs, over time, became a kind of precedent, and with an increase in record keeping there came both an increased reliance on existing writs and a reluctance to depart from that precedent. In this context, selecting the right writ became key and the profession developed its educational system and literature around these writs.

The next logical step from this development was that the originating writ effectively established whether a claim could be made and, if it could, its terms. Take for example the writ of detinue: "The king to the sheriff of *N*., greeting. Command *A*. that justly and without delay he render to *B*. one box marked with the seal of the aforesaid *B*., with three written bonds contained in the same box, which he unjustly detains, as he says. And if he will not do so etc."[144] There is little substance to the terms of the writ. There is no requirement to get to the bottom of the 'facts' of a case, and as such 'facts' and substantive law play a far less prominent role in the early common law than they do in modern litigation.

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140. 4 BRACTON, *supra* note 65, at 284.
141. BAKER, *supra* note 1, at 60, 63.
142. *Id*. at 63 (citing Hide v. Flavel (1267) K.B. 26/180, m. 24).
143. *Id.* at 64.
144. BAKER, *supra* note 1, at 583.

While the lawyer is required to consider the matter with some level of abstraction, the purpose of such abstraction is to enable the lawyer to fit the problem within the system of classification.

The formal logic required from a plaintiff meant that lawyers thought more in terms of this kind of reasoning. Lawyers for defendants, likewise, challenged a claim more on technical grounds in pleadings rather than on factual disputes. Take for instance how little is said of the factual basis of the claim in the writ referred to in the preceding paragraph. It is simply asserted, in the broadest terms possible, that the defendant detains the specified item unjustly. While circumstances may be implied from the writ, the writ does not argue or persuade the court of the plaintiff's case; the assertion in the writ is more administrative than argumentative in nature. Milsom notes that the reason for the absence of persuasion in writs was that "there was no one to be persuaded."[145] In other words, the assertion is formal, administrative, and procedural in nature. It does not put forward a substantive argument.

It follows that because the writ was primarily an administrative document, it did not need to answer the substantive question of, for example, what constitutes a contract, or a covenant, or a debt, or any other such fundamental conceptual principle. While exposition of such concepts may not have been the purpose of writs, that would have been less of an issue for substantive development of the law if there were other available mechanisms that permitted such considerations. But such mechanisms were few and far between in the early common law. As Baker states, concepts like contract or "[o]wing could only become a legal concept when the circumstances of a transaction were looked into in order to establish whether they resulted in a debt."[146]

As the writs and actions became more rigid, so too did processes which developed around them. This in turn meant that making a mistake on aspects of formality (such as confusing matters of form on one writ with another) could be fatal for a party and determinative for the court.[147] These differences also meant that if a plaintiff's lawyer selected the wrong writ in commencing a claim, even if another writ was available, the plaintiff would have to start the litigation process again. For example, a protracted case from 1315 between Thomas Hothwait and Hugh de Courtenay disputing a church vacancy largely centered around whether the originating writ was appropriate or not.[148] The record of proceedings shows a certain Stonore (presumably the then-advocate but soon-to-be judge Sir John Stoner) argued that "the original writ is the foundation in law. Therefore since [the plaintiff] has no foundation in law in his count, it seems to us that he ought not to be received."[149] Form and formality framed the

145. Milsom, *supra* note 73, at 3.

146. BAKER, *supra* note 1, at 79.

147. *See, e.g.*, *id.* at 63.

148. Pleas of the Term of St. Michael in the Ninth Year of the Reign of King Edward the Son of King Edward (Hothwait v. Courtenay) Y.B. Mich. 9 Edw. II, pl. 2 (1315) (Eng.), *reprinted in* 45 PUBLICATIONS OF THE SELDEN SOCIETY 1, 2–9 (1935).

149. *Id.* at 5.

dispute, and failure to adhere to these requirements was frequently fatal to plaintiffs. Relying on the right writ was key, for if nothing else the wrong writ poisoned the plaintiff's entire claim.

D. An Alternative to Writs

Writs were the primary, but not the only, way in which a plaintiff could commence litigation in some royal courts. If a justice was on a traveling circuit, known as a justice in eyre,[150] or the King's Bench sat in a county, the sheriff of that county was in attendance.[151] In such circumstances, there was no need to first go off to Chancery and seek a writ ordering the sheriff to initiate proceedings.[152] While this procedure was convenient and more flexible for a plaintiff, it was limited. For instance, in addition to the geographic requirements of the bill procedure, the procedure was not available for the Court of Common Pleas due to Chapter 11 of Magna Carta (which required the Court of Common Pleas to remain at Westminster).[153]

Where it was available, a bill had significant advantages for plaintiffs from a procedural standpoint. Although writs were the far more common originating process, a bill's flexibility meant that it could be used to test the scope of actions and key concepts to a greater degree than writs allowed. This factor explains why several cases referred to in the remainder of this Article involve a plaintiff commencing litigation on a bill rather than a writ. One such advantage is that it gave plaintiffs relative flexibility in describing their claim. Unlike originating writs, which largely fixed the plaintiff's action from the moment the writ was sought (and hence why using the wrong writ proved fatal), the bill allowed the plaintiff to hold off on precisely forming the nature of the claim until after the defendant was arrested and a bail application took place.[154] Another benefit here with the bill process is that the plaintiff could use this to work out whether financially the matter was worth pursuing.[155]

Notwithstanding the greater flexibility associated with bills as a basis to bring a claim, both bills and writs framed and limited how courts understood and resolved contractual problems. These originating processes provided a basis for dispute resolution that did not require comprehensive conceptual understanding of contracts or contract law. Therefore, accounts of contract law which assume that this body of law has always been focused on substantive rather than formal considerations will always face the difficult task of squaring such assumptions with the historical reality of an early common law contract restricted largely to matters of form and formal logic. This picture is clearest if

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150. BAKER, *supra* note 1, at 19.

151. *Id.* at 48.

152. *Id.*

153 . *See Selected Readings and Commentaries on Magna Carta: 1400–1604*, 132 PUBLICATIONS OF THE SELDEN SOCIETY 91 (2015).

154. BAKER, *supra* note 1, at 50.

155. *Id.*

one looks specifically at the main contractual actions of debt and covenant, and their associated writs.

IV. MAIN MEDIEVAL CONTRACTUAL WRITS

A. Covenant

Covenant was in a sense the quintessential medieval contractual action. The action was available for nearly all consensual agreements and obligations.[156] As a thirteenth-century statute notes,[157] the early theory with the action of covenant was that any type of agreement could potentially fall within its scope. Milsom calls covenant the "action on a contract."[158] While this may have been the case from the eleventh to thirteenth centuries, over time the jurisprudence that developed around the action of covenant was not simply contractual. The restrictions that occurred in this development were such that covenant fell out of favor to the much more popular form of action known as debt.

Three reasons explain why, despite a promising start in the common law, covenant never encompassed a broad conceptual understanding of contract as contract law does today. First, a jurisdictional rule meant that, from at least the fourteenth century, a plaintiff relying on a common law writ of covenant could only do so if they produced a sealed document, known as a 'specialty.'[159] Secondly, certain in-court processes (in addition to those already considered), including the evidentiary rather than dispositive nature of the covenant deed, discouraged plaintiffs from bringing actions in covenant. The result was fewer opportunities for substantive and conceptual questions of contract law to be put to judges or juries. Thirdly, the remedial fragmentation that followed these first two points meant that there was not one remedy for resolving issues involving contractual transactions. This procedural fragmentation made conceptual cohesion around a unified notion of covenant difficult.

1. The Formal Requirement Rule.—The story of the action of covenant is "[l]ike a plant shooting up too enthusiastically at the start of spring only to be faced with a late frost."[160] This analogy captures the general scholarly view that covenant rose to prominence as the basis to bring contractual claims in common law courts into the early thirteenth century, only to be frozen thereafter because of a rule requiring a document under seal as a precondition to relying upon the action.[161] While there is no dispute that this is what happened based on the historical record, there is less consensus regarding why this change emerged.

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156. *Id.* at 339.

157. Statute of Wales (1284), c. 10, Statutes of the Realms, I, p. 65, *reprinted in* BAKER, *supra* note 4, at 309–10.

158. S.F.C. Milsom, *Not Doing Is No Trespass*, 12 CAMBRIDGE L.J. 105, 108 (1954).

159. *See* SIMPSON, *supra* note 21, at 10.

160. IBBETSON, *supra* note 19, at 24.

161. *See id.* at 21, 24.

One likely explanation is that the norm of using sealed deeds to evidence a disputed transaction transitioned to a requirement imperceptibly.[162] Simpson suggests that the story is somewhat different, and that early covenant recorded cases reflect a struggle between conflicting views as to whether oral covenants not contained in written documents should be enforceable in the royal courts.[163] On this explanation, the theory is that royal courts believed local courts were better placed to determine disputes often centered on questions of credibility, and such questions invariably arose when an alleged oral covenant is central to the dispute.

If Simpson is correct,[164] then the introduction of the jurisdictional rule in the royal courts was not (at least initially) evidence of a conceptual fragmentation.[165] This view is consistent with the Year Book records. For example, Year Books of the late fifteenth-century show that this jurisdictional rule about specialty was not adopted in local courts in London.[166] In other words, covenants could be enforceable if informal—just not in the common law courts.[167]

Evidence of common law courts requiring sealed deeds as a precondition for a covenant claim dates back at least as early as 1292. A case in the Shropshire Eyre, recorded as *Corbet v. Stury*, involved the plaintiff bringing a claim against multiple defendants.[168] The defendants borrowed the plaintiff's horse for a jousting match in which the horse was, unfortunately, maimed.[169] There are several reports of the case, including the Year Book record which refers to the action as debt rather than covenant.[170] While the matter ultimately settled, the pleadings show that, prior to settlement, the parties argued before the court about whether the covenant needed to be in writing.[171]

Eventually, this rule hardened so that informal covenants fell outside the jurisdiction of common law courts.[172] Consider the *Case of the Waltham Carrier* from 1321.[173] In this case, the plaintiff relied on a writ of covenant to bring a claim against the defendant regarding undelivered hay.[174] The plaintiff said the

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162. *Id.* at 24.

163. *See* SIMPSON, *supra* note 21, at 11.

164. *Id.*

165. In other words, the jurisdictional fragmentation was not a result of a conceptual fragmentation that believed a purported covenant could only be a covenant if it was solemnized in a sealed deed.

166. *See, e.g.*, Y.B. 22 Edw. IV, f. 1, pl. 6 (1482) (Eng.).

167. *See* Teeven, *supra* note 110, at 39.

168. Corbet v. Stury, Y.B. 20 & 21 Edw. I, Rolls Series, at 223 (1292) (Eng.), *reprinted in* BAKER, *supra* note 4, at 312–13.

169. *Id.* at 312.

170. *Id.* at 312–13. This ambiguity is likely because the case was brought by bill rather than writ which, as noted in Part III, gave plaintiffs more flexibility in how they stated their claim.

171. *Id.* at 313.

172. *See* BAKER, *supra* note 1, at 341.

173. *Carrier's Case* (1321), *reprinted in* 86 PUBLICATIONS OF THE SELDEN SOCIETY 1, 286 (Helen M. Cam ed., 1969).

174. *Id.*

parties agreed that the defendant would receive and transport the hay from Waltham to London for six shillings.[175] The plaintiff paid three shillings as a downpayment, and the defendant received the hay but never delivered it.[176] The defendant argued there was no case to answer, for there was no sealed deed.[177] The plaintiff responded that it was impractical to put all covenants in writing.[178] Judge Herle, found in favor of the defendant, and the recording of the judgment contains the memorable line that "we shall not undo the law for a cartload of hay."[179] Additionally, Judge Herle stated that a covenant "is none other than the assent of the parties that" must be in writing.[180] From a substantive legal standpoint, there is no mention of how much detail parties need to give in relation to what they are assenting to; the point is that the written document is evidentiary. The result of the case was that there was no recognizable covenant at common law.[181]

What might to us seem like a rather minor rule in practice had profound consequences on how the action of covenant developed. Moreover, one sees how practice interacts with conceptual understanding. The use of the concept of a 'covenant' at common law impacted its meaning, and the jurisdictional rule increased the distinction between the concepts of covenant and contract, and at least in part explains why today we speak of 'contract' and not 'covenant' law. The rule prevented the emergence of a general contractual remedy at common law. A litigant seeking to rely on an informal contract to bring a claim would have to use another action, such as debt, or go to a local court. A claim in covenant would be argued and decided primarily through the formalities of that action (e.g., whether there was a signed instrument) rather than on any substantive basis.

The hardening of one procedural rule associated with covenant, coupled with other procedural rules unattractive to potential plaintiffs (such as jury assessment of damages), meant that the action of covenant withered away. Instead, plaintiffs used conditional bonds and the action of debt as the main action for contractual disputes.

2. Arguing Breach of Covenant.—Even though the rule requiring a sealed document for covenant claims restricted its scope, one might think that such a development could lead to the development of a substantive body of law regarding how one interprets the agreement as solemnized in the written instrument. However, as the historical record demonstrates, this is not what occurred in the early common law. Take the fourteenth-century case of *Aubrey v. Flory*,[182] for instance. This case provides a relatively rare example of how

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 286–87.
179. 86 SELDEN SOCIETY, *supra* note 173, at 286.
180. *Id*.
181. *Id.* at 287.
182. Aubrey v. Flory (1321), *reprinted in* 86 SELDEN SOCIETY, *supra* note 173, at 235–41.

common law courts would approach a covenant matter beyond disputes around formalities, such as whether the deed was in fact the defendant's deed (which was a common way to rebut a plaintiff's claim).[183] In this case, a defendant grocer entered into a deed with the plaintiff supplier in London. The parties agreed that certain goods would later be delivered to the defendant at a fair in Lynn.[184] When the plaintiff brought the perishable goods to the defendant, the defendant refused to accept them.[185] Several versions of the case are recorded,[186] and the record shows a detailed series of pleadings and discussion between the bar and bench regarding whether wager law is available.[187] Interestingly, the writ asks for "swift justice to be done . . . according to the law and custom of our realm or according to law merchant."[188]

Despite *Aubrey v. Flory* facially appearing ripe for a discussion about the substance of the agreement between the parties and the basis for the defendant refusing the goods, this case contains no reference to the terms of the deed. There is no substantive discussion of covenant law. In fact, what one does see from the record is the court trying to dissuade the parties from demurring on a point of law, which was simple a way for a party to ask the court to make a statement on the law as it might apply in the case. This reluctance from early common law courts was not uncommon; one can see such reluctance in *Aubrey v. Flory* when the judge tells the parties that they can put the point of law to the court "at [their] risk."[189] Unsurprisingly, the issue seems to have gone no further.

What the recording of a case like *Aubrey v. Flory* points to is that the deed itself played an evidentiary rather than dispositive role in the proceedings.[190] That is to say, the written agreement acted more like a receipt does today, recording the existence of a pre-existing transaction. To paraphrase Maitland and Montague,[191] there is no contract at all, at least not as we understand it (and leaving to one side, for present purposes, a complicating factor like the existence of consideration).

From cases like these, it is possible to see that even when parties get an opportunity to opine on the substantive law of covenant, that opportunity is not taken. The court records reflect a jurisprudential world which is focused on a type of formal legal logic which has little use for broad conceptual or substantive contract considerations. And because that logic begins and ends with formal writs, cases could be resolved formally without judges needing to state on record what their view of the substantive law of covenant was.

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183. *Id*. at 240.
184. *Id*. at 239.
185. *Id*.
186. *Id*. at 235, 240.
187. *Id*. at 237.
188. 86 SELDEN SOCIETY, *supra* note 173, at 243.
189. *Id.* at 237.
190. *See id*. at 237–39.
191. *See* MAITLAND & MONTAGUE, *supra* note 6, at 15.

3. Fragmentation.—The covenant rule changed to require a sealed deed fragmented jurisdiction and the actions under which such claims were made. Given that each writ had its own conceptual existence and underpinning, with rules and procedures which influenced each stage of proceedings, there were bound to be gaps that arose in practice. For example, because of this rule around specialty and the action of covenant, contracts exchanging services for payment (which were really formalized) were not brought in covenant.[192] In time, an anomaly arose whereby half of this transaction was not actionable at common law. This is because a party performing a service for payment under an informal agreement could claim an amount owed via the action of debt (which did not require a written document but did require a specific amount owed),[193] but the party benefitting from the performance of a service had no common law action.

These gaps in the law provided space for creative arguments that blurred the line between what we would now think of as tort law versus traditional contract law. For example, a 1329 case from the Nottingham Eyre involved the plaintiff using a bill to bring a claim against a local doctor.[194] The plaintiff had a problem with his eye, which he wanted the defendant to cure; however, the "cure" caused the plaintiff to lose his eye.[195] The plaintiff was, unsurprisingly, rather displeased with the defendant's service.[196] Counsel for the defendant argued that the matter was really contractual in nature.[197] Part of the basis for this line of argument was that the plaintiff had submitted himself to the doctor's "medicines and . . . care," and therefore no "trespass" occurred.[198] The defendant's argument created several problems for the plaintiff if correct. First, the plaintiff was not owed a specific amount, which ruled out a debt claim. Secondly, there was no sealed deed, barring a covenant claim. It followed that the court had no power to resolve the matter in the plaintiff's favor. The Court dismissed the claim, with Judge William Denum recorded as saying: "suppose a farrier, who is man of skill . . . injures your horse with a nail, whereby you lose your horse: you will never have recovery against him. No more shall you here."[199] The maxim of Judge Herle, that "for a cartload of hay we shall not undo the law" of covenant,[200] also unfortunately extended to a gouged eye.

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192. *See, e.g.*, SIMPSON, *supra* note 21, at 148.

193. *Id*. at 148–49.

194. The Oculist's Case, LI. MS. Hale 137(1), fo. 150 (Eyre of Nottingham) (1329–1330) (Eng.), *reprinted in* BAKER, *supra* note 4, at 381.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id*.

199. *Id*.

200. 86 SELDEN SOCIETY, *supra* note 173, at 286.

B. Debt

The writ of debt was the most commonly used action for contractual claims up to the sixteenth century.[201] The action of debt remained popular to enforce performance on conditional bonds until the nineteenth century,[202] making it by far the most durable means to bring contractual claims in common law courts. The writ of debt as described by Glanvill takes the following form: "Command *N.*, that justly and without delay, he render to *R.*, [stipulated goods] . . . of which he complains that he has unjustly deforced him."[203] From the twelfth to sixteenth centuries, the majority of actions on contracts were a specific action of debt requiring a bond or other sealed instrument, and these claims were known as debt *sur obligation*.[204]

The popularity of the action owed much to its simplicity and flexibility. The writ of debt could be used for both formal and informal transactions, although when there was only an oral agreement, the scope of the action was narrower because there needed to be a specific sum of money in dispute.[205] A type of deed known as a conditional bond was a common instrument used to secure performance of an underlying agreement because, unlike contracts today, the instrument could include a penalty that incentivized performance.[206] In theory, the penalty was compensatory, not usurious.[207] Practically, the penalty operated as interest does for creditors today—to mitigate some of the inherent risks in lending.[208] Thus, a promise to pay £100 as a penalty for failure to pay £50 under a bond was permissible, and in fact often the amount owed under the bond was fixed at twice the original loan amount.[209] In this scenario, the loan of the £50 was gratuitous, and the agreement to pay £100 if the gratuitous loan was not repaid by a certain date was compensatory. The parties willingly entered into the bond, so there was nothing preventing its enforcement if the condition was not performed. The operation of bonds in this way creatively circumvented religious sensibilities that prohibited the use of interest. The bond's penalty was only enforceable if the debtor failed to perform the condition, so there was no guarantee the creditor would be entitled to the larger amount.

Early common law lawyers thought about the action of debt in terms of what was owed (noting that the Latin verb *dēbēre* means to owe or be bound).[210] This fact shows, again, how the writ framed the logic and terms of the law. Litigation

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201. *See, e.g.*, SIMPSON, *supra* note 21, at 53.
202. *See* BAKER, *supra* note 1, at 347.
203. *See* GLANVILL, *supra* note 61, at 198.
204. SIMPSON, *supra* note 21, at 88.
205. *Id.* at 53.
206. The rule against penalties did not develop until the late-seventeenth century. *See id.* at 113.
207. *Id.* at 114.
208. *Id.*
209. *See, e.g.*, *id.* at 114.
210. CASSELL'S LATIN AND ENGLISH DICTIONARY, *supra* note 53, at 151.

on a conditional bond was understood in terms of a creditor-debtor relationship, and not in terms of the underlying agreement it sought to secure. In other words, it was the form of the transaction that mattered rather than the precise details of what was transacted. Courts were not primarily concerned with the facts of a case aside from when they went to the formal nature of the relationship.

Yet despite the popularity of the action of debt, it never developed into a substantive contract law jurisprudence for at least two reasons. First, unlike covenant (which necessitated agreement), debt was not necessarily contractual; the action of debt contained scenarios where there was no agreement. This scope meant that, conceptually, debt did not always coincide with contract. Secondly, the action of debt was successfully argued through technical grounds, and therefore a court was largely uninterested in substantive legal considerations.

Regarding the first point, understanding the etymology is helpful to understand the concept of a 'debt' when Latin was the language of learning. Originally, a 'debt' in the medieval legal sense was an obligation broadly understood.[211] This broader understanding is consistent with the etymology of the noun *debitum*.[212] The broader understanding is also consistent with Glanvill's usage of the term,[213] which is not surprising when Latin was the language of learning and the law. Therefore, the original concept of a 'debt' was closer to how the term was used in Roman law.[214] The Year Books examples from the fourteenth and fifteenth centuries contain non-contractual uses of a writ of debt.[215] For instance, the action of debt could be used to recover an amount owed by dint of a judgment of the court on an action of debt (i.e., a debt upon a successful action of debt).[216] Using an action of debt in this way was neither contractual nor consensual. An exception like this shows that the action of debt relied on underlying notion of entitlement rather than contract.[217] Again, this relates back to etymology of debt as owing something to another, which need not be consensual.

The etymology of the term 'debt' and nature of the action of debt did not create an environment in which the action could be considered exclusively consensual, let alone contractual in a modern sense.[218] Moreover, for a medieval lawyer, the issue in dispute in debt actions was whether the debtor held a debt to which the creditor was entitled.[219] The notion of entitlement—what was owed to the creditor—was the focus.[220] Consequently, plaintiffs in medieval England thought about the debtor's failure to perform in terms of misfeasance (i.e.,

211. IBBETSON, *supra* note 19, at 18.
212. CASSELL'S LATIN AND ENGLISH DICTIONARY, *supra* note 53, at 151.
213. *See* GLANVILL, *supra* note 61, bk. X.
214. *See* JUSTINIAN'S INSTITUTES 13–14 (Peter Birks & Grant McLeod eds. 1987).
215. *See, e.g.*, Y.B. 11 Hen. IV, f. 56, pl. 2 (Eng.); *see also* SIMPSON, *supra* note 21, at 73.
216. *See, e.g.*, Y.B. 11 Hen. IV, f. 56, pl. 2 (Eng.); *see also* SIMPSON, *supra* note 21, at 73.
217. *See, e.g.*, BAKER, *supra* note 1, at 342–43.
218. SIMPSON, *supra* note 21, at 80.
219. *Id.*
220. *Id.*

failure to perform correctly) rather than nonfeasance (i.e., failure to perform a duty).[221] In other words, when a debt was not paid, it was not because the debtor did not live up to the promise to pay. Instead, the debtor acted illegally because the debtor detained in his or her possession a thing to which the creditor was entitled.[222]

Regarding the second point, Simpson points out that "the writ [of debt] was not trammelled by any inbuilt substantive restrictions."[223] This aspect of the action meant that pleadings resorted to procedural technicalities rather than a substantive agreement. As noted, the writ of debt could, for instance, require the plaintiff to claim a specified sum.[224] When a plaintiff specified the amount of money owed, the proper writ was usually debt rather than covenant, and during the medieval period, the plaintiff could not simultaneously bring an action of debt and covenant.[225] When a specific amount was claimed, it was important to ensure the amount claimed did not differ from the amount transacted. Preciseness was important because a plaintiff's claim could be dismissed if a jury found that the amount owed differed in any way to the amount claimed.[226] A reason for this apparent harshness is that, notwithstanding the fungible nature of what was often claimed in a writ of debt, the plaintiff was effectively seeking a remedy of specific performance. On this logic, getting the precise amount to which the creditor was entitled is important.

Creditors bringing an action of debt based on a condition bond typically needed to do little more than state that they were relying on the writ of debt and produce a bond.[227] In other words, it was not necessary for the plaintiff to specify to the court which conditions in the bond formed the basis of the claim. The plaintiff could proffer further details at his or her discretion, but it was not necessary.[228] After the plaintiff produced the bond, the defendant could choose whether to rely on an available proof or seek a trial by jury.[229] If the plaintiff made a claim based upon an informal contract without a written instrument, then the plaintiff needed suitors before the defendant had a claim to answer.[230] But this went to questions of creditability of the parties rather than any inquiry into what exactly was agreed.

Once the plaintiff brought an action with the necessary bond or deed (for formal transactions) or suitors (for informal arrangements), the burden automatically rested with the defendant.[231] For formal transactions, a typical

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221. *Id.*
222. *Id*.
223. *Id*. at 73.
224. *Id.* at 70–71.
225. *Id.* at 61, 70.
226. *Id*. at 63.
227. *Id*. at 92.
228. *Id.*
229. *Id.* at 139.
230. *Id.* at 136.
231. *See, e.g.*, BAKER, *supra* note 1, at 344.

defense was that there was no legal instrument (*non est factum*), or that the instrument was not the defendant's (*non est factum meum*).[232] Either question was for the jury and did not require the court to undertake substantive consideration of the agreement.[233]

On the few occasions where the court did consider the terms of a deed or bond, the scope of such consideration tended to be strict and narrow. For example, in *Glaston v. Abbott of Crowland*,[234] The claim was based on a deed between the abbot's predecessor and the plaintiff.[235] The plaintiff handed over the deed to the defendant's predecessor, who kept the document and did not dispose of it.[236] Given that possession of the deed was evidence for a claim (rather than dispositive), the plaintiff plotted to steal the document so that he could use it as evidence in a claim for payment.[237] The plaintiff broke into a chest the defendant abbot used to store the deed, and relied on the stolen deed for his claim.[238] The record of the case shows how little the court was interested in underlying facts. The judge noted that the court "cannot inquire upon this writ of debt" on the veracity of the theft.[239] The formal rules and internal logic of the writ prevented the court from inquiring further. If the defendant wanted to allege trespass, that claim needed to be made in separate proceedings, in which damages might be available to correct the wrong.[240] The action of debt was only concerned with ensuring an entitlement to a thing is enforced (i.e., a kind of specific performance).[241]

What a case like this shows is that the law was strict on matters of form, but often silent on what we might call substance. That silence extended to directions to the jury, matters of evidence, and burdens of proof. Even if a judge wanted to develop the law or consider fundamental concepts like contract, the system provided few if any opportunities for such speculation. As Baker states, "in actions of debt on a contract . . . there could be no elaboration of the law of contract. The medieval law of debt was a law of procedure and little more, because it was a survival of the ancient pattern of lawsuit."[242]

What this Part demonstrates is that neither action—covenant nor debt—was a simpler law of contract focused on form over substance. Contract as a concept was ancillary to the lawyer's focus on the formal and technical rules which required one to shoehorn legal problems into pre-existing categories. In a doctrinal sense, the story of early common law contract provides an example of

232. SIMPSON, *supra* note 21, at 98.

233. *Id*.

234. Glaston v. Abbot of Crowland, Y.B. Mich. 4 Edw. III, no. 1 (1330) (Eng.), *reprinted in* 98 PUBLICATIONS OF THE SELDEN SOCIETY 665 (Donald W. Sutherland ed., 1983).

235. *Id.*

236. *Id*.

237. *Id.* at 666.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 667.

242. BAKER, *supra* note 1, at 89.

a dual balancing act legislators and judges must make. The first aspect of this act requires a balancing of procedural rigidity and legal stability. The second is substantive legal flexibility and the uncertainty this can sometimes create. In a theoretical sense, this story shows how difficult it is to make accurate generalizations about what contract law is or must be.

V. PLEADINGS, PROOFS AND JURIES

A. Pleading

Once writs around the actions of debt and covenant became fixed, avenues to develop law were limited largely to, at first instance, the methods of pleadings, proofs and juries. The importance of these processes is secondary only to the writs when attempting to understand early common law contract. As Hogg notes when tracing the role of a promise in the early common law:

> [O]ne remarkable shared feature of both English law and Roman law is the extent to which legal development in each came about as a result of changes in forms of pleading rather than as a result of legal theory. While their content might be different, English law and Roman law were both essentially legal systems based upon actions . . . . [T]he eventual rise of will theory in the Common law should not really be seen as the triumph of any overarching theoretical or moral perspective, but rather the result of gradual development in legal and commercial practice.[243]

In the education of a medieval English lawyer, pleading came second only to an understanding of types of writs.[244] Littleton, writing in the fifteenth century, noted that it is "one of the most honourable, laudable, and profitable things in our law to have the science of well pleading."[245] Once a law student learned the writs, the next step was to learn pleading.[246] Pleadings in medieval law resembled a series of chess moves, and they contained their own kind of formal logic which permeated the early common law. While such pleadings were often recorded in Latin,[247] they were spoken in Norman French until 1362.[248]

The pleading system that developed in the early common law was different to modern pleading in some important respects beyond language. Central to medieval pleading were two things. First, the ability to understand the nature of

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243. MARTIN HOGG, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES 119 (2011).

244. BAKER, *supra* note 1, at 78.

245. PLUCKNETT, *supra* note 10, at 399.

246. BAKER, *supra* note 1, at 78.

247. *See* BAKER, *supra* note 1, at 94–95.

248. PLUCKNETT, *supra* note 10, at 400.

the action and how it fit within technical categories and rules formed around the system of writs and actions.[249] Secondly, pleading was undertaken in open court rather than through written pleadings.[250] For centuries, legal training was directed to this oral aspect of pleading, particularly following the increased importance of the jury.[251]

Pleadings in medieval law resembles the way interlocutory matters are handled today, in that what we would recognize as factual disputes followed legal pleadings.[252] This description does not, however, mean that pleading was ancillary to the litigation process; medieval pleading was a distinct stage.[253] Indeed, often this was the central part of litigation, where a good lawyer could add the most value.[254] The order of pleadings relatively early on in litigation meant that judges often hesitated to make findings of law aside from preliminary technical matters.[255] This factor partly explains why the Year Book case records largely do not contain discussions on substantive law.[256]

Writs did not say much other than the statement of an order or command, and so courts required a way to understand what gave rise to the writ. This is where pleadings were crucial. A plaintiff or the plaintiff's pleader would appear at the bar of the court with the defendant (or the defendant's pleader), and the plaintiff would briefly explain what gave rise to the writ.[257] The defendant could then simply deny the claim and, if possible, provide proof or offer up a technical procedural reason as to why the matter should be thrown out (e.g., a 'variance' between the writ and the plaintiff's opening statement).[258] In one recorded case from the late-thirteenth century, in which a plaintiff brought a writ of debt,[259] the judge stated that "the defendant can choose any of three courses: to put himself upon the countryside [to a jury];to be at his law [to wager law]; to put himself upon your suit."[260]

Where proof (such as wager law) or a jurisdictional technicality did not determine the matter, then the parties needed to 'reach the issue' to be put to the jury.[261] Reaching the issue meant that the parties would, with the court's assistance, work out the question to be put to the jury.[262] Often the issue reached was simply a general denial of circumstances giving rise to the case, and there

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249. *Id.*
250. *Id.*
251. *See e.g.*, *id.* at 412; *see also* BAKER, *supra* note 1, at 84, 89.
252. PLUCKNETT, *supra* note 10, at 417.
253. *Id.* at 399–400.
254. *Id.* at 400.
255. *Id.* at 417.
256. *See, e.g.*, BAKER, *supra* note 1, at 89.
257. *Id.* at 83.
258. *Id.* at 83–84.
259. Anon. Y.B. 2 & 3 Edw. II (1297) (Eng.), *reprinted in* BAKER, *supra* note 4, at 232.
260. *Id*. 'Suitors' were typically eleven witnesses of the transaction brought to support the suit. *See, e.g.*, BAKER, *supra* note 1, at 7.
261. *See* BAKER, *supra* note 1, at 84.
262. *See, e.g.*, *id.* at 80.

was a presumption that any matter not argued was true.[263] The court moreover did not have power to consider matters not pleaded,[264] and this also limited the court's ability to develop the law. The lay nature of the jury meant that the parties needed to frame the issue in terms that the jury could understand. In an action of covenant, framing the issue was essential to restitution because the jury decided the quantum of damages.[265]

In addition to reaching the issue, there was also an informal aspect to pleadings which allowed the parties and the court to informally discuss a potential pleading as a means of reaching the issue. If it was apparent that the court was not with one particular side's argument or question of law, then that party could withdraw the pleading before it was entered on the roll for posterity.[266] Informal pleading was a popular way for judges to avoid demurrers on question of law.[267] While this was convenient for parties and judges in particular cases, one consequence of informal pleadings was that it made the development of a substantive body of law based on discernible principles applied to facts more difficult.[268] However, the relatively minor role which 'fact' played in this process is less surprising when one also thinks about the history of the concept of a 'fact.' As one etymological dictionary explains:

> The modern, empirical, sense of "thing known to be true, a real state of things, what has really occurred or is actually the case," as distinguished from *statement* or *belief*, is from 1630s, from the notion of "something that has actually occurred." The particular concept of the scientific, empirical fact ("a truth known by observation or authentic testimony") emerged in English 1660s, via Hooke, Boyle, etc., in The Royal Society, as part of the creation of the modern vocabulary of knowledge (along with theory, hypothesis, etc.); in early 18c. it was associated with the philosophical writings of Hume. Middle English thus lacked the noun and the idea of it; the closest expression being perhaps *thing proved* (c.1500).[269]

Alisdair MacIntyre states that the surprisingly late development of the notion of a 'fact' has much to do with the mind of lawyer Sir Francis Bacon.[270] MacIntyre, tracing this history, notes that:

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263. *Id.* at 85.
264. *Id.*
265. *Id.* at 78–79.
266. *Id.* at 86.
267. *Id.*
268. *Id.* at 87.
269. *Fact*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=fact [https://perma.cc/33LW-DFLW] (last visited Sep. 25, 2025).
270. MACINTYRE, *supra* note 16, at 79.

> The twentieth-century observer looks into the night sky and sees stars and planets; some earlier observers saw instead chinks in a sphere through which the light beyond could be observed. What each observer takes himself or herself to perceive is identified and has to be identified by theory-laden concepts. Perceivers without concepts, as Kant almost said, are blind. Empiricist philosophers have contended that common to the modern and the medieval observer is that which each really sees or saw, prior to all theory and interpretation, namely many small light patches against a dark surface; and it is at the very least clear that what both saw *can* be so described. But if all our experience were to be characterized exclusively in terms of this bare sensory type of description . . . we would be confronted with not only an uninterpreted, but an uninterpretable world, with not merely a world not yet comprehended by a theory but with a world that never could be comprehended by a theory . . . . Theory is required to support observation, just as much as observation theory.[271]

Plucknett's view on the role of 'facts' in early English law is consistent with MacIntyre's general understanding of the concept's development.[272] When considering the distinction between facts and law, Plucknett notes that it "seem[s] obvious to modern English lawyers [that there is a distinction], yet there was a time when it did not exist, and the distinction, even when it was recognised, was not always drawn at the same point."[273] Milsom points out the implication that the development of this concept of a 'fact' has on the law when he states "legal development consists in the increasingly detailed consideration of facts," which he seeks to demonstrate largely through the development of contract law.[274] There are, however, some limits to Milsom's proposition if the notion of fact as we understand it did always exist or play a key role in legal proceedings like it does today. In other words, if legal development is dependent on the increasingly detailed consideration of such facts, and the concept of a fact as used today did not exist for at least most of the early common law era, then logically it would follow that the law was in stasis for that period.

Of course, legal development did occur during the 500 years following the Norman Conquest. If the development of contract law during the first 500 years of the common law era is considered, perhaps a more accurate observation is that legal development occurred during this period more gradually and within a formal and procedural framework which, although remarkably durable, was also less flexible, less substantive, and less abstract than modern common law contract. Lawyers required a different kind of reasoning to navigate that system. The system ensured stability through the granting of limited formal powers,

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271. *Id.* at 79, 81.
272. PLUCKNETT, *supra* note 10, at 417.
273. *Id.*
274. Milsom, *supra* note 73, at 1.

while also permitting flexibility through informal avenues such as informal pleadings.

The role of judges in this context of pleading demonstrates the limits of formal powers during the early common law. The judge was there to state the law and assist the parties in resolving the matter. The judge was not, in the early common law, there to create law. This point is surprising given the narrative often presented in law schools, which is more a picture of the age of Mansfield than it is of the early common law.[275] Interestingly, Sir Francis Bacon critiqued the expanding role of judges in developing the law in the sixteenth century when he stated that "[j]udges ought to remember that their office is 'jus dicere,' and not 'jus dare;' to interpret law, and not to make law, or give law."[276] The irony is that Bacon's epistemology in time provided an avenue for the kind of common law jurisprudence more familiar to modern lawyers and judges.

In the sixteenth century, the system of pleading began to change so that it became the beginning rather than the end of the lawyer's art.[277] This change was based on the role of demurrer in pleadings being adapted to an unintended consequence of a sixteenth century statute.[278] The demurrer involved an admission of the circumstances as alleged by one's opponent, combined with an assertion that the law did not compel a response because at law those circumstances amounted to nothing actionable as pleaded.[279] The "general traverse" for a defendant was different to a demurrer, in that typically a defendant would simply deny the facts which gave rise to the "general issue" to be put to the jury.[280] This was often preferable to a demurrer because a demurrer meant putting a legal question to a reluctant judge.[281] However, the Statute of Jeofails 1540 changed this.[282]

Parliament enacted the Statute of Jeofails to reduce the number of objections to trivial errors in forms of pleading.[283] Instead of producing the intended effect, the legislation simply meant parties taking issue with such errors relied on demurrers, which in turn meant that judges increasingly had to answer questions of law on the record.[284] The unintended consequence eventually caused the demise of the medieval informal pleading because judges did not want to provide unrecorded opinions in tentative pleadings which might prejudice decisions judges would have to make following demurrer.[285] In other words, if

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275. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD (2004).

276. FRANCIS BACON, BACON'S ESSAYS AND WISDOM OF THE ANCIENTS 282 (1884) (ebook), https://www.gutenberg.org/files/56463/56463-h/56463-h.htm#FNanchor_579_579 [https://perma.cc/73BJ-UL6J].

277. BAKER, *supra* note 1, at 89.

278. *See, e.g.*, *id.* at 86–87.

279. *Id* at 86.

280. *Id.* at 84.

281. *Id.* at 86.

282. *Id.* at 90.

283. *Id.*

284. *Id*.

285. *Id.*

a seventeenth century judge was going to put his opinion on record for posterity, then it needed to occur after fuller pleadings had taken place. A reason this change did not occur earlier is because tentative pleadings permitted informal discussion with the bench and bar, and following these discussions, a lawyer could withdraw a novel or losing argument before it was recorded.[286]

There are at least two lessons in this discussion on pleadings in the early common law relevant to scholars today. First, early common law contained a combination of formal in-court rules that constricted substantive legal development with flexible oral pleadings which further arrested the possibility of substantive legal development. On this basis, early common law pleadings did not provide scope to argue or discuss conceptual or substantive matters of contract, nor did it provide room for theorizing about contract law. Secondly, the focus in pleadings on the process of formal logic, rather than using 'facts' as a basis for more probabilistic arguments, is unsurprising given 'facts' did not always have the same meaning they do today. It is only with later emphasis on establishing facts that one also sees a more substantive and conceptual common law contract developing.

B. Proofs

Baker describes a "proof" as those older methods of resolving non-legal issues in litigation.[287] A "proof" differs from a "trial" in that the latter suggests the weighing up of various factors in reaching a conclusion, whereas the former does not.[288] Proofs included supernatural proofs such as the ordeal of fire or water.[289] Of particular importance for present purposes is the notions of wager law.

Waging one's law was an alternative to trying an issue before a jury.[290] This proof developed out of the old Anglo-Saxon systems of oaths.[291] As a proof, wager law was neither investigatory nor rational—it avoided the need for human reason.[292] Wager of law was a popular mode of proof for a defendant in actions of debt and detinue in particular, and involved the defendant swearing an oath (usually saying nothing was owed).[293] Take the following oath responding to a writ of debt: "In the name of the living God, I owe note to *N* sceatt nor shilling nor penny nor penny's worth; but I have discharged to him all that I owed him, so far as our verbal contracts were at first."[294]

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286. *Id.* at 86.
287. *Id.* at 79.
288. *Id*.
289. *See* Teeven, *supra* note 110, at 40.
290. *Id.*
291. *Id.*
292. *See* BAKER, *supra* note 1, at 79.
293. *Id* at 81.
294. PLUCKNETT, *supra* note 10, at 400 (emphasis omitted).

In wager of law, an oath would need to be backed up with oaths from (usually) eleven helpers known as compurgators.[295] The compurgators were not asked legal questions, they did not provide their reasons for swearing an oath, and formal rules of evidence or substantive law did not develop under wager of law.[296] Wager of law therefore did not involve questions of law or fact at all. The compurgators were simply there to state whether the defendant was credible or not; they made no statement as to the truth of the alleged transaction or its particulars.[297]

There was no temporal mechanism for punishing perjury when someone waged law.[298] Therefore, it was possible under wager of law for a mischievous defendant to find eleven compurgators to assist in the defendant's unscrupulousness. Avoiding one's debts this way became even easier to do once more matters were heard at Westminster rather than locally.[299] A tradition even arose at Westminster which allowed a defendant to purchase professional oath-takers, which in effect meant that a defendant with deep enough pockets could purchase the services of strangers to destroy a plaintiff's claim.[300]

Legal reasoning had no role in this process. Wager of law, if conducted successfully, decided the whole case. It destroyed the plaintiff's claim before any consideration of fact or law could develop. In this way, wager law inhibited the possibility of a modern understanding of contract law from developing. In cases of debt in particular, wager of law impacted the substantive development of the law in a number of ways.[301] It prevented examination of the facts of the case. It meant that no general principles of law applied if wager law applied. It discouraged plaintiffs from bringing legitimate actions and limited the development of substantive law. As a result, a conceptual and substantive body of contract law could not develop from cases where wager law was successfully used by a defendant.

C. Juries

Unlike methods of proof which did not involve human reason, juries developed a trial procedure which relied on the reason of jurors. Despite its initial role as another oath-taking body, juries developed the ability to reason through issues over time. While the jury had ancient origins dating back to the Anglo-Saxons, the traditional form of trial by jury familiar today (namely, the smaller 'petty jury' as opposed to a 'grand jury') first arose in criminal cases around 1220 following a decision by the Catholic Church five years earlier to

295. *See* SIMPSON, *supra* note 21, at 138.
296. BAKER, *supra* note 1, at 79.
297. Teeven, *supra* note 110, at 40.
298. *Id.*
299. *Id.*
300. *See* BAKER, *supra* note 1, at 81.
301. IBBETSON, *supra* note 19, at 33.

stop participating in ordeals.[302] In early medieval common law, issues were originally called upon primarily in a criminal trial, and usually in response to a defendant pleading not guilty.[303] . The sheriff used a writ of *venire facias* to summon the jurors—twelve men unrelated to the parties—to court.[304]

While pleading shaped the question(s) put to the jury, once the question was posed, it was for the jury to determine the matter.[305] The jury could use local standards to answer the question, and they could do so without concern that their methods or answer might alter the law.[306] The potential arbitrariness of these standards may explain a fourteenth-century statement that plaintiffs sometimes preferred wager law over jury trials in cases of debt.[307] After all, defendants with credibility issues in small communities likely had a harder time finding neighbors willing to assist with their case.

The role of the jury in the early common law, like the role of wager of law, in effect took decision-making out of the hands of judges. Even when juries wanted to ask a judge a legal question, the bench was often relucent to indulge the jury, lest it force the court to make a legal statement on the record.[308] Judges could give unrecorded directions to get around this risk, and through such directions, avoided making a statement that might become recorded precedent for later cases.[309]

The discussion in this Part shows that the trial procedures used in early common law contract litigation encouraged a procedural and formal approach to contract dispute resolution. The concept of contract did not change because there were few opportunities for courts to try and change it. Procedural legal pleadings did not give rise to discussions of fact and how principles of law might apply to facts. Indeed, the very notion of a fact as a concept was a later development. The system of proofs both deterred litigation and, when used, allowed defendants and courts to avoid legal reasoning altogether. Even the jury trial, although it could involve argumentation, was far less directed and structured than jury trials today. Therefore, rules and principles did not uniformly develop there either. Moreover, because jury reasoning was not legal reasoning and was not recorded as such, opportunities to substantively develop the law of contract or even challenge the nature of the concept did not arise then as it later would.

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302. *See* BAKER, *supra* note 1, at 80.
303. *Id.*
304. *Id*.
305. PLUCKNETT, *supra* note 10, at 120.
306. *See* BAKER, *supra* note 1, at 87.
307. PLUCKNETT, *supra* note 10, at 116 n.4.
308. BAKER, *supra* note 1, at 88.
309. *Id.* at 89.

VI. COURT REPORTING AND TREATISE WRITING

The earliest recorded judge statements come from the 1250s.[310] A generation or so later arose the series of recordings known as Year Books.[311] The Year Books ran up until the mid-sixteenth century.[312] Historically, the view was that these reports were primarily official documents.[313] The majority view today is that the Year Books were by and for the legal profession.[314] As Plucknett describes it, the Year Books during the time of Edward III "resemble not so much the modern law report as a professional newspaper which combines matters of technical interest with the lighter side of professional life."[315]

The professional nature of the Year Books meant that they were not a means for the development of substantive jurisprudence. Rather, the role of these reports was to assist lawyers with writs and pleadings, first and foremost, for these were the two most important aspects of a lawyer's artform. To the extent that these reports assisted in the development of law, they did it in a way which was not binding, and they talked about matters which were neither conceptual nor substantive on matters of contract law.[316]

Case reporting was, consequently, limited in its ability to serve as a basis to develop law. This limit, however, is unsurprising given formation of precedent as we understand it was not the purpose of case reporting. As Milsom has noted:

> A court in the Year Book period, let alone at any earlier time, knew even less than today what had really happened [in a particular case]; and in one respect the procedural framework was less deceptive. Judges could not in general state what look like given facts and then seem, as a separate process, to draw from them legal conclusions; they could at best pronounce upon a single hypotheses: if this, then that . . . . Latent in this rightness were questions which became separated: truth in fact, and justice in law. This separation, and the true beginnings of the law as an intellectual system, could only be brought about by the possibility of more detailed assertions than the blank denial.[317]

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310. *Id.* at 189.

311. *Id*.

312. PLUCKNETT, *supra* note 10, at 273. Arguably the Year Books did not end here, as ostensibly they were simply private recordings of what was said in court used to assist lawyers in their profession.

313. *See* BAKER, *supra* note 1, at 189.

314. *Id*.

315. PLUCKNETT, *supra* note 10, at 270.

316. *Id.* at 272; *See also* BAKER, *supra* note 1, at 190.

317. *See* S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 187–88 (1985).

This same general description could also be applied to the Register of Writs,[318] the Abridgements of cases,[319] or copies of pleadings which also were popular during the period between the eleventh and sixteenth centuries. Each served primarily an educational rather than jurisprudential purpose. The target audience was students and the bar, not the bench. The advancement of a jurisprudence which would permit the creation of a modern conceptual notion of contract was largely foreclosed because the method of reasoning which would allow one to speculate on conceptual matters was not necessary for parties to succeed in litigation or for judges to determine cases. The facts of cases were not recorded for judges to discover conceptual legal principles for application in later cases. While there was norm and strong preference to defer to similarly decided cases, the absence of recorded precedent as we know it resulted from an early common law system and tradition which had its own internal formal logic. That logic permitted development, but when such development occurred, it generally did so far more gradually relative to legal development today.

The absence of commentaries dealing specifically with contract law as its own body of law also meant that there was less of a coherent basis on which to develop that body of law. For example, there was no published treatise dealing solely with common law contract as a distinct area of law until almost the nineteenth century. In 1790, Powell published *Law of Contracts and Agreements* in which he comprehensively sought to discuss contract law.[320] St. Germain's *Doctor and Student* and other earlier treatises did discuss contracts several centuries before,[321] but such texts considered contracts as a small part in a general survey of law. After Powell's text, it took another seventeen years for the publication of the next contract law treatise.[322] Even once such commentaries were written and published, up until the twentieth century they were "slight" by contemporary standards.[323] In other words, the treatises which dealt with contract as a distinct subject matter did not exist between the eleventh and mid-sixteenth centuries.

The discussion in this Part shows that, during the early common law, the manner of recording and transmitting legal knowledge did not aim to develop a broader conceptual, theoretical, or substantial understanding of contract. Legal writing from that time, in and out of the courtroom, does not show lawyers, judges, or commentators thinking about contract as a broad separate area of law worthy of its own literature. The manner of recording legal matters attended to the needs of the legal profession first and foremost. Lawyers were the ones who wrote the legal literature, retained possession of it, and transmitted it. Their motivation was not to record precedent for use in later cases. Instead, legal

318. PLUCKNETT, *supra* note 10, at 276.
319. *Id.* at 273–75.
320. *See* GORDLEY, *supra* note 11, at 134; *see also* MILSOM, *supra* note 317, at 195.
321. *See* SIMPSON, *supra* note 21, at 377.
322. See MILSOM, *supra* note 317, at 195–96.
323. *See* BAKER, *supra* note 1, at 372.

writers focused on those skills—particularly knowledge of writs and pleadings—which were most fundamental to courtroom success. This practical approach meant that broad theoretical considerations were relatively absent in early common law contract. Surprisingly, even without the canons of precedent as we know it, early common law contract hastened in its development. Indeed, in some ways it was more stable than contract law is today. However, this was because of the system of writs, pleadings, and proofs which buttressed a formal body of contract law.

CONCLUSION

Modern contract law arose from historical processes and developed through case law, which is a necessarily selective reading of the past. Modern understandings of contract law, however, are often so selective that they do not consider early common law contract and its development in the medieval period at all. That development demonstrates a body of contract law based on first principles, and one which focuses largely on rules of form and procedure to provide litigants a means of dispute resolution. Understanding early common law contract allows one to see that, at least historically, formal and procedural aspects of contract law were its essence, and not substantive doctrines and rules which are the focus of attention for contract lawyers and students today.

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NOTES

VALUING THE VOICELESS: A PATH FORWARD FOR DETERMINING BRAIN DEATH WITHOUT JEOPARDIZING THE RIGHT TO LIFE OF VULNERABLE PATIENTS IN INDIANA

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INTRODUCTION

> The more I thought about Juan, the more I realized how little we still understood about consciousness and its many faces. We'd thrown everything we had at Juan, every type of brain scan, every newfangled technique we had at our disposal; yet we had failed to spot consciousness where consciousness clearly existed . . . .
>
> —Adrian Owen[1]

It was just like any other ordinary Friday. Juan, then nineteen years old, had enjoyed an evening out with friends.[2] When he got home, he had a quick bite to eat, said goodnight to his parents, and went to bed.[3] By morning, he was completely unresponsive.[4]

Juan was rushed to the hospital, where physicians found that he had "extensive damage to the white matter in his brain, including the frontal and parietal lobes, regions critical for working memory, attention, and other high-level cognitive functions."[5] He was rated a 3 on the Glasgow Coma Scale, which is the lowest score possible before being considered dead.[6] Despite the use of

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1. ADRIAN OWEN, INTO THE GRAY ZONE 215 (2017).
2. *Id.* at 207.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 208.

cutting-edge fMRI technology to test for any signs of consciousness in Juan, neuroscientist Adrian Owen and his colleagues came up empty-handed.[7]

Seven months later, to everyone's surprise, Juan was no longer vegetative: he was eating, walking, and talking again.[8] A year later, he was attending school.[9] "The doctors [had] said his brain was done. Zero chance of recovery and no options," his mother recalled.[10] Reflecting on that experience, she said to Owen, "We were at a very dark point in our lives . . . . You gave us hope."[11]

In 2022, a similar situation occurred right here in Indianapolis, Indiana.[12] A seventeen-year-old girl named Treasure Perry had a severe allergic reaction at work.[13] She was taken to the Riley Hospital for Children where, days later, she was pronounced brain dead.[14] In this case, however, her mother met resistance, not hope. Despite observing signs of life in Treasure and expressing that the removal of Treasure's life support would "go[] against [her] beliefs,"[15] Treasure's mother could do nothing but watch helplessly when the Marion Superior Court ordered that "all medical treatment, including mechanical ventilation, be discontinued."[16]

The legal basis for this order came from Indiana Code § 1-1-4-3,[17] in which Indiana has adopted, word-for-word, the language of the Uniform Determination of Death Act (UDDA).[18] The UDDA defines brain death as the "irreversible cessation of all functions of the entire brain, including the brain stem."[19] The UDDA also indicates that brain death must be determined "in accordance with accepted medical standards."[20] Nonetheless, the current accepted medical standards are implemented inconsistently[21] and do not measure all functions of the brain or brain stem.[22] Consequently, brain death is frequently determined while some functions of a patient's brain are, or may still

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7. *Id.*

8. *Id.* at 209.

9. *Id.* at 216.

10. *Id.* at 216–17.

11. *Id.* at 216.

12. Erik Ortiz, *Her daughter was declared dead. Despite hospital objections, she believes she was alive.*, NBC NEWS (Aug. 11, 2022, 15:01 ET), https://www.nbcnews.com/news/us-news/daughter-was-declared-dead-hospital-objections-%20believes-alive-rcna42612 [https://perma.cc/V684-F2TU].

13. *Id.*

14. *Id.*

15. *Id.*

16. *In re* Perry, No. 49D06-2208-MI-026530, at 5 (Ind. Super. Ct. Marion Cnty. Aug. 11, 2022).

17. Uniform Determination of Death Act, IND. CODE § 1-1-4-3 (2025).

18. Uniform Determination of Death Act § 1 (1980).

19. *Id.*

20. *Id.*

21. Alexandra Junn & David Y. Hwang, *Practice Variability in Determination of Death by Neurologic Criteria for Adult Patients*, YALE J. BIOLOGY & MED. 719, 721 (2019).

22. Michael Shapiro, *Euthanasia by Organ Donation*, 41 DALHOUSIE L.J. 153, 161 (2018).

be, active.[23] False positive determinations of brain death also occur with regularity, due to inaccurate implementation of the standards.[24]

Furthermore, even if it were possible to ensure that "every neuron in the brain ha[d] ceased functioning,"[25] a problem remains: patients who are considered brain dead from a legal standpoint are often still biologically alive.[26] In other words, patients whose bodies are still pumping blood, still fighting infections, and still functioning in any other way are still alive.[27]

Brain death, in fact, is a legal fiction, meaning that the law treats brain death as equivalent to biological death for practical purposes.[28] In large part, this is due to the need for more organ donations, since organs are "severely [in] short supply."[29] The challenge, however, is that vital organs like the heart cannot be harvested from living patients for two reasons. First, physicians take the Hippocratic Oath to "do no harm."[30] Second, the "dead donor rule" (DDR) prohibits the removal of "any vital organs" before a patient has died.[31] Thus, it is often necessary, legally, for a patient to be declared brain dead before their surrogates can consent to organ donation.[32] In reality, though, as Michael Shapiro explains in *Euthanasia by Organ Donation*, "[i]t is the discontinuation of artificial respiration [prior to the harvesting of organs] that results in the death of the patient at the time they die, rather than the disease process."[33]

When voiceless patients die by the removal of life support, without an advance directive or approval from their surrogate(s), it is a violation of their right to life under the Fourteenth Amendment.[34] Additionally, when providers justify withdrawing life support by promoting brain death as a biological truth,[35] and then use the DDR as a façade to avoid the reality that the patient is still alive,[36] this lack of transparency invalidates surrogates' informed consent to

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23. Michael Nair-Collins & Franklin G. Miller, *False Positives in the Diagnosis of Brain Death*, 28 CAMBRIDGE Q. OF HEALTHCARE ETHICS 648, 648 (2019).

24. *Id.*

25. Rob Stein, *Debate simmers over when doctors should declare brain death*, NAT'L PUB. RADIO (Feb. 11, 2024, 7:01 ET), https://www.npr.org/sections/health-shots/2024/02/11/1228330149/brain-death-definition [https://perma.cc/4VVH-7FGD].

26. Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. MICH J.L. REFORM 301, 302 (2015).

27. *Id.*; Katherine Schiller, *Life After Brain Death*, 41 J. LEGAL MED. 205, 206 (2021).

28. Shah, *supra* note 26, at 304.

29. Stein, *supra* note 25.

30. Schiller, *supra* note 27, at 207.

31. *Id.* at 206.

32. Shah, *supra* note 26, at 315.

33. Shapiro, *supra* note 22, at 165.

34. U.S. CONST. amend. XIV, § 1.

35. Nair-Collins & Miller, *supra* note 23, at 648.

36. *See* Robert D. Truog, *Defining Death: Getting It Wrong for All the Right Reasons*, 93 TEX. L. REV. 1885, 1899 (2015) ("[D]ependence upon life support cannot be a reason for considering a person to be dead.").

their loved ones' organ donations.[37] To validate consent, the legal fiction must be acknowledged.

Moreover, a recently suggested revision to the UDDA—namely, that the adjective describing "cessation" be changed from "irreversible" to "permanent"[38]—poses grave concerns for patients from vulnerable populations that tend to be devalued by society.[39] This is because "permanent" is a lower standard of brain death to meet, permitting death to be declared when a provider or surrogate *chooses* to stop medical interventions.[40] Thus, this one-word revision would allow for the legally permissible euthanasia of multiple groups of voiceless but living patients, including patients like Juan, based on others' value judgments about their lives.[41]

Not only are these issues surrounding brain death likely to cause emotional distress for patients' family members, but they also violate the First Amendment's Free Exercise Clause by substantially hindering patients' and families' ability to exercise their religious beliefs in life-or-death health care situations.[42] Only one state, New Jersey, offers a complete religious exemption from brain death for individuals who believe solely in cardiac death.[43] Indiana offers no exemption, as Treasure's family experienced firsthand, and that needs to change.[44]

Accordingly, this Note argues for a wholistic revision of brain death within Indiana's UDDA to safeguard the right to life of vulnerable patients in Indiana. It also calls for increased transparency about the biological reality of brain death to give validity to patients' and surrogates' informed consent for organ donations. To these ends, Part I of this Note discusses the ideologies underlying the UDDA by giving an overview of its evolution over time. Part II delves into the legal, medical, religious, and social factors that matter most when determining how to revise the UDDA. Part III argues that a comprehensive revision of brain death within Indiana's UDDA—including a complete exemption from brain death, the continued use of "irreversible," heightened and standardized medical standards, and a requirement of transparency for informed consent—is not only a constitutional necessity but also in the best interests of patients. By raising the bar for the determination of brain death moving forward, Indiana could lead the way in ensuring that the lives of vulnerable, voiceless patients are not unconstitutionally taken.

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37. IND. CODE § 34-18-12-3 (2025).

38. DETERMINATION OF DEATH ACT § 3 (UNIF. L. COMM'N, Draft June 27, 2023).

39. Schiller, *supra* note 27, at 212.

40. Jennifer Popik, *Comments: National Right to Life Committee, Inc.*, UNIF. L. COMM'N (July 11, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

41. Schiller, *supra* note 27, at 212.

42. U.S. CONST. amend. I.

43. New Jersey Declaration of Death Act, N.J. REV. STAT. § 26:6A-5 (2025).

44. Uniform Determination of Death Act, IND. CODE § 1-1-4-3 (2025).

I. IDEOLOGIES UNDERLYING THE UNIFORM DETERMINATION OF DEATH ACT

A. Death: An Evolving Concept

It turns out that death is not as final as it seems; it is a concept that continues to evolve. In the not-so-distant past, death was only determined when a patient's breathing and heartbeat had stopped (i.e., cardiac death).[45] In the mid-1900s, however, two major medical advances led to the need to reconceptualize what death meant: one was the modern ventilator;[46] the other was the first successful heart transplant.[47]

The dawn of the modern ventilator made it possible for patients who would otherwise have died to live on for years by means of mechanical ventilation.[48] Some viewed this invention as simply "masking" a death that had already occurred; others saw it as a life-saving piece of technology, akin to a pacemaker or dialysis.[49] In addition to these differing viewpoints, there was also a concern that patients who remained on a ventilator for years would burden their families and the health care system.[50] Furthermore, there were ethical questions: Did these patients want to be kept alive?[51] *Should* they be kept alive?[52]

Secondly, there was the new prospect of organ transplantations. This possibility, like the modern ventilator, was controversial.[53] For instance, would the donor be dead prior to, or die from, the transplant?[54] How could illegal

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45. Thaddeus Mason Pope, *Brain Death Forsaken: Growing Conflict and New Legal Challenges*, 37 J. LEGAL MED. 265, 270 (2017) (citing James L. Bernat, *The Definition and Criterion of Death*, 118 HANDBOOK OF CLINICAL NEUROLOGY 419, 419–20 (2013)).

46. Bob Marcotte, *Ventilators: Three Centuries in the Making*, U. ROCHESTER (Apr. 11, 2020), https://www.rochester.edu/newscenter/brief-history-of-ventilators-424312 [https://perma.cc/R2XP-VPZ6].

47. *First Heart Transplant Performed Thirty-Five Years Ago*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK (Dec. 3, 2002), https://optn.transplant.hrsa.gov/news/first-heart-transplant-performed-35-years-ago [https://perma.cc/9RWR-TDRX] (performed by Christiaan Barnard in Cape Town, South Africa).

48. Shapiro, *supra* note 22, at 165.

49. Shah, *supra* note 26, at 312.

50. Henry K. Beecher et al., *A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death*, 205 JAMA 337, 337–40 (1968).

51. Alvin Powell, *Death Is Universal, but Sometimes Murky*, HARV. GAZETTE (July 24, 2018), https://news.harvard.edu/gazette/story/2018/07/harvard-ethicist-robert-truog-on-why-brain-death-remains-controversial [https://perma.cc/TQ9H-ANBV].

52. *Id.*

53. Scott J. Schweikart, *Reexamining the Flawed Legal Basis of the "Dead Donor Rule" as a Foundation for Organ Donation Policy*, 22 AMA J. ETHICS 1019, 1020 (2020).

54. Truog, *supra* note 36, at 1887.

harvesting be prevented to protect patients from exploitation?[55] Would transplant surgeons be held liable for the deaths of organ donors?[56]

As a result of these two medical advances and the concerns they posed, Henry Beecher, an anesthesiologist from Harvard Medical School, called for the formation of an Ad Hoc Committee of his colleagues to consider developing a definition of brain death.[57] This committee included medical professionals, researchers, and professors of various areas of expertise.[58] After much deliberation, the Committee suggested a new possible diagnosis—"irreversible coma"—which focused on a loss of neurological functioning in patients.[59]

According to the Committee, the criteria for determining "irreversible coma" would be threefold: (1) "unreceptivity or unresponsivity" to stimuli (meaning no response to pain), (2) "no movements or breathing" (tested by watching for breathing after discontinuation of a ventilator), and (3) "no reflexes" (meaning no pupil dilation, blinking, yawning, swallowing, etc.).[60] Furthermore, all of these criteria would be assessed "by purely clinical signs," meaning by observation alone.[61] The Committee did not mandate medical testing, such as the use of an electroencephalogram (EEG);[62] it only *recommended* an EEG.[63] A flat EEG would be considered indicative of "irreversible coma."[64] The Committee also cautioned against the possibility of false diagnoses, which could occur in patients with hypothermia (a dangerously low body temperature) or after giving medications that depress the central nervous system.[65]

While the Committee felt confident that these criteria could diagnose irreversible unconsciousness, they remained hesitant to suggest that this should become a new definition of death.[66] Prominent bioethicist and pediatrician Robert Truog, currently a professor at Harvard Medical School and Boston Children's Hospital,[67] would have supported that hesitancy, as he believes that the Committee failed to provide "any scientific, philosophical, or logical

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55. *See* Norbert W. Paul et al., *Cases Abusing Brain Death Definition in Organ Procurement in China*, 31 CAMBRIDGE Q. OF HEALTHCARE ETHICS 379, 381–82 (2022).

56. Schweikart, *supra* note 53, at 1019.

57. Beecher et al., *supra* note 50, at 337.

58. Ariane Lewis et al., *Shouldn't Dead Be Dead?: The Search for a Uniform Definition of Death*, 45 J.L. MED. & ETHICS 112, 112 (2017).

59. Powell, *supra* note 51.

60. Beecher et al., *supra* note 50, at 337–38.

61. *Id.* at 337.

62. *Electroencephalogram (EEG)*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/electroencephalogram-eeg [https://perma.cc/RF39-D22A] (last visited Jan. 18, 2025) (describing an EEG as a test where electrodes are placed on a patient's scalp to detect the electrical activity of that patient's brain).

63. Beecher et al., *supra* note 50, at 338.

64. *Id.*

65. *Id.*

66. Powell, *supra* note 51.

67. *Robert D. Truog, MD, MA: Bio*, HARV. MED. SCH., https://bioethics.hms.harvard.edu/faculty-staff/robert-d-truog [https://perma.cc/HG5J-GVPS] (last visited Jan. 16, 2025).

justification for why the state of irreversible coma could be equated with death."[68]

Nonetheless, Kansas proceeded to adopt the Harvard criteria into law, and several other states followed.[69] This meant that a patient could be simultaneously alive in one state while dead in another, leading to complications with inheritance, taxation, and other areas of the law.[70] Therefore, President Carter called for a special commission to address these inconsistencies.[71]

The Commission began by identifying issues with the Harvard criteria, including (1) the inability to test for "unreceptivity"—the complete unawareness of stimuli[72]—in an unconscious patient and (2) the misleading use of the word "coma," which refers to "a condition of a *living* person."[73] The word "coma" was, thus, removed from the definition, and a model statute, keeping the adjective of "irreversible," was proposed.[74]

That model statute, now known nationwide as the Uniform Determination of Death Act (UDDA), allowed for the determination of death in either of the following two ways:

An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions [cardiac death], or (2) irreversible cessation of all functions of the entire brain, including the brain stem [brain death], is dead. A determination of death must be made in accordance with accepted medical standards.[75]

The UDDA intentionally left "accepted medical standards" undefined to allow physicians and other specialists to adjust their methods for determining death in response to future advances.[76]

In the late 1990s, around fifteen years after the UDDA's creation, research emerged that questioned the validity of brain death.[77] Most notably, that research came from Dr. D. Alan Shewmon, a pediatric neurologist with triple board certification in Pediatrics, Neurology, and Electroencephalography who is now retired from serving as Professor of Neurology and Pediatrics at UCLA's School of Medicine and as Chief of the Neurology Department at Olive-UCLA

68. Truog, *supra* note 36, at 1887–88.

69. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMEDICAL & BEHAV. RSCH., DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL, AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH 62 (1981) [hereinafter PRESIDENT'S COMM'N].

70. Lewis et al., *supra* note 58, at 113.

71. PRESIDENT'S COMM'N, *supra* note 69, at 6.

72. Beecher et al., *supra* note 50, at 337.

73. PRESIDENT'S COMM'N, *supra* note 69, at 25 (emphasis added).

74. *Id.* at 73.

75. Uniform Determination of Death Act § 1 (1980).

76. Ariane Lewis et al., *Determination of Death by Neurologic Criteria in the United States: The Case for Revising the Uniform Determination of Death Act*, 47 J.L. MED. & ETHICS 9, 13 (2019).

77. Shah, *supra* note 26, at 313.

Medical Center.[78] Dr. Shewmon successfully showed that some patients, who had been accurately determined to be dead under neurological criteria, could perform integrative bodily functions, including wound healing, maintaining a warm body temperature, mounting stress responses to pain, and fighting infections.[79] Many of the patients determined to be brain dead also still had a functioning hypothalamus[80]—which is a "coordinating center" that stabilizes the body's temperature, blood pressure, hunger, thirst, sleep, and more[81]—and some patients even underwent puberty or gestated fetuses.[82] This significantly undermined the assertion that these patients were, in fact, biologically dead.[83]

In response to this research, President George W. Bush gathered a group of scholars in 2008 to determine whether to abandon brain death altogether or develop a new rationale for why "brain dead" patients should be considered dead.[84] This group was called the President's Council, and it opted for the second option: creating a new rationale.[85] It noted that completely abandoning the concept of brain death would greatly hinder organ transplantations due to the "dead donor rule" (DDR).[86] The DDR is not a legal construct, but it is a widely held belief among physicians that "it is wrong to kill one person to save the life of another."[87] This means that the organ donor "must already be dead before vital organs are removed."[88] Since patients determined to be brain dead are the "ideal source of transplantable organs," keeping the neurological criteria for death was crucial for the continuance of life-saving transplantations.[89]

With this consideration in mind, the President's Council introduced the idea of "total brain failure," also known as the "whole brain" standard.[90] The Council defined this failure as a cessation of the "fundamental vital *work* of a living organism," which it viewed as receptivity to external stimuli, the ability to act upon the world to meet one's needs, and the "basic felt need" that drives a person to act.[91] For diagnostic purposes, the Council said that "total brain failure" has

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78. Declaration of D. Alan Shewmon, M.D. at 1, McMath v. California, No. 15-CV-06042-HSG (N.D. Cal. Dec. 12, 2016).

79. D. Alan Shewmon, *The Brain and Somatic Integration: Insights Into the Standard Biological Rationale for Equating "Brain Death" with Death*, 26 J. MED. & PHIL. 457, 467–68.

80. Shah, *supra* note 26, at 311.

81. *Hypothalamus*, CLEV. CLINIC (Mar. 16, 2022), https://my.clevelandclinic.org/health/body/22566-hypothalamus [https://perma.cc/2WQ7-URRE].

82. Shewmon, *supra* note 79, at 468–69.

83. Shah, *supra* note 26, at 312.

84. PRESIDENT'S COUNCIL ON BIOETHICS, CONTROVERSIES IN THE DETERMINATION OF DEATH: A WHITE PAPER BY THE PRESIDENT'S COUNCIL ON BIOETHICS 6, 11 (2008).

85. *Id.* at 58.

86. *Id.* at 10–12.

87. Ann Thorac Surg, *Consequences of the Dead Donor Rule*, NAT'L LIBR. OF MED., at 5 (Apr. 2014), https://pmc.ncbi.nlm.nih.gov/articles/PMC4100619 [https://perma.cc/9YZC-VA22].

88. *Id.*

89. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 84, at 8.

90. *Id.* at 19.

91. *Id.* at 60–61.

occurred when the following criteria are met: (1) a documented history of injury rather than a transient cause of current symptoms, (2) complete unresponsiveness, (3) no brainstem reflexes, and (4) no drive to breathe during an apnea test.[92] This was strikingly reminiscent of the Harvard criteria from 1968, forty years prior.[93]

While acknowledging that uncertainties about the validity of brain death determinations should be worked out first "on [their] own terms," without "an eye to the practical effects that a new standard for determining death might have," the Council nonetheless proceeded to consider organ donorship at the forefront of its discussions, ultimately concluding that brain death was "conceptually sound."[94] As Dr. Shewmon has said, "At its inception, 'brain death' was proposed not as a coherent concept but as a *useful* one"—in other words, as a means to an end.[95]

Due to lawsuits and lingering questions, the American Academy of Neurology (AAN) was concerned about losing the public's trust in the legitimacy of brain death.[96] For example, conditions like Guillain-Barré syndrome[97] and high cervical spine injury[98] "mimic brain death," thus leading to false positive determinations of brain death in patients.[99] Therefore, in 2016, the AAN convened an interdisciplinary summit, called the Quality Standards Subcommittee, to address these issues.[100] The Subcommittee explicitly discussed the shortfalls of assessing brainstem reflexes clinically, such as the inability of patients with a cervical spine injury to demonstrate spinal reflexes, facial trauma that could mask a patient's facial responses, and the effects that neuromuscular blocking agents and other drugs could have on patients' ability to move in response to stimuli.[101] Notwithstanding these issues, the AAN still decided that confirmatory tests, such as EEGs, should remain optional when determining brain death.[102]

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92. *Id.* at 33–34.

93. Beecher et al., *supra* note 50, at 337–38.

94. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 84, at 9–12.

95. D. Alan Shewmon, *Brain Death: A Conclusion in Search of a Justification*, HASTINGS CTR. REP. S22, S22 (2018) (emphasis added).

96. Lewis et al., *supra* note 76, at 9.

97. *Guillain-Barré Syndrome*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/guillainbarr-syndrome [https://perma.cc/NLU2-N3R7] (last visited Jan. 18, 2025) (describing Guillain-Barré syndrome as a neurological disorder "in which the body's immune system attacks part of the peripheral nervous system," potentially leading to paralysis).

98. *Quadriplegia*, CLEV. CLINIC (Aug. 10, 2022), https://my.clevelandclinic.org/health/symptoms/23974-quadriplegia-tetraplegia [https://perma.cc/V5NM-EU6X] (explaining that cervical spine injuries can result in quadriplegia, involving a permanent partial or complete loss of feeling and movement below the shoulders and neck).

99. Lewis et al., *supra* note 58, at 114–15.

100. *Id.* at 114.

101. *Id.*

102. *Id.*

Today, all fifty states recognize the UDDA's whole-brain criteria for brain death, either statutorily or judicially,[103] and the AAN's standards are used as the baseline for brain death determinations throughout the United States and beyond.[104] Yet fundamental inconsistencies persist among states' different UDDA variations.[105] These include the use or absence of the language "including the brain stem," the types of professionals qualified to determine brain death, the particular medical standards used, and states' responses to families' objections to brain death.[106] As these inconsistences show, the concept of brain death is still up for debate, still unsettled, still evolving. And this evolution has been the subject of recent controversy.

B. To Revise or Not to Revise?

In 2020, the Uniform Law Commission (ULC) created a Study Committee to consider whether the UDDA should be revised.[107] The Study Committee noted that "portions of the UDDA do not align with current medical practice," so it called for a Drafting Committee to address four issues: (1) the medical criteria used to determine death, (2) the appropriateness of "irreversible" versus "permanent," (3) the brain region that matters when determining neurological death, and (4) other issues, such as accommodating religious objections.[108] The new, resulting UDDA would then be called the rUDDA, with "r" standing for "revised."[109]

Nonetheless, from January to July of 2023, the Drafting Committee received sixty-five letters from concerned parties with conflicting views.[110] The debates became "so contentious" that the Drafting Committee was unable to reach a consensus about what revisions, if any, to make.[111] Thus, the ULC paused the revision process, leaving many issues unresolved.[112]

With the lingering possibility of a future rUDDA, it is crucial to consider the legal, medical, religious, and social issues underlying the current UDDA, as

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103. Lewis et al., *supra* note 76, at 13 (including a detailed list of statutes and cases that have incorporated or adopted the UDDA).

104. Lewis et al., *supra* note 58, at 123.

105. Junn & Hwang, *supra* note 21, at 721.

106. *Id.*; Lewis et al., *supra* note 76, at 13.

107. Samuel A. Thumma et al., *Issues Memorandum: Determination of Death Act (20__), Uniform*, UNIF. L. COMM'N (June 22, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "2023 Annual Meeting—Draft and Issues Memorandum").

108. *Id.*

109. *Id.*

110. Lucy Grelle, *Comments—Various Authors—January 2023 Through July 2023*, UNIF. L. COMM'N (May 30, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

111. Stein, *supra* note 25.

112. *Id.*

well as the diverse viewpoints of stakeholders who contributed to the Drafting Committee's debates. These issues and voices cover a broad range of topics and address both the potential harms and benefits that could result from revisions to this longstanding legal and medical precedent.

II. THE UDDA'S CONTROVERSIAL ISSUES AND LEGAL IMPLICATIONS

A. Religious Objections

As evidenced by the decades-long controversy surrounding brain death that continues to this day, what constitutes death is highly dependent upon people's values and beliefs.[113] This is rooted in the fact that American culture places great importance on religious freedom and personal autonomy.[114] However, despite this culture of individuality and empowerment, the decision to test for brain death is usually left to the discretion of providers.[115] And once a patient has been declared brain dead, providers have no ethical duty to maintain life support.[116] For some patients and their families, this creates a profound moral dilemma.[117]

Those who have expressed religious objections to brain death include the Japanese Shinto, Muslims, Roman Catholics, Orthodox Jews, Buddhists, and certain Indigenous cultures.[118] Not all individuals within these groups oppose brain death, but those who do only believe in the validity of cardiac death and object to withdrawing life support after a determination of brain death.[119]

Some object based on their beliefs about the soul's relationship to the body. For the Japanese Shinto, body and soul are interconnected, so if the body is otherwise healthy, the death of the brain is not the equivalent of "true death" because the soul lives on.[120] Similarly, Muslims and Roman Catholics believe that death occurs when the soul leaves the body, although precisely when this happens is not clearly defined.[121] Some Muslims accept brain death but believe that no legal consequences should occur until patients' respiration and

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113. Eran Segal, *Religious Objections to Brain Death*, 29 J. CRITICAL CARE 875, 875 (2014).

114. Robert A. Burt, *The Medical Futility Debate: Patient Choice, Physician Obligation, and End-of-Life Care*, 5 J. PALLIATIVE MED. 249, 250 (2002).

115. Pope, *supra* note 45, at 309 (citing Ariane K. Lewis & Thaddeus M. Pope, *Physician Power to Declare Death by Neurologic Criteria Threatened*, 26 NEUROCRITICAL CARE (2017)).

116. *Id.* at 308.

117. *Id.* at 316.

118. Lewis et al., *supra* note 58, at 122; Shah, *supra* note 26, at 330 (citation omitted).

119. Pope, *supra* note 45, at 291.

120. Yuri Terunuma & Bryan J. Mathis, *Cultural Sensitivity in Brain Death Determination: A Necessity in End-of-Life Decisions in Japan*, NAT'L LIBR. OF MED. (May 13, 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8120912 [https://perma.cc/AU9K-UWUN].

121. Andrew C. Miller et al., *Brain Death and Islam*, NAT'L LIBR. OF MED. (Oct. 2014), https://pmc.ncbi.nlm.nih.gov/articles/PMC4188144 [https://perma.cc/T3CJ-XLXX]; Joseph Meaney, *Unacceptable Revisions to the Uniform Determination of Death Act*, NAT'L CATH. BIOETHICS CTR. (June 13, 2023), https://www.ncbcenter.org/messages-from-presidents/uddarevisions [https://perma.cc/7JCM-XTQA].

circulation have also ceased.[122] And some Roman Catholics accept brain death yet emphasize that rigorous tests must be used to have "moral certitude" that the entire brain, including the hypothalamus, has ceased working.[123]

Others object based on beliefs unrelated to the soul. In Orthodox Judaism, the Torah links life to the presence of breath, so "as long as a person breathes, the heart functions, and the blood circulates, death has not yet occurred."[124] One rabbi has argued that "the function of the brain . . . is of more importance than the beating of a heart,"[125] but this is not the majority opinion among Orthodox Jews.[126] Buddhists, like Orthodox Jews, look beyond brain function when defining death.[127] In Buddhism, death is determined by the absence of vitality (i.e., metabolic processes), body heat, and consciousness, so a loss of consciousness alone does not constitute death.[128] Within some Indigenous cultures, brain death due to an accident or war injury is accepted, but it may be difficult to accept brain or cardiac death when it results from disease.[129] This is partially because disease is viewed as "a disturbance in the relationship among self, spiritual forces, community and environment," and disturbances may only be temporary.[130] Finally, for many individuals, regardless of their religious background, the possibility of miracles provides hope.[131] According to the Pew Research Center, nearly eighty percent of adults in the United States believe in miracles and, thus, may not be deterred by the idea of medical futility.[132]

1. The Free Exercise Clause.—Implicated by these various religious objections to the legal definition of brain death is the First Amendment, which states in relevant part that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ."[133] To determine whether a violation of the Free Exercise Clause has occurred, courts

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122. Miller et al., *supra* note 121.

123. Meaney, *supra* note 121.

124. Miller et al., *supra* note 121.

125. Kenneth Shuster, *"When Has the Grim Reaper Finished Reaping?" How Embracing One Religion's View of Death Can Influence Acceptance of the Uniform Determination of Death Act*, 30 TOURO L. REV. 655, 660 (2014).

126. Miller et al., *supra* note 121.

127. Damien Keown, *Buddhism, Brain Death, and Organ Transplantation*, 17 J. BUDDHIST ETHICS 1, 12 (2010).

128. *Id.*

129. Yoshiko Yamashita Colclough & Gary M. Brown, *American Indians' Experiences of Life-Threatening Illness and End of Life*, NAT'L LIBR. OF MED. (Oct. 1, 2014), https://pmc.ncbi.nlm.nih.gov/articles/PMC4238934 [https://perma.cc/6MTD-GNUR]. This information comes from the background section of an exploratory study and only represents the health care values of some Indigenous cultures.

130. *Id.* (quoting KENNETH COHEN, HONORING THE MEDICINE: THE ESSENTIAL GUIDE TO NATIVE AMERICAN HEALING 16 (2003)).

131. Pope, *supra* note 45, at 289.

132. *U.S. Religious Landscape Survey: Religious Beliefs and Practices,* PEW RSCH. CTR., (June 1, 2008), https://www.pewresearch.org/religion/2008/06/01/u-s-religious-landscape-survey-religious-beliefs-and-practices [https://perma.cc/G7VX-KX73].

133. U.S. CONST. amend. I (emphasis added).

turn to the Religious Freedom Restoration Act (RFRA).[134] The federal RFRA states that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[135] "Exercise of religion" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[136] And to explain why a "rule of general applicability" could be problematic, the RFRA notes that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[137]

The RFRA expressed this viewpoint in response to *Employment Division v. Smith*, where the United States Supreme Court "virtually eliminated" the requirement that the government justify burdens imposed on religious exercise by "neutral" or generally applicable laws.[138] The RFRA also superseded *Church of Lukumi Babalu Aye v. City of Hialeah*, where ordinances targeting only religious killings of animals yet permitting other types of animal killings violated the Free Exercise Clause by being "underinclusive."[139] In contrast to *Church of Lukumi Babalu Aye*, the RFRA does not require that government action target religious practices directly but only that it impose a substantial burden on those practices, thus restoring the "compelling interest" test from *Sherbert v. Verner*.[140]

In *Sherbert*, an employee was disqualified from receiving benefits and ultimately lost her job because she would not work on Saturdays, which were the Sabbath Day of her faith.[141] The United States Supreme Court noted that the requirement to work on Saturdays imposed a burden because it forced the employee "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[142] Employees who worshipped on Sundays, however, were statutorily protected from having to make that same kind of choice.[143] Having established that a substantial burden on the employee's free exercise of religion existed, the Court then held that the government must show (1) a "compelling state interest" for upholding the regulation and (2) that "no alternative [and less burdensome] forms of regulation" would protect that interest.[144] Nonetheless, the government's

134. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000BB-4 (2025).
135. 42 U.S.C. § 2000bb-1(a).
136. 42 U.S.C. § 2000bb-2(4) (as defined under 42 U.S.C. § 2000cc-5(7)(A)).
137. 42 U.S.C. § 2000bb(a)(2).
138. 42 U.S.C. § 2000bb(a)(4).
139. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993).
140. 42 U.S.C. § 2000bb(b)(1).
141. Sherbert v. Verner, 374 U.S. 398, 399, 404 (1963).
142. *Id.* at 404.
143. *Id.* at 406.
144. *Id.* at 406–07 (describing a level of judicial scrutiny now known as "strict scrutiny," although Justice Brennan did not refer to it as such within *Sherbert*).

interest in avoiding potential disruptions to the work schedule was "doubtful . . . to warrant a substantial infringement of religious liberties."[145]

In 2015, Indiana passed its own RFRA with the same provisions: if a governmental entity has "substantially burden[ed]" an individual's exercise of religion, that entity must show that the burden is (1) "in furtherance of a compelling governmental interest" and (2) the "least restrictive means" of furthering that interest.[146] Indiana's RFRA also goes a step further by allowing an individual to assert a violation of this statute as a claim or defense "regardless of whether the state or any other governmental entity is a party to the proceeding."[147] Thus, individuals can bring RFRA claims against private Indiana providers that are substantially burdening their exercise of religion in health care decisions, such as by forcing the withdrawal of life support against a patient's or family's religious beliefs. To avoid such life-altering RFRA violations and the lawsuits that could result, an exemption from brain death is needed within the UDDA.

2. A Complete Exemption from Brain Death.—While a few states have allowed temporary accommodations for objecting families, only one state, New Jersey, offers a complete religious exemption from brain death determinations.[148] This is intended for individuals who believe that "continued circulatory and respiratory activity, even if artificially sustained, is evidence of life."[149] New Jersey's exemption reads as follows:

The death of an individual shall not be declared upon the basis of neurological criteria . . . when the licensed physician authorized to declare death, has reason to believe, on the basis of information in the individual's available medical records, or information provided by a member of the individual's family or any other person knowledgeable about the individual's personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria[.][150]

Thus, if a determination of brain death would violate the patient's "personal religious beliefs," as evidenced by information in the patient's medical records or as expressed by loved ones, the opt-out would allow death to be declared "solely upon the basis of cardio-respiratory criteria . . . ."[151]

This opt-out provision was life-changing for a young girl named Jahi McMath.[152] Jahi was a thirteen-year-old from California who experienced

145. *Id.* at 407.

146. IND. CODE § 34-13-9-8 (2025).

147. IND. CODE § 34-13-9-9 (2025).

148. Pope, *supra* note 45, at 318.

149. Alyssa A. DiRusso, *Life and Death Matters in Conflict of Laws*, 97 TUL. L. REV. 703, 719 (2023).

150. N.J. REV. STAT. § 26:6A-5 (2025).

151. *Id.*

152. *See* Janet L. Dolgin, *Choosing Death, Shaping Death: Assumptions About Disabilities, Race, and Death*, 25 QUINNIPIAC HEALTH L.J. 61, 89 (2022).

severe complications after a routine tonsillectomy.[153] Within days of her surgery, she was declared brain dead.[154] However, Jahi's mother, Nailah, noticed that Jahi still exhibited signs of life, such as the warmth of her body and the reactiveness of her feet.[155] Given these signs of life, Nailah said that it would go against her religious beliefs not to recognize and treat Jahi as a living human being.[156] Thus, Nailah filed for a temporary restraining order (TRO) to halt the removal of Jahi's ventilator and to have a gastric tube (for nutrition) and a tracheostomy tube (for breathing) inserted, which would have made it possible for Jahi to be transferred to another facility.[157] Nevertheless, the California court system only required the hospital to maintain the "status quo" of Jahi's treatment, which did not include any nutrition for Jahi.[158] Subsequently, Nailah felt compelled to consent to the issuance of a death certificate in order to obtain custody of Jahi's body.[159] She then moved with Jahi to New Jersey, where the religious exemption would allow Jahi to receive medical care.[160]

Taking these religious considerations into account, the Drafting Committee included a provision in the rUDDA that would allow for a patient or surrogate to object generally to a determination of death.[161] Subsections (a) and (b) of this provision read as follows:

> (a) The individual may object to a determination of death . . . .
>
> (b) An objection under subsection (a) must be documented in the individual's medical records [or through information provided to the health-care institution by the individual's surrogate].[162]

Subsection (c) provides that a "health-care institution shall . . . comply with the individual's choice that a determination of death not be made . . . ," but it stipulates that this choice "must be made before beginning the clinical

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153. Winkfield v. Child.'s Hosp. Oakland, No. C 13-5993 SBA, 2014 U.S. Dist. LEXIS 8560, at *1 (N.D. Cal. Jan. 22, 2014).

154. *Id.*

155. Examiner Staff, *A Personal Story of Representing Jahi McMath*, S.F. EXAM'R (Dec. 25, 2013), https://www.sfexaminer.com/lifestyles/a-personal-story-of-representing-jahi-mcmath/article_ce07c872-30b5-505d-9e9f-37d28a812ea6.html [https://perma.cc/T699-F9FS].

156. Complaint for Declaratory Relief & Request for Temporary Restraining Order & Injunctive Relief at 4, Winkfield v. Child.'s Hosp. Oakland, No. C 13-5993 SBA (N.D. Cal. Dec. 30, 2013).

157. *Id.* at 1.

158. Order Deferring in Part & Denying in Part Plaintiff's Application for a Temporary Restraining Order at 2, Winkfield v. Child.'s Hosp. Oakland, No. C 13-5993 SBA (N.D. Cal. Dec. 30, 2013).

159. Dolgin, *supra* note 152, at 88.

160. *Id.* at 89.

161. DETERMINATION OF DEATH ACT § 6 (UNIF. L. COMM'N, Redline Comparison Draft June 27, 2023).

162. *Id.* at § 6(a), (b).

evaluation for the determination of death . . . ."[163] Also, notably, no part of this opt-out provision requires that the objection be religious in nature.[164]

A general exemption like this is important because some individuals who object may not be religious. According to a Pew Research Center survey, forty-eight percent of adults in the United States identify as "spiritual" and twenty-two percent as "spiritual but not religious."[165] Over eighty percent of these spiritual individuals believe that humans have a soul or a spirit in addition to their physical body and that there is "something spiritual beyond the natural world."[166] These patients and surrogates, who have taken a more individualized approach to their spiritual lives, may have values that they hold just as deeply as those who practice an organized religion. When considering objections to brain death, this should not be overlooked.

B. Scientific Objections

"[B]iology suggests that brain death is not a valid conception of death," says Seema K. Shah, a professor of bioethics at the National Institutes of Health.[167] "If patients and families have very deeply held religious or moral views about the sanctity of life, it is reasonable for them to reject equating brain death and biological death."[168] It is also reasonable to reject brain death for scientific reasons. Dr. Paul Byrne, a neonatologist and clinical professor of pediatrics, holds the following: "To state that life has left the body when there is a beating heart, normal blood pressure, normal temperature, and normal color is false . . . . Many other evidences of being alive continue in those declared 'brain dead.'"[169]

For example, as Dr. Shewmon notes, a patient on a ventilator who does not show any signs of consciousness may still be able to circulate blood, digest food, excrete waste, grow and develop, regulate body temperature, heal wounds, fight infections, and even reproduce.[170] In addition to maintaining these various bodily functions, patients declared brain dead often demonstrate osmoregulation (maintaining an appropriate concentration of salt and water),[171] secrete vasopressin (preventing diabetes insipidus),[172] have ischemic penumbra (a

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163. *Id.* at § 6(c).

164. *Id.* at § 6.

165 . David O'Reilly, *What Does Being Spiritual Mean?*, PEW (May 29, 2024), https://www.pewtrusts.org/en/trust/archive/spring-2024/what-does-being-spiritual-mean [https://perma.cc/TAB4-NPSV].

166. *Id.*

167. Shah, *supra* note 26, at 331.

168. *Id.*

169. Paul A. Byrne & George M. Rinkowski, *"Brain Death" Is False*, 66 THE LINACRE Q. 42, 47 (1999).

170. Shewmon, *supra* note 79, at 467–68.

171. Nair-Collins & Miller, *supra* note 23, at 651.

172. James L. Bernat & Anne L. Dalle Ave, *Aligning the Criterion and Tests for Brain Death*, 28 CAMBRIDGE Q. OF HEALTHCARE ETHICS 635 (2019).

condition where neurons have survived in a low-blood-flow state),[173] and react to incisions for organ procurement with an increase in heart rate and blood pressure (perhaps indicative of pain).[174] Such a person is not dead, biologically speaking, yet may still be labeled "brain dead."[175]

Dr. Shewmon, whose statement challenging the rUDDA was endorsed by over one hundred experts,[176] takes issue with labeling living persons as legally dead.[177] To him, a living person is a "human organism [that] maintains its internal homeostasis to resist the tendency toward decay," meaning that the human organism is able to regulate "a whole host of mutually interdependent physiological functions."[178] Death, by contrast, only occurs when a patient's body can no longer "maintain or restore homeostasis."[179] Thus, to declare a patient dead whose body is maintaining homeostasis by engaging in osmoregulation and digestion, for instance, would be scientifically objectionable, contradicting a biological reality.

1. Brain Death as a Legal Fiction.—Given this biological reality, brain death is a legal fiction.[180] A legal fiction "exists when the law treats something known to be false (or not known to be true) as if it were true for a particular legal purpose."[181] In this case, the legal purpose for equating brain death with biological death is to permit the withdrawal of treatment and the donation of organs and to protect the individuals who make and carry out these decisions from liability.[182] Rather than openly acknowledging this fiction and its purposes, however, many providers promote brain death as a true reflection of reality.[183] This is what happened when a physician exclaimed to Jahi's McMath's family, "What don't you understand? She is dead, dead, dead."[184]

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173. *Id.*

174. Truog, *supra* note 36, at 1891.

175. *Id.* at 1897.

176. Michael Cook, *UDDA and RUDDA: Uproar Over Possible Change in Brain Death Criteria*, BIOEDGE (May 30, 2021), https://bioedge.org/uncategorized/udda-and-rudda-uproar-over-possible-change-in-brain-death-criteria [https://perma.cc/V54A-E66G].

177. D. Alan Shewmon et al., *Comments: D. Nguyen, D.A. Shewmon, M. Y. Rady, and Others*, UNIF. L. COMM'N (July 12, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

178. *Id.*

179. *Id.*

180. Shah, *supra* note 26, at 304.

181. *Id.*

182. *Id.* at 325 (discussing how this legal fiction allows for the withdrawal of life support and organ donation); Schiller, *supra* note 27, at 214 (discussing the protection of transplant surgeons from liability).

183. Charlie Camosy, *"Brain Death" at a Crossroads*, THE PILLAR (July 14, 2023), https://www.pillarcatholic.com/p/brain-death-at-a-crossroads [https://perma.cc/FT2W-MUL6].

184. Examiner Staff, *supra* note 155.

Several months later in New Jersey, Jahi showed more signs of life: her body underwent puberty, and she responded to her mother's voice.[185] Dr. Shewmon also visited Jahi and observed firsthand as Jahi moved her right arm in response to a command to do so.[186] Jahi's family recorded numerous videos of Jahi moving in response to verbal commands, and these videos were genuine according to forensics experts, who analyzed the videos for skeptics.[187] Dr. Shewmon then examined the videos and gave sworn testimony that Jahi was not brain dead but was, in fact, in a minimally conscious state.[188] Hence, for Jahi, the legal fiction of brain death had not only failed to represent her biological reality but had also jeopardized her right to life.

C. Testing for Brain Death

Another danger that affects patients' right to life is the lack of consensus and accuracy in brain death determinations. While it is true that the AAN's standards are considered the baseline "accepted medical standards" throughout the United States,[189] there is no regulatory body that enforces those standards.[190] Therefore, hospitals and providers often deviate from the norm.[191] This is why Ariane Lewis and her medical colleagues called for revisions to the UDDA in 2019.[192] They were concerned about diagnostic practices that varied "significantly," such as differences in whether ancillary tests were required and differences in apnea-test techniques.[193]

Ancillary tests serve to confirm the accuracy of brain death determinations, yet they are not legally required in most jurisdictions.[194] This means that the standard laboratory testing done before and after an apnea test to measure arterial carbon dioxide is not required, which could undermine the apnea test's accuracy.[195] Other ancillary tests that experts believe should be legally required include neuroimaging procedures to test for intracranial circulatory arrest (i.e., the complete stoppage of blood flow to the brain)[196] and laboratory testing to

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185. Rachel Aviv, *What Does It Mean to Die?*, NEW YORKER (Jan. 29, 2018), https://www.newyorker.com/magazine/2018/02/05/what-does-it-mean-to-die [https://perma.cc/999U-6MAS].

186. Nair-Collins & Miller, *supra* note 23, at 653 (citing Alan D. Shewmon, *Truly Reconciling the Case of Jahi McMath*, 29 NEUROCRITICAL CARE 165, 169 (2018)).

187. *Id.* at 652.

188. Declaration of D. Alan Shewmon, *supra* note 78, at 2.

189. Lewis et al., *supra* note 58, at 123.

190. Lewis et al., *supra* note 76, at 14.

191. David M. Greer et al., *Variability of Brain Death Policies in the United States*, 73 JAMA NEUROLOGY 213, 213 (2016).

192. Lewis et al., *supra* note 76, at 10.

193. *Id.* at 14.

194. Nair-Collins & Miller, *supra* note 23, at 650.

195. *Id.*

196. Bernat & Dalle Ave, *supra* note 172, at 637.

check for functioning of the hypothalamus (which regulates hormones).[197] Providers argue that the implementation of ancillary tests should be left to medical discretion and not become a legal requirement.[198] Nonetheless, there remains a "mismatch" between the medical and legal standards for brain death, such that providers only following the AAN's standards are not actually testing "all" functions of the "entire" brain.[199]

This mismatch was apparent in *In re Guardianship of the Person and Estate of Aden Hailu*.[200] Aden was a young woman who was declared brain dead after a surgery to remove her appendix.[201] Her father, who observed signs of life such as Aden squeezing his hand, contested her brain death diagnosis.[202] Siding with Aden's father, the Supreme Court of Nevada noted that the hospital had failed to "establish whether the AAN guidelines adequately measure[d] the extraordinarily broad standard laid out" by the UDDA.[203] And to permit the withdrawal of Aden's life support based on this "undeveloped record" would be an irreversible error.[204]

In addition to this mismatch between the UDDA's language and the AAN's standards, there is another testing concern: false positives and misdiagnoses as a result of "examiner error" are common when it comes to determining brain death.[205] In Indiana, only a physician can declare brain death, but some states also allow physician assistants and nurses to do so.[206] Furthermore, there is research showing that even physicians lack sufficient training in how to determine brain death.[207] Scholars have proposed solutions, such as learning modules, brain death simulations, and specialized credentialing.[208] In the meantime, however, informed consent about the inaccuracies and risks of brain death testing should be required.

1. Informed Consent for Apnea Testing.—Apnea tests are a required component of brain death determinations.[209] Nonetheless, since physicians do

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197. Meaney, *supra* note 121.

198. Jan K. Carney, *Comments: American College of Physicians*, UNIF. L. COMM'N (June 7, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

199. Pope, *supra* note 45, at 307.

200. *In re* Guardianship of Hailu, 361 P.3d 524 (Nev. 2015).

201. Siobhan McAndrew, *The Contested Death of Aden Hailu*, RENO GAZETTE J. (Mar. 29, 2016, 8:53 PT), https://www.rgj.com/story/news/2016/03/25/contested-death-aden-hailu/82269006 [https://perma.cc/3F8Q-8SMM].

202. *Id.*

203. *Hailu*, 361 P.3d at 531.

204. *Id.* at 532

205. Nair-Collins & Miller, *supra* note 23, at 653.

206. Lewis et al., *supra* note 58, at 118.

207. Popik, *supra* note 40.

208. Bernat & Dalle Ave, *supra* note 172, at 638.

209. David M. Greer et al., *Pediatric and Adult Brain Death/Death by Neurologic Criteria Consensus Guideline: Report of the AAN Guidelines Subcommittee*, 101 NEUROLOGY 1112, 1121 (2023).

not classify brain death determinations as a "medical procedure," they generally do not seek consent prior to testing for brain death.[210] This means that they conduct apnea and other tests without explaining the "material risks" and "expected outcome" of the proposed testing to surrogates, thereby disregarding the requirements for informed consent.[211]

States are divided on this issue. In Montana, a district court held that the surrogate's consent was required before apnea testing because Montana's UDDA did not mandate or specifically grant health care providers the right to conduct a brain death examination.[212] In that same decision, it also held the following: (1) Montana patients have a state constitutional right "to choose or refuse" a brain death examination under "the personal autonomy component of [Montana's] individual privacy guarantees," and (2) parents have a "fundamental liberty interest" under the Fourteenth Amendment's Due Process Clause to make this decision on behalf of their children.[213] Nevada, by contrast, enacted a statute that explicitly states, "A determination of the death of a person . . . is a clinical decision that does not require the consent of the person's authorized representative or the family member with authority to consent . . . ."[214]

The current language of the rUDDA does not remedy this issue.[215] Although it requires "a reasonable effort to notify" surrogates that a brain death evaluation will occur, it neither requires consent nor grants providers an explicit right to conduct brain death determinations.[216] This lack of clarity is especially concerning because apnea testing can harm patients.[217]

Dr. Coimbra, a neurologist with a specialty in brain ischemia, illustrated this harm in his letter to the Drafting Committee.[218] He first explained that ischemic penumbra is a condition of reduced blood flow to the brain, which can potentially be reversed by giving a patient thyroid hormone replacement.[219] Further, he noted that some patients are deemed brain dead "precisely *because* they are not receiving a life-saving replacement of thyroid hormones."[220] He

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210. Lewis et al., *supra* note 76, at 15.

211. IND. CODE § 34-18-12-3 (2025).

212. *In re* Guardianship of A.C., No. DG-16-08, at 6–7 (Mont. Dist. Ct. Sep. 16, 2016).

213. *Id.* at 7.

214. NEV. REV. STAT. § 451.008(1) (2025).

215. UNIF. L. COMM'N, *supra* note 38.

216. *Id.*

217. *E.g.*, Paul A. Byrne & Christine M. Zainer, *Comments: Christine Zainer and Paul Byrne*, UNIF. L. COMM'N (July 26, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

218. Cicero G. Coimbra, *Comments: Cicero G. Coimbra*, UNIF. L. COMM'N (July 24, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

219. *Id.*

220. *Id.* (emphasis added).

then told the story of one such patient, a woman in her thirties who had been clinically determined "brain dead" by a different neurologist.[221] After Dr. Coimbra tested her thyroid levels and administered the appropriate amount of hormones, she was able to be extubated eight days later and to communicate with her family by lip reading within a few months.[222] Thus, she was not dead.

Even more concerning is the fact that others like Dr. Coimbra's patient may be declared "brain dead" incorrectly and then subjected to apnea testing. According to Dr. Coimbra, apnea testing causes hypotension, "thereby further reducing brain circulation and aggravating brain damage."[223] Apnea testing can also "collapse brain circulation," causing irreversible brain damage.[224] Thus, the apnea testing itself can cause brain death in a formerly alive patient.

D. Organ Donorship by Brain Death

While heightening the accepted medical standards and requiring informed consent for brain death testing would help to prevent testing-related harms, these changes could also result in fewer organ donations.[225] Three transplantation organizations wrote a joint letter to the Drafting Committee, expressing concerns about rUDDA provisions that would delay or allow an opt-out to brain death determinations.[226] They feared that these provisions would have a "chilling effect" on the lives of patients with end-stage organ diseases.[227] The American College of Physicians, however, cautioned that "there is [a] risk that determination of death will be driven, explicitly or implicitly, by interest in obtaining organs for transplantation," so keeping these issues separate is "critical" to avoid undermining trust in the organ transplantation system.[228]

The Association of American Physicians and Surgeons, Inc., also cautioned that there is a risk of coercion when patients, as in Canada, are euthanized before becoming organ donors.[229] Canada offers medical assistance in dying (MAiD), where an approved practitioner either administers a substance that causes death

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Bernat & Dalle Ave, *supra* note 172, at 638.

226. Elizabeth A. Pomfret et al., *Comments: American Society of Transplant Surgeons, American Society of Transplantation, and Organization for Donation and Transplant Professionals*, UNIF. L. COMM'N (July 18, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

227. *Id.*

228. Carney, *supra* note 198.

229. Sheila Page, *Comments: Association of American Physicians and Surgeons, Inc*, UNIF. L. COMM'N (June 22, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

or prescribes a drug that patients can take themselves to end their lives.[230] To participate in MAiD, patients must make a voluntary request that is not the result of "outside pressure or influence."[231] Nonetheless, this protocol is not a perfect science. One example of coercion is the experience of Heather Hancock, a patient with cerebral palsy, who was pressured by a nurse to consider MAiD.[232] The nurse told her, "You're being selfish. You're not living, you're merely existing."[233] According to Shapiro, author of *Euthanasia by Organ Donation*, such concerns are not isolated to Canada, given that MAiD is "a more transparent view" of how the United States currently approaches organ donations.[234]

As a case in point, Dave Adox, a patient from New Jersey who was diagnosed with ALS, sought to donate as many of his organs as possible once his disease had progressed.[235] After some difficulty finding a hospital that would assist him, he finally got his wish, spending the end of his life surrounded by family as he was sedated and then disconnected from life support.[236]

Although not usually openly acknowledged, Dave's MAiD-like approach to dying is commonplace in the United States. Patients declared "brain dead" are kept alive via mechanical ventilation to preserve their organs for donation.[237] Their families can spend time with them.[238] Then, while their hearts are still beating, their life support is withdrawn, and their organs are procured—either immediately if they are a heart donor or after cardiac death has occurred.[239] To be clear, the removal of their life support and organs is the cause of their death.[240]

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230. *Medical Assistance in Dying: Overview*, GOV'T OF CAN. (Oct. 28, 2024), https://www.canada.ca/en/health-canada/services/health-services-benefits/medical-assistance-dying.html [https://perma.cc/GQ23-V7ZA].

231. *Id.*

232. Alex Schadenberg, *Canadian Woman Pressured to "Choose" Euthanasia. She Was Told that She Was Selfish for Living*, EUTHANASIA PREVENTION COAL. (July 12, 2024), https://alexschadenberg.blogspot.com/2024/07/canadian-woman-pressured-to-choose.html [https://perma.cc/8B4Y-2B35].

233. *Id.*

234. Shapiro, *supra* note 22, at 167.

235. Karen Shakerdge, *A Dying Man's Wish to Donate His Organs Get Complicated*, NAT'L PUB. RADIO (Dec. 26, 2016, 4:30 ET), https://www.npr.org/sections/health-shots/2016/12/26/499494248/a-dying-man-s-wish-to-donate-his-organs-gets-complicated [https://perma.cc/3CGH-9S4Q].

236. *Id.*

237. Pauline M. Todd et al., *Organ Preservation in a Brain Dead Patient: Information Support for Neurocritical Care Protocol Development*, 95 J. MED. LIBR. ASS'N 238, 238 (2007).

238. Pope, *supra* note 45, at 277.

239. Nair-Collins & Miller, *supra* note 23, at 654.

240. Shapiro, *supra* note 22, at 165; Schiller, *supra* note 27, at 214.

E. Violations of Patients' Right to Life

The Fourteenth Amendment declares that no state shall "deprive any person of life . . . without due process of law."[241] Nonetheless, despite this protection of patients' right to life, some states allow physicians to withdraw life support against surrogates' instructions, as seen in Indiana with Treasure Perry.[242] Per policy at the Riley Hospital for Children, two physicians conducted a brain death examination and believed Treasure to be dead.[243] Treasure's mother, who was also her surrogate, observed signs of life and tried to get Treasure transferred to another hospital.[244] However, no hospital would accept Treasure without a tracheal tube, which the Riley Hospital refused to insert after declaring brain death.[245] Treasure's physician also refused to visit Treasure to check for changes in her status "because deceased patients are not rounded on."[246]

When considering the merits of Treasure's case, Judge Kurt M. Eisgruber of the Marion Superior Court made a factual finding that "[t]here is no hope of [sic] that Perry will have any brain activity in the future."[247] Judge Eisgruber also referred to Treasure as a "dead person" who was on "mechanical ventilation, not life support, as no life support exists for a deceased person."[248] And in denying her a tracheal tube, Judge Eisgruber noted "downsides to providing medical therapy to a deceased person . . . [such as] the risks (no benefits) associated with medical therapies, and the toll on the healthcare team, specifically moral distress."[249] Judge Eisgruber expressed particular concern that health care workers would leave their profession due to this distress, yet he did not express a similar concern about the distress of Treasure's family.[250]

Decisions like this pose a threat to patients' constitutional right to life because "there is no way of knowing how many patients might recover to the minimally conscious state" after brain death is declared.[251] This is unknown because physicians or surrogates usually withdraw life support or consent to organ donation quickly, without giving patients a chance to recover.[252] Nevertheless, if given more time, some patients in a coma become minimally conscious or enter a vegetative state instead of dying, and around half of patients

241. U.S. CONST. amend. XIV, § 1.
242. *In re* Perry, No. 49D06-2208-MI-026530 (Ind. Super. Ct. Marion Cnty. Aug. 11, 2022).
243. *Id.* at 2–3.
244. Ortiz, *supra* note 12.
245. *Id.*
246. *Perry*, No. 49D06-2208-MI-026530, at 4.
247. *Id.* at 3.
248. *Id.* at 4–5.
249. *Id.* at 4.
250. *Id.*
251. Nair-Collins & Miller, *supra* note 23, at 653.
252. Truog, *supra* note 36, at 1894.

who are vegetative eventually recover consciousness.[253] While patients in a coma may still exhibit some reflexes, there is no other indication of their consciousness, which puts them at risk of being misdiagnosed.[254] Similarly, patients with locked-in syndrome are quadriplegic and may only be able to blink, yet they are fully conscious.[255] They, too, are at risk of misdiagnosis. Dr. Owen, the neurologist who examined Juan, has seen this time and again, especially with Kate.[256]

1. The Harm of Value Judgments.—Kate had contracted a viral condition that caused her to lapse into a coma due to widespread inflammation of her brain and spinal-cord tissue.[257] Within a few weeks, she had improved and was declared vegetative, but she still "showed no signs of inner life."[258] Dr. Owen conducted testing with a PET scanner and was surprised to find that Kate's brain was responding to visual input.[259] Months later, Kate started to speak again and, in time, visited with Dr. Owen.[260] She told him that she remembered becoming conscious again, having emotions, and feeling "incredibly angry" because most of her caretakers viewed her as "just a body."[261]

Viktor Frankl, a neurologist and Holocaust survivor, expressed concerns about this objectification and the value judgments that providers make.[262] He said, "With each patient, the doctor does not have the human being but the 'case' in front of him," and this "medical jargon" causes a "tendency for dissociation by doctors . . . and their objectification of human beings."[263] He went on to question, "Is the doctor ever employed by society to kill? Doesn't he rather have the task to save where he can and to give care whenever he is unable to heal?"[264] If providers made value judgments about whether patients were fit to live, patients and their families would lose trust in the medical profession because "no one would ever know whether the doctor was still approaching them as helper and healer or already as judge and executioner."[265]

Jahi's family expressed this same sentiment after being repeatedly pressured in California to consent to organ donorship, feeling like the hospital cared more

253. Sara Buscher, *Comments: Euthanasia Prevention*, UNIF. LAW COMM'N (Mar. 14, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—January 2023 through July 2023").

254. J.T. Giacino et al., *The Minimally Conscious State: Definition and Diagnostic Criteria*, 58 NEUROLOGY 349, 350 (2002).

255. *Id.*

256. OWEN, *supra* note 1, at 40.

257. *Id.* at 28.

258. *Id.* at 28–29.

259. *Id.* at 31.

260. *Id.* at 37.

261. *Id.* at 39.

262. VIKTOR E. FRANKL, YES TO LIFE IN SPITE OF EVERYTHING 68, 73 (2019).

263. *Id.* at 68.

264. *Id.* at 73.

265. *Id.*

about having an organ donor than it cared about Jahi.[266] This distrust in the medical system is especially prevalent among "individuals from disadvantaged or minority backgrounds," including people of color like Jahi, Aden, and Treasure.[267] Frankl also saw it in Nazi concentration camps and mental institutions, where people who were not physically able to work were "judged to be unworthy of life" and murdered.[268] Furthermore, this mentality extended beyond Nazi Germany to the United States, as seen in *Buck v. Bell*, a United States Supreme Court decision that referred to people with disabilities as "defectives" and "imbeciles" and legally upheld their forced sterilization.[269] Indiana, in fact, passed the first eugenics sterilization legislation in the world in 1907.[270]

Value judgments about people of color and people with disabilities are particularly dangerous in medical settings, where their Fourteenth Amendment right to life is at stake.[271] This is because patients who are declared dead lose "basic human rights," and there is no longer a duty for providers to treat them.[272] Thus, a death determination holds serious consequences.

Additionally, if "irreversible" were changed to "permanent," the right to life of patients with disabilities would be jeopardized.[273] This is because "irreversible" means that no medical intervention can possibly help, whereas "permanent" means that no further medical interventions will be tried.[274] Allowing death to be declared based on a choice to stop trying interventions opens the door for more "quality-of-life judgments" about patients.[275] As award-winning author Katherine Schiller has observed, "Faced with patients who doctors (and society) would prefer to be treated as if they were [dead], proponents chose to expand the definition of death to include them rather than carving out exceptions to the rules for living people."[276]

Dr. Truog has emphasized that the question of "whether someone is dead" is entirely different from the question of "whether a life is worth living."[277] Regarding the worth of life for people with severe disabilities, one study showed that seventy-two percent of patients with locked-in syndrome indicated that they

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266. Dolgin, *supra* note 152, at 91.

267. Truog, *supra* note 36, at 1911.

268. FRANKL, *supra* note 262, 88.

269. Buck v. Bell, 274 U.S. 200, 205, 207 (1927).

270. *Indiana Eugenics: History & Legacy, 1907-2007*, SCHOLARWORKS INDIANAPOLIS, https://scholarworks.indianapolis.iu.edu/browse/title?scope=4e5f76bf-5f6c-4328-82c6-d6327848d4d1[https://perma.cc/ET8S-KFSL] (last visited Feb. 11, 2025).

271. U.S. CONST. amend. XIV, § 1.

272. Pope, *supra* note 45, at 274 (quoting PETER SINGER, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 22 (1994)).

273. Popik, *supra* note 40.

274. *Id.*

275. *Id.*

276. Schiller, *supra* note 27, at 208.

277. Truog, *supra* note 36, at 1897.

were happy, an unexpected result.[278] It may not even be what those patients expected, which is especially concerning if any of them had completed an advance directive, such as a "do not resuscitate" (DNR) order, prior to becoming locked in.[279]

During her lecture for the Fairbanks Center for Medical Ethics, Attorney Emily Munson of Indiana Disability Rights voiced a related concern—namely, that people who are newly disabled may not be in the best position to assess whether they could be happy living with a disability.[280] Some of the reasons for this include the fact that newly disabled individuals may have depression, intensive care psychosis, a head injury, or an electrolyte imbalance that could temporarily affect their complex decision-making capabilities.[281] Furthermore, if patients, their families, or their providers have internalized any of society's prejudices against people with disabilities, they may underestimate their potential to be happy and live meaningful lives.[282]

As someone who has personal experience navigating life with a disability, Attorney Munson explained that it takes time for newly disabled individuals to adjust.[283] More precisely, she said, "We see overwhelmingly in studies that, after about three weeks, people [who did not initially wish to live] change their minds."[284] This is because they need time to grieve the loss of their former identity.[285] They also may not realize that assistive technology, accessible housing, and other resources exist and are available to them unless they talk with another, "similarly-situated" individual who has already navigated the life transition that they now face.[286]

Thus, value judgments made in haste about the happiness or worth of patients' lives can be harmful, even if made by the patients themselves. After obtaining needed support, overcoming depression, looking beyond society's prejudices, or regaining their full decision-making capacity, patients' views may change. They may surprise themselves and society by wishing to live. And Frankl urged that it is wrong to deny life to any patient who has a will to live[287]—that is, it is wrong to "deprive any person of life . . . without due process of law."[288]

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278. OWEN, *supra* note 1, at 186.

279. *Id.* at 187.

280. Emily Munson, *Rethinking Informed Consent After Traumatic Spinal Cord Injury*, FAIRBANKS CTR. FOR MED. ETHICS (Jan. 18, 2017), https://www.youtube.com/watch?v=doADLh6-uNk [https://perma.cc/UA5F-PRWK].

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. FRANKL, *supra* note 262, at 78.

288. U.S. CONST. amend. XIV, § 1.

III. UDDA PROTECTIONS FOR VULNERABLE PATIENTS IN INDIANA

For all of the legal, medical, religious, and social reasons outlined above, Indiana should amend its UDDA to provide the maximum amount of protection for vulnerable patients by adopting these four interrelated provisions: (1) a complete exemption from brain death, including for nonreligious reasons; (2) the continued use of "irreversible"; (3) "accepted medical standards" for brain death that are heightened, statutorily standardized, and updated periodically as technology advances; and (4) a requirement of informed consent for apnea testing. There should also be a regulatory mandate that requires all medical personnel, attorneys, and others who counsel about the option to donate anatomically to explain that brain death is a legal fiction.

A. Complete Exemption from Brain Death

Patients and their surrogates should have the option to opt out of brain death determinations, regardless of their reasoning. For some, withdrawing life support from patients with "continued circulatory and respiratory activity, even if artificially sustained," goes against their religious beliefs.[289] This would be the equivalent of murdering their loved ones, whether by starvation, dehydration, or oxygen deprivation. For others who are spiritual yet nonreligious, they may have moral or scientific objections, especially given brain death's status as a legal fiction and the prevalence of false positives and misdiagnoses due to examiner error.[290]

Regarding religion, Indiana providers should heed the First Amendment's Free Exercise Clause,[291] as claims of free exercise violations can be brought against them under Indiana's RFRA when they prohibit the exercise of religious beliefs in health care decisions.[292] The ability to live out one's religious beliefs by rejecting a brain death determination and seeking continued life-saving care, for instance, is an "exercise of religion."[293] Viewed through the lens of *Sherbert*, refraining from withdrawing life support due to religious views about the sanctity of life is analogous to refraining from working on Saturdays due to the holiness of the Sabbath.[294] Moreover, when life support is set to be withdrawn against a patient's or family's religious beliefs, this imposes a "substantial[] burden" on the patient's family.[295] To hold steadfast to their beliefs, they may need to retain legal counsel[296] or relocate to New Jersey, where a religious

289. DiRusso, *supra* note 149, at 719.
290. Nair-Collins & Miller, *supra* note 23, at 653.
291. U.S. CONST. amend. I.
292. IND. CODE §§ 34-13-9-8 to -9 (2025).
293. 42 U.S.C. § 2000bb-2(4) (as defined under 42 U.S.C. § 2000cc-5(7)(A)).
294. Sherbert v. Verner, 374 U.S. 398, 399 (1963).
295. IND. CODE § 34-13-9-8 (2025).
296. *In re* Perry, No. 49D06-2208-MI-026530 (Ind. Super. Ct. Marion Cnty. Aug. 11, 2022).

exemption exists, leaving behind their employment, housing, and social support system.[297]

In addition, Indiana providers would be hard-pressed to meet the demands of strict scrutiny in RFRA cases involving objections to brain death. First, while saving patients with end-stage organ diseases would likely qualify as a "compelling" interest,[298] accomplishing this goal by taking the lives of heart-beating organ donors would be an "underinclusive" policy because it would only preserve the lives of some patients.[299] Second, a less burdensome way of saving patients with end-stage organ diseases does exist—namely, allowing patients with terminal illnesses, like Dave, to voluntarily consent to life-saving organ donations.[300]

To avoid these RFRA issues, Indiana legislators should adopt language within Ind. Code § 1-1-4-3 that allows for a complete exemption from brain death, which could read as follows:

A patient or surrogate may object to a determination of brain death at any time. An objection must either be documented in the patient's medical records or communicated to the health care institution by the patient or the patient's surrogate. After an objection is made, death shall only be declared, and the time of death fixed, on the basis of cardio-respiratory criteria.

This language does not necessitate any evidence of a patient's religious beliefs, which could result in litigation, nor does it require that an objection be made before brain death has been declared, which providers may not make possible for surrogates. It also allows for non-religious objections. In these ways, it safeguards vulnerable patients' lives and personal beliefs.

B. Keeping "Irreversible," Abandoning "Permanent"

The standard of "irreversible" should never be replaced by "permanent." This one-word revision could result in the legally permissible euthanasia of multiple groups of *living* patients, including those who are minimally conscious, vegetative, locked-in, comatose, or have other disabilities that society devalues.[301] The Arc, an organization that advocates for people with disabilities, fears that this change would lead to a "better dead than disabled" mentality.[302] Since "permanent" says nothing about the irreversibility of a patient's condition

297. Dolgin, *supra* note 152, at 89.

298. IND. CODE § 34-13-9-8 (2025).

299. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993).

300. Schiller, *supra* note 27, at 216; Truog, *supra* note 36, at 1905–06. Although beyond the scope of this Note, the idea of allowing patients with terminal illnesses to voluntarily consent to dying by organ donation in order to save the lives of others is an interesting proposition to consider, provided that strong safeguards could be put into place to prevent coercion.

301. Schiller, *supra* note 27, at 212.

302. Marty Ford, *Comments: The Arc*, UNIF. L. COMM'N (July 11, 2023), https://www.uniformlaws.org/home (search for "Determination of Death Committee"; then select "Determination of Death Committee," followed by "Documents" and then "Comments—Various Authors—August 2023 through December 2023").

and simply represents a choice to stop medical interventions, it gives providers and surrogates power to discriminate and euthanize based on their own value judgments about what constitutes a meaningful life.[303]

Recently, Indiana has taken some conflicting stances on the right to life. For instance, Indiana has effectively banned abortion since August 2023 to protect the right to life of unborn babies.[304] Nonetheless, Indiana resumed executions in December 2024 after a fifteen-year pause, holding that some criminals did not have a right to life.[305] Thus, Indiana is poised to consider both sides of the right-to-life debate. When it comes to brain death determinations, Indiana should safeguard patients' right to life by keeping "irreversible" within Ind. Code § 1-1-4-3 indefinitely. This is crucial because voiceless patients, much like unborn babies, are not in a position to defend themselves, but they do have constitutional rights.[306]

C. Heightened "Accepted Medical Standards"

The "accepted medical standards" for brain death should become heightened, statutorily standardized, and updated periodically as technology advances. Firstly, stricter standards are needed because the current required, clinical-only testing does not assess "*all* functions of the *entire* brain, including the brain stem."[307] Indiana's "Statewide Guidelines for the Establishment of Brain Death," just like the AAN guidelines, do not require any ancillary testing.[308] This is problematic because conditions like Guillain-Barré syndrome and high cervical spine injury can mimic brain death.[309] Failure to test for intracranial circulatory arrest and hypothalamic function could also lead to false positives and misdiagnoses.[310] Patients like Juan, Kate, and Jahi, who each made unexpected recoveries, were at risk of being declared dead prematurely because of their initial inability to respond to stimuli.[311] And yet, despite this potential for misdiagnosis, the current guidelines allow providers like Treasure's

303. Popik, *supra* note 40.

304. *Abortion Access in Indiana,* ACLU OF IND., https://www.aclu-in.org/en/abortion-access-indiana [https://perma.cc/LZY6-BS4D] (last visited Feb. 11, 2025).

305. Daniel Carson, *Will There Be More Executions in Indiana in 2025?*, 35 IND. LAW. 1, 1 (Jan. 15–18, 2025).

306. U.S. CONST. amend. XIV, § 1.

307. Uniform Determination of Death Act, IND. CODE § 1-1-4-3(a)(2) (2025) (emphasis added).

308. Emil L. Weber, *Statewide Guidelines for the Establishment of Brain Death*, IND. STATE MED. ASS'N, https://www.ismanet.org/pdf/convention/09-01outline.pdf [https://perma.cc/U7Z6-LV83] (last visited Feb. 11, 2025).

309. Lewis et al., *supra* note 58, at 114–15.

310. *See* Bernat & Dalle Ave, *supra* note 172, at 637–38.

311. PRESIDENT'S COMM'N, *supra* note 69, at 25.

physician to avoid doing their due diligence, refusing to "round" on "deceased" patients to check for changes in their status.[312]

Currently, Ind. Code § 1-1-4-3 does not specify what its "accepted medical standards" should be.[313] This needs to change by statutorily requiring an EEG, relevant laboratory testing, and neuroimaging, which would provide extra safeguards against life-or-death clinical mistakes. Giving statutory authority to the standards would also protect physicians and health care facilities from litigation that questions the validity of the testing methods employed.[314] The authority to update these standards as technology advances could then be delegated to an administrative agency, which would periodically meet to discuss and propose revisions.[315] Additionally, whenever possible, fMRI technology and assessment protocols, such as those that Dr. Owen has created, should be used to search for otherwise unnoticeable signs of life.[316]

D. Informed Consent for Apnea Testing

Informed consent for apnea testing should be statutorily required within Ind. Code § 1-1-4-3. In Indiana, informed consent involves explaining the "material risks" and "expected outcome" of testing to patients or their surrogates.[317] As Dr. Coimbra has explained, the material risks of apnea testing include hypotension, "thereby further reducing brain circulation and aggravating brain damage," and the potential to "collapse brain circulation," making the damage irreversible.[318] Therefore, apnea testing can cause irreparable harm to a patient who is still alive.

Moreover, apnea testing done without ancillary laboratory tests may also be inaccurate.[319] And given that the expected outcome of apnea testing is a brain death declaration, resulting in the withdrawal of life support and other treatments as well as the loss of basic human rights, these further risks should be discussed with surrogates.[320] This aligns with Montana's holding that surrogates must consent before apnea testing is done, given that Montana's UDDA does not explicitly grant providers the right to conduct a brain death exam.[321] Similarly, Indiana's UDDA does not explicitly grant providers such a right, so consent should also be required in Indiana.[322]

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312. *In re* Perry, No. 49D06-2208-MI-026530, at 4 (Ind. Super. Ct. Marion Cnty. Aug. 11, 2022).

313. Uniform Determination of Death Act, IND. CODE § 1-1-4-3 (2025).

314. *In re* Guardianship of Hailu, 361 P.3d 524, 531 (Nev. 2015).

315. Lewis et al., *supra* note 76, at 18.

316. OWEN, *supra* note 1, at 158.

317. IND. CODE § 34-18-12-3 (2025).

318. Coimbra, *supra* note 218.

319. Nair-Collins & Miller, *supra* note 23, at 650.

320. Pope, *supra* note 45, at 274.

321. *In re* Guardianship of A.C., No. DG-16-08, at 7 (Mont. Dist. Ct. Sep. 16, 2016).

322. Uniform Determination of Death Act, IND. CODE § 1-1-4-3 (2025).

E. Disclosure of Brain Death as a Legal Fiction

All medical personnel, attorneys, and others who provide counsel about the option to donate anatomically should be required to explain that brain death is a legal fiction. As discussed above, a legal fiction exists when the law treats a known falsity as if it were true "for a particular legal purpose."[323] Under Indiana law, however, informed consent cannot be based on a falsity: it must involve a truthful explanation to the decisionmaker about the "general nature of the patient's condition."[324] Telling a potential organ donor or surrogate that brain death *is* biological death is not a truthful description of the donor's condition. Rather, heart-beating patients with bodies maintaining homeostasis in various ways remain alive until the transplant surgeon is ready; then they die from the withdrawal of life support and the procurement of their organs.[325]

"One of the hallmarks of the scientific method is a commitment to follow the truth wherever it may lead," says Dr. Truog, but the medical profession's "unwillingness . . . to engage in transparent and open dialogue" about the true reality of brain death is a "significant breach" of trust.[326] It is also a significant danger for people with disabilities, providing "ethical cover" for devaluing and ending their lives, thus highlighting the need for increased transparency.[327]

CONCLUSION

Determining brain death without violating patients' fundamental rights is like trying to navigate a minefield. Without guidance along the way, lives will be lost. This is why Indiana's UDDA needs a comprehensive set of protections for vulnerable, voiceless patients, including (1) a complete exemption from brain death, (2) the continued use of "irreversible," (3) heightened and standardized "accepted medical standards," and (4) a requirement of informed consent for apnea testing. A regulatory mandate requiring acknowledgment of brain death as a legal fiction is also necessary to validate informed consent for organ donations. These provisions would be most impactful if adopted nationwide, but change has to start somewhere. Why not in Indiana?

This is a call to Indiana legislators to lead the way in safeguarding the right to life of vulnerable patients who cannot speak up for themselves. This includes patients like Kate who may be fully conscious and wish, more than anything, to

323. Shah, *supra* note 26, at 304.
324. IND. CODE § 34-18-12-3(1) (2025).
325. Shapiro, *supra* note 22, at 165; Schiller, *supra* note 27, at 214.
326. Truog, *supra* note 36, at 1913.
327. Schiller, *supra* note 27, at 215.

be viewed as human.[328] As Dr. Owen has come to realize, the stories of Kate, Juan, and many others are a "haunting reminder of the resiliency of consciousness," a reminder to "reflect anew on the nature of *being*, the meaning of what it means to be alive, and whether *anyone* can be said to be irretrievably lost."[329]

328. OWEN, *supra* note 1, at 39.
329. *Id.* at 215.

SURVEILLANCE AND SCAPEGOATS: EVANSVILLE'S GERMAN AMERICANS, WORLD WAR ONE, AND WHAT IT TEACHES ABOUT FISA SECTION 702

ADAM BROOKMAN*

INTRODUCTION

America's history of wartime hysteria often threatens civil liberties. In wartime, 'by any means necessary' often becomes the battle cry, and individual rights are sacrificed for national security.[1] As Congress debates the reauthorization of Foreign Intelligence Surveillance Act (FISA) Section 702—a law granting the Attorney General and the Director of National Intelligence broad authority to conduct warrantless surveillance of foreign targets, often capturing U.S. persons' communications[2]—this pattern deserves renewed scrutiny.

Robert Prager's 1918 lynching proves this pattern's lethal power. In 1905, Prager left Dresden, Germany, for America's promise of opportunity.[3] By 1917, he had settled in Collinsville, Illinois, as the United States entered World War I.[4] He took steps to prove his loyalty to America. He applied for citizenship, registered as an "enemy alien" as required by law, and attempted to enlist in the military.[5] These efforts proved futile.

In early 1918, after dynamite purportedly disappeared from a local mine, workers branded Prager as a prime suspect.[6] On April 3, a mob of miners dragged him from his home.[7] They forced him to kiss the American flag and paraded him through the town streets wrapped in it.[8] The police intervened, but the mob stormed the police station and reclaimed their prey.[9]

Eventually, the mob marched Prager to the outskirts of town.[10] One man grabbed a rope, and others shined their cars' headlights on a nearby tree.[11] They strung the rope over a branch and tied it around Prager's neck, but the mob's first attempt failed.[12] With his hands free, Prager grabbed the rope, which

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1. *See infra* Parts I and II.

2. 50 U.S.C. § 1881(a) (2024).

3. *See* FREDERICK C. LUEBKE, BONDS OF LOYALTY: GERMAN-AMERICANS AND WORLD WAR I 3 (1974).

4. *Id.* at 4.

5. *Id.*

6. *Id.*

7. *Id.*; ERIK KIRSCHBAUM, BURNING BEETHOVEN: THE ERADICATION OF GERMAN CULTURE IN THE UNITED STATES DURING WORLD WAR I, at 16 (2015).

8. LUEBKE, *supra* note 3, at 6.

9. *Id.* at 6, 8.

10. *Id.* at 8.

11. *Id.* at 9.

12. *Id.*

prevented strangulation.[13] He pleaded for his life.[14] The man holding the rope released the tension, and Prager dropped.[15] Prager begged to write a letter to his family before dying.[16] Prager wrote, "Dear parents . . . I must on this fourth day of April, 1918, die. Please pray for me, my dear parents. This is my last letter and testament. Your dear son and brother, Robert Paul Prager."[17] Then, just after midnight, the mob resituated Prager and the rope, secured his hands, and lynched him.[18] The citizens and mine workers likely felt they had done their duty, protected their land from German imperialism, and served 'justice' to a German American they suspected of disloyalty.

For German Americans in Evansville, Indiana, just 200 miles from Collinsville, Prager's lynching served as a stark warning: abandon your heritage or face the consequences. Communities that once openly celebrated German culture quickly erased their identities under the pressure to prove their patriotism.[19] This climate of suspicion and forced assimilation reveals a larger historical trend: during wartime, marginalized groups often become scapegoats, leading to government and public overreach. Evansville exemplifies this pattern.

Unfortunately, these experiences extend beyond World War I. Justice Antonin Scalia warned of this recurring danger when he remarked on Japanese internment: "[Y]ou are kidding yourself if you think the same thing will not happen again."[20] His words remain relevant as lawmakers debate reauthorizing FISA Section 702, a surveillance statute that raises pressing concerns about privacy, disproportionate impact, and national security overreach.[21]

This note argues that the treatment of German Americans during World War I highlights the risks of an unchecked government. Part I explores how wartime crises grow federal power. It outlines the legal basis for government overreach, tracing it from the Espionage and Sedition Acts to the Foreign Intelligence Surveillance Act (FISA) and Section 702. Part II examines the rise and fall of Evansville's German American community. It illustrates how federal policies and public hysteria forced assimilation and erased cultural identity. Part III draws parallels between these historical events and modern surveillance under Section 702. It demonstrates how fears about national security can lead to policies that often target specific communities. This historical context is crucial as Congress considers whether to reauthorize Section 702. Lawmakers must understand that fear can undermine constitutional rights and must introduce

13. *Id.* at 9–10.

14. LUEBKE, *supra* note 3, at 10.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. KIRSCHBAUM, *supra* note 7, at 119.

20. Debra Cassens Weiss, *Scalia: Korematsu Was Wrong, But 'You Are Kidding Yourself' If You Think It Won't Happen Again*, A.B.A. J. (Feb. 4, 2014, at 13:05 CST), https://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won [https://perma.cc/KS47-GWD4].

21. *See infra* Part I.

reforms that balance national security needs with civil liberties.

The history of German Americans during World War I provides a salient example of how fear can distort legal protections. Then, as now, national security concerns created an environment where fear overpowers reason, subjecting entire communities to suspicion, coercion, and forced assimilation. The loss of German American culture in Evansville, Indiana, serves as both a warning and a reflection of the risk posed by Section 702 today. Broad surveillance powers may again enable the government to target specific groups under the guise of security. History shows that emergency measures rarely remain temporary.[22] Without meaningful safeguards, today's surveillance programs could replicate past injustices and trade constitutional protections for the hope of national security.

I. LEGAL FRAMEWORK

Throughout United States history, national crises have led the federal government to increase its powers in the name of security. During World War I, the Espionage and Sedition Acts limited free speech and targeted German Americans, anti-war activists, and socialist groups.[23] After 9/11, this pattern repeated itself in a major way when the government increased digital surveillance with the USA PATRIOT Act and FISA Section 702.[24] The government justified these actions as crucial for combating the threat of terrorism.[25] Yet many of the provisions persist. This government expansion has forever shifted the balance between national security and civil liberties.

A. World War I Repression: Federal Statutes and Judicial Endorsement

1. The Espionage Act of 1917 and the Sedition Act of 1918.—On the campaign trail, President Wilson, in an address to the New York Press Club presented himself as a supporter of limited government and argued that "The history of liberty is a history of the limitation of governmental power, not the increase of it."[26] Yet in early April 1917, when the United States joined the conflict, he warned Congress that "[i]f there should be disloyalty, it will be dealt

22. *See infra* Part I.

23. LUEBKE, supra note 3, at 241.

24. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

25. *See, e.g.*, *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 8–20 (2001) (statement of John Ashcroft, Att'y Gen. of the U.S.) ("threat" is mentioned 35 times in the hearing transcript).

26. WOODROW WILSON, A CROSSROADS OF FREEDOM THE 1912 SPEECHES OF WOODROW WILSON 130 (1956).

with a firm hand of stern repression."[27] Wilson's shift stemmed from his concerns about sabotage and espionage as the nation prepared for war.[28] Shortly after the United States joined the war, Congress enacted the Espionage Act of 1917, which granted federal authorities extensive powers to suppress speech and actions considered disloyal.[29] Although framed as a neutral law, its enforcement disproportionately targeted German Americans, anti-war activists, and socialists.[30] The Act criminalized interference with military operations and espionage while enabling the government to prosecute those opposing the war.[31] It restricted publications, social gatherings, and any public expression against the war.[32]

The Sedition Act of 1918 extended these restrictions, making it a crime to criticize the government, military, or war efforts.[33] Under this expansion, nearly 2,000 people faced prosecution, with many charged for simply questioning the war.[34] Together, these laws stifled public debate and justified extensive surveillance of German Americans, leading local officials and private citizens to monitor their neighbors.[35] The ultimate effect ended with essentially a legal muzzle on the German American community.[36]

2. The Judiciary's Influence.—Rather than serving as a check on the executive power and responding to the extraordinary measures, the Supreme Court affirmed the government's authority to limit speech.[37] In *Schenck v. United States*, the Court introduced the "clear and present danger" test, which allowed for the restriction of speech when it presented an immediate threat to national security.[38] Justice Oliver Wendell Holmes, in his opinion for the Court, likened speech to a falsely yelled "fire" in a packed theater, reasoning that some

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27. HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917–1921 21 (Quid Pro Books 2013) (1960) (quoting WOODROW WILSON, ADDRESS TO JOINT SESSION OF CONGRESS (April 2, 1917)).

28. *Id.* at 5–6.

29. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792).

30. *See* Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N. Y. U. J. L. & LIBERTY 46, 474–75 (2024) (describing the Justice Department-backed vigilantes who "ransacked the homes of German Americans"); Christopher P. Graham, *Free Speech and the Sedition Act of 1918*, 61 ADVOCATE 27, 27–28 (2018) (recounting prosecution and ten-year sentence of socialist Eugene V. Debs for an anti-war speech); *id.* at 28–29 (describing conviction of socialist Dr. Marie Equi for anti-war activism); Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 73 (2002) (noting that World War I prisons "filled up with anti-war protestors, striking workers, and immigrants believed to be dangerously radical").

31. 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792).

32. *See, e.g.*, LUEBKE, *supra* note 3, at 241.

33. Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (1918).

34. Murray & Wunsch, *supra* note 30, at 76.

35. *See, e.g.*, LUEBKE, *supra* note 3, at 228, 277.

36. *Id.* at xiii–xiv.

37. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Schaefer v. United States, 251 U.S. 466 (1920).

38. 249 U.S. at 52.

expressions might be restricted if they posed an immediate danger.[39] However, some scholars argue that Holmes's standard failed to effectively safeguard speech rights.[40] Instead of moving away from prior restrictive doctrines, the clear and present danger test simply rebranded the existing bad tendency test.[41] Thus, the ruling gave the federal government broad authority to classify disloyal speech as criminal, regardless of any actual harm.[42] In his famous dissent in *Abrams v. United States*, Holmes later separated himself from this reasoning, condemning the government's overreach and politically driven speech restrictions.[43] But by then, *Schenck* had already established a precedent that curtailed civil liberties during wartime.[44] The damage was already done.

Subsequent cases extended the logic in *Schenck*. In *Schaefer v. United States*, the Supreme Court upheld the convictions of editors of the Philadelphia Tageblatt, a German-language newspaper, for publishing articles expressing alleged pro-German sentiments.[45] The prosecution's case depended largely on the claim that their reporting, although sourced from English-language outlets, was framed to display a pro-German bias.[46] Justice Joseph McKenna's majority opinion condemned efforts to undermine public morale.[47] He reasoned that the crucial question was whether speech could weaken national resolve.[48] This decision significantly impaired press freedoms and had a profound impact on non-English publications.[49]

Justices Louis Brandeis and Holmes dissented together.[50] The dissent cautioned that these restrictions would place the press under the control of a fearful, "intolerant majority".[51] Brandeis criticized the vague definition of disloyalty, warning that such ambiguity could lead to dangerous outcomes.[52] The majority ruling increased the chilling effect on the opposition.[53] It made it risky for German-language publications to voice any opinions that differed from

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39. *Id.*

40. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 194 (2004).

41. *Id.* at 195.

42. *Id.* Two cases later solidified that the clear and present danger test did not offer any further protections for those who needed it. *See* Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

43. *See* 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); STONE, *supra* note 40, at 206–07.

44. *Abrams*, 250 U.S. at 619 (citing Schenck v. United States, 249 U.S. 47 (1919)).

45. 251 U.S. 466, 468, 482 (1920).

46. *See id.* at 473–74.

47. *Id.* at 477.

48. *Id.* at 474.

49. Napolitano, *supra* note 30, at 479–80.

50. Schaefer v. United States, 251 U.S. 466, 482–95 (1920) (Brandeis, J., dissenting).

51. *Id.* at 495.

52. *Id.* at 494–95.

53. *Id.* at 494.

the government's stance.[54]

3. Government-Sanctioned Vigilantism.—As legislative and judicial support for suppressing dissent grew, the Wilson administration authorized the creation of the American Protective League (APL), a volunteer corps under the Department of Justice.[55] With over 200,000 civilian members, the APL operated as a quasi-law enforcement agency, conducting surveillance and reporting suspected "enemy aliens" and other so-called disloyal persons.[56] The APL wiretapped phones, intercepted mail, and conducted warrantless searches of homes and businesses.[57] They targeted German Americans and other perceived subversives.[58] Members and supporters pressured individuals to buy Liberty Bonds and viewed refusals as acts of disloyalty.[59] Those who did not buy bonds faced social ostracism, public shaming, and even violence.[60]

The APL's unchecked authority blurred the lines between federal law enforcement and civilian vigilantism.[61] Although the government sanctioned its actions, APL often surpassed legal boundaries, resulting in widespread abuses.[62] Federal officials later voiced concerns about the APL's excesses, yet the

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54. *See id.* Congress initially resisted giving the President unrestricted powers to silence the press, rejecting a "press censorship" provision in the Espionage Act. *See also* Thomas F. Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act*, 17 MICH. L. REV. 621, 624 (1919) (explaining Congress initially resisted giving the President unrestricted powers to silence the press, rejecting a 'press censorship' provision in the Espionage Act); 65th Cong., 1st Sess., in 55 CONG. REC. H1595–1607 (April 30, 1917) (noting the House's defeat of the press-censorship clause). Federal prosecutors and some lower courts expanded the Act's language to punish criticism. However, judges George Bourquin and Charles Fremont Amidon stood out by insisting on solid evidence of intent to disrupt military recruiting or operations. They emphasized that mere talk does not constitute a crime. *See* United States v. Hall, 248 F. 150, 153 (D. Mont. 1918) (Bourquin, J.); United States v. Schutte, 252 F. 212, 214 (D.N.D. 1918) (Amidon, J.). Meanwhile, Judge Learned Hand, in Masses Pub. Co. v. Patten, 244 F. 535, 541 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917), insisted that only direct incitement to unlawful acts constituted a punishable offense under the First Amendment. *See also* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 153–55 (2d ed. 2011).

55. JOAN M. JENSEN, THE PRICE OF VIGILANCE 17–25 (1968). Other vigilante groups emerged, including the Knights of Liberty, Boy Spies of America, and Sedition Slammers. *Id.* at 274; Christopher Capozzola, *The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America*, 88 J. AM. HIST. 1354, 1361 (2002). These organizations often exceeded legal limits, using forced loyalty tests and public humiliation violence. *See, e.g.*, PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 94–95 (1st ed. 1979). In Texas, six farmers were whipped for refusing to donate to the Red Cross; elsewhere, people were tarred and feathered for opposing the war sentiments. *Id.* at 131. Authorities often ignored these acts, blurring the line between patriotism and loyalty vigilantism. *See, e.g.*, LUEBKE, *supra* note 3, at 12.

56. JENSEN, *supra* note 55, at 213.

57. *Id.* at 58, 148–49.

58. *Id.* at 33, 173; Murray & Wunsch, *supra* note 30, at 76.

59. JENSEN, *supra* note 55, at 110, 153.

60. *Id.* at 110.

61. Murray & Wunsch, *supra* note 30, at 76.

62. JENSEN, *supra* note 55, at 33, 95.

organization continued its operations largely unhindered.[63] This set a dangerous precedent for using public hysteria to target perceived internal threats.[64]

The laws enacted by Congress, along with the favorable legal infrastructure empowered by deferential Supreme Court opinions, became a powerful tool. This landscape fundamentally changed civic life for German Americans. It demonstrates how quickly security concerns can bypass constitutional rights. Soon, individual states hopped on the wagon to "protect" themselves and support the overall effort and began to enact their own laws.

B. Anti-German Laws at the State Level

While federal statutes and Supreme Court rulings laid the groundwork for suppressing dissent nationwide, many states went further. Seeking to demonstrate their patriotism—and, in many cases, to exploit anti-German hysteria—states passed laws that directly targeted the German language, newspapers, schools, and religious observances. These laws swiftly weakened German Americans' ability to preserve their cultural identity.

Several states, including Indiana, Nebraska, and Iowa, passed laws banning the German language in schools.[65] In 1919, Indiana passed the McCray Act, which aimed to eliminate German-language instruction and reflected the national movement to suppress German culture.[66] State Senator Franklin McCray and Lieutenant Governor Edgar D. Bush introduced the bill.[67] It banned teaching German in all public, private, and parochial elementary schools, required that schools use only English for instruction, and imposed fines and imprisonment on violators.[68]

The Indiana legislature expedited the bill.[69] The Indiana Senate approved it with just one dissenting vote.[70] The House followed with unanimous support, suspending procedural rules to speed up the process.[71] Governor James P. Goodrich signed the act into law, which declared an emergency need for its immediate enactment.[72] While framed as a patriotic measure to promote national unity, the law dismantled established German language education.[73] The law remained in effect until the Supreme Court's decision in *Meyer v. Nebraska*, which held that state laws prohibiting foreign language instruction

63. *Id.* at 95.
64. *See, e.g.*, *id.* at 30.
65. KIRSCHBAUM, *supra* note 7, at 103, 109, 125; Paul J. Ramsey, *The War Against German-American Culture: The Removal of German-Language Instruction from the Indianapolis Schools, 1917–1919*, 98 IND. MAG. HIST. 285, 298–301 (2002).
66. Ramsey, *supra* note 65, at 288.
67. *Id.* at 299.
68. *Id.*
69. *Id.* at 299–300.
70. *Id.* at 299.
71. *Id.* at 299–300.
72. *Id.* at 300.
73. *Id.* at 288, 293.

violated the Due Process Clause of the Fourteenth Amendment by infringing on the rights of parents and teachers to direct a child's education.[74] This differed from earlier cases like *Schenck*[75] and *Abrams,*[76] both of which supported wartime restrictions on expression. In *Meyer*, the Court struck down a Nebraska law that prohibited the teaching of select foreign languages, one of which was German.[77] The Court acknowledged that the state's purported purpose of the law was to foster national unity but ultimately held that the banning of German language instruction was not legitimate.[78]

Other State's laws went even further, restricting German church services and even banning German-language telephone conversations.[79] Federal war hysteria often supported this effort.[80] They enabled local officials to target and penalize individuals for maintaining their German heritage.[81]

By the end of the war, federal and state governments had effectively criminalized German American culture. City halls and courtrooms sent a clear message: any public display of German identity invited suspicion and retaliation. This historical episode teaches us vital lessons. Public sentiment can quickly lead to legal constraints, particularly when national security is emphasized. Today, advancing surveillance technologies grant the federal government new tools to monitor communities, raising concerns about history repeating itself in a digital age.

C. Modern Surveillance Framework: PATRIOT Act and FISA Section 702

1. The PATRIOT Act.—In response to the September 11, 2001, terrorist attacks, the Bush Administration pushed for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act or PATRIOT Act).[82] The 9/11 attacks created intense public pressure.[83] Congress quickly passed the law within 45 days of the tragedy, expanding intelligence sharing, authorizing roving wiretaps,

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74. 262 U.S. 390, 403 (1923). The ruling also highlighted the importance of individual choice. *See id.* at 399, 401; Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing *Meyer* as a foundational parental rights case). Today, scholars argue that *Meyer* prioritizes parental rights over speech freedoms and that this focus generally limits its effectiveness as a precedent for the First Amendment. *See* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 22 (2009).

75. Schenck v. United States, 249 U.S. 47 (1919).

76. Abrams v. United States, 250 U.S. 616 (1919).

77. *Meyer*, 262 U.S. at 403.

78. *Id.*

79. KIRSCHBAUM, *supra* note 7, at 125.

80. *Id.*

81. *Id.* at 128–29.

82. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); John T. Soma et al., *Balance of Privacy vs. Security: A Historical Perspective of the USA PATRIOT Act*, 31 RUTGERS COMPUT. & TECH. L.J. 285, 287–88 (2005).

83. *Id.* at 307–12.

and broadening electronic surveillance.[84] The Act amended more than fifteen existing laws, including the Foreign Intelligence Surveillance Act (FISA) and the Electronic Communications Privacy Act (ECPA).[85] When threats decreased, or courts intervened, policies usually shifted back to a balanced approach.[86]

One of the Act's most controversial provisions, Section 215, allowed the FBI to seize any items linked to national security investigations.[87] Critics argued this provision facilitated government overreach.[88] The Act also lowered FISA's surveillance threshold, permitting orders when foreign surveillance was merely a "significant purpose", even if law enforcement played a primary role.[89] Additionally, the Act expanded the legal definition of terrorism to include cyberterrorism and attacks on mass transportation.[90]

The Act ignited constitutional debates, particularly regarding the Fourth Amendment protections.[91] Opponents warned that it enabled the incidental collection of Americans' communications while limiting judicial oversight.[92] FISA court proceedings remained secret, with minimal adversarial checks, which has also raised concerns.[93] While courts have upheld many provisions, some, including indefinite gag orders that restricted free speech, have been struck down.[94]

Because the PATRIOT Act significantly expanded government surveillance powers, Congress included sunset clauses for several key provisions to ensure periodic review and reauthorization.[95] Advancements in technology heighten the clash between privacy and security, driving continuous changes in legislation and court rulings.[96]

2. The Evolution and Impact of FISA Section 702.—Congress enacted FISA in 1978 in response to revelations of widespread domestic spying, particularly

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84. Soma et al., *supra* note 82, at 338, 308–312.

85. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); Soma et al., *supra* note 82, at 307–12.

86. Soma et al., *supra* note 82, at 287.

87. *Id.* at 304.

88. *Id.* at 327.

89. *In re* Sealed Case, 310 F.3d 717, 734 (F.I.S.C.R. 2002) ("[T]he Patriot Act amendments clearly disapprove the primary purpose test."); Soma et al., *supra* note 82, at 318–19.

90. Soma et al., *supra* note 82, at 318, 326.

91. *See generally*, A.B.A., PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT (Stewart A. Baker & John Kavanagh eds., 2005); Soma et al., *supra* note 82, at 327.

92. *In re* Sealed Case, 310 F.3d at 733 (citing concerns of some Senate Judiciary Committee members on the harms posed by the amendments).

93. Soma et al., *supra* note 82, at 310.

94. *See, e.g.*, John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008), *as modified* (Mar. 26, 2009); Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013), *vacated*, 800 F.3d 559 (D.C. Cir. 2015), *remanded to*, 142 F. Supp. 3d 172 (D.D.C. 2015); Smith v. Obama, 816 F.3d 1239 (9th Cir. 2016).

95. *See, e.g.*, PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112–14, 125 Stat. 216 (2011) (extending the PATRIOT Act to June 1, 2015).

96. Soma et al., *supra* note 82, at 340.

those uncovered by the Church Committee in 1975–76.[97] FISA aimed to regulate electronic surveillance of foreign intelligence within the United States and established the Foreign Intelligence Surveillance Court (FISC) to oversee requests for targeting foreign powers and their agents within U.S. territory.[98] While the framework imposed some safeguards, including a probable cause requirement, it granted broad surveillance authority that would later expand significantly.[99]

After the 9/11 attacks, officials feared that FISA's warrant requirements slowed counterterrorism efforts.[100] In response, President Bush authorized Stellar Wind, a secret warrantless surveillance program that bypassed the FISA's 1978 warrant requirements.[101] The Bush administration justified this step by arguing that modern communications often passed through U.S.-based networks, which made the old geographic limitations useless.[102] Congress later codified this framework by passing the PATRIOT Act, which removed barriers between intelligence and law enforcement and expanded government surveillance powers.[103] Stellar Wind sparked controversy for lacking judicial oversight.[104] In 2008, Congress responded by enacting the FISA Amendments Act, which introduced Section 702.[105] This provision changed United States intelligence collection.[106] Section 702 permits warrantless surveillance of non-U.S. persons abroad, even when their communications pass through U.S.-based networks.[107]

Section 702 grants the Attorney General (AG) and Director of National

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97. Kevin Burns, Note, *Foreign Intelligence Surveillance Act Section 702: The Good, the Bad, and a Proposal to Make It Less Ugly*, 34 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 689, 691–92 (2024).

98. *Id.* at 693.

99. *Id.* at 693–94.

100. *Id.* at 694–95 (explaining that the PATRIOT Act loosened FISA's warrant requirements to give officials greater flexibility after 9/11).

101. OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., A REVIEW OF THE DEPARTMENT OF JUSTICE'S INVOLVEMENT WITH THE PRESIDENT'S SURVEILLANCE PROGRAM 3 (2009).

102. *See, e.g.*, *id.* at 28–29. The Bush Administration had to justify the vast expansion of surveillance powers. It claimed that the existing FISA protocols impeded prompt action against national security threats. In its justification, the Administration noted that many modern communications passed through U.S.-based networks, thus heightening their urgency. The critics, on the other hand, argued that the program did not provide enough judicial oversight and lacked any meaningful checks. This permitted the extensive collection of American data. *See* Napolitano, *supra* note 30, at 523 (discussing Attorney General John Ashcroft's approval of the program without assessing its constitutionality).

103. Burns, *supra* note 97, at 694.

104. OFF. OF THE INSPECTOR GEN., *supra* note 101, at 238.

105. Charlie Savage, *What Is the Powerful Surveillance Law That Divided Lawmakers?*, N.Y. TIMES (Apr. 12, 2024), https://www.nytimes.com/2024/04/12/us/politics/surveillance-law-section-702-fisa.html [https://perma.cc/5A39-W522]; *See also* FISA Amendments Act of 2008, Pub. L. No. 110–261, 122 Stat. 2436, 2438.

106. *In re* Sealed Case, 310 F.3d 717, 732 ("This bill . . . break[s] down tradition barriers between law enforcement and foreign intelligence.") (internal quotations omitted).

107. 122 Stat. at 2438.

Intelligence (DNI) authority to approve surveillance of non-U.S. persons abroad without individual court orders.[108] The statute prohibits the government from targeting U.S. persons or individuals inside the United States; if such surveillance is necessary, traditional FISA procedures requiring probable cause and individualized warrants must be followed.[109] The AG and DNI must submit annual certifications to FISC.[110] These certifications outline targeting procedures and safeguards designed to prevent the collection of U.S. persons' data.[111] These safeguards include: (1) targeting procedures that ensure surveillance applies only to foreign individuals abroad;[112] (2) minimization procedures that dictate how collected intelligence is stored and shared;[113] and (3) querying procedures that regulate how analysts search the database U.S. persons' data.[114]

Section 702 collects data in two ways.[115] The first is upstream collection, which occurs when the National Security Agency (NSA) collaborates with telecommunications providers where it will tap into key internet infrastructure.[116] This allows the NSA to look at communications prior an intelligence target's arrival in the United States.[117] The other is downstream collection, sometimes referred to as the PRISM program.[118] PRISM collects data from technology companies like Google, Microsoft, and AT&T.[119] It requires these companies to hand over stored or real-time communications of targeted individuals.[120]

D. The Evolution and Impact of Section 702

The scope of Section 702 has steadily expanded. In 2022, the program targeted 246,073 people or accounts, up from 232,433 in 2021.[121] While foreign intelligence remains FISA's primary goal, surveillance of foreign targets

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108. *Id.*

109. Burns, *supra* note 97, at 695.

110. *Id.* at 696.

111. *Id.*

112. *Id.* at 695.

113. *See, e.g.*, PRIV.& CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 50 (2014).

114. *Id.* at 12.

115. *Id.* at 7.

116. *Id.*

117. *Id.* at 36.

118. *Id.* at 7; Associated Press, *The secret to NSA's PRISM program: Bigger, bolder data seizures than the Bush era*, WASH. TIMES (June 15, 2013), https://www.washingtontimes.com/news/2013/jun/15/secret-nsas-prism-program-bigger-bolder-data-seizu/ [https://perma.cc/7HFN-VBHT].

119. *Id.*

120. *Id.*

121. Burns, *supra* note 97, at 699.

inevitably sweeps in communications involving U.S. persons.[122] This has resulted in vast amounts of incidentally collected U.S. person data and has raised ongoing legal and constitutional concerns.[123]

However, the program has demonstrated counterterrorism successes. In 2009, Section 702 helped thwart Najibullah Zazi's 2009 plan to bomb the New York City subway.[124] It also played a role in dismantling ISIS propaganda networks aimed at American radicalization.[125] In 2021, the program prevented an Iranian-sponsored cyberattack on Boston Children's Hospital.[126] More recently, the government has used the program to share intelligence on Russian military actions to assist Ukraine.[127]

On the other hand, Section 702 has been subject to abuse. From December 2021 to November 2022, FBI agents conducted 119,383 searches in Section 702's database for Americans' information.[128] Many of these were entirely unauthorized.[129] These searches included queries on January 6th protesters, Black Lives Matter activists, a United States Senator, and 19,000 donors to a congressional candidate.[130]

Beyond unauthorized searches, victims of improper surveillance face major legal hurdles in challenging the program.[131] The government frequently invokes the "state secrets" privilege, blocking access to surveillance records and hindering lawsuits.[132] Additionally, when prosecutors rely on Section 702-derived evidence, they often fail to notify defendants.[133] From 2013 to 2018, prosecutors notified only eleven defendants that evidence against them came from Section 702 surveillance.[134] Litigants also struggle to prove standing due

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122. *See* OFF. OF THE DIR. OF NAT'L INTEL., ANNUAL STATISTICAL TRANSPARENCY REPORT REGARDING THE INTELLIGENCE COMMUNITY'S USE OF NATIONAL SECURITY SURVEILLANCE AUTHORITIES 7 (2024).

123. *Id.* at 9.

124. MAJORITY FISA WORKING GRP. OF THE H. PERMANENT SELECT COMM. ON INTEL., FISA REAUTHORIZATION: HOW AMERICA'S MOST CRITICAL NATIONAL SECURITY TOOL MUST BE REFORMED TO CONTINUE TO SAVE AMERICAN LIVES AND LIBERTY 34, 118th Cong. (2023).

125. *Id.* at 35.

126. *FBI Director Cites Mysterious Iran-Linked Attack in Arguing for Section 702*, WASH. POST (Dec. 7, 2023), https://www.washingtonpost.com/politics/2023/12/07/fbi-director-cites-mysterious-iran-linked-attack-arguing-section-702/ [https://perma.cc/QH6S-WYTD].

127. MAJORITY FISA WORKING GRP., *supra* note 124, at 3.

128. OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 122, at 25.

129. *See* Burns, *supra* note 97, at 713–17 (noting several instances of documented misuse of Section 702 data against U.S. citizens).

130. Savage, *supra* note 105; Patrick Toomey & Sara Robinson, *Mass Surveillance Is Dangerous for American Communities: Reforming the Section 702 Spying Regime*, A.B.A. (June 3, 2024), https://www.americanbar.org/groups/crsj/resources/human-rights/2024-june/mass-surveillance-dangerous-american-communities-reforming-section-702/ [https:/perma.cc/QW3S-89P6].

131. Burns, *supra* note 97, at 709–12.

132. *Id.* at 710–11.

133. *Id.* at 711.

134. Sarah Beller, *401-Forbidden: An Empirical Study of Foreign Intelligence Surveillance Act Notices, 1990-2020*, 13 HARV. NAT'L SEC. J. 158, 174 (2022).

to limited access to surveillance records and consistent government obstruction.[135]

In response to public outcry and congressional scrutiny, the FBI implemented internal reforms to curb abuses.[136] The FBI now must document justification before searching the database.[137] The agency also created an internal audit office and mandated new training,[138] requires agents to receive attorney approval for large-scale queries,[139] and now segregates Section 702 data from other databases.[140] But these administrative changes have not satisfied some privacy advocates who demand more—particularly a warrant requirement for searching Americans' communications.[141]

In January 2025, a district judge in the Eastern District of New York ruled that officials must obtain a warrant before searching U.S. person data collected under Section 702.[142] The court rejected the government's long-held position that once foreign intelligence data is legally obtained, it remains open for review without constitutional safeguards.[143] Citing Second Circuit precedent, the court stressed that national security concerns do not override the warrant requirement.[144] The defendant appealed this ruling, but the decision's unresolved reasoning leaves its long-term impact uncertain, particularly for the defendant and other Section 702 challengers.[145] If reversed, the decision could reaffirm the government's position and maintain surveillance authority. Until the appellate process concludes, litigants face a fluid legal landscape where significant legal shifts remain possible.

Legislation like the Espionage Act, the Sedition Act, state-level bans on the German language, the PATRIOT Act, and FISA Section 702 emerged in response to perceived crises. Each reflected urgent national concerns, yet each left a lasting mark on free expression and individual privacy. These laws demonstrate how emergency powers can quickly erode constitutional protections and often harm minority and immigrant communities.

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135. Burns, *supra* note 97, at 709–10.

136. *Id.* at 725–26.

137. MAJORITY FISA WORKING GRP., *supra* note 124, at 30.

138. *Id.* at 28.

139. *Id.* at 29.

140. *Id.*

141. Wes Davis, *U.S. Congress pushes warrantless wiretapping decision off until April next year*, THE VERGE (Dec. 6, 2023, at 19:16 ET), https://www.theverge.com/2023/12/16/24004356/section-207-reauthorized-until-april-fisa-national-defence-cyber-surveillance [https://perma.cc/4PER-SZBW].

142. United States v. Hasbajrami, No. 1:11-cr-623, 2025 WL 258090, at *20 (E.D.N.Y. Jan. 21, 2025), *superseded by*, 2025 WL 447498 (E.D.N.Y. Feb. 10, 2025), *appeal docketed*, No. 25-542 (2d Cir. Mar. 7, 2025).

143. *Id.* at *9.

144. *Id.* at *7–8.

145. Notice of Criminal Appeal, United States v. Hasbajrami, No. 25-542, at 1 (2d Cir. Mar. 7, 2025).

II. BACKGROUND

During World War I, the government restricted speech, assembly, and cultural expression. The government justified these restrictions as necessary to protect national security.[146] The fear of espionage led to laws that impacted German Americans.[147] This section looks at the historical background of such laws, using Evansville, Indiana, as a case study. Evansville: a city where federal and state legal systems—alongside a climate of fear and hysteria—dismantled the German American community identity. This history provides a lens into how federal power can reshape entire communities.

A. The Road to War and American Nativism

1. Historical Roots of Nativism and Nativist Legislation.—Nativism had long influenced U.S. politics, often depicting non-Anglo immigrants as threats to American values.[148] Drawing on Louis Hartz's "Fragment Theory,"[149] scholars note how early America's English Protestant and republican ideals fostered suspicion toward groups that resisted rapid assimilation.[150] By the early 20th century, German immigrants became a primary target for those fearing foreign influence.[151] The Dillingham Commission, a congressional body established to investigate immigration's effects, exemplified this nativist thinking.[152] Though initially concerned with Southern and Eastern Europeans, the Commission recommended restrictions on "undesirable[]" groups.[153] The findings laid a legal and rhetorical foundation for future anti-German measures.[154]

2. The Path to War and Escalation of Anti-German Sentiment.—The Lusitania sinking in 1915,[155] The Black Tom explosion in 1916,[156] and the

146. *See supra* Part I.

147. *Id.*

148. *See, e.g.*, Duncan Moench, *Anti-German Hysteria and the Making of the Liberal Society*, 7 AM. POL. THOUGHT 86, 87 (2018).

149. LOUIS HARTZ, THE FOUNDING OF NEW SOCIETIES: STUDIES IN THE HISTORY OF THE UNITED STATES, LATIN AMERICA, SOUTH AFRICA, CANADA, AND AUSTRALIA 3–6 (1964).

150. Moench, *supra* note 148, at 90.

151. *Id.* at 103.

152. KATHERINE BENTON-COHEN, INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY 21–42 (2018).

153. *Id.* at 118.

154. *See, e.g.*, *id.*

155. *The Lusitania Disaster*, LIBRARY OF CONG., https://www.loc.gov/collections/world-war-i-rotogravures/articles-and-essays/the-lusitania-disaster/ [https://perma.cc/G3NX-64QN] (last visited Dec. 2, 2024).

156. Elke Weesjes & Phil Nerges, *100 Years of Terror*, NAT. HAZARDS CTR. (Oct. 31, 2016), https://hazards.colorado.edu/article/100-years-of-terror-the-black-tom-explosion-and-the-birth-of-u-s-intelligence-services-1 [https://perma.cc/C68B-YR85].

Zimmermann Telegram in 1917[157] increased anti-German sentiment. President Woodrow Wilson also began to warn of potential threats on home soil.[158] In his addresses to Congress, Wilson charged that "There are citizens of the United States . . . who have poured the poison of disloyalty into the very arteries of our national life," invoking the direct threat of disloyalty.[159] This rhetoric paved the way for superpatriotism.[160] By April 1917, when the United States declared war on Germany, patriotic fervor exploded.[161] This intense nationalism transformed into a widespread eagerness to snuff out dissenters.[162] Wilson's Democratic Party suggested that a German identity was problematic.[163]

3. Popular Culture and the Policing of "German" Influences.—The broader climate of hysteria spurred Americans to rebrand or eradicate visible signs of German heritage.[164] Foods like sauerkraut or hamburgers were renamed "liberty cabbage" and "liberty sandwiches," while dachshunds were denounced in Ohio for their German origin.[165] The anti-German sentiment also came from Theodore Roosevelt, who vilified German Americans who insisted on preserving cultural traditions, labeling them "traitors."[166]

4. Forced Assimilation and the Erosion of German Identity.—Consequently, German Americans were forced to give up visible expressions of their heritage—stopping German-language services in churches, eliminating German classes in schools, and anglicizing their names to evade harassment.[167] This environment of enforced uniformity, based on the legal framework outlined in Part A, combined national hysteria and federal power into a commanding force that allowed the government and the nation as a whole to achieve the goal

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157. Zimmermann Telegram (1917), NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/zimmermann-telegram [https://perma.cc/R6JG-W259] (last visited Aug. 31, 2025).

158. *See* Woodrow Wilson, *Address at the Fiftieth Anniversary of the Manhattan Club in New York City* (Nov. 4, 1915), AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/317075 **[**https://perma.cc/5VJ2-AZEW**]** (last visited Sep. 9, 2025) (warning that "very loud and very clamorous" voices spoke "alien sympathies" and were "partisans of other causes than that of America"); Woodrow Wilson, *Address on Flag Day* (June 14, 1917), AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/node/206616 [https://perma.cc/V6WA-BS5B] (last visited Sep. 9, 2025) (declaring that "there should be no tolerance for those who inject the poison of disloyalty into our most critical affairs").

159. Wilson's Third Annual Message, 1 *in* MESSAGES AND PAPERS OF WOODROW WILSON 133 (1924) (denouncing "infinitely malignant" hyphenates who "preach and practice disloyalty").

160. *See* STONE, *supra* note 40, at 146 (explaining how Wilson's rhetoric about disloyalty legitimized repression and encouraged the rise of superpatriotism).

161. *See, e.g.*, MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 78–79 (1995).

162. Moench, *supra* note 148, at 111.

163. Woodrow Wilson, *Final Address in Support of League of Nations* (speech delivered in Pueblo, Colo., Sep. 25, 1919).

164. Natasha Karunaratne, *The Anti-German Sentiment of World War I*, RE-IMAGINING MIGRATION, https://reimaginingmigration.org/the-anti-german-sentiment-of-world-war-i/ [https://perma.cc/L7CC-5XYX] (last visited Aug. 31, 2025).

165. *Id.*; *Exit the German Dachshund*, JASPER WKLY. COURIER, Aug. 30, 1918.

166. Moench, *supra* note 148, at 111–12.

167. *Id.* at 112.

of protecting themselves.

B. German Americans in Evansville Before World War I

1. Early German Settlement in Evansville (1836–1865).—Between 1836 and 1837, German farmers from Ingelheim, Germany, arrived in Evansville, acquiring thousands of acres.[168] This marked the first major wave of German immigration to Evansville.[169] Lutheran churches anchored these farming communities, while additional immigrants from Hesse, Swabia, and Bavaria settled in the Lamasco District on the city's west side.[170] Seeking religious freedoms and economic opportunity, these newcomers leveraged Evansville's fertile soil for agriculture and built a thriving cultural enclave with German language schools, churches, and businesses.[171]

2. The Second Wave of German Immigration (1865–1882).—A second wave of Germans arrived between 1865 and 1882, primarily Roman Catholic blue-collar workers fleeing Bismarck's "Kulturkampf."[172] Many settled in German Township, while others moved into Evansville's city limits.[173] By 1900, German-born residents and their children comprised nearly forty percent of Vanderburgh County's population, reinforcing Evansville's identity as a center of German American life.[174] German newspapers, cultural festivals, and religious organizations flourished and strengthened community ties.[175]

3. Cultural Integration and Preservation (Early 20th Century).—By the early 1900s, German immigrants began to enter Evansville's education, business, and politics spheres, yet many maintained distinct identities in church-centered communities.[176] Lutheran, Roman Catholic, and Evangelical churches remained central to social life, offering services in German.[177] Families spoke German at home, believing language was essential to preserving their faith and heritage.[178] Parochial schools made German central to their curriculum, and public schools later recognized this by offering advanced placement and credit

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168. DARREL E. BIGHAM, REFLECTIONS ON A HERITAGE: THE GERMAN AMERICANS IN SOUTHWESTERN INDIANA 3 (1980).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* Kulturkampf was the cultural and political battle of conflicting values between Otto von Bismarck and the Roman Catholic Church about secular power. *See, e.g.*, Gul Farrukh, *Divided Devotion: A Historical Exploration of Bismarck's Kulturkampf and its Impact on German Society*, 3 J. SOC. SCI. REV. 21 (2023) (providing an in-depth analysis and explanation of Kulturkampf).

173. BIGHAM, *supra* note 168, at 3.

174. *Id.*

175. *Id.* at 4–7.

176. *Id.* at 4.

177. *Id.* at 7, 12.

178. *Id.*

in German to students who came from those parochial schools.[179] The slow assimilation of Evansville's German Americans stemmed from their dedication to language and the strength of their enclaves.

4. Social and Cultural Organizations as Cultural Preservers.—Beyond language and religion, German Americans preserved their heritage through social organizations. They established German-language Masonic lodges, two Männerchors (men's choirs), and a Turnverein (gymnastics club).[180] The Germania Männerchor became the city's largest German cultural organization, attracting 700 members.[181] The Turnverein offered sports, exercise, and social events, influencing citywide traditions like school "Field Day" celebrations.[182] Meanwhile, German culture thrived at Saturday markets at Fourth Street and First Avenue (Little Market), which served as gathering a space where families reinforced their cultural identity through German food, clothing, and traditions.[183]

5. Celebrations and Traditions as Expressions of German Heritage.—German culture remained highly visible through annual "German Day" celebrations in June, featuring German music, food, and festivities.[184] Churches hosted summer socials, strengthening communal bonds.[185] Christmas was a major holiday for many German Americans and has always been an important holiday in German culture.[186] German culture influence in Evansville was so prominent that in 1915, the Evansville Businessman's Association included the German anthem "Die Wacht am Rhein" as one of the three songs at its annual meeting.[187] Only a few years later, playing this song became a crime.

C. Wartime Hysteria and the Turning Tide in Evansville

1. Mayor Benjamin Bosse's Political Balancing Act.—Anti-German hysteria was not unique to any particular area. In fact, we must not look any further than our own state to find a poignant historical example. Benjamin Bosse, a prominent Democrat and successful businessman, was first elected mayor of Evansville in 1913 and subsequently re-elected in 1917, just as the United States entered World War I.[188] Although Bosse himself was of German

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179. *Id.* at 12.

180. *Id.* at 25.

181. *Id.* at 15–16.

182. *Id.*; Claire Nolte, *The German Turnverein*, ENCYC. OF 1848 REVOLUTIONS, https://sites.ohio.edu/chastain/rz/turnvere.htm [https://perma.cc/LCW5-PPPL] (last visited Nov. 5, 2024).

183. BIGHAM, *supra* note 168, at 4, 9–10.

184. *Id.* at 16.

185. *Id.*

186. *Id.* at 16–17.

187. *Id.* at 5.

188. *Regional Voices: Jeffrey Bosse, The Story of Benjamin Bosse*, PBS, https://www.pbs.org/video/evansville-rotary-club-regional-voices-jeff-bosse-story-benjamin-bosse/ (last visited Sep. 5, 2025).

heritage, he found himself navigating a delicate political landscape.[189] His administration sought to balance Evansville's economic ties to its German American population while demonstrating unwavering support for the war effort.[190] To maintain political favor, Bosse aligned himself with national superpatriotic campaigns, encouraging aggressive loyalty enforcement while avoiding direct condemnation of German Americans.[191]

The Bosse administration's passive approach was met with more direct attacks on German Americans by other local authorities. Local authorities, including Police Chief Edgar Schmitt and Liberty Loan Postmaster John Nolan, took the lead in targeting German Americans.[192] Schmitt spearheaded local surveillance efforts and arrested individuals suspected of disloyalty, while Nolan leveraged his position to pressure German Americans into purchasing Liberty Bonds—a practice that became a de facto loyalty test.[193] Those who refused risked being labeled as enemy sympathizers, subjecting them to arrest, public shaming, and professional ruin.[194]

Evansville likely reflected the broader national wave of hysteria, fear, and hostility toward German Americans during World War I.[195] Bosse perhaps sought to ensure Evansville supported the national war effort.[196] To that end, his administration, like those across the nation, likely promoted and encouraged Evansville citizens to participate in patriotic campaigns that mirrored

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189. FRANK M. GILBERT, HISTORY OF THE CITY OF EVANSVILLE AND VANDERBURG COUNTY, INDIANA 392 (1910).

190. BIGHAM, *supra* note 168, at 18 (noting the prominence of German Lutherans and Catholics in Evansville's Democratic politics, the rise of figures such as Mayor Bosse, and the shifting loyalties during World War I).

191. *See id.* (explaining that both parties in Evansville "regularly placed a predominately German American slate before the electorate and could not hope to win without ritual appearances at the German Day Volksfest of the Maennerchor or having a number of party workers who could speak German," reflecting outward displays of loyalty to national causes while maintaining German American support).

192. *Less Than Half Register*, THE EVANSVILLE COURIER, Feb. 14, 1918; *see* Telegram to D.C. (April 15, 1918) (on file with Fold3 database) (listing Nolan as an active correspondent regarding German American activities); *see also* Report on Sieveking (Apr. 16, 1918) (on file with Fold3 database) (describing Nolan's role in initiating investigations into suspected disloyalty).

193. *Id.*

194. *See* LUEBKE, *supra* note 3, at 225–27 (detailing how German Americans faced loyalty tests and risked professional and social ruin if they resisted patriotic demands).

195. *See id.*at 225–30 (describing national "superpatriotism" and hostility toward German Americans); *see also* KIRSCHBAUM, *supra* note 7, at 110–18 (detailing mob hostility and repression of German culture).

196. *See* BIGHAM, *supra* note 168, at 18 (explaining the dominance of German Lutherans and Catholics in Evansville's Democratic politics, the prominence of German cultural and patriotic societies, and the civic leadership provided by figures such as Mayor Bosse, all of which came under heightened scrutiny as World War I placed new pressures on public displays of loyalty).

nationwide movements for "100 percent Americanism."[197] This atmosphere of heightened patriotism seemed to have spurred superpatriotism throughout the city.[198] That surge of patriotic fervor, in turn, likely exacerbated the social and political pressures faced by Evansville's German American population.[199]

Prior to being elected mayor in 1916, Bosse served as the Indiana delegate to the Democratic National Convention.[200] This convention would ultimately nominate Woodrow Wilson as the Democratic candidate for president.[201] The convention and his involvement with the Democratic Party likely guided Bosse's policies and stance during wartime. In that light, it seems that Bosse sought to present himself as the mayor who promoted war production, expanded services, and fostered a patriotic community. He may also have felt pressure to ensure that Evansville's large German American community did not cause any problems and diminish his political status within the party.

Early on, Bosse probably took a staunch patriotic stance.[202] To play the political game, however, he would never explicitly speak against the German Americans, as he knew they were a large factor in the economic success of Evansville.[203] Nevertheless, the patriotism he exuded, coupled with the anti-German hysteria that swept the nation, fueled fervor into the hearts of many Evansville citizens. Moreover, Bosse left the question of German Americans up to the local and federal authorities, such as the Evansville police chief, Edgar Schmitt, and the Liberty Loan Postmaster, John Nolan.[204] They helped lead campaigns and investigations to search for "disloyal" or anti-war citizens, specifically targeting the German Americans.[205]

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197. For an example of other German communities facing similar pressures, *see, e.g.*, Tina Stewart Brakebill, *From "German Days" to "100 Percent Americanism": McLean County, Illinois 1913-1918: German Americans, World War One, and One Community's Reaction*, 95 J. OF THE ILL. ST. HIST. SOC'Y (1998-) 148, 148–55 (2002); Moench, *supra* note 148, at 86–95 (discussing "100 percent Americanism" as a nationwide movement).

198. *See* LUEBKE, *supra* note 3, at 225–30 (describing "superpatriotism in action" during the war); *see also* STONE, *supra* note 40, at 153–60 (analyzing how patriotic fervor suppressed dissent).

199. *See* PETRA DEWITT, DEGREES OF ALLEGIANCE: HARASSMENT AND LOYALTY IN MISSOURI'S GERMAN-AMERICAN COMMUNITY DURING WORLD WAR I 120–27 (2012) (explaining harassment of German Americans under heightened patriotic pressure); *see also* KIRSCHBAUM, *supra* note 7, at 120–27 (describing the eradication of German cultural institutions).

200. LOUIS GRANAT & J. BRUCE KREMER, OFFICIAL REPORT OF THE PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, HELD AT SAINT LOUIS, MISSOURI, JUNE 14, 15 AND 16TH, 1916 , at 59 (1916).

201. *Id.*

202. *Id.*

203. *Id.* German Americans played a central role in Evansville's economy, including major industries such as the Globe-Bosse-World Furniture Company. BIGHAM, *supra* note 168, at 13. Additionally, both political parties regularly placed German American slates before voters and sought their support through cultural events making German Americans an indispensable civic and political force. *Id.* at 18. To be politically successful, no candidate could completely lose the German American vote. *Id.*

204. Less Than Half Register, *supra* note 192; Report on Sieveking, *supra* note 192.

205. Less Than Half Register, *supra* note 192; Report on Sieveking, *supra* note 192.

2. Implementation of Enemy Alien Registration.—As anti-German sentiment grew across the nation, the federal government mandated that all non-naturalized German Americans register as "enemy aliens."[206] By February 1918, only 400 individuals in Evansville had complied with the requirements.[207] In response, local authorities grew more determined as the residents stood firm against them.[208]

Police Chief Schmitt ordered a clear directive: anyone who does not register will face arrest.[209] In the weeks to follow, local authorities would arrest German Americans, force them to register, and then let them go.[210] This process aimed to intimidate and label them as potential threats in the public eye.[211] Individuals feared they would be ousted as the federal government began rounding up suspected "enemy aliens."[212]

3. The Sieveking Investigation.—The case of George Sieveking, an evangelical minister, is a powerful example. Sieveking, a German immigrant who had lived in the United States since 1889, had spent years ministering in various Midwestern churches before settling in Evansville in 1914.[213] By all accounts, he was a respected figure within the German American community—until he became the subject of a loyalty investigation.[214]

In 1917, an Evansville resident reported to the police that Sieveking had preached against the draft and war and was allegedly planning a violent antiwar protest.[215] Concerned that such activities might bring federal scrutiny to Evansville, the local police sought guidance from federal authorities in Indianapolis.[216] Federal agents advised them to send an informant to Sieveking's congregation and verify the claims.[217] After weeks of surveillance, the informants found no evidence, and the case went dormant.[218]

Yet, in 1918, the investigation resurfaced when Sieveking exclaimed, "Don't want your bonds. You made me register as enemy and now I am an

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206. *World War I Enemy Alien Records*, NAT'L ARCHIVES, https://www.archives.gov/research/immigration/enemy-aliens/ww1 [https://perma.cc/8VQW-PG3V] (last visited Nov. 6, 2024).

207. Less Than Half Register, *supra* note 192.

208. *Mayor and Chief to Act on Aliens*, THE EVANSVILLE COURIER, Feb. 21, 1918.

209. Less Than Half Register, *supra* note 192.

210. *See Mayor and Chief to Act on Aliens*, *supra* note 208 (describing the enforcement regime).

211. *Id.*

212. *Id.*

213. Interview by Federal Agents with George Sieveking, in Evansville, Ind. (Apr. 30, 1918) (on file with Fold3 database).

214. *Id.*

215. Report on Sieveking, *supra* note 192.

216. Letter from C. F. Werner to Murdock (Aug. 2, 1917) (on file with Fold3 database).

217. *Id.*

218. There was correspondence with federal authorities in August of 1917. Report From C.F. Werner on Sieveking Investigation (Aug. 17, 1917) (on file with Fold3 database). But no correspondence surfaces again until April 1918.

enemy to this country."[219] It is not clear why Sieveking refused to buy bonds or make that statement. Nolan reported him to federal authorities, claiming that Sieveking was "inflaming neighbors to a degree which threatened violence" and that he had to "beg a meeting not to lynch him."[220] Alarmed, federal officials ordered Sieveking's arrest.[221]

Sieveking was transported to Indianapolis and questioned.[222] There, the Assistant United States Attorney recommended his internment because of his alleged "pro-German" talk.[223] With no trial, no due process, and no opportunity to defend himself, Sieveking was sent to Fort Oglethorpe, Georgia, an internment camp for suspected enemy aliens.[224]

4. The Rottmayer Investigation.—Joseph Rottmayer, a stove worker in Evansville, faced scrutiny for allegedly sympathizing with the Germans.[225] This case is another example the city's crackdown. Witnesses reported that Rottmayer publicly supported Germany and refused to purchase a Liberty Bond.[226]

The Davis-Houghland detective agency investigated and took Rottmayer in after reviewing the reports.[227] They then subjected him to intense interrogation.[228] Rottmayer, fearing the consequences, insisted that he made his statements as a joke and lacked any loyalty to Germany.[229] To demonstrate his allegiance to the United States, he had to write a formal apology to the federal government, fly an American flag outside his home, and purchase a Liberty Bond to show his patriotism.[230]

John Nolan, who played a role in persecuting Sieveking, would later investigate Rottmayer.[231] However, the damage was done. Rottmayer faced public humiliation and coercion.[232] His experience highlights the intense pressure German Americans felt to shed their cultural identity and prove their loyalty to the United States.

5. Impact on Evansville's German American Community.—The cases of Sieveking and Rottmayer were not isolated incidents. The profound impact on Evansville's German community included the shutdown of German-language newspapers, closure of German schools and ban on German-language

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219. Letter from Federal Authorities (Apr. 13, 1918) (on file with Fold3 database)

220. *Id.*

221. Order to Arrest Sieveking (Apr. 15, 1918) (on file with Fold3 database).

222. Report on Sieveking, *supra* note 192.

223. Telegram from Indianapolis U.S. Att'y to Dep't of Justice (Apr. 16, 1918) (on file with Fold3 database).

224. Progress Report (July 2, 1919) (on file with Fold3 database).

225. *Doffs Hat to American Flag*, THE EVANSVILLE COURIER, Nov. 23, 1917.

226. *Apologizes to United States*, THE EVANSVILLE COURIER, Nov. 22, 1917.

227. *Id.*

228. *Id.*

229. *Doffs Hat to American Flag*, *supra* note 225.

230. *Id.*

231. *Apologizes to United States*, *supra* note 226.

232. *Id.*

education, abandonment of German services in churches, and boycotting or forced renaming of German businesses.[233]

Even those who had previously been well-integrated and respected members of the community found themselves treated as foreign threats.[234] Fear of persecution led many German Americans to anglicize their names, stop speaking German, and publicly distance themselves from their heritage.[235] The forced assimilation of Evansville's German Americans permanently altered the city's cultural landscape.

D. German Americans After World War I in Evansville

World War I devastated Evansville's German American community.[236] Societal pressure compelled them to abandon their cultural identity, and their vibrant, diverse character vanished.[237]

1. Systematic Dismantling of German Institutions.—By 1918, German culture had virtually disappeared from public life.[238] The German language was outlawed in many states, including instruction in schools.[239] Churches abandoned German services.[240] The German-language press collapsed.[241] The Germania Männerchor membership dropped by fifty percent and traditional celebrations like German Day ceased entirely.[242]

Some made deliberate choices to "Americanize" their family.[243] By 1919, Central High School had replaced German language instruction with French.[244] Economic changes accelerated this transformation, too. As Evansville transitioned from agriculture to manufacturing, German Americans began working in factories and needed to learn English.[245] The transition dismantled the close-knit German communities that once upheld their culture. The lively "Little Germany" that once characterized Evansville now exists only in fragments.[246]

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233. BIGHAM, *supra* note 168, at 21–23.
234. *Id.*
235. *Id.* at 22.
236. *Id.*
237. *Id.*
238. *Id.*
239. *See, e.g.*, Ramsey, *supra* note 65, at 299 (discussing Indiana's McCray Act).
240. BIGHAM, *supra* note 168, at 23.
241. *Id.* at 300.
242. *Id.* at 22, 25.
243. BIGHAM, *supra* note 168, at 22.
244. *Id.*
245. *Id.* at 20.
246. *Id.* at 24–27.

E. Recent FISA Section 702 Debates

1. Recent Congressional Reauthorization Efforts.—The debate over FISA Section 702's reauthorization shows congressional divisions on surveillance and civil liberties. In April 2024, the House passed a two-year reauthorization after initial failure.[247] At the time, soon-to-be and then-former President Donald Trump pressured Congress to "kill" the program, which led to a shortened timeframe as a compromise.[248] Debates over surveillance authorities have grown increasingly contentious as shifting political coalitions redefine the balance between national security and privacy.[249]

Congress's debate about whether to reauthorize Section 702 focused on warrants for searching Americans' communications discovered in Section 702 searches.[250] Advocates for more privacy who oppose Section 702's use consistently advocate for warrants.[251] They claim that Section 702 "violate Americans' fundamental civil liberties and civil rights."[252] Ultimately, the warrant requirement amendment failed by a 212-212 tie vote in the House.[253] Many intelligence officials disagreed and were opposed to the warrant requirement, claiming that it would limit the capability to investigate potential threats.[254] Then-FBI Director Christopher Wray warned that Section 702's expiration would harm public safety, emphasizing its importance in preventing terrorist attacks and disrupting cyber threats.[255]

The reauthorization bill introduced several significant reforms. First, it codified new restrictions on database searches.[256] Second, it also limited who could access the raw intelligence to reduce the potential for abuse.[257] Finally, it

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247. *See* CONG. RSCH. SERV., R48592, REAUTHORIZATION OF FISA SECTION 702, at 1–2 (2024), https://www.congress.gov/crs-product/R48592; Savage, *supra* note 105.

248. *Id*.

249. *Id.*

250. *Id.*; *see, e.g.*, 170 Cong. Rec. H2323 (daily ed. Apr. 12, 2024) (statement of Rep. Lofgren) (urging adoption of warrant requirement for U.S.-person queries).

251. *See, e.g.*, Savage, *supra* note 105.

252. *Id.*; Letter from Access Now et al. to the Hon. Charles Schumer, Majority Leader, U.S. Senate (Nov. 13, 2023).

253. Savage, *supra* note 105. The 212-212 vote in the House on the amendment concerning warrants for searching Americans' communications discovered in Section 702 searches revealed an unusual bipartisan split. The amendment received support from 86 Republicans and 200 Democrats. Conversely, the opposition comprised 130 Republicans and 82 Democrats. This distribution indicates a significant bipartisan divide on privacy concerns and governmental surveillance authorities. *See* H.R., Roll Call Vote No. 114, 118th Cong., 2d Sess., Congressional Record (Apr. 12, 2024).

254. Savage, *supra* note 105 ("National security officials from the Biden administration had lobbied Congress heavily not to pass the amendment.").

255. *Warrant Requirement for FBI's Section 702 Queries Would Impede Investigations, Endanger National Security, Director Says*, FBI (Apr. 9, 2024), https://www.fbi.gov/news/stories/warrant-requirement-for-fbi-s-section-702-queries-would-impede-investigations-endanger-national-security-director-says [https://perma.cc/LPF6-P7FB].

256. *Reforming Intelligence and Securing America Act*, H.R. 7888, 118th Cong. § 2 (2024).

257. *Id.*

created new requirements for reporting to improve transparency.[258]

Privacy advocates argue they will push for stronger civil liberties as the bill advances.[259] The debate strikes directly at the core of the balance between national security and constitutional rights, which has always challenged the nation. The outcome will impact future foreign intelligence collection and the balance between government power and individual privacy.

As Congress debates Section 702 today, Evansville's history reminds us that unchecked government surveillance poses long-term risks. These risks often exceed the original goals of such powers. By learning from history, modern society can protect the rights of vulnerable communities, ensuring that national security does not infringe on civil liberties and cultural identity.

III. ANALYSIS

Throughout American history, times of perceived crisis have often led to increased government overreach, frequently infringing on civil liberties. The way German Americans were treated during World War I serves as a relevant comparison to today's digital surveillance practices under Section 702 FISA. This section identifies three key parallels: (1) the enforcement actions undertaken by citizens and the private sector; (2) the stifling of cultural and political expression; and (3) the lack of effective oversight. The analysis concludes by examining how these lessons can inform the forthcoming debate on the reauthorization of Section 702.

A. Historical Parallels: Wartime Hysteria, Targeted Communities

1. Civilian (and Corporate) Enforcement as a Tool of Fear.—During World War I, the dialogue surrounding the war and national security caused communities to feel an impending threat and took surveillance into their own hands. The APL enlisted everyday citizens to expose disloyalty.[260] This turned neighbors into watchdogs against each other.[261] In Evansville, Liberty Bond sales were used as a means of testing loyalty, highlighting how espionage fears led to social pressure for compliance.[262] Those who declined to buy bonds were labeled disloyal and frequently faced severe repercussions,[263] similar to what Joseph Rottmayer and George Sieveking experienced.

Today's surveillance systems function like a modern citizen-enforcement model. Private companies now often take on the roles once filled by civilians.[264] Under Section 702, technology firms and internet service providers must assist

258. *Id.*
259. Letter from Access Now, *supra* note 252.
260. LUEBKE, *supra* note 3, at 211–12.
261. *See, e.g.*, Capozzola, *supra* note 55, at 1361.
262. *See supra* Part II.
263. *Id.*
264. Burns, *supra* note 97, at 698.

government requests, allowing the government to gather data on a large scale.[265] Though the legal mechanisms differ from World War I's civilian deputization, both contexts create a climate of fear. 266 Where the APL might have dug through trash, wiretapped phones, and followed individuals around to coerce compliance, today's government reliance on technology companies can sidestep traditional warrant requirements through "incidental collection" or so-called "back-door search[es]" of Americans' data. [267] In both periods, inadequate oversight increases the likelihood of these tools being misused against minorities or marginalized groups.

2. Erosion of Cultural and Political Expression.—In Evansville, German Americans abandoned their language, closed their businesses, and set aside their culture to avoid suspicion. [268] German newspapers closed, churches ceased holding services in German, and social organizations like the Germania Männerchor went underground. [269] The pressure to assimilate was not only social but also legally reinforced through bans on German language instruction in schools and surveillance of their communities.[270]

Today, Section 702 has a similarly chilling effect, particularly within Muslim and other immigrant communities.[271] Because the statute allows the targeting of foreign individuals (with minimal regard for the incidental collection of U.S. persons' data), many people self-censor their communications—especially those with international ties—to avoid becoming subjects of government scrutiny.[272] The FBI has illustrated the abuse of Section 702 by targeting specific groups, including protesters and ethnic communities.[273] This misuse mirrors how the APL targeted German cultural organizations.[274]

3. Minimal Judicial Oversight and Unchecked Executive Power.—The Espionage and Sedition Acts operated with scant judicial checks, leaving local authorities and postmasters to interpret and enforce vague definitions of "disloyalty."[275] Similarly, the Foreign Intelligence Surveillance Court provides

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265. *Id.*

266. Capozzola, *supra* note 55, at 1361.

267. Burns, *supra* note 97, at 698, 703.

268. BIGHAM, *supra* note 168, at 22.

269. *Id.*

270. *Id.*

271. Toomey & Robinson, *supra* note 130.

272. *See* BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF LAW, *Comments to the Privacy and Civil Liberties Oversight Bd. re: Section 702 of the Foreign Intelligence Surveillance Act* 15–16 (Nov. 4, 2022), https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-pclobs-oversight-project-section-702 [https://perma.cc/QS93-NARW]; Lee Rainie & Mary Madden, *Americans' Privacy Strategies Post-Snowden*, PEW RSCH. CTR. (Mar. 16, 2015), https://www.pewresearch.org/internet/2015/03/16/americans-privacy-strategies-post-snowden/ [https://perma.cc/PE5W-8PXS].

273. Toomey & Robinson, *supra* note 130.

274. LUEBKE, *supra* note 3 at 211–12.

275. STONE, *supra* note 40 at 178–79.

only a broad, programmatic review of Section 702 surveillance rather than scrutinizing individualized warrants.[276] Intelligence agencies possess significant discretion in targeting foreign communications, often resulting in the incidental collection of vast amounts of data belonging to U.S. persons.[277]

Any litigant who tries to challenge these issues faces nearly impossible odds due to problems in proving standing. In *Clapper v. Amnesty International USA*, the Supreme Court protected Section 702 surveillance, holding that plaintiffs must show a "certainly impending" harm to demonstrate standing.[278] The Court dismissed the Second Circuit's standard for standing, stating that a mere chance of future events involving multiple separate government actions cannot meet the constitutional requirement for an actual or imminent threat.[279] Furthermore, the Court ruled that plaintiffs could not manufacture standing by voluntarily incurring costs to mitigate a hypothetical risk of surveillance.[280] Article III standing requirements prevent litigants from challenging Section 702 surveillance because it can be difficult to prove incidental collection with a lack of clear proof of captured communications.[281]

Many Americans, particularly in Muslim and immigrant communities, pull back on their international communications and think about their cultural connections in fear of surveillance.[282] Government officials have historically justified increased government power through inflaming rhetoric and aggressive threats of imminent fear. Wilson emphasized and warned of sabotaging German spies "filling . . . unsuspecting communities," while modern officials cite the prevented attacks to defend Section 702's utility.[283] Both risk minimizing surveillance's broader costs to society's fabric and the erosion of civil liberties it may cause.

Defenders of Section 702 argue for its necessity based on post-9/11 security needs, echoing World War I-era justifications.[284] However, the German American experience reveals that emergency measures often persist beyond their valid reasons.[285] Like the World War I-era laws, Section 702 has extended itself and now covers drug trafficking, cyber threats, and foreign visitor screening.[286]

Surveillance lessons are crucial for the reauthorization of Section 702. Congress should consider that granting extensive surveillance powers to the

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276. Burns, *supra* note 97, at 708.

277. *Id.*

278. 568 U.S. 398, 409 (2013).

279. *Id.* at 410–14.

280. *Id.* at 416–17.

281. Burns, *supra* note 97, at 709.

282. Toomey & Robinson, *supra* note 130.

283. Moench, *supra* note 148, at 112.

284. *See Joint Statement for the Record on Section 702 of the Foreign Intelligence Surveillance Act Before the S. Comm. on the Judiciary*, 118th Cong. 5 (2023) (statement of Chris Fonzone, Gen. Couns., Off. of the Dir. of Nat'l Intel., et al.).

285. DON HEINRICH TOLZMANN, THE GERMAN-AMERICAN EXPERIENCE 298 (2000).

286. Burns, *supra* note 97, at 712.

Executive Branch might go beyond the intended use and cause harmful consequences. The attack on German Americans in Evansville, Indiana, demonstrates how unchecked executive authority can weaken American pluralism. Today's surveillance practices could be misused, potentially resulting in outcomes like those seen during World War I. This historical context highlights the importance of revisiting these issues.

B. Critiquing Section 702: Oversight Gaps and Domestic Implications

1. Incidental Collection of U.S. Persons' Data.—Although Section 702 targets "non-U.S. persons located outside the United States,"[287] those searches tend to turn up a large volume of "incidental" U.S. communications.[288] The FBI conducts an alarming amount of warrantless "queries" on U.S. citizens.[289] As with the muddy lines between foreign agents and innocent civilians during World War I, the broad contours of "foreign intelligence" under Section 702 pave the way for routine domestic surveillance.[290] This situation is especially intense for individuals with strong connections overseas—reflecting how simply speaking German a century ago could provoke suspicion.

2. Judicial Oversight Deficiencies.—The FISC provides only a limited review of Section 702 surveillance.[291] Section 702's approval relies on generalized certifications by the FISC rather than individual warrants.[292] This structural design permits extensive executive branch latitude in deciding who and what to monitor. During World War I, federal authorities similarly turned to local infrastructures, such as vigilantes and postmasters. This risked problems as much of the work done was unchecked.[293] Congress has held hearings on Section 702 compliance,[294] but the current system lacks the proper checks and balances to curb overreach. The secretive nature of FISC proceedings and broad government interpretations of "foreign intelligence" shield the program from much outside scrutiny.[295]

3. Societal Chilling Effect.—When people are aware that they could be surveilled, they might alter their behavior.[296] Studies indicate that some Muslim Americans and immigrant groups limit their religious gatherings, avoid political

287. MAJORITY FISA WORKING GRP., *supra* note 124, at 21.

288. Burns, *supra* note 97, at 698.

289. *Id.* at 700.

290. *Id.* at 694.

291. Beller, *supra* note 134, at 201.

292. Burns, *supra* note 134, at 695–96.

293. *See, e.g.*, CHRISTOPHER CAPOZZOLA, UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN 152 (2008); *see also* Capozzola, *supra* note 55, at 1361.

294. Joint Statement for the Record, Hearing on Oversight of Section 702 of the Foreign Intelligence Surveillance Act Before the S. Comm. on the Judiciary, 118th Cong. (June 13, 2023).

295. Beller, *supra* note 134, at 163; Burns, *supra* note 97, at 694.

296. BRENNAN CTR. FOR JUST., *supra* note 272.

discussions online, and refrain from making international calls families.[297] Similarly, German Americans in Evansville avoided speaking German publicly and changed their names to appear more American.

C. What Should We Do? Lessons from the Treatment of German Americans

Congress should heed the historical lessons from the treatment of German Americans when deciding whether—or how—to reauthorize FISA Section 702. At least three crucial themes emerge: (1) the recurrent pattern of wartime civil liberties curtailments, (2) the erosion of constitutional protections through unchecked surveillance powers, and (3) the disproportionate harm to communities.

1. Patterns of Wartime Civil Liberties Curtailments.—Emergencies have consistently prompted rapid expansions of executive power, from the World War I crackdown on dissent to the post-9/11 surveillance apparatus.[298] Congress has been, and will likely continue to be, willing to give extensive power to the executive that risks impacting the protections and fundamental rights that the Constitution guarantees in times of perceived threat.[299] Initially designed to combat "disloyalty," the Espionage Act became a mechanism targeting labor organizers and peace activists.[300] Section 702 illustrates a comparable mission creep: initially defended for counterterrorism, it now encompasses inquiries into cybercrime, narcotics, and other areas.[301] This shift resembles the uncontrolled expansion of anti-German actions into daily life's cultural, social, and linguistic aspects.

2. Erosion of Constitutional Principles.—Section 702's design can abridge the Fourth Amendment through "incidental" and "about" collection practices, which allow the government to capture and query Americans' communications without a traditional warrant.[302] Many scholars have noted and opined that the Constitution has some flexibility in times of crisis.[303] But this theory and

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297. *Id.* Beyond other historical events, both Trump v. Hawaii, 585 U.S. 667 (2018) and surveillance policies under FISA Section 702 have created a belief that Muslim Americans are inherent security threats. This has affected their free expression and undermined civic participation, like the experiences of German Americans during World War I. As the executive branch expands its reach, concerns about how Section 702 could be used to target groups continue. Given the extensive powers conferred by existing surveillance laws, upcoming administrations may exploit these authorities in ways that could disproportionately affect vulnerable populations. *See, e.g.*, Jennifer Lee Koh, *Executive Discretion and First Amendment Constraints on the Deportation State*, 56 GA. L. REV. 1473, 1480 (2022).

298. *See* Napolitano, *supra* note 30, at 468–72; Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (1918).

299. *See, e.g.*, STONE, *supra* note 40.

300. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917).

301. Burns, *supra* note 97, at 712.

302. PRIV. & CIV. LIBERTIES OVERSIGHT BD., *supra* note 113, at 7.

303. *See, e.g.*, Charles Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 17 (1917).

principle should not justify the wholesale abandonment of constitutional protection. The program's structure creates a legal fiction that surveillance targeting foreigners does not implicate Americans' constitutional rights, even when it routinely captures American communications.[304]

The debate over Section 702 reveals the tension between what scholars Eric Posner and Adrian Vermeule term the "accommodation view" and the "strict view" of civil liberties during emergencies.[305] Section 702 embodies the accommodation view taken to its extreme. It prioritizes governmental discretion to a degree that it risks completely forgoing the Fourth Amendment protections for some Americans. However, as Geoffrey Stone's analysis of historical overreach demonstrates, such wartime restrictions on civil liberties have often proved excessive and, in hindsight, often unwarranted to the degree in which they are taken.[306]

The program's oversight mechanisms have proven that they can fail. Samuel Issacharoff and Richard Pildes hypothesize an "institutional process" model for effective oversight.[307] The FISA Court's limited review of general procedures, rather than individual surveillance decisions, can lead to meaningless and ineffective checks on executive power. Issachroff and Pildes would advocate for a more meaningful check on this type of power.[308] Similarly, Amanda Tyler advocates for maintaining a "business as usual" judicial review during emergencies, where courts consider and decide cases as if circumstances were normal. 309 However, as it currently stands, Section 702's structure systematically prevents meaningful review.

3. Disproportionate Effects.—Modern surveillance programs, like the restrictions on German Americans during World War I, can disproportionately affect specific communities within the United States.[310] Evidence suggests that Muslim Americans, Arab Americans, and those similarly situated face heightened scrutiny under Section 702.[311] This awareness creates a chilling effect on cultural practices and life.[312]

Mark Tushnet argues that to effectively address contemporary issues that balance the interests of national security and civil liberties, we must utilize and

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304. *See, e.g.*, PRIV. & CIV. LIBERTIES OVERSIGHT BD., *supra* note 113, at 6.

305 . Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 55 (Mark Tushnet ed., 2005).

306. STONE, *supra* note 40, at 539.

307. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 2, 6 (2003).

308. *Id.* at 5–6.

309. Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 VA. L. REV. 489, 561–62 (2023).

310. Toomey & Robinson, *supra* note 130.

311. *Id.*

312. BRENNAN CTR. FOR JUST., *supra* note 272.

learn from past examples of overreach.[313] Thus, the insights we glean from German Americans during World War I and other historical instances, where civil liberties were sacrificed for national security, should shape our responses to today's problems. Eugene Rostow condemned the internment of Japanese Americans, highlighting the dangers of unrestrained executive authority.[314] Likewise, the extensive surveillance powers under Section 702 illustrate how, once granted, emergency powers can have lasting effects on civil liberties.

D. Recommendations: Concrete Steps for Reform

1. Enhance Statutory Guardrails and Sunset Provisions.—Congress should consider and refine Section 702 to prevent overreach. One step could be to narrow the definition of "foreign intelligence."[315] It could also restrict or outright prohibit "about" collection practices. Another step is to enact meaningful sunset clauses to require comprehensive review. This approach would require lawmakers to consistently reassess the necessity and scope of surveillance instead of mere automatic reauthorization.

2. Strengthen Judicial Review.—Adopting individualized review processes for U.S. person queries would curb some of Section 702's most controversial backdoor searches. The FISA Court should have the authority to review, in real-time, significant executive branch decisions that affect Americans, drawing on the principle of "business as usual" judicial oversight advocated by scholars like Amanda Tyler.[316]

3. Lower Barriers to Standing and Litigation.—*Clapper*'s "certainly impending" standard[317] makes any type of meaningful judicial scrutiny of mass surveillance nearly impossible. One possible change could be to adopt the more flexible standard taken by the Second Circuit— the "objectively reasonable likelihood" test—which would allow more challenges of unconstitutional surveillance to proceed through the courts without having to present near-impossible proof that they were personally monitored.[318]

4. Promote Transparency and Independent Oversight.—All things Section 702 are generally shrouded in secrecy. Producing regular, declassified reports to Congress—and sometimes to the public—would help reduce the secrecy surrounding surveillance measures. Another method may be to add structured audits to ensure that executive agencies cannot stretch their authority in the

313. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 295–96 (2003).

314. Eugene V. Rostow, *The Japanese American Cases–A Disaster*, 54 YALE L.J. 489, 491 (1945).

315. 50 U.S.C. § 1801(e).

316. Tyler, *supra* note 309, at 561–62.

317. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

318. Amnesty Int'l USA v. Clapper, 638 F.3d 118, 134 (2d Cir. 2011), *rev'd*, 568 U.S. 398 (2013); *see also Clapper*, 568 U.S. at 432–33, 441 (Breyer, J., dissenting) (arguing Article III standing is satisfied by a "reasonable probability" or "substantial risk" of surveillance).

interest of national security.

The story of German Americans in World War I offers a historical backdrop that sheds light on today's discussions around FISA Section 702. Both instances illustrate how unrestrained government power can foster a culture of fear and self-censorship, leading to community alienation, hindering free expression, and diminishing public trust.

As Congress considers reauthorizing Section 702, it is vital to reflect on historical lessons during these discussions. The absence of safeguards, limited oversight, and lack of judicial recourse poses a considerable threat to civil liberties and social cohesion. By examining the experiences of German Americans, lawmakers can recognize the long-lasting consequences of wartime surveillance and devise a more balanced, constitutionally sound approach forward.

CONCLUSION

The issues surrounding FISA Section 702 are eerily reminiscent of past government overreach. Today, many recognize that current surveillance laws also lack vital safeguards, yet Congress has failed to pass any amendments to Section 702 to formalize these concerns.

As Congress debates reauthorization, it must remember the history of German Americans during World War I. National security will always remain a vital concern, but it should be carefully balanced with constitutional rights. When fear takes over and begins to shape policy, people often suffer, as some groups still do today. And when these freedoms are encroached upon, it can become difficult, if not impossible, to reverse without hard-fought efforts.

To prevent past mistakes from repeating themselves, lawmakers must enforce strong oversight, transparency, and limits on government surveillance. By learning from history, Congress can help ensure that national security does not justify the erosion of civil liberties.

LIABILITY TO LIEN ON: FRAUDULENT LIENS AND THE NEED FOR ADDITIONAL PROTECTION IN INDIANA

BRAYDEN LENTZ*

INTRODUCTION

In the summer of 2024, an Indiana man named Michael-Tyrone Sturghiss recorded $20 million liens on the homes of Lance Hamner, the Johnson County prosecutor, and the Honorable K. Mark Loyd, the presiding Franklin City Court judge.[1] The source of the alleged debts was "kidnapping," stemming from Sturghiss's arrest and subsequent prosecution in the county for failing to identify himself during a traffic stop.[2] Filing these documents cost Sturghiss $50 and the effort it took to travel to the county's recording office with his homemade "Notice of Lien."[3] There, despite the facially frivolous nature of the underlying claims, Indiana law required the county recorder to accept the forms and enter them into the public record.[4] Although Sturghiss could never collect these vast sums, the filings achieved their purpose the moment the recording office received them. Compared to the ease with which Sturghiss submitted the claims, removing the filings required the victims to resort to court action. Despite this harassing effect, Sturghiss committed no crime.

Regardless of their legal deficiencies, these filings are not an isolated occurrence. Across the country, state and federal officials at all levels of government are battling efforts by sovereign citizens, a loose association of anti-government extremists who do not acknowledge the legitimacy of the United States,[5] to harass agencies and interfere with official processes.[6] Often, these individuals file fraudulent liens and other financial documents aimed at encumbering the private property of public officials in retaliation for perceived mistreatment by the legal system.[7] These practices are so damaging and widespread that the Federal Bureau of Investigation (FBI) has labeled the

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1. Notice of Lien, Michael-Tyrone Sturghiss (July 9, 2024) (on file with author).

2. *Id.*; State v. Sturghiss, No. 41H01-2405-CM-000408 (filed May 13, 2024), https://public.courts.in.gov/mycase/#/vw/CaseSummary/eyJ2Ijp7IkNhc2VUb2tlbiI6IlNJbUlrczdMYzlSWGdNdTBCRE9XLXpkZmJtenZycmhwLXpPS3JSYlV6MFUxIn19 [https://perma.cc/K3GN-8K42].

3. Recording each lien would have cost $25 in Indiana. IND. CODE § 36-2-7-10(c)(1) (2024).

4. IND. CODE § 26-1-9.1-520 (2024); IND. CODE § 26-1-9.1-516(b) (2024).

5. *See* ANTI-DEFAMATION LEAGUE, THE SOVEREIGN CITIZEN MOVEMENT IN THE UNITED STATES 5–6 (2023), https://www.adl.org/sites/default/files/pdfs/2024-12/The-Sovereign-Citizen-Movement-in-the-United-States.pdf [https://perma.cc/54PS-QQMZ].

6. *Id.* at 11.

7. NAT'L ASS'N OF SEC'YS OF STATE, STATE STRATEGIES TO SUBVERT FRAUDULENT UNIFORM COMMERCIAL CODE (UCC) FILINGS: A REPORT FOR STATE BUSINESS FILING AGENCIES 4–5 (2014), https://www.nass.org/sites/default/files/surveys/2017-08/final-nass-report-bogus-filings-040914.pdf [https://perma.cc/FP3Q-EGRF].

conduct "paper terrorism."[8]

In response to this fraudulent behavior, jurisdictions nationwide have acted to deter the threat by implementing criminal penalties. Currently, thirty-seven states,[9] the District of Columbia,[10] and the federal government prosecute individuals who engage in these schemes.[11] The precise contours of these laws vary widely, but each protects government employees against illegitimate filings.[12] Because of these measures, covered officials can perform their duties without fear of this harassment by aggrieved citizens.

Yet despite the nearly nationwide consensus that criminalizing such practices is necessary to deter the behavior, Indiana has failed to adopt any similar safeguard.[13] Instead, fraudulent filing victims in Indiana must resort to court action to remove the lien and pursue costs from the perpetrator.[14] This civil remedy places too heavy a burden on the recipient of the attack and provides insufficient assurances of compensation; sovereign citizens do not acknowledge

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8. Erica Goode, *In Paper War, Flood of Liens Is the Weapon*, N.Y. TIMES (Aug. 23, 2013), https://www.nytimes.com/2013/08/24/us/citizens-without-a-country-wage-battle-with-liens.html [https://perma.cc/XNX2-N8ZW].

9. *See generally* ALA. CODE § 13A-9-12 (2024); ALASKA STAT. ANN. § 11.46.560 (West 2024); ARIZ. REV. STAT. ANN. § 33-420(E) (2024); ARK. CODE ANN. § 5-37-215(b) (West 2024); CAL. PENAL CODE § 115 (West 2024); COLO. REV. STAT. ANN. § 18-5-114 (West 2024); FLA. STAT. § 817.535(2)(a) (2024); GA. CODE ANN. § 16-10-20.1(b) (West 2024); HAW. REV. STAT. § 507D-7(c) (2024); 720 ILL. COMP. STAT. 5/32-4f (2024); KAN. STAT. ANN. § 21-5940 (2024); KY. REV. STAT. ANN. § 434.155 (West 2024); LA. STAT. ANN. § 14:133.6 (2024); ME. REV. STAT. ANN. tit. 17-A, § 706-A (West 2024); MD. CODE ANN., CRIM. LAW § 3-808 (West 2024); MICH. COMP. LAWS § 440.9501(6) (2024); MINN. STAT. § 609.7475 (2024); MISS. CODE ANN. § 97-7-73 (2024); MO. REV. STAT. § 570.095 (2024); NEB. REV. STAT. § 28-935 (2024); NEV. REV. STAT. § 108.226(4) (2024); N.H. REV. STAT. ANN. § 478:42(V) (2024); N.J. REV. STAT. § 2C:21-42 (2024); N.Y. PENAL LAW § 175.35 (McKinney 2024); N.C. GEN. STAT. ANN. § 14-118.6 (West 2024); N.D. CENT. CODE ANN. § 41-10-02 (West 2024); S.C. CODE ANN. § 36-9-501 (2024); S.D. CODIFIED LAWS § 22-11-28 (2024); TENN. CODE ANN. § 39-17-117 (West 2024); TEX. PENAL CODE ANN. § 37.101 (West 2024); UTAH CODE ANN. § 76-6-503.5 (West 2024); VA. CODE ANN. § 18.2-213.2 (West 2024); W. VA. CODE § 61-5-27a(c) (2024); WIS. STAT. § 943.60 (2024); WYO. STAT. ANN. § 29-1-601(c) (West 2024) (referencing the thirty-five states that expressly criminalize filing fraudulent liens, security statements, or UCC documents). *See also* Gruff v. Dep't of State, 934 A.2d 769, 769–70 (Pa. Commw. Ct. 2007) (applying 18 PA. STAT. AND CONS. STAT. ANN. § 4911 (West 2024) to a fraudulent lien); State v. Coleman, No. 106631, 2018 WL 5096086, at *1, *5 (Ohio Ct. App. Oct. 18, 2018) (applying OHIO REV. CODE ANN. § 2921.52(B)(4) (West 2024) to a fraudulent lien) (referencing the two states that have applied general fraudulent filing statutes to false liens).

10. D.C. CODE ANN. § 50-1215 (West 2024).

11. 18 U.S.C. § 1521.

12. *See generally* statutes cited *supra* note 9 (protecting public officials explicitly by identifying them as a protected class, such as Illinois's approach, 720 ILL. COMP. STAT. 5/32-4f, or implicitly by applying blanket prohibitions against fraudulent filings, such as Kentucky's approach, KY. REV. STAT. ANN. § 434.155).

13. Both attempts to introduce criminal penalties in Indiana have failed to advance out of committee. H.R. 1343, 123d Gen. Assemb., Reg. Sess. (Ind. 2024); H.R. 1019, 124th Gen. Assemb., Reg. Sess. (Ind. 2025).

14. IND. CODE § 26-1-9.1-902 (2024).

the government's legitimacy and often refuse to pay judgments against them.[15] As a result, Indiana's current laws leave Hoosiers' public officials vulnerable to private harm. The State must address this deficiency.

This Note argues that the Indiana General Assembly should criminalize knowingly filing a fraudulent lien against public officials. Part I of this Note provides an overview of the sovereign citizen movement and the threat its paper terrorism tactics pose. This part shows that the movement's beliefs and organization are largely decentralized but that its adherents employ similar lien-filing strategies against the government. Part II discusses Indiana's current approach to bogus filings and the shortfalls of its remedies. This part demonstrates that Indiana does not have a sufficient mechanism in place to fight against these extremist tactics. Part III examines statutes other jurisdictions use to combat paper terrorism. Taking the most desirable elements of each of these examples, Part IV proposes a model statutory scheme for Indiana to enact. This final part argues for criminal penalties that increase in severity with subsequent violations for those who knowingly file fraudulent liens against government employees. Without appropriate safeguards, Indiana leaves its public officials vulnerable to anti-government harassment.

I. PAPER TERRORISM AND THE SOVEREIGN CITIZEN MOVEMENT

A. Sovereign Citizens: What Do They Believe?

Although the government classifies sovereign citizens under a common moniker, these individuals do not belong to an overarching institution. Instead, as the FBI's definition suggests, sovereign citizens are "[a] network of loosely affiliated individuals [l]iving within the United States [w]ho believe federal, state, and local governments are operating illegitimately."[16] The movement as it exists today emerged in the 1980s when its more united predecessor group, the Posse Comitatus,[17] faded out.[18] The current adherents of the sovereign citizen movement are "loosely affiliated," and not centralized.[19] These men and women

15. Michael N. Colacci, *Sovereign Citizens: A Cult Movement That Demands Legislative Resistance*, 17 RUTGERS J. L. & RELIGION 153, 156–57 (2015).

16. DOMESTIC TERRORISM OPERATIONS UNIT, FED. BUREAU OF INVESTIGATION, SOVEREIGN CITIZENS: AN INTRODUCTION FOR LAW ENFORCEMENT 1 (2010), https://info.publicintelligence.net/FBI-SovereignCitizens.pdf [https://perma.cc/7EG5-9KW3].

17. The Posse Comitatus movement was a far-right group that believed there was no legitimate government beyond the county level. TERRI A. MARCH-SAFBOM, WEAPONS OF MASS DISTRACTION: STRATEGIES FOR COUNTERING THE PAPER TERRORISM OF SOVEREIGN CITIZENS 16–17 (2018), https://www.hsdl.org/c/view?docid=811407 [https://perma.cc/GP4E-TL9W]. Unlike the modern sovereign citizen movement, Posse Comitatus had direct ties to the white supremacist Christian Identity Movement. *Id.*

18. *See* ANTI-DEFAMATION LEAGUE, *supra* note 5, at 5.

19. Christine M. Sarteschi, *Sovereign Citizens: A Narrative Review with Implications of Violence Towards Law Enforcement*, 60 AGGRESSION AND VIOLENT BEHAV., Sep.–Oct. 2021, at 1, 1.

unite in their shared belief that the government is unlawful or without constitutional power, but they generally do not organize together.[20] Therefore, the movement contains no identifiable leaders and there is no established infrastructure that individuals may join.[21] Instead, followers tend to act independently as "lone wolves,"[22] or in like-minded groups that unite to discuss ideology and draft paperwork.[23]

Because of this decentralized structure, adherents of the sovereign citizen movement also lack a monolithic belief system.[24] Although actors share a core understanding that some legal defect has rendered the authority of the state flawed,[25] they reach this conclusion in different ways. Most often, adherents cite to three general ideological explanations for their conviction that the government is operating illegitimately: the illegality of the Fourteenth Amendment, the "redemption" theory, and "Moorish" privileges.[26]

Many sovereign citizens believe that the passage of the Fourteenth Amendment in 1868 was illegal and that it "tricked" individuals into renouncing their state citizenship.[27] This renouncement of "original" state citizenship then created two classes of Americans: "de facto" citizens and "de jure" citizens.[28] Under this theory, most Americans are "de facto" citizens, which followers also refer to as "Fourteenth Amendment citizens"[29] or "federal citizens."[30] De facto citizens have unknowingly traded away their original constitutional freedoms in exchange for federal citizenship.[31] In effect, these citizens have agreed to subject themselves to the jurisdiction of federal and state governments by

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20. *Id.* at 1, 8.

21. *Id.*

22. DEVON M. BELL, THE SOVEREIGN CITIZEN MOVEMENT: THE SHIFTING IDEOLOGICAL WINDS 17 (2016), https://apps.dtic.mil/sti/tr/pdf/AD1027164.pdf [https://perma.cc/XT9W-SEJU].

23. DOMESTIC TERRORISM OPERATIONS UNIT, *supra* note 16, at 3.

24. BELL, *supra* note 22, at 30.

25. Samuel Barrows, *Sovereigns, Freemen, and Desperate Souls: Towards A Rigorous Understanding of Pseudolitigation Tactics in United States Courts*, 62 B.C. L. REV. 905, 912 (2021).

26. J.M. BERGER, WITHOUT PREJUDICE: WHAT SOVEREIGN CITIZENS BELIEVE 6–10 (2016), https://extremism.gwu.edu/sites/g/files/zaxdzs5746/files/downloads/JMB%20Sovereign%20Citizens.pdf [https://perma.cc/M7L6-7QU6].

27. BELL, *supra* note 22, at 9.

28. *See* Michael Crowell, *A Quick Guide to Sovereign Citizens*, ADMIN. OF JUST. BULL., UNIV. OF N.C. SCH. OF GOV'T AT CHAPEL HILL, at 2 (Nov. 2015), https://www.sog.unc.edu/sites/default/files/reports/aojb1504.pdf [https://perma.cc/LKP2-V9EH]; ANTI-DEFAMATION LEAGUE, THE SOVEREIGN CITIZEN MOVEMENT: COMMON DOCUMENTARY IDENTIFIERS & EXAMPLES 1 (2016), https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Sovereign-Citizen-Documentary-Identifiers.pdf [https://perma.cc/R5WS-B7LN]; BERGER, *supra* note 26, at 3–4.

29. *See, e.g.*, United States v. Stouder, No. 3:04-1044, 2005 WL 2715666, at *2 (M.D. Tenn. Sep. 2, 2005) (referencing defendant's claim that he is a "free and lawful man who is a Sovereign Citizen/National, and who is not a 14th Amendment individual/citizen of the United States.").

30. *See* Crowell, *supra* note 28, at 2.

31. *See id.*

accepting the benefits of enacted laws and regulations.[32] Conversely, sovereign citizens claim to be "de jure" citizens, or "original citizens of the states."[33] Unlike de facto citizens, this latter class retains complete constitutional protection and all rights due at common law but remains immune from all state and federal laws, regulations, and courts.[34] These sovereigns hold that anyone can reclaim the privileges owed to him as a de jure citizen by denouncing or rescinding federal citizenship, [35] which involves disassociating from government regulation. [36] Therefore, an identifying characteristic of these sovereign citizens is their common refusal to obey regulatory laws, pay taxes, or obtain any type of government-issued licenses.[37]

Other followers subscribe to the "strawman" or "redemption" theory.[38] This view holds that when the United States moved away from the gold standard in 1933, it went bankrupt.[39] As a result, the federal government used its citizens to secure the value of the dollar for international trade. [40] To accomplish this scheme, the government established secret United States Treasury Department accounts for each citizen, known as strawman accounts, to serve as collateral for the federal currency.[41] These sovereign citizens hold that the government then issued social security numbers and birth certificates as a way of registering citizens for these third-party entities that use their name.[42] These adherents believe that because they have discovered this procedure, they can charge debts to their strawman account by filing a mixture of Internal Revenue Service (IRS)

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32. *See id.*

33. *See id.*

34. *See id.*; BERGER, *supra* note 26, at 3–4. *See, e.g.*, *Stouder*, 2005 WL 2715666, at *2.

35. Crowell, *supra* note 28, at 2. *See, e.g.*, Clarke v. Allen, No. 3:17-CV-00582-MMD-WGC, 2020 WL 3510921, at *2 (D. Nev. June 29, 2020) (concluding that the plaintiff's attempts to divide himself into two legal entities as a result of the Fourteenth Amendment was a legal fiction repeatedly rejected by the courts); United States v. Mitchell, 405 F. Supp. 2d 602, 604–05 (D. Md. 2005) (connecting defendants' assertions that they were "'flesh and blood' men" with other sovereign citizen arguments in the district rooted in the belief that Fourteenth Amendment federal citizenship could be rejected).

36. *See* BELL, *supra* note 22, at 9, 38; Crowell, *supra* note 28, at 2.

37. *See, e.g.*, BELL, *supra* note 22, at 9, 38.

38. *Id.* at 8.

39. *Id.* For an example of a litigant using this argument, see Keybank, N.A. v. Brightly, No. NNHCV166062161S, 2018 WL 4419476, at *3–4 (Conn. Super. Ct. Aug. 29, 2018) (rejecting a civil litigant's "redemptionist theories" after the individual cited Pub. L. No. 73-10, 28 Stat. 31 (1933) as a payment defense).

40. BELL, *supra* note 22, at 8.

41. *Id.*; DOMESTIC TERRORISM OPERATIONS UNIT, *supra* note 16, at 1; McLaughlin v. CitiMortgage, Inc., 726 F. Supp. 2d 201, 209–10 (D. Conn. 2010) (explaining the redemptionist theory).

42. DOMESTIC TERRORISM OPERATIONS UNIT, *supra* note 16, at 6; *McLaughlin*, 726 F. Supp. 2d at 210–11 (observing that defendant's assertion that the name printed on court filings belonged to his "STRAWMAN" indicated his adherence to the sovereign citizen movement).

and Uniform Commercial Code (UCC) forms.[43] They also rely on other fraudulent financing documents, such as illegitimate promissory notes and offset bonds.[44]

The third common branch of sovereign citizens classify as "Moorish."[45] This sect is predominantly Black and tends to be more organized than the other groups.[46] Moorish adherents supplement traditional sovereign views of government illegitimacy with reference to a 1786 treaty between the United States and Morocco.[47] These followers believe that the treaty grants them special privileges as "Moors" and places them beyond the jurisdiction of the United States government.[48] Because of this perceived heritage, these individuals often use fraudulent diplomatic license plates and homemade "world passports"[49] to exercise their self-proclaimed immunity from the laws of the United States.[50] Furthermore, courts note that filings from Moorish sovereign citizens frequently contain references to United Nations documents, the Barbary Treaties, the United States Constitution, the president, self-made quasi-documents, Earth coordinates, and "principalities" and "territories."[51]

These three branches are not all-inclusive,[52] and believers frequently combine elements of each,[53] but sovereign citizens across the spectrum rely on similar tactics and "pseudo-legal" arguments in their encounters with courts and other government entities.[54] They often file voluminous paperwork with

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43. DOMESTIC TERRORISM OPERATIONS UNIT, *supra* note 16, at 1. For an example of common "redemptionist" legal arguments, see Monroe v. Beard, 536 F.3d 198, 203 n.4 (3d Cir. 2008) (detailing a publication circulating in federal prisons titled *Cracking the Code* that advocated for the abuse of UCC filings to free inmates' respective "strawman" accounts).

44. DOMESTIC TERRORISM OPERATIONS UNIT, *supra* note 16, at 6.

45. ANTI-DEFAMATION LEAGUE, *supra* note 5, at 9.

46. *See id.*

47. *Id.*

48. *See* Bey v. Bray, No. 4:22-CV-933-SDJ-KPJ, 2023 WL 5987393, at *3 (E.D. Tex. Aug. 1, 2023) (referencing plaintiff's assertion he was a "True Al Moroccan Noble Indigenes of the Land" not bound by United States Laws as a result of the "The Treaty of Peace and Friendship Between the United States and Morocco-Seventeen Eighty-Seven"); Bey v. State, 847 F.3d 559, 559–60 (7th Cir. 2017) (rejecting defendant's argument that he was an "Aboriginal Indigenous Moorish-American" that could not be taxed in Indiana).

49. Murakush Caliphate of Amexem Inc. v. New Jersey, 790 F. Supp. 2d 241, 245 (D.N.J. 2011).

50. *See id.*; ANTI-DEFAMATION LEAGUE, *supra* note 5, at 9.

51. *Murakush Caliphate*, 790 F. Supp. 2d at 249.

52. *See* Crowell, *supra* note 28, at 3.

53. *See, e.g.*, *Murakush Caliphate*, 790 F. Supp. 2d at 242 (discussing interplay between the Moorish and redemptionist movements); Mason v. Anderson, No. CV H-15-2952, 2016 WL 4398680, at *2 (S.D. Tex. Aug. 18, 2016) (rejecting plaintiff's references to strawman trusts, bible verses, and the Fourteenth Amendment of the Constitution).

54. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 4; BELL, *supra* note 22, at 8.

groundless references to common law,[55] the Bible,[56] the United States Constitution,[57] Supreme Court decisions,[58] and foreign treaties[59] as binding authority.[60] Furthermore, law enforcement and government staff recognize sovereign citizens by their use of capital letters and unnecessary colons when writing their names, unusual copyrights, notaries for documents when not required, and phrases such as "accepted for value" or "SLS,"[61] among other idiosyncrasies.[62] Finally, these individuals routinely refuse to pay taxes or obtain or show government identification forms and permits.[63] The most extreme among them engage in varying levels of sabotage against the government, including violence against law enforcement.[64]

B. Sovereign Citizens: Who Are the Believers?

Rather than making it inaccessible, the movement's amorphous organizational structure and unorthodox beliefs, combined with the growth of the internet, drive its expansion.[65] In 1976, the predecessor movement, Posse Comitatus, reached an estimated 12,000 to 50,000 members across twenty-three states.[66] Today, there are between 300,000[67] and 400,000 sovereign citizens spread across the country.[68]

Furthermore, the movement's flexibility allows it to transcend ethnic lines.[69] Although the first waves of sovereign citizens were predominantly white, the Anti-Defamation League now considers the movement the most multicultural

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55. Wolshlager v. Gast, No. 1:19-CV-293, 2019 WL 2250752, at *1 (W.D. Mich. May 2, 2019) (referencing plaintiff's complaint that he was a "SOVEREIGN, COMMON LAW CITIZEN" with the right to travel).

56. *In re* Marcantel, No. CV 23-180-BAJ-EWD, 2023 WL 3190435, at *1 n.6 (M.D. La. Apr. 3, 2023) (referring to Bible quotes in a filing).

57. Wilson v. Ally, No. CV 3:23-5151-SAL-SVH, 2023 WL 11694112, at *5 (D.S.C. Oct. 26, 2023) (holding that a sovereign citizen's general invocation of the Constitution was insufficient to state a claim).

58. Perkins v. Ivey, 772 F. App'x 245, 247 (5th Cir. 2019) (rejecting a sovereign citizen's citation of Lozman v. City of Riviera Beach, 568 U.S. 115 (2013), which he used to assert that he was not operating a "vessel" and was thus immune from laws governing vehicles).

59. *In re* Mooreese El, No. 3:21-MC-3-BJB, 2021 WL 4594666, at *1 (W.D. Ky. Oct. 6, 2021) (commenting on the trend of sovereign citizens to refer to eighteenth-century treaties).

60. *See* NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 4; BELL, *supra* note 22, at 8.

61. "Sovereign Living Soul." DOMESTIC TERRORISM OPERATIONS UNIT, *supra* note 16, at 2.

62. *Id.*

63. *Sovereign Citizens Movement*, S. POVERTY L. CTR. (2023), https://www.splcenter.org/fighting-hate/extremist-files/ideology/sovereign-citizens-movement [https://perma.cc/T4GK-Q3ZS].

64. *SEE* SARTESCHI, *SUPRA* NOTE 19, AT 1.

65. BELL, *supra* note 22, at 53–54.

66. JAMES RIDGEWAY, BLOOD IN THE FACE 133 (2d ed. 1995).

67. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 4.

68. ANTI-DEFAMATION LEAGUE, *supra* note 5, at 21.

69. BELL, *supra* note 22, at 38.

among the American far right.[70] Because sovereign citizens unite over their belief that the United States government is illegitimate, they welcome all individuals who share this understanding, regardless of their background.[71] As a result, there are now rapidly growing numbers of Black, Hispanic, and Hawaiian adherents.[72]

Even within these diverse populations, the movement does not confine itself to disadvantaged or traditionally vulnerable populations. Despite their eccentric practices, recent studies show that most sovereign citizens are not delusional or mentally ill.[73] Instead, the ideology flourishes across the spectrum of Americans who are distrustful of the United States government.[74] Perceived mistreatment by elected officials and the disinformation that spread during the COVID-19 pandemic and recent presidential elections spurred the group's recent growth.[75] Whereas the original sovereigns were traditionally older, white, and from rural regions of the country, a growing number of young men and women of various backgrounds are now joining the ranks.[76] Many of these individuals are more affluent than their predecessors.[77]

Finally, prison inmates comprise the largest body of believers. Since the 1990s, sovereign citizens behind bars have spread their message to other incarcerated individuals.[78] These populations are the most vulnerable to sovereign ideals because individuals either deem they have nothing to lose by trying the tactics or are eager to believe that the paperwork will set them free.[79] Even if those prospects are unappealing, prisoners recognize the filings as an opportunity to harass those who arrested and sentenced them.[80] This practice is now notorious, so much so that in 2022 the Indiana Court of Appeals classified the sovereign citizen movement as a "prison gang" in *Parks v. State*.[81]

C. Paper Terrorism and the Weaponization of Liens

Beyond their shared belief in government illegitimacy, sovereign citizens engage in a common scheme of "paper terrorism."[82] Paper terrorism is "the use

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70. ANTI-DEFAMATION LEAGUE, *supra* note 5, at 10.

71. BELL, *supra* note 22, at 18.

72. *Id.* at 38.

73. Sarteschi, *supra* note 19, at 1, 9.

74. *See* Rachel Goldwasser, *New Recruits: Sovereign Citizenship Takes Hold Among Younger, Affluent, Female Communities*, S. POVERTY L. CTR. (June 4, 2024), https://www.splcenter.org/year-hate-extremism-2023/new-recruits [https://perma.cc/6JVR-MGSQ].

75. *See id.*

76. *See id.*; ANTI-DEFAMATION LEAGUE, *supra* note 5, at 9.

77. Goldwasser, *supra* note 74.

78. ANTI-DEFAMATION LEAGUE, *supra* note 5, at 25.

79. *Id.*

80. *See, e.g.*, United States v. Neal, 776 F.3d 645 (9th Cir. 2015).

81. Parks v. State, No. 21A-MI-1320, 2022 WL 288167, at *3 (Ind. Ct. App. Feb. 1, 2022), *transfer denied sub nom.*, Warren Parks v. State, 188 N.E.3d 846 (Ind. 2022).

82. ANTI-DEFAMATION LEAGUE, *supra* note 5, at 11–12.

of bogus legal documents and filings, or the misuse of legitimate documents and filings . . . to harass, intimidate, and retaliate against . . . perceived enemies."[83] Although the term is broad enough to include IRS and other official filings intended to overwhelm government offices or to "free" the sovereign citizen from government control, fraudulent liens are the most popular tactic since the 1970s.[84]

Sovereign citizens record liens on property to cloud title and inconvenience the recipient rather than secure a legally enforceable debt.[85] When a lien is legitimate, it is a property right.[86] Traditionally, a creditor files a lien to establish his interest in a debtor's property arising from law or contract.[87] That interest may be perfected and valid, or "merely claimed."[88] Similarly, encumbrances are claims of liability that attach to property.[89] The legal authority underlying these property claims can be statutory,[90] derive from the common law,[91] or arise from a binding agreement.[92] Those who wish to file[93] a lien in Indiana may record a Claim of Lien Affidavit or Affidavit of Lien with a county recorder or rely on a

83. *Id.* at 11.

84. *Id.* at 11–12.

85. *Id.* at 12.

86. United States v. Reed, 668 F.3d 978, 982 (8th Cir. 2012).

87. *Id.* at 983.

88. *Id.* at 982.

89. *Id.*

90. Statutory claims tend to be non-consensual, meaning that the debtor does not need to agree to the use of his property as collateral for the interest to be binding. Mark Williams, *Different types of liens provide creditors with different rights*, WOLTERS KLUWER (Feb. 26, 2024), https://www.wolterskluwer.com/en/expert-insights/different-lien-types-provide-creditors-with-different-rights#:~:text=Statutory%20liens%20arise%20by%20operation%20of%20law&text=In%20certain%20circumstances%2C%20creditors%20obtain,Mechanic's%20liens [https://perma.cc/8URA-CYZ4]. In Indiana, non-consensual statutory grounds for claiming an interest in real property include mechanic's liens, IND. CODE § 32-28-3-1 (2024), consumer loans and mortgages, IND. CODE § 32-28-3-2 (2024), judgment liens, IND. CODE § 34-55-9-2 (2024), and tax liens, IND. CODE § 6-1.1-22-13 (2024). For a definition of a non-consensual mechanic's lien, see Serv. Steel Warehouse Co., L.P. v. U.S. Steel Corp., 182 N.E.3d 840, 844 (Ind. 2022) ("[A] supplier that furnished materials **for** the erection of a building . . . can have a lien on that building and the accompanying land.").

91. IND. CODE § 32-28-13-1 (2024). To create a common law lien in Indiana, there must be a debt, and the creditor must possess the debtor's collateral. Ball State Univ. v. Irons, 27 N.E.3d 717, 721 (Ind. 2015).

92. IND. CODE § 26-1-9.1-109 (2024) (enumerating property interests that may arise from agreement). The statute includes secured transactions that create a security interest by contract, sale, or consignment. *Id.* Apart from agricultural liens, these agreements must be consensual, meaning that the debtor needs to agree to use his personal property as collateral. *Id.* Such agreements do not extend to a debtor's real property. *Id.* For an example of these principles, see Merrillville 2548, Inc. v. BMO Harris Bank N.A., 39 N.E.3d 382, 393 (Ind. Ct. App. 2015) (holding that the trial court erred in applying § 26-1-9.1-109 to the creation of a contractual leasehold mortgage, which is a lien on real property, because the UCC governs only security interests in personal property).

93. Filing a purported lien does not create an enforceable lien or encumbrance, but the recording is necessary to perfect a legitimate legal interest. United States v. Reed, 668 F.3d 978, 982–83 (8th Cir. 2012).

UCC submission.[94] This latter option, a UCC filing, is by far the most common because states nationwide have similar formatting standards, and the documentation is widely available.[95]

Sovereign citizens taking advantage of the UCC's infrastructure rely on a UCC-1, also known as a financing statement.[96] This form is a lien-identifying document on which a filer provides the names of the debtor and creditor, a return address, and a description of the collateral property.[97] Because the submission standards for financing statements require little specificity of the alleged collateral, sovereign citizens usually include either the address and legal description of a purported debtor's residence, or the phrase "all personal and real property."[98] If these elements are present, the statement is "sufficient," and the recorder generally must file it.[99] These forms do not require the debtor's signature, which allows filers to submit these documents unilaterally and without the victim's consent.[100]

Sovereign citizens rely on these liens because filing them is cheap,[101] easy, and unrestricted.[102] Typical statements claim enormous debts, ranging into the millions of dollars, that bear no relation to reality.[103] For example, in 2018, a sovereign citizen named Timothy Pate filed a series of liens in Georgia against

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94. *See* David J. Cook, *Addressing the Problem of Bogus Liens*, L.A. LAW., Dec. 2013, at 12, 12.

95. *See* NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 3.

96. *Reed*, 668 F.3d at 983.

97. *Id.*; Cook, *supra* note 94, at 12.

98. *Reed*, 668 F.3d at 983; Cook, *supra* note 94, at 12.

99. *Reed*, 668 F.3d at 983.

100. Cook, *supra* note 94, at 12.

101. The nationwide average filing cost is between $10 and $25 per UCC filing. Wolters Kluwer Compliance Solution Staff, *What Is a UCC Filing? Learn the Basics*, WOLTERS KLUWER (Aug. 26, 2022), https://www.wolterskluwer.com/en/expert-insights/what-is-a-ucc-filing#:~:text=With%20the%20myriad%20of%20jurisdictions,unnecessary%20or%20unwanted%20budget%20surprises [https://perma.cc/Q3UR-UAKH]. In Indiana, filing a financing statement (UCC-1) with the Secretary of State costs just less than $15. *Fee Calculator*, INBIZ, https://inbiz.in.gov/Inbiz/FeeCalculator/Index [https://perma.cc/5FTF-6YHN] (last visited Dec. 1, 2024). The standard cost for filing a UCC Financing Statement or other lien in county recording offices in Indiana is $25. IND. CODE § 36-2-7-10(c)(1) (2024).

102. *See* Barrows, *supra* note 25, at 926–27.

103. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 5. For examples of extravagant claims, see Hout v. Off. of the Governor, 538 P.3d 702, 703 (Alaska 2023) (detailing a fraudulent UCC Financing Statement claiming Alaska's Governor owed a sovereign citizen $250 million in gold dollars); United States v. Croteau, 819 F.3d 1293, 1299 (11th Cir. 2016) (adding that the sovereign citizen defendant filed several fraudulent liens alleging debts up to $300 million); State v. Wilson, No. 106862, 2019 WL 259456, at *1 (Ohio Ct. App. Jan. 17, 2019) (referring to defendant's $10,000,000 lien on a clerk of courts); United States v. Phillips, No. 1:12-CR-872, 2014 WL 4628588, at *1 (N.D. Ill. Sep. 16, 2014) (alleging a sovereign citizen filed twelve liens, each claiming $100 billion debts, against officers and employees of the United States); United States v. James, No. 5:14-CV-387-OC-30PRL, 2015 WL 7351394, at *2–5 (M.D. Fla. Nov. 20, 2015) (discussing defendant sovereign citizen's seven UCC Financing Statements alleging $100 million debts and two additional statements alleging $12.4 billion debts against federal judges and prosecutors).

several United States magistrate judges, the former United States Treasury Secretary, the IRS commissioner, the Treasury inspector general, a federal bankruptcy judge, the United States Bankruptcy clerk of the court, and others for values ranging between $15 million and $100 million.[104] Although filers like Pate cannot collect these sums because there is no legally recognized debt to secure, these liens still enter the public record and damage the recipient in several ways.[105]

First, these attacks cost the victim time and money. Whereas the perpetrator can submit these liens with ease, recipients bear the heavier burden of seeking judicial action to strike the filing from the record.[106] This legal avenue generally requires hiring and paying an attorney.[107] The National Association of Secretaries of State acknowledges that this process can cost the average individual several thousands of dollars and take months or years.[108] Additionally, by the time the supposed debtor can remove the lien, the recording will have already harmed his credit score.[109] Resolving this damage adds to the financial burden and takes even longer.[110]

Second, fraudulent liens cause added inconvenience and embarrassment to the alleged debtors who fail to receive notice of the filing. Often, recipients do not discover these liens until they attempt to sell their home or apply for credit.[111] It is at this time that prospective lenders and creditors detect the presence of the alleged encumbrances while searching the UCC and other public records prior to dealing.[112] The presence of the lien may then "impede, delay, or increase the cost of a credit transaction, the refinancing of a home, or a loan to buy a home."[113] In extreme cases, these filings cause deals to falter and result in litigation between parties.[114]

Finally, these practices tend to intimidate victims and prevent responsive action. When individuals discover a retaliatory lien, they often fear they will provoke the attacker into making additional filings.[115] This threat of future harassment dissuades many recipients from initiating the litigation necessary to

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104. Press Release, U.S. Att'y Off., S. Dist. of Ga., 'Sovereign Citizen' Who Targeted Federal Judges and Government Officials Sentenced to 25 Years in Prison (Jan. 28, 2020), https://www.justice.gov/usao-sdga/pr/sovereign-citizen-who-targeted-federal-judges-and-government-officials-sentenced-25 [https://perma.cc/YXD2-ZVP2].

105. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 5.

106. Monroe v. Beard, 536 F.3d 198, 209 (3d Cir. 2008).

107. *Id.*

108. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 3.

109. *Monroe*, 536 F.3d at 209.

110. *Id.*

111. Michael Mastrony, *Common-Sense Responses to Radical Practices: Stifling Sovereign Citizens in Connecticut*, 48 CONN. L. REV. 1013, 1027 (2016).

112. *Id.*

113. Cook, *supra* note 94, at 12.

114. *Id.*

115. *Id.*

punish filers.[116]

II. INDIANA'S APPROACH TO FRAUDULENT FILINGS

A. Pre-Filing Administrative Remedies

The National Association of Secretaries of State recommends that states adopt pre-filing administrative remedies as part of a comprehensive plan to combat sovereign citizens' bogus filings.[117] The Association defines pre-filing administrative remedies as any grant of discretionary power allowing the Secretary of State's office to refuse to file false or fraudulent UCC records.[118] When recorders reject fraudulent financial statements prior to entry, it saves "time and resources often required to remove the filing from the public record."[119] It also prevents the lingering effects that a bogus filing will have on the victim since filings cost money to remove and can cause immediate damage to credit.[120]

Indiana adopted this pre-filing administrative remedy in 2013 when it enacted Indiana Code section 26-1-9.1-901.[121] This statute permits the Secretary of State to reject a financing statement where there is reasonable cause to believe it is materially false, forged, fraudulent, or intended to harass.[122] This statute is helpful, but contains several flaws that hinder it from slowing and preventing bogus filings.

First, those responsible for vetting lien documents are unprepared and ill-equipped for the task. Pre-filing remedies require active review of all financial statements submitted to the office, both in person and electronically.[123] Filing offices have neither the staff nor the experience in the relevant law to examine each document and adjudicate whether the claimed debt exists.[124] Even if they were capable, such efforts would undermine filing efficiency and lead to backlog because staff would need to scrutinize every claim.[125] Furthermore, such an intensive process risks denying lawful security interests.[126] If recording offices have broad discretion, they may mistakenly remove or refuse to file legitimate liens by bona fide creditors.[127] This is dangerous because a refusal to

116. *Id.*
117. *See* NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 8.
118. *Id.*
119. *Id.*
120. *Id.*
121. IND. CODE § 26-1-9.1-901 (2024) (effective Apr. 24, 2013).
122. *Id.*
123. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 8.
124. Harry C. Sigman, *Improvements (?) to the UCC Article 9 Filing System,* 46 GONZ. L. REV. 457, 490 (2011).
125. *See id.* at 488–91.
126. Barrows, *supra* note 25, at 926–27.
127. *See id.* at 927.

file a valid financing statement does not render the underlying lien void.[128] Instead, that valid lien becomes "hidden" from those searching the record, but remains enforceable against the property owner.[129] This can cloud title and cause problems in bankruptcy.[130]

Second, section 26-1-9.1-901 only grants refusal authority to the Secretary of State. County recorders, who also file UCC financing statements and other lien-identifying documents, do not have the same discretion.[131] Indiana Code section 26-1-9.1-520 requires that Indiana recording offices accept all financing documents except those that lack the correct filing fee, are illegible, do not abide by stationery requirements, or fail to identify the debtor or the property affected.[132] This acceptance of all correctly filed documents, no matter how illegitimate, constitutes an "open drawer policy" that is incapable of slowing fraudulent behavior.[133] Even the Secretary of State, with authority to review documents before filing, has no duty to do so.[134] Therefore, Indiana law permits only one office the discretion to reject fraudulent liens, and provides no incentive to exercise it.

Finally, refusing to file a statement does nothing to stop a filer from trying again.[135] Recording offices must notify any person who submitted a rejected record of the "fact of and reason for the refusal."[136] Therefore, even if a sovereign citizen makes an error for which the filing office can refuse the statement, the office will put him on notice of his mistake, and he is free to file again. The only limitation on filing is one's willingness to pay the fee.[137] Therefore, pre-filing administrative remedies alone provide no incentive for sovereign citizens to stop filing, and many sovereign citizens become "serial" filers.[138]

Although pre-filing administrative remedies are an effective tool for rejecting illegitimate financial statements, Indiana only grants this discretion to a single office. Furthermore, even if county filers had the same authority to refuse statements, this power would be unwieldy and impractical for their offices, which lack the resources and practical knowledge to review every document for accuracy. This responsibility also threatens to put legitimate liens at risk.

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128. IND. CODE § 26-1-9.1-520(c) (2024).
129. *See* Barrows, *supra* note 25, at 927 n.155.
130. IND. CODE § 26-1-9.1-520(c); *See* Barrows, *supra* note 25, at 927 n.155.
131. IND. CODE § 26-1-9.1-520; IND. CODE § 26-1-9.1-516(b) (2024).
132. IND. CODE § 26-1-9.1-520; IND. CODE § 26-1-9.1-516(b).
133. Cook, *supra* note 94, at 13.
134. IND. CODE § 26-1-9.1-901(c) (2024).
135. Cook, *supra* note 94, at 13.
136. IND. CODE § 26-1-9.1-520(b).
137. *See* Cook, *supra* note 94, at 12.
138. *Id.* at 13.

B. Post-Filing Expedited Judicial Relief

In concert with pre-filing administrative remedies, the National Association of Secretaries of State also recommends the adoption of post-filing expedited judicial relief procedures to counter abuse of filing systems by sovereign citizens.[139] It defines post-filing judicial relief as any measure that "authorizes corrective action on an existing financing statement through an accelerated judicial review process."[140] Such protections are necessary because victims cannot remove UCC filings on their own, and expungement requires an official court order terminating[141] or purging[142] the record.[143] These recommended post-filing systems provide a quicker, cheaper, and more streamlined approach to discharging fraudulent filings because they simplify the proceedings and reduce the fees traditionally associated with bringing the legal action.[144]

Indiana codified its post-filing corrective procedures in Indiana Code section 26-1-9.1-902, which authorizes alleged debtors to file a motion for judicial review of any UCC-1 filing.[145] If a judge finds the financing statement fraudulent, he may declare the filing ineffective and terminate or purge the document from the record.[146] The court may also award filing fees, attorney's fees, administrative expenses, and other reasonable costs at its discretion.[147]

Although section 26-1-9.1-902 streamlines the removal process, the burden of combatting illegitimate filings falls squarely on the victim. The alleged debtor still must initiate the court action, which will generally require hiring legal counsel to maneuver the process.[148] Even if victims manage to navigate this procedure alone, they will exhaust time and money filing the appropriate paperwork and paying filing fees.[149]

Additionally, this post-filing relief fails to address the core harm that fraudulent filings cause: inconvenience in commercial transactions. Because individuals do not generally discover these bogus liens until they engage in

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139. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 9.

140. *Id.*

141. Termination may render a filing unenforceable, but the document remains on the record. PAUL HODNEFIELD, CORP. SERV. CO., WHITE PAPER: UCC TERMINATIONS AND THE DILIGENT SEARCHER 1 (2015), https://www.cscglobal.com/cscglobal/pdfs/WP-UCC-Terminations-and-Searching.pdf [https://perma.cc/ZA7L-J65U].

142. Purging involves the actual removal of the document from the filing index. *What's the difference between a "lapsed" and "purged" UCC filing?*, FIRST CORP. SOLS.: RISK MGMT. BLOG, https://ficoso.com/ucc/whats-the-difference-between-a-lapsed-and-purged-ucc-filing/ [https://perma.cc/NM2Y-9DYA] (last visited Feb. 17, 2025).

143. Cook, *supra* note 94, at 13; IND. CODE § 26-1-9.1-902(3) (2024).

144. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 9.

145. IND. CODE § 26-1-9.1-902(a).

146. IND. CODE § 26-1-9.1-902(b)(2)–(3).

147. IND. CODE § 26-1-9.1-902(b)(1).

148. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 10.

149. *Id.* at 3.

activity that relates to their credit, this post-filing removal process most often occurs at or after the time the filing causes harm.[150] Even with expedited relief, the filing will delay potential financial and real estate dealings and damage the victim's credit score in the time prior to judicial action.[151]

Finally, the removal of the financing statement does not automatically impose financial penalties on the filer.[152] Instead, the court has discretion over whether to award fines and fees to the prevailing party.[153] Because Indiana does not mandate any financial penalties for engaging in this fraudulent activity, the expedited relief does not necessarily trigger liability for the perpetrator.[154] As a result, attackers can file damaging documentation without any assurance that they will need to repay the victim for any harm they cause.

Indiana's post-filing expedited judicial relief procedure provides a necessary mechanism for remedying the harm of fraudulent filings, but it does little to deter the conduct. The victim still bears the cost of initiating the removal process and fixing the damage the recorded liens caused. And he does so without the promise that the filer will compensate him for his efforts. Therefore, sovereign citizens can rely on their purported liens costing their victim time, money, and convenience without any guarantee that a court will impose fines on them in the process.

C. Civil Liability

The National Association of Secretaries of State also recommends civil penalties.[155] The Association acknowledges that many states impose court costs, attorney's fees, and other related expenses on harassment filers.[156] Specifically, the body highlights the approaches of West Virginia and Georgia, which permit fines of $500 and up to $10,000, respectively, for each fraudulent filing.[157] Unlike the administrative and judicial removal remedies, the threat of monetary loss disincentivizes future fraudulent filings by imposing costs on the offender.[158]

Indiana recently adopted these UCC recommendations in two separate measures. First, where an alleged debtor shows a financing statement to be fraudulent, the court may award filing fees, attorney's fees, administrative fees, and other reasonable costs.[159] Second, in 2022, the Indiana General Assembly added financial penalties for failing to comply with proper filing deadlines and

150. Mastrony, *supra* note 111, at 1027.
151. *See, e.g.*, Monroe v. Beard, 536 F.3d 198, 209 (3d Cir. 2008).
152. *See* IND. CODE § 26-1-9.1-902(b) (stating the court "may" award costs and fees).
153. *See id.*
154. *See id.*
155. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 10.
156. *Id.*
157. *Id.*
158. *Id.*
159. IND. CODE § 26-1-9.1-902 (effective Apr. 24, 2013).

other statutory guidelines that will result in a $500 fine for each deficiency.[160]

Although monetary damages are necessary in Indiana's comprehensive approach to combatting fraudulent liens, they are not enough to outweigh the advantages of this paper terrorism tactic. First, the victim still generally needs to spend his time and money to hire an attorney to pursue the action.[161] Second, these financial penalties extend only to UCC filings and do not protect against other claimed liens, such as a mechanic's lien.[162] Finally, sovereign citizens that engage in this conduct are often indigent or unwilling to pay judgments against them.[163] Additionally, many flee the jurisdiction when they discover pending litigation.[164] Together, these shortcomings require that the victim proactively pursue damages through the courts without a reasonable guarantee that he will be able to collect the costs from the perpetrator.[165] Even with this threat of civil judgment, the risks associated with fraudulent filing do not outweigh the benefits of the document's harassing effect.

III. CRIMINAL LIABILITY

A. The Case for Criminal Punishment

Threat of punishment provides the necessary deterrent against sovereign citizens seeking to harass public officials. Generally, legislatures seek to discourage behavior by employing criminal sanctions.[166] Unlike civil penalties, which require the recipients of these retaliatory filings to pursue judicial remedies, penal laws allow lawmakers to set statewide standards for government engagement with these troublesome litigants.[167] Where these measures exist, potential filers face not only the risk that their victim might sue them for monetary damages but also the threat that the State will prosecute them.

The drafters of the UCC, the National Association of Secretaries of State, and legislatures across the country recognize that criminal liability is necessary to combat harassing lien filings. The official commentary to UCC section 9-518, concerning wrongfully filed records, states that the mere removal of filings is insufficient to combat abuses of the filing systems and recommends states implement their own criminal penalties.[168] Following the dramatic expansion of the sovereign citizen movement in the early 2000s, the National Association of Secretaries of State acknowledged, "fraudulent filings had become so

160. IND. CODE § 26-1-9.1-625 (2024) (effective July 1, 2022).

161. Cook, *supra* note 94, at 13.

162. *See* IND. CODE § 26-1-9.1-902; IND. CODE § 26-1-9.1-625 (applying fines only to violations of Indiana's codification of the UCC).

163. Cook, *supra* note 94, at 13.

164. *Id.*

165. *See* Mastrony, *supra* note 111, at 1030.

166. Barrows, *supra* note 25, at 932.

167. *Id.*

168. U.C.C. § 9-518 cmt. 3 (A.L.I. & UNIF. L. COMM'N 2023).

widespread and prolific, that new approaches were needed."[169] As a result, that Association adopted the UCC drafters' recommendation for criminal penalties and advocated for laws making it a felony to file a financing statement with the intent to harass another.[170]

Finally, acknowledging the threat of the sovereign citizen movement and respecting these professional recommendations, thirty-seven states,[171] the District of Columbia,[172] and the federal government now recognize the value of criminal sanctions in deterring fraudulent lien filings.[173] All thirty-nine of these jurisdictions prosecute individuals for harassment filings that claim to encumber the property of government officials.[174] Among these are three of Indiana's four neighbors: Kentucky,[175] Michigan,[176] and Illinois.[177]

B. Model Approaches

Although jurisdictions across the country recognize the need for criminal sanctions for bogus filings, they differ widely in their approaches. Lawmakers have adopted different penalties and punishment schemes,[178] scienter requirements,[179] and protected classes.[180] The laws also apply to distinct

169. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 7.

170. *Id.*

171. *See* statutes cited *supra* note 9.

172. D.C. CODE ANN. § 50-1215 (West 2024).

173. 18 U.S.C. § 1521.

174. *See generally* statutes cited *supra* note 9 (protecting public officials explicitly by identifying them as a protected class, such as Illinois's approach, 720 ILL. COMP. STAT. 5/32-4f (2024), or implicitly by applying blanket prohibitions against fraudulent filings, such as Kentucky's approach, KY. REV. STAT. ANN. § 434.155 (West 2024)).

175. KY. REV. STAT. ANN. § 434.155.

176. MICH. COMP. LAWS § 440.9501 (2024).

177. 720 ILL. COMP. STAT. 5/32-4f.

178. *Compare* ARK. CODE ANN. § 5-37-215(c)(1) (West 2024) (rendering the first fraudulent filing a Class A misdemeanor, punishable by up to a year in prison), *and* WYO. STAT. ANN. § 29-1-601(c) (West 2024) (making fraudulent filings against public officials or employees a misdemeanor punishable by up to six months in prison and providing no enhancements for subsequent violations), *with* N.H. REV. STAT. ANN. § 478:42(V) (2024) (considering the first fraudulent lien a class B felony, punishable by up to seven years in prison), *and* FLA. STAT. § 817.535(2)(a) (2024) (holding that the first fraudulent filing offense is a felony of the third degree, punishable by up to five years in prison, and enhancing the felony level with each subsequent violation).

179. *Compare* ALASKA STAT. ANN. § 11.46.560(a)(1) (West 2024) (implementing a "reckless" standard), *with* ARIZ. REV. STAT. ANN. § 33-420(E) (2024) (requiring a "knowing" mindset), *and* D.C. CODE ANN. § 50-1215 (West 2024) (providing that a defendant must make a false lien statement "intentionally").

180. *Compare* 18 U.S.C. § 1521 (sanctioning only filings made against federal employees), *with* N.H. REV. STAT. ANN. § 478:42(V) (criminalizing all fraudulent filings).

filings[181] and are triggered at different levels of completion.[182] Specifically, this paper discusses the approaches of the federal government,[183] Florida,[184] Nebraska,[185] and Tennessee.[186]

Important to the discussion of these state statutes is the fact that fraudulent lien cases rarely make it to an appellate court.[187] One explanation is that many sovereign citizens represent themselves pro se and either do not appeal trial court decisions or they cannot perfect the paperwork necessary to file an appeal.[188] Additionally, courts consider many arguments so clearly frivolous that they dismiss them offhand without serious explanation.[189] Because of this lack of serious legal challenges, many courts have not had the opportunity to interpret these statutes. Therefore, analysis of these provisions occasionally requires reliance on the plain statutory text and reference to similar language found elsewhere.

1. Federal Statute.—Starting with the federal approach, Congress enacted 18 U.S.C. § 1521 as part of the Court Security Act of 2007.[190] The statute balances criminalizing a broad range of fraudulent conduct while simultaneously limiting its reach to activities seeking to harm federal employees. Generally, the law makes it illegal for anyone to attempt to file a retaliatory lien against the property of a federal employee "knowing or having

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181. *Compare* CAL. PENAL CODE § 115 (West 2024) (criminalizing the submission of any false or forged instrument) *and* ALASKA STAT. ANN. § 11.46.560 (criminalizing any false lien document), *with* ARK. CODE ANN. § 5-37-215(c)(1) (criminalizing only fraudulent submissions under the UCC).

182. *Compare* TENN. CODE ANN. § 39-17-117 (West 2024) (triggering criminal liability at the preparation stage of a fraudulent lien), *and* FLA. STAT. § 817.535(2)(a) (triggering criminal liability the moment an individual attempts to file), *with* KY. REV. STAT. ANN. § 434.155 (2024) (requiring that the individual successfully file the illegal lien).

183. 18 U.S.C. § 1521.

184. FLA. STAT. § 817.535(2)(a).

185. NEB. REV. STAT. § 28-935 (2024).

186. TENN. CODE ANN. § 39-17-117(a)(1).

187. Crowell, *supra* note 28, at 3.

188. *Id.* For an example of a denied appeal, see Jefferson v. Williams-Mapp, No. W2021-01058-COA-R3-CV, 2022 WL 1836926, at *3–4 (Tenn. Ct. App. June 3, 2022) (concluding that the appellant's brief did not comply with Tennessee's rules for appellate review).

189. *See* Taylor-Bey v. State, 53 N.E.3d 1230 (Ind. Ct. App. 2016) (noting that sovereign citizen arguments denying jurisdiction should be rejected summarily); United States v. Coleman, 871 F.3d 470, 476 (6th Cir. 2017) (compiling cases rejecting frivolous arguments espoused by sovereign citizens and tax protesters).

190. Although the legislative history does not directly mention sovereign citizens, federal agencies have acknowledged that these individuals were the driving cause of the enactment. *See, e.g.*, U.S. DEP'T OF JUST., CRIMINAL TAX MANUAL CHAPTER 27: FALSE RETALIATORY LIENS 1–2 (2015), https://www.justice.gov/d9/pages/attachments/2015/06/09/ctm_chapter_27.pdf [https://perma.cc/7QMH-MV4Q] (concluding that Congress enacted 18 U.S.C. § 1521 in 2007 in response to a growing number of retaliatory filings by sovereign citizens and tax protesters); Jones v. Caruso, 569 F.3d 258, 261 (6th Cir. 2009) (compiling fraudulent lien cases from the early 2000s).

reason to know" it contains false information.[191]

Regarding the prohibited conduct, § 1521 specifically punishes any actor who "files, attempts to file, or conspires to file" a false lien or encumbrance with a Class D felony,[192] punishable by up to ten years in prison and a fine of up to $250,000.[193] By including the attempt or the conspiracy to engage in a fraudulent filing, Congress did not confine the statute to completed acts.[194] Instead, it sought to prevent the harm from occurring, wherever possible.[195] This flexibility allows prosecutors to do two things.

First, the government may pursue individuals whose fraudulent financing statement never entered the public record because it never made it to the recording office, or the office refused to file it. An example of this preemptory prosecution occurred in *United States v. Neal*.[196] There, prison guards inspected mail the appellant, Neal,[197] attempted to send to his mother.[198] Inside a package, the authorities found UCC-1 financing statements identifying prison staffers as alleged debtors, and claiming these employees owed between $5 thousand and $45 million each.[199] The package also included instructions for Neal's mother to file the documents.[200] Although his forms never made it to a recording office, the court upheld Neal's conviction under § 1521, holding that his creation of the forms with the instructions to file them was precisely the type of "conspiring to file" that the statute seeks to prohibit.[201]

Second, this broad "attempts to file" language allows the government to prosecute sovereign citizens who make an error in the filing that renders it victimless. For example, in *United States v. Reed*, the appellant, Reed,[202] filed a $5 million lien against the IRS agent who was pursuing him for tax fraud, but

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191. The Act states, "[w]hoever files, attempts to file, or conspires to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in section 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation, shall be fined under this title or imprisoned for not more than 10 years, or both." 18 U.S.C § 1521.

192. 18 U.S.C. § 3559(a)(4).

193. 18 U.S.C. § 3571.

194. *See* United States v. Neal, 776 F.3d 645, 653 (9th Cir. 2015).

195. *See id.*

196. *Id.*

197. Although the court did not label Neal as a sovereign citizen, they mention that he filed numerous nonsensical motions containing accusations indicative of the movement. For example, Neal alleged that the United States had no jurisdiction because it was a "corporation." *Id.* at 650.

198. *Id.* at 649, 655.

199. *Id.* at 649.

200. *Id.*

201. *Id.* at 653.

202. The court does not explicitly label Reed as a sovereign citizen, but he displays characteristics traditionally associated with the movement. Specifically, Reed refused to pay taxes and alleged that the IRS officials owed him $9 million for violating the copyright he owned on his name. United States v. Reed, 75 F.4th 396, 400 n.1 (4th Cir. 2023).

he used the agent's pseudonym rather than his legal name.[203] Reed tried to argue this mistake rendered him free from liability because the alleged debtor was fictitious.[204] The court refused this argument, reasoning that a filer need only attempt to file the lien against the property of a federal employee specified in 18 U.S.C. § 1114 and that Reed believed he was doing just that when he filed the statement. [205] Section 1521's inclusion of attempt or conspiracy allows authorities to pursue those who engage in fraudulent conduct and does not require them to wait until a filer's conduct harms a victim before the government may sanction him.

In addition to its encompassing filing standards, the law's "knowingly" scienter requirement is broad enough to capture fraudulent activity without criminalizing honest mistakes. In *United States v. Hoffert*, the district court convicted Hoffert[206] under 18 U.S.C. § 1521 after he filed liens against seven federal officials for $8 million each. [207] Hoffert challenged the conviction, claiming the fraudulent lien statute's "knowing or having reason to know" standard was overbroad and could permit the conviction of innocent persons who made errors on lien applications.[208] The Third Circuit Court of Appeals disagreed and held that the statute was constitutional. [209] It reasoned that § 1521's "knowing or having reason to know" of a lien's fraudulence operates under a reasonableness standard. [210] Thus, "having reason to know" puts potential offenders on notice that their exorbitant lien claims, which bear no connection to reality, will be unreasonable and thus criminal.[211]

Furthermore, this reasonableness standard prevents sovereign citizens from raising the defense that they believed their lien was legitimate. In *United States v. Williamson*, the trial court convicted appellant, Williamson, under § 1521 after he recorded liens for $909,067,650 against two IRS agents.[212] Williamson was a tax protester, rather than a sovereign citizen, but he argued on appeal that the trial court should have given a "good-faith" defense instruction.[213] This instruction would require the jury to find a defendant "not guilty" if it concluded that he genuinely believed the liens were legitimate at the time of filing.[214] The appellate court rejected this argument, holding that a genuine belief is irrelevant

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203. *Id.* at 399.

204. *Id.* at 401.

205. *Id.* at 401–02.

206. The court does not refer to Hoffert as a sovereign citizen, but he displays characteristics traditionally associated with the movement. Specifically, he alleged that his incarceration was illegal in the absence of a contract between himself and the United States Incorporation's "subcorporation, PENNSYLVANIA." United States v. Hoffert, 949 F.3d 782, 785 (3d Cir. 2020).

207. *Id.* at 787.

208. *Id.* at 788.

209. *Id.* at 789.

210. *Id.*

211. *Id.*

212. United States v. Williamson, 746 F.3d 987, 989 (10th Cir. 2014).

213. *Id.* at 993.

214. *Id.*

so long as that belief is unreasonable.[215] This reasonableness test considers the subjective understanding of the defendant, but it also recognizes what a reasonable person would infer from the information.[216] Although the court in *Williamson* did not apply this test to the facts of the case, it presumed that no reasonable person would have believed the $909,067,650 in liens against IRS agents in their official capacity was reasonable.[217] Therefore, even sovereign citizens who believe their liens are legitimate are subject to prosecution under federal law.

Thus, this "knowing" mens rea requirement reaches not only intentional efforts to harass officials but also objectively unreasonable conduct. As a result, the government may still prosecute violators who are genuine believers that they are entitled to vast sums of money. This standard is valuable when dealing with sovereign citizens who might trust their lien is accurate or claim that they erred in good faith. Conversely, because this standard considers what a reasonable person would infer from the circumstances, individuals who make an honest error in the value of a legitimate lien do not violate § 1521.

Finally, 18 U.S.C. § 1521 limits its protection to liens filed against federal employees on account of their employment. Specifically, the law forbids filing fraudulent liens against "any officer or employee of the United States or any agency in any branch of the United States Government"[218] "on account of the performance of official duties."[219] This "on account of" language means that the prosecution must prove the filer submitted the bogus financial document against the employee in retaliation for, or as a result of, his employment.[220] Satisfying this element generally only requires showing some relationship between the defendant and the employee.[221] The statute, therefore, does not cover fraudulent liens that are unrelated to an individual's employment with the federal government.

Because of this narrow scope, the United States charged only sixty-three individuals for violating 18 U.S.C. § 1521 between 2009 and 2022.[222] This relatively small number shows that restricting the law's reach to action against federal employees on account of their duties has allowed the government to combat behavior without redirecting vast resources toward enforcement.

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215. *Id.* at 994.

216. *Id.*

217. *See id.*

218. 18 U.S.C. § 1114.

219. 18 U.S.C. § 1521.

220. *See generally* United States v. Pate, 84 F.4th 1196, 1214 (11th Cir. 2023) (Grant, J., dissenting) (arguing that "on account of" means that an earlier act of the government official will serve as the requisite criminal motivation in the context of 18 U.S.C. § 1521); United States v. Reed, 75 F.4th 396, 401 (4th Cir. 2023) (noting that Congress's intention in passing 18 U.S.C. § 1521 was to prevent harassment of federal employees on account of their duties).

221. CRIMINAL TAX MANUAL CHAPTER 27, *supra* note 189, at 8.

222. *Federal Criminal Case Processing Statistics Data Tool*, DEPT. OF JUST. BUREAU OF JUST. STAT., https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-CriminalCodeStats&tab=Criminal CodeStatistics [https://perma.cc/GU6M-AEF9] (last visited Mar. 17, 2025).

Furthermore, despite the infrequency of the charges, the penalties remain stern. The average prison sentence for violators of § 1521 is just over fifty-four months.[223] Therefore, the limited protective scope of 18 U.S.C. § 1521 allows the federal government to enforce the statute both firmly and sparingly.

2. State Statutes.—

a. Florida.—Florida's fraudulent filing approach resembles the federal standard but with broader protection and sterner penalties. It balances this additional breadth by elevating the prosecution's burden to prove the filer's intent. Specifically, Florida Statutes section 817.535(2)(a) makes it a felony of the third degree[224] to submit any false representation of an interest in another's property to a filing office with the intent to harass or defraud.[225]

Beginning with the penalties, Florida follows the National Association of Secretaries of State's recommendation that harassment filings be a felony.[226] Not only does the offense start as a felony of the third degree, but the statutory scheme also scales the penalties upward for repeat offenders.[227] Specifically, section 817.535(2)(b) adds that a second violation against a private citizen will constitute a felony of the second degree.[228] Section 817.535(2)(b)(3) then holds that where the alleged debtor is a public officer or employee, the offense begins as a felony of the second degree, and a subsequent violation will be a felony of the first degree.[229] These increasingly stern punishments serve to deter serial filers who may be unaffected by low-level misdemeanor convictions.

Florida's fraudulent lien statute also expands its reach beyond the federal standard by applying to private citizens. Whereas 18 U.S.C. § 1521 limits its protection to federal employees,[230] Florida can prosecute any individual who attempts to harass another with a false financing statement.[231] Although this extension is helpful, it is not a necessity. It is less common for filers to attack non-governmental actors and introducing such blanket protections places

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223. *Id.* (calculating the mean of the "Prison Determinate Mean" from 2009 to 2022 returns an average of 54.445 months).

224. A felony of the third degree, without habitual offender enhancements, carries a punishment of up to five years in prison, FLA. STAT. § 775.082(3)(e) (2024), and a $5,000 fine. FLA. STAT. § 775.083(1)(c) (2024).

225. Florida law states that "[a] person who files or directs a filer to file, with the intent to defraud or harass another, any instrument containing a materially false, fictitious, or fraudulent statement or representation that purports to affect an owner's interest in the property described in the instrument commits a felony of the third degree." FLA. STAT. § 817.535(2)(a) (2024).

226. *See* NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 7, at 7.

227. FLA. STAT. § 817.535(2)(b).

228. A felony of the second degree, without habitual offender enhancements, carries a punishment of up to fifteen years in prison, FLA. STAT. § 775.082(3)(d), and a $10,000 fine. FLA. STAT. § 775.083(1)(b).

229. A felony of the first degree, without enhancements, carries a punishment of up to 30 years in prison, FLA. STAT. § 775.082(3)(b), and a $10,000 fine. FLA. STAT. § 775.083(1)(b).

230. 18 U.S.C. § 1521; 18 U.S.C. § 1114.

231. FLA. STAT. § 817.535(2)(a).

additional strain on limited public resources.[232]

In order to prevent overreach, Florida balances these strict penalties and broader protection with a higher scienter requirement than the federal law requires. For a prosecutor to secure a conviction for fraudulent filing in Florida, he must prove, beyond a reasonable doubt, that the defendant "had the intent to defraud or harass another" at the time of filing.[233] Although an enormous claim in a financing statement may support a finding of intent to harass, sovereign citizens regularly act with conviction, and they may genuinely believe that the lien secures a valid debt. For example, in *United States v. Hoffert*, Hoffert told the federal marshals questioning him about his claimed liens that he intended for "the marshals to seize and liquidate the property of the lien debtors."[234] Although the federal court found the $8 million value of Hoffert's liens and other circumstantial evidence sufficient to satisfy 18 U.S.C § 1521's "knowing" standard of falsity,[235] Hoffert's genuine belief that the debts were real would complicate an effort to prove guilt under Florida's "intent to defraud or harass" scienter standard.

While Florida's strict and scaling penalties provide a strong deterrent to fraudulent filings and serve to punish those who victimize others with their paper terrorism tactics, these sweeping protections ultimately extend beyond what is necessary to combat the current threat of fraudulent filings by sovereign citizens. The statutory scheme has the effect of drawing authorities and prosecutors into murky waters by allowing civilian debtors to allege that legitimate financing statements are fraudulent and meant to harass. Furthermore, the intentional scienter standard places an overly high a burden on prosecutors dealing with the sovereign citizen movement. These populations are often so convinced of their beliefs that proving intent to defraud will be unnecessarily challenging.

b. Nebraska.—Nebraska's statutory approach resembles Florida and the United States Code, but it employs an even more elaborate scheme to combat fraudulent filings. Specifically, Nebraska's law makes it a Class IV felony[236] to knowingly submit for filing any nonconsensual common-law lien, UCC financing without a bona fide security agreement, or any other document that attempts to harass any individual or obstruct government processes.[237]

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232. *See* Norman M. Powell, *Bogus Filings—Some Legal and Policy Considerations*, 47 U.C.C. L. J. 43 (2017).

233. *In re* Standard Jury Instructions in Crim. Cases–Rep. No. 2016-02, 199 So. 3d 234, 239 (Fla. 2016).

234. United States v. Hoffert, 949 F.3d 782, 787 (3d Cir. 2020).

235. *Id.* at 791.

236. NEB. REV. STAT. § 28-935(2) (2024). In Nebraska, a Class IV felony carries a maximum of 2 years in prison and a $10,000 fine. NEB. REV. STAT. § 28-105(1) (2024).

237. The Nebraska state code states:

The broad enumeration of prohibited conduct in the Nebraska statute criminalizes more conduct than both Florida and the federal government. Whereas the federal statute requires that the bogus filing serve as retaliation against its employees[238] and Florida's law mandates an intent to defraud or harass,[239] Nebraska punishes all fraudulent filings that the filer should have known were illegitimate.[240] It explicitly lists nonconsensual common-law liens and unsecured UCC filings, before including the all-encompassing "any document filed in an attempt to harass" anyone or "obstruct a government operation."[241] In effect, the statute extends to every conceivable fraudulent lien filing regardless of its form or recipient. This flexibility allows the law to react to evolving paper terrorism tactics and not constrain itself to a narrow set of behaviors.

The Nebraska law also preemptively closes loopholes that sovereign citizens might seek to exploit. First, the statute states that a "lack of belief in the jurisdiction or authority of the state or the government of the United States is no defense to prosecution."[242] This is a direct rebuke of the sovereign citizen movement, rejecting this question of jurisdiction before a defendant can raise it. Second, the offense employs the same "knowing or having reason to know" that one is engaging in any of the prohibited filing activities as 18 U.S.C. § 1521. Although there are no appellate cases interpreting the matter, Nebraska will presumably employ a similar standard to the federal government's "reasonable person" approach.[243] This flexibility is essential to combatting sovereign citizens who may claim that they filed the lien with a legitimate belief in the debt.

c. Tennessee.—Tennessee's approach mirrors Nebraska's coverage, but it goes a step further. Rather than enumerating each type of illegal lien filing, the

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(1) A person commits the offense of fraudulently filing a financing statement, lien, or document if the person directly, or through an intermediary, submits for filing or recording in the public record, as defined in section 28-911:

(a) Any document purporting to create a nonconsensual common-law lien, as defined in section 52-1901, knowing or having reason to know that the lien is a nonconsensual common-law lien;

(b) A financing statement pursuant to article 9, Uniform Commercial Code, knowing or having reason to know that the financing statement is not based on a bona fide security agreement or was not authorized or authenticated by the alleged debtor identified in the financing statement or an authorized representative of the alleged debtor; or

(c) Any document filed in an attempt to harass an entity, individual, or public official or obstruct a government operation or judicial proceeding, knowing or having reason to know such document contained false information.

NEB. REV. STAT. § 28-935.

238. 18 U.S.C. § 1521.

239. FLA. STAT. § 817.535(2)(a) (2024).

240. NEB. REV. STAT. § 28-935.

241. *Id.*

242. NEB. REV. STAT. § 28-935(3).

243. *See* United States v. Williamson, 746 F.3d 987, 994 (10th Cir. 2014).

state makes it a Class E felony[244] to knowingly prepare, file, or sign any document with the intent to encumber any real or personal property without a reasonable basis.[245] To prevent abuse of this broad language, the statute also excludes specified populations from its reach.[246]

Unlike most jurisdictions, which require an attempt to file, Tennessee prohibits any effort to prepare a fraudulent lien.[247] This means that an offender would not even need to complete the form or attempt to file. Although the courts of Tennessee have yet to interpret this element directly, they have relied on its language to define the offense.[248] In *State v. Lyons*, the state supreme court differentiated fraudulent filing from its forgery counterpart.[249] Relying on the statute's "prepare, sign, or file" language, the court held that the fraudulent filing offense requires only the intent to encumber another's property and not an "entry on the books" like forgery requires.[250]

Tennessee's statute also prevents over-criminalization by including protections for certain parties assisting in the lien filing process. One example is that the law does not apply to agents who prepare, sign, or file liens in the ordinary course of business.[251] Although other states may presume their fraudulent lien provisions do not apply to these individuals, this explicit exception for filers is relevant. Without this protection, a state risks penalizing recording offices whose duty it is to file these liens. Such an exemption is especially appropriate for officials with an obligation to file every submitted document.

IV. CLOSING THE GAP: A CRIMINALIZING APPROACH IN INDIANA

A. Model Statute

Drawing from the best elements of 18 U.S.C. § 1521, and the approaches of Florida,[252] Nebraska,[253] and Tennessee,[254] Indiana should adopt the following statute:

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244. In Tennessee, a Class E felony carries a prison sentence of between one and six years and a fine of up to $3,000. TENN. CODE ANN. § 40-35-111(b)(5) (West 2024).

245. In Tennessee, "It is an offense for any person to knowingly prepare, sign, or file any lien or other document with the intent to encumber any real or personal property when such person has no reasonable basis or any legal cause to place such lien or encumbrance on such real or personal property." TENN. CODE ANN. § 39-17-117(a)(1) (West 2024).

246. TENN. CODE ANN. § 39-17-117(c).

247. TENN. CODE ANN. § 39-17-117(a)(1).

248. *See* State v. Lyons, 669 S.W.3d 775 (Tenn. 2023).

249. *Id.*

250. *Id.* at 788.

251. TENN. CODE ANN. § 39-17-117(c).

252. FLA. STAT. § 817.535 (2024).

253. NEB. REV. STAT. § 28-935 (2024).

254. TENN. CODE ANN. § 39-17-117.

> (1) A person who knowingly presents for filing or recording in a public record or a private record generally available to the public any false lien or claim relating to any real or personal property or directly affecting contractual relationships of a public officer or employee when such person knows or should have known that the contents or any part of the contents of the instrument are false, groundless, or frivolous commits filing a fraudulent financial statement, a Level 6 felony.
>
> > (a) This section does not apply to a register of deeds or other government employee who acts in the course of his or her official duties and files, enters, or records any instrument relating to title on behalf of another person.
>
> (2) The first subsequent offense of fraudulently filing a financial statement is a Level 5 felony.
>
> (3) The second subsequent offense of fraudulently filing a financial statement is a Level 4 felony.

This statute will do several things. First, the "knowing or should know" scienter requirement follows the federal standard.[255] This mens rea encompasses bogus statements that sovereign citizens file to harass or intimidate and does not defer to the filer's subjective belief. As the court held in *United States v. Williamson*, the "should know" mindset requirement applies a reasonable person standard.[256] Thus, the statute will protect against filings that are unreasonable under the circumstances.[257] This restriction prevents criminalizing honest filing mistakes, while retaining the ability to punish actors who engage in paper terrorism.

Second, the statute applies to the attempt, as well as the successful act of filing a fraudulent lien. This standard allows the state to pursue sovereign citizens and other filers who try to harass officials but make some mistake that prevents a recording office from filing the document. As the Fourth Circuit held in *United States v. Reed*, an error should not protect a filer from liability, nor should the state have to wait until a victim suffers harm to penalize the activity.[258] Still, this "presents for filing" language does not go as far as jurisdictions like Tennessee that punish the preliminary act of creating the fraudulent document.[259] Such a standard would sweep too broadly and risk overburdening law enforcement and endangering filers who make honest errors on drafts of proper paperwork.

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255. *See* 18 U.S.C. § 1521.
256. United States v. Williamson, 746 F.3d 987, 994 (10th Cir. 2014).
257. *Id.*
258. United States v. Reed, 75 F.4th 396 (4th Cir. 2023).
259. TENN. CODE ANN. § 39-17-117(a)(1).

Third, this proposed law applies to filings in any generally available record. Because Indiana Code section 26-1-9.1-901 currently only grants filing discretion to the Secretary of State, public recorders throughout the state must file nearly every financial statement that the public sends them.[260] Because this "open drawer" policy governs all local recording offices, they are most vulnerable to fraudulent statements. Indiana's criminal approach must punish filings in any record viewable by the public.

Fourth, this statute follows the guidance of Florida Statutes section 817.535 and provides for scaling penalties beginning at the felony level. Paper terrorism poses a serious threat to Indiana officials, and those who engage in the practice are not making innocent mistakes. They are partaking in a course of intentional conduct that seeks to undermine legitimate public processes. The threat of a felony conviction and increasing criminal penalties serve as a serious deterrent to those seeking to harass Hoosier officials. When coupled with the state's non-criminal remedies for removing illegitimate filings and imposing financial penalties, Indiana's approach will make the potential cost of filing fraudulent liens greater than the potential benefit of inconveniencing victims. Right now, the allure of paper terrorism outweighs the risks in Indiana.

Fifth, this provision would adopt the sweeping breadth of Nebraska's approach without enumerating each type of improper filing. Instead of referencing common-law liens, UCC financing statements, and other filings, this proposal for Indiana covers "any false lien or claim relating to any real or personal property." Like Tennessee's statute,[261] this language is concise and all-encompassing.

Finally, the statute would only protect public officers and employees. Sovereign citizens focus most of their attacks on government functions, and the corresponding threat to private citizens is low.[262] At the same time, authorities lack the resources to pursue every claim of financing statement fraud.[263] Because the goal of the law is to combat paper terrorism attacks in Indiana, and not to turn prosecutors into the police of public records, it is best to limit the reach of the protected class to those government workers who are most at risk.

CONCLUSION

In the past forty years, sovereign citizens across the United States have leveraged their ability to file fraudulent financial statements under the UCC and the common law to harass public officials.[264] These groups of loosely related anti-government extremists repeatedly engage in schemes of filing fraudulent, or otherwise unenforceable, liens against government officials in attempts to

260. IND. CODE § 26-1-9.1-520 (2024); IND. CODE § 26-1-9.1-516(b) (2024).
261. TENN. CODE ANN. § 39-17-117(a)(1).
262. Sarteschi, *supra* note 19, at 1.
263. *See generally* Powell, *supra* note 232, at 50–51.
264. Colacci, *supra* note 15, at 157.

undermine governmental processes or get revenge on those who arrested or convicted these citizens for other crimes.[265]

This Note examined the ongoing threat sovereign citizens and similar litigants pose to Indiana's courts, law enforcement, and other public officials. It analyzed the state's approach to fraudulent financing documents and discussed the benefits and shortcomings inherent to administrative remedies and financial penalties. Ultimately, this Note holds that the threat of criminal punishment is the only way to deter sovereign citizens from filing fraudulent liens. Because the sovereign citizen threat stretches nationwide, this Note looked to the criminal statutes of Florida, Nebraska, Tennessee, and the federal government. Combining the best elements from each, this Note recommended a model statute that protects public servants. This statute captures those filers who "knowingly" engage in fraudulent conduct but ensures that liability will not spread to those individuals who err in good faith. The law would provide the state with a necessary tool to deter sovereign citizens from harassing public officials and punish those who engage in such activity. The statute's self-constraining nature will allow it to accomplish these aims without introducing sweeping liability that would overburden law enforcement and state courts.

265. *Id.*

MEREDITH V. PENCE: A LESSON IN INDIANA *UN*CONSTITUTIONAL LAW

LAUREN BEATY ZENTZ*

INTRODUCTION

Following Indiana's 2011 General Assembly session, then-Governor Mitch Daniels announced, "social justice has come to Indiana education"[1] after signing the School Scholarship Act into law.[2] Commonly known as the Choice Scholarship Program (CSP), the law was dubbed "the nation's most ambitious voucher program."[3] Shortly after the Act went into effect, the *Meredith* plaintiffs filed suit.[4] The plaintiffs asserted that the CSP violated three provisions of the Indiana Constitution: the Education Clause of Article 8, the Bill of Rights's compelled support provision under Section 4, and another Bill of Rights religious freedom provision in Section 6.[5] The lawsuit culminated around the CSP's payment of public tax dollars to religious institutions engaged in K-12 private education.[6]

The religious private schools received state tax revenues through what is known as a "voucher." Vouchers operate like an individual scholarship and cover a portion of the student's cost to attend a private, tuition-based school.[7] Voucher values are updated yearly, consistent with public school per-pupil allotments, and equal up to 90% of the public school amount.[8] In the CSP's first school year in effect, Indiana disbursed 3,911 vouchers.[9] Enrollments more than doubled in the second year, with 9,139 vouchers disbursed in the 2012–2013

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1. Cory Turner, Eric Weddle, & Peter Balonon-Rosen, *The Promise and Peril of School Vouchers*, WFYI INDIANAPOLIS (May 12, 2017), https://www.wfyi.org/news/articles/the-promise-and-peril-of-school-vouchers [https://perma.cc/B5G7-QEPM].

2. H.E.A. 1003, 117th Gen. Assemb., Reg. Sess. (Ind. 2011).

3. Sean Cavanagh, *Ambitious Voucher Program Signed into Law in Indiana*, EDUC. WK. (May 10, 2011), https://www.edweek.org/policy-politics/ambitious-voucher-program-signed-into-law-in-indiana/2011/05 [https://perma.cc/3A3D-XFKY].

4. Verified Complaint for Declaratory & Injunctive Relief, Meredith v. Daniels, 49D07-1107-PL-025402 (Ind. Super. Ct. July 1, 2011), 2011 WL 13077603 (trial pleading).

5. *Id.* at ¶ 1–2.

6. *Id.*

7. *Indiana Choice Scholarship Program*, EDCHOICE (Oct. 4, 2024), https://www.edchoice.org/school-choice/programs/indiana-choice-scholarship-program/ [https://perma.cc/X9QA-5JBT].

8. *Id.*

9. OFF. OF SCH. FIN., IND. DEP'T EDUC., 2015–2016 CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION & PAYMENT DATA 7 (2016) (including CSP data from 2011 through 2016).

academic year.[10] The legislation capped the number of vouchers available in its first two years at 7,500 and 15,000, respectively.[11] After the total voucher caps expired, vouchers were only limited according to the law's income, residency, and prior public school attendance requirements.[12]

When Governor Daniels signed the CSP into law, he believed the voucher program was "not likely to be a very large phenomenon in Indiana . . . [and] exercised by a meaningful but not an enormous number of [] students."[13] State representatives lauded the program as a method to provide low-income families with the school choice already available for wealthier citizens who could afford to send their children to private schools.[14] The CSP also aimed to improve access to higher quality schooling while saving money since the state only paid up to 90% of the cost it would have paid to educate the student at a public school.[15] The Indiana Department of Education published reports on its website after each academic year, providing the number of voucher recipients, the schools involved, and the demographics of the students enrolled.[16]

Private school voucher programs often call for 'parental choice' and the freedom to choose where a child receives an education, whether by religious, secular, private, or public schools.[17] Choice is not a product of the CSP, as Hoosiers have always had the choice to educate their children in private schools rather than the public system.[18] The CSP only made a parent's choice of private education a *taxpayer* burden rather than a *personal* burden on the parents who elected to exercise the choice based on personal preferences or needs.[19]

This Note argues that the CSP is unconstitutional, and the Indiana Supreme Court wrongly decided the *Meredith v. Pence* case that challenged the voucher program's constitutionality. Part I of the Note outlines the history of school

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10. *Id.*

11. IND. CODE § 20-51-4-2(b) (2011).

12. IND. CODE § 20-51-1-4.5(1) to (5) (2011) ("[A] household with an annual income of not more than one hundred fifty percent [] of the amount required for the individual to qualify for the federal free or reduced price lunch program").

13. Grace Salata, Cooper VanDriessche & Taylore Williams, *Voucher dilemma: Taxpayer cost jumped from $15.5 million to more than $300 million,* THE INDIANAPOLIS STAR (Sep. 5, 2024, 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/K9G4-9CDQ].

14. Claire McInerny, *School Voucher Program Cost State $18 Million More Than Previous Year*, WFYI INDIANAPOLIS (July 19, 2016), https://www.wfyi.org/news/articles/school-voucher-program-cost-state-18-million-more-than-previous-year [https://perma.cc/2KSW-TUGG].

15. Salata, VanDriessche & Williams, *supra* note 13.

16. *Indiana Choice Scholarship Program*, IND. DEP'T OF EDUC., https://www.in.gov/doe/students/indiana-choice-scholarship-program/ [https://perma.cc/JV2D-ATRK] (last visited Mar. 8, 2025).

17. *E.g.*, *What are School Vouchers?*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/ [https://perma.cc/M7KS-E75H] (last visited Mar. 8, 2025).

18. *See* RICHARD G. BOONE, A HISTORY OF EDUCATION IN INDIANA 22–23 (New York, D. Appleton & Co. 1892).

19. Salata, VanDriessche & Williams, *supra* note 13.

choice vouchers in the United States and the history of the CSP. Part II provides an overview of the *Meredith v. Pence* litigation and decision in the Indiana Supreme Court. Part III of the Note summarizes the Supreme Court's method of interpretation for constitutional questions and outlines the historical record necessary for a complete understanding of the provisions at issue in *Meredith*. Part IV analyzes the *Meredith* decision and highlights inconsistencies between the historical record and the *Meredith* Court's reasoning. Finally, Part V proposes the legislation's repeal and the overturning of *Meredith v. Pence*.

I. SCHOOL CHOICE VOUCHERS

A. History of the School Choice Movement

The first examples of 'school choice' and state-sponsored voucher programs for attending private schools appeared in the 1950s and 60s.[20] Private school vouchers originated as "primary tools for segregationists to preserve unequal education for African American and Hispanic children."[21] This history is widely forgotten, if not ignored, thus enabling current voucher proponents to employ anti-integration rhetoric absent widespread discredit.[22] The 1960s school choice programs ended only with a Supreme Court order indicating that the vouchers were "unconstitutional and [] 'evasive schemes' [that] could not be used to circumvent integration."[23]

Southern school voucher programs surfaced in anticipation of and soon after the Supreme Court's decision in *Brown v. Board of Education*.[24] The *Brown* decision mandated public school desegregation but said nothing of private education.[25] Before the Little Rock Nine entered the public school system in Arkansas, the Governor spearheaded a ballot measure asking whether the people of Arkansas wanted integrated public schools or to shut the schools down.[26] Faubus told the voters that if they "wanted to close the schools, a private corporation would take over the school buildings and open them as 'private' segregated schools."[27] With the voters' approval, Faubus closed Little Rock public schools and transferred responsibility for school operations to a private

20. Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, S. SPACES (June 4, 2019), https://southernspaces.org/2019/segregationists-libertarians-and-modern-school-choice-movement/ [https://perma.cc/4YKS-XCA6].

21. *Id.*

22. *Id.*

23. JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 118 (Penguin Books 2013 ed.) (1988).

24. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1955–1961, at 263 (Oxford U. Press 1994).

25. *Id.*

26. *Id.* at 266.

27. *Id.*

group.[28] Under the arrangement, white children continued their educations unscathed, and black children went without schooling that year.[29]

In 1960, freedom of choice had two meanings.[30] Throughout the South, the phrase described a process "allowing each county to decide whether to comply with desegregation rulings or close its schools."[31] Alternatively, Virginia used freedom of choice to refer to tuition "grants" parents could use at segregated private and public schools elsewhere after their public schools integrated or closed.[32] In Mississippi, Louisiana, Virginia, Alabama, North Carolina, South Carolina, and Georgia, state governments formed groups to develop strategies for blocking school desegregation.[33] All seven states adopted private school voucher programs (eight, counting Little Rock).[34] Fifteen years after *Brown*, the U.S. Supreme Court found that Mississippi continued to evade integration and "ordered every school district in the state 'to terminate dual school systems at once.'"[35] Southern states reacted by striking any laws with racial identifiers and replaced the laws with "race-neutral programs for advancing freedom of choice for parents."[36]

Thirty years later, the school choice movement re-emerged in the 1990s.[37] However, this time, the movement evaded the reprehensible race-based motivations, instead "treating schooling as a consumer good, not a civic responsibility."[38] The aim became to model and manage the education systems across the country as a business, following the suggestions of economist Milton Friedman for "a system of competition [and] innovation, [that] changes the character of education."[39] The constituency of this twenty-first century voucher movement is often made of wealthy families with state-subsidized tuition and billionaires who profit from privatization, like the Koch brothers.[40] The previous white supremacist organizations continued to support education choice, gaining new backing from Christian nationalists, the Alliance Defending Freedom, and the American Legislative Executive Council.[41]

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28. *Id.*

29. *Id.*

30. GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 236 (2007).

31. *Id.*

32. *Id.*

33. Suitts, *supra* note 20.

34. *Id.*

35. *Id.* (quoting Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969)).

36. *Id.*

37. ROBERTS & KLIBANOFF, *supra* note 30, at 236.

38. DIANE RAVITCH, SLAYING GOLIATH: THE PASSIONATE RESISTANCE TO PRIVATIZATION AND THE FIGHT TO SAVE AMERICA'S PUBLIC SCHOOLS 34 (2020).

39. *Milton Friedman on Vouchers*, EDCHOICE (2003), https://www.edchoice.org/about/legacy/articles/milton-friedman-on-vouchers/ [https://perma.cc/U3GZ-C7TZ].

40. RAVITCH, *supra* note 38, at 35–36.

41. *Id.* at 36.

The majority of CSP proponents likely fail to appreciate their sentiments' historical significance and would repudiate any allegation of racism behind school choice today. Indiana's CSP supporters would probably align their support with Friedman's justifications.[42] However, contrary to his economic justification, competition hardly emerged in the 2011 CSP legislation because Indiana private schools were not created in 2011.[43] In fact, private schools existed before public schools in Indiana, and Indiana's public schools were subject to private competition before they opened.[44]

B. The Facts Litigated: 2011–2012 CSP

The Indiana Supreme Court held oral arguments on the *Meredith v. Pence* litigation on November 21, 2012.[45] In late 2012, the available data would have shown only 13,235 voucher payments under the CSP.[46] At the time, the state offered "graded" vouchers for families with slightly higher incomes, valued at 50% of the per-student public school funding allotment.[47] Additionally, in 2012, eligibility for the CSP required that students attend at least one year of public school before transferring to private school with a voucher.[48] Consequently, the Court considered relatively minimal CSP data during oral arguments, as information was limited to the 2011–2012 academic year and some of the following fall semester's statistics.[49]

Participants seeking a CSP voucher first completed a form to verify the student's eligibility and then applied to a private school from the list of CSP-approved institutions.[50] After acceptance to an eligible school, the private school and the student's parent were required to complete paperwork that verified the student's enrollment before any CSP funds were disbursed.[51] The Indiana Department of Education reviewed the paperwork, and if approved, the

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42. Grace Salata, Cooper VanDriessche & Taylore Williams, *Voucher dilemma Part 2: Unraveling impact of school choice program on education in Indiana,* THE INDIANAPOLIS STAR (Sep. 5, 2024, 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/AG6G-854K].

43. *See* BOONE, *supra* note 18, at 22 (discussing Indiana's earliest private schools in the 1810s).

44. *See id.*

45. Oral Argument, Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013) (No. 49S00-1203-PL-00172), https://mycourts.in.gov/arguments/default.aspx?&id=1416&view=detail&yr=2012&when=&page=1&court=&search=meredith&direction=%20ASC&future=True&sort=&judge=&county=&admin=False&pageSize=20 [https://perma.cc/GN7B-TZ36].

46. IND. DEP'T OF EDUC., *supra* note 16.

47. IND. CODE § 20-51-4-4(2)(B) (2011).

48. IND. CODE § 20-51-1-4.5(5) (2011).

49. IND. DEP'T OF EDUC., *supra* note 16.

50. Brief of Appellants at *5, Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013) (No. 49S00-1203PL172), 2012 WL 3262456.

51. *Id.*

department would instruct the state auditor to make the voucher payment.[52] When the state auditor made a voucher payment, that payment was issued as a direct electronic transfer from the state to the private school's provided bank account.[53] CSP private schools were not asked to, let alone required to, maintain a separate bank account for CSP funds.[54] Because vouchers could not be directly disbursed to participating students, the CSP led to a routine practice of Indiana tax revenues being redirected to private school and church accounts.[55]

The CSP statute and the state government placed limited regulations on the program. Private school regulation in the CSP only prescribed a minimum curriculum required by the state and participation in statewide testing, the requirements for state accreditation, which most private schools already followed.[56] CSP funds lacked statutory restrictions regarding their use, and the funding came with no disclosure requirements to track the voucher's use (or lack thereof).[57] Similarly, eligible private schools were only prohibited from denying admission "on the basis of race, color, or national origin."[58] However, CSP institutions could deny or expel students for any other purported reason, including behavioral issues, disciplinary matters, the student's academic performance, or (at the time of litigation) disability.[59]

The CSP also did not require that private schools permit voucher students the choice to opt out of religious curriculum.[60] Therefore, a private school could legally base acceptances or retention on a student's refusal to participate in religious curriculum and expel students that did not comply with religious components.[61] This fact was particularly relevant because over 99% of voucher students in the 2011–2012 school year attended a religious school.[62] That year only six of the CSP schools were not religiously affiliated.[63]

Of the CSP participant schools in 2011, 97.7%, or 253 of the schools, were religiously affiliated and provided that religious instruction was *crucial* to the school's curriculum.[64] The vast majority of institutions were deeply committed to their religious identity and often defined the schools "as 'ministries' of the

52. *Id.*
53. *Id.*
54. *Id.* at *5 n.4.
55. *Id.*
56. *See* IND. CODE § 20-51-4-1(a)(1)–(3) (2011).
57. Meredith v. Pence, 984 N.E.2d 1213, 1220 (Ind. 2013) ("Once distributed, the voucher program places no specific restrictions on the use of the funds."); *see also* IND. CODE § 20-51-4-1(a)(1) ("[T]he department or any other state agency may not in any way regulate the educational program of a nonpublic eligible school that accepts a choice scholarship under this chapter, including the regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the [] school.").
58. IND. CODE § 20-51-4-3(a) (2011).
59. Brief of Appellants, *supra* note 50, at *35.
60. IND. CODE § 20-51-4-1(a)(1) (2011).
61. Brief of Appellants, *supra* note 50, at *4–5.
62. *Id.* at *6.
63. *Id.*
64. *Id.* at *6–7.

parishes, churches, or religious faiths with which they [were] affiliated."[65] Private schools further underscored that commitment with sentiments warning parents and voucher students that the institutions were "Catholic first and schools second."[66]

The remaining 2.3% of CSP participant schools—six private schools in the entire state—were nonsectarian institutions.[67] Of those six nonsectarian, CSP approved institutions, "two [were] specialized institutions for children with special needs or behavioral problems, and one [was] a military boarding school."[68] By the time *Meredith v. Pence* reached the Supreme Court, only two nonsectarian, traditional schools were available under the CSP—a single K-12 school located in Evansville and a high school in Carmel, both of which, had school tuitions greatly exceeding the amount of a CSP voucher.[69] From these facts, the plaintiffs argued that the *only* schools available for traditional CSP students (given their low-income status) were religiously affiliated.[70]

C. Evolution of Vouchers in Indiana Post-Meredith

Today, the CSP's object of "help[ing] lower-income families escape failing public schools" is far from the program's reality.[71] In the 2023–24 academic year, CSP families earning more than $100,000 a year outnumbered the participants with yearly incomes below $50,000.[72] That year, the majority of CSP users never previously attended public school.[73] The conflict between the current CSP and the program *Meredith* considered is the result of a series of alterations to the program over the course of a decade.[74]

After the CSP received constitutional approval, the Indiana General Assembly began loosening the program's eligibility requirements.[75] Legislators initially modified the qualifying public-school districts and created an exception that extended eligibility for the sibling of a CSP user.[76] Legislators eventually eliminated graded vouchers (providing awards of 50%, 75%, or 90% of the per student costs by income level) and added to the list of program-eligible

65. *Id.* at *7.
66. *Id.*
67. *Id.* at *6.
68. *Id.*
69. *Id.*
70. *Id.*
71. Salata, VanDriessche & Williams, *supra* note 13.
72. *Id.*
73. *Id.*
74. Scott Elliott, *Did vouchers cost Indiana $16 million? Estimate sparks debate,* CHALKBEAT IND. (June 19, 2014, 17:40 ET), https://www.chalkbeat.org/indiana/2014/6/19/21107430/did-vouchers-cost-indiana-16-million-estimate-sparks-debate/ [https://perma.cc/NG56-HJAY].
75. *Id.*
76. *Id.*

districts.[77] In each year thereafter, the Indiana General Assembly further eased CSP eligibility requirements[78] until the 2021 legislative session.[79] That year, the General Assembly more than tripled the maximum household income eligibility required in prior years, allowing a family of four earning up to $147,075 a year to get a voucher.[80] When this increase occurred, Indiana's median household income was just $70,051 a year.[81] The Indiana General Assembly continued to increase the income eligibility amount each year,[82] culminating in universal eligibility beginning in the 2026–2027 academic year.[83]

In the 2024–25 academic year, a family of four, earning less than $237,910 a year, was eligible for a voucher under the program.[84] In practice, that threshold translated to near universal eligibility, with about 97% of Hoosier families qualifying.[85] There were 76,067 vouchers disbursed during the 2024–25 academic year.[86] Of the participants, over two-thirds had never attended a public school before receiving a voucher.[87] Indiana tax dollars paid an additional $58 million to fund vouchers in the 2024–25 academic year compared to the prior academic year's spending, and the program overall cost the state $497 million, despite educating a minimal number of Hoosier children compared to the public schools.[88]

Absent a requirement that the student first attend a public school, the CSP began to cover the cost of students who were never positioned to attend public schools.[89] Parents who always planned for their children to attend a private school and already paid full tuition to send their children to private schools could apply for vouchers.[90] Thus, the Hoosier tax dollars that fund the state's budget took on new educational expenditures that taxes never would have covered without the CSP.[91] Notably, in 2015 the Indiana Department of Education

77. Meredith v. Pence, 984 N.E.2d 1213, 1219 n.7 (Ind. 2013).

78. Elliott, *supra* note 74.

79. Salata, VanDriessche & Williams, *supra* note 13.

80. *Id.* The article's associated graphic is available at: https://perma.cc/R9JC-3JSH.

81. *Quick Facts: Indiana*, U.S. CENSUS BUREAU (2024), https://www.census.gov/quickfacts/fact/table/IN/INC110223 [https://perma.cc/9RG9-RUWG].

82. Salata, VanDriessche & Williams, *supra* note 13.

83. Caroline Beck, *Indiana spends $497 million on private school vouchers. Report shows who gets the money*, THE INDIANAPOLIS STAR, (July 10, 2025, 5:27 ET), https://www.indystar.com/story/news/education/2025/07/10/indiana-spends-497-million-on-vouchers-2-indy-schools-got-11-3-million/84517333007/ [https://perma.cc/S6BF-YFUF]; *See*, H.E.A. 1001, 124th Gen. Assemb., Reg. Sess. (Ind. 2025) (deleting the language in Ind. Code § 20-51-1-4.3(3) regarding the choice scholarship program income eligibility, effective June 29, 2026).

84. Beck, *supra* note 83.

85. Salata, VanDriessche & Williams, *supra* note 13.

86. OFF. OF SCH. FIN., IND. DEP'T EDUC., 2024–2025 CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION & PAYMENT DATA 4 (2025).

87. Salata, VanDriessche & Williams, *supra* note 13.

88. Beck, *supra* note 83.

89. Salata, VanDriessche & Williams, *supra* note 42.

90. *Id.*

91. *Id.* "[T]he last 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.").

discontinued its practice of publishing CSP savings statistics, following the first academic year that showed equal numbers for voucher recipients that previously attended public schools to those who did not.[92]

Originally, all CSP voucher recipients were low-income Hoosiers in 'failing' public schools.[93] Today, the average CSP student is vastly different from the program *Meredith* considered; the average participant is a "white female, who [] never attended public school, from a family earning more than $99,000 a year."[94] In 2024 alone, the CSP cost the state an estimated $600 million, despite educating only 7% of K-12 students in Indiana.[95] The state's last budget allocated "36% of new state tax funding for [K–12] education to private schools" and allocated the remaining 64% of funds to the public schools that educate the other 93% of the state.[96]

The CSP today significantly exceeds the program's initial capacity and promise. Today the CSP covers more than seventeen times the number of students in the program's first year and seven and a half times the number of CSP participants enrolled in its second year.[97] *Meredith v. Pence* only contemplated the first two years of the CSP, but it is not the recent CSP data that renders the decision unconstitutional because any encroachment on constitutional rights is a violation, regardless of scale.

II. STATEMENT OF THE CASE

The Meredith plaintiffs initiated their challenge in July 2011 when the CSP went into effect.[98] Their challenge alleged that the CSP was unconstitutional under three different provisions of the Indiana Constitution: the Education Clause in Article 8, Section 1, and two religious freedom clauses of the Bill of Rights Article 1, Sections 4 and 6.[99]

A. Summary of the Precedent

The Education Clause precedent applicable to the CSP developed in *Bonner v. Daniels*.[100] *Bonner* arose from quality issues in Indiana public schools and sought to better the public school system, alleging that the Indiana General Assembly failed to carry out its duty to provide for public schools.[101] The

92. Salata, VanDriessche & Williams, *supra* note 13.
93. Elliott, *supra* note 74.
94. Salata, VanDriessche & Williams, *supra* note 13.
95. *Id.*
96. *Id.*
97. *Id.*
98. Meredith v. Daniels, No. 49D07-1107-PL-025402 (Ind. Super. Ct. Jan. 13, 2012), 2012 WL 2525426 (trial order).
99. *Id.*
100. 907 N.E.2d 516 (Ind. 2009).
101. *Id.* at 518.

Indiana Supreme Court interpreted the provisions in Article 8, Section 1 to determine whether the Constitution required minimum quality standards for the uniform common schools.[102] The Court interpreted the clause as providing two duties of the General Assembly.[103] However, neither of the duties created an affirmative responsibility regarding quality.[104] The Court stated that Article 8, Section 1 "assign[ed] [] a specific task with performance standards" on the Indiana General Assembly.[105] The task was to provide schools, and the performance standards were a limitation to the power, requiring "general and uniform" schools that were "free and open to all."[106]

The prominent Article 1, Section 6 precedent the *Meredith* Court applied, and both parties relied on, came from *Embry v. O'Bannon*.[107] The *Embry* decision considered the constitutionality of a system allowing for the dual enrollment of parochial school students in a nearby public school.[108] The system created a trade between the public and private institutions wherein "public schools agreed to provide various secular [instruction] to private school students . . . in return for securing those students' enrollment in their respective public school corporations."[109] The additional students meant more state funding would be sent to the public schools, while the parochial schools remained the students' primary educators.[110] The public-school instruction only supplemented the programs not offered at the parochial school.[111] Under the agreements, parochial schools did not receive any state funding.[112] However, the claimants argued that parochial schools still benefited greatly from the state funding as they saved money through their access to public-school teachers and services free of charge.[113]

The Court considered whether such funding constituted unconstitutional use of "money . . . drawn from the treasury, for the benefit of [a] religious or theological institution."[114] Justice Dickson authored the decision, though "no opinion [] commanded a majority of the court [on] the merits."[115] The majority agreed that the dual-enrollment system did not violate Article 1, Section 6 of the Constitution because the parochial schools received only "incidental benefits"

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102. *Id.* at 520.
103. *Id.*
104. *Id.* at 521.
105. *Id.* at 520.
106. *Id.* at 521 (internal quotation omitted).
107. Meredith v. Pence, 984 N.E.2d 1213, 1227 (Ind. 2013) (citing Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003) (plurality opinion)).
108. *Embry*, 798 N.E.2d at 158.
109. *Id.* at 159.
110. *Id.* at 158–59.
111. *Id.* at 159.
112. *Id.* at 166–67.
113. *Id.*
114. IND. CONST. art. I, § 6.
115. Brief of Appellants, *supra* note 50, at *18.

from the system.[116] However, a majority of the Court concurred in the decision, though expressing different justifications for the decision than those provided in Justice Dickson's opinion.[117]

Justice Dickson's opinion upheld the dual-enrollment agreements on other grounds, without Section 6, but still provided his dicta regarding the constitutional provision.[118] In his effort to ascertain whether the Section 6 "religious or theological institution" language encompassed parochial schools, Dickson wrote over three pages discussing the language's potential meaning at ratification.[119] However, the decision left the interpretation open and decided the case by asking "whether the dual enrollment . . . confer[red] substantial benefits upon the participating parochial schools or directly fund[ed] activities of a religious nature."[120] The opinion differentiated between incidental and substantial benefits, to support the Court's decision to uphold the program, as the Section 6 precedent did not prohibit incidental benefits to a religious institution.[121]

No *Embry* opinion commanded a majority for two reasons. The first related to issues of standing and was the subject of one concurrence.[122] Justice Boehm's concurrence provided the second reason for disagreement.[123] Boehm stated that he departed from Dickson's opinion where it "implie[d] that Article I, Section 6 of the Indiana Constitution has nothing to say about funding for parochial schools."[124] Although Justice Boehm found the dual enrollments constitutional, he noted that it was "an entirely different question [] whether all citizens of the state can be compelled to pay for religious education with tax dollars" and stated that Section 6 specifically prohibited that funding.[125] Boehm further denied the Dickson opinion's implication that parochial schools were not religious institutions, noting that parochial schools were plainly included in the provision's meaning.[126] Boehm provided a historical analysis that contradicted the dicta in Dickson's historical analysis.[127] The concurrence ended by highlighting that the Court "implicitly [left] the door open to public funding of

116. *Embry*, 798 N.E.2d at 167.

117. *See id.* at 167–69 (Sullivan, J., concurring in result); *see also id.* at 169–70 (Boehm, J., concurring in result).

118. *Embry*, 798 N.E.2d at 167; *see also* Brief of Appellants, *supra* note 50, at *18.

119. *Embry*, 798 N.E.2d at 161–64.

120. *Id.* at 164.

121. *Id.* at 164–65; *see also* State *ex rel.* Johnson v. Boyd, 28 N.E.2d 256, 265 (Ind. 1940) ("The fact that the church contributed the use of the buildings and equipment used for these schools does not make the schools conducted therein parochial schools. The acceptance of private donations to a public cause does not make the cause private."); Ctr. Twp. of Marion Cnty. v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991).

122. *Embry*, 798 N.E.2d at 167–69 (Sullivan, J., concurring in result).

123. *Id.* at 169 (Boehm, J., concurring in result).

124. *Id.*

125. *Id.*

126. *Id.* at 169–70 (Boehm, J., concurring in result).

127. *Id.* at 169.

sectarian schools" and noted that "[t]he Constitution stands squarely against [it]."[128]

B. Meredith v. Pence *at the Supreme Court*

The *Meredith* plaintiffs who challenged the CSP were a group of Indiana taxpayers, including public school teachers and parents of public school students, all of whom had proper standing under Indiana's public standing doctrine.[129] Defendants of the CSP included a number of state officials and Governor Mitch Daniels, who Mike Pence subsequently replaced upon his election.[130] The trial court decided the case on summary judgement in favor of the defendants' and plaintiffs appealed.[131]

The first constitutional question in *Meredith v. Pence* arose from Article 8, Section 1.[132] The plaintiffs claimed the CSP itself, along with the voucher program's future effect on public school funding, undermined the history and purpose of Article 8, thus violating "the duty to *provide* for a general and uniform system of open common schools without tuition."[133] The second part of the argument concerned the present and future impacts of the program because a majority of Indiana's school-aged children already qualified and voucher caps would expire the next year in 2013.[134] Therefore, the CSP would undermine the "uniform system of common schools" because the program siphoned public school funding and had the potential to take away the majority of students, constituting more than a supplement to public education.[135]

As an education law, the CSP necessarily had to fall under one of the General Assembly's two Article 8 duties, either the duty to encourage education or the duty to provide for the common schools.[136] Because the second duty, to provide, encompassed only the common schools, CSP private schools did not qualify as a legislative act under that duty.[137] The State argued that the CSP fell within the first duty, to encourage, because it was a separate form of state-sponsored education, outside education by the common schools.[138] However, the *Meredith* plaintiffs argued the CSP could not be a supplement to common school education when a majority of students qualified.[139] This argument

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128. Id. at 170 (Boehm, J., concurring in result).

129. Meredith v. Pence, 984 N.E.2d 1213, 1217 n.4 (Ind. 2013).

130. *Id.* at 1216–17.

131. Meredith v. Daniels, No. 49D07-1107-PL-025402 (Ind. Super. Ct. Jan. 13, 2012), 2012 WL 2525426 (trial order).

132. *Meredith*, 984 N.E.2d at 1220–21; IND. CONST. art. VIII, § 1.

133. *Meredith*, 984 N.E.2d at 1221 (quoting Bonner v. Daniels, 907 N.E.2d 516, 520 (Ind. 2009)).

134. Brief of Appellants, *supra* note 50, at *4.

135. *Id.* at *37–38.

136. *Meredith*, 984 N.E.2d at 1221–22.

137. *Id.* at 1223.

138. *Id.* at 1221–22; Brief of Appellants, *supra* note 50, at *36.

139. Brief of Appellants, *supra* note 50, at *37.

highlighted the impossible nature of meeting the performance standards outlined in *Bonner* when facing low enrollment and minimal funding to share among schools across the state.[140]

The second constitutional arguments raised involved two of the religious freedom provisions in the Bill of Rights: Article 1, Section 4 and Article 1, Section 6.[141] The plaintiffs also argued the CSP violated the Court's decision in *Embry* by providing not only a substantial benefit, but a direct payment to the religious institutions.[142] The argument compared the CSP to the *Embry* program and highlighted major differences between the two pieces of legislation.[143] Plaintiffs further noted the lack of a majority opinion and disagreements in the *Embry* opinions, while building on Justice Boehm's concurrence.[144] Additionally, the plaintiffs' Section 4 arguments highlighted the relevant historical context for Indiana's compelled support clause, including the state's second constitutional convention.[145]

C. The Meredith *Decision*

The Indiana Supreme Court decided *Meredith v. Pence* on March 26, 2013, upholding the CSP under all three constitutional provisions.[146] The Court held the CSP legislation as "within the legislature's power under Article 8, Section 1, and that the enacted program d[id] not violate either Section 4 or Section 6 of Article 1 of the Indiana Constitution."[147] The decision was divided into five parts, one for the standard of review and burden of proof, another summarizing the CSP legislation, and then providing three separate parts to discuss each constitutional challenge raised.[148]

1. Education Clause.—The Court first addressed the plaintiffs' challenge under the Education Clause's two duties. The decision interpreted the plaintiffs' contentions as arguing that the "directive for a system of public schools supersede[d] the other directive of Article 8."[149] The Court then reiterated its *Bonner* precedent and that decision's understanding of the clause to include two distinct duties.[150] The decision held that the CSP legislation fell under the first Article 8 duty, the duty to encourage education.[151]

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140. *Id.* at *35 ("[P]ublic schools are required to meet the needs of all such students, even if funding is inadequate to do so . . . .").

141. *Id.* at *12.

142. *Id.* at *9 (citing Embry v. O'Bannon, 798 N.E.2d 157, 164 (Ind. 2003)).

143. *Id.* at *20.

144. *Id.* at *19 (citing *Embry*, 798 N.E.2d at 169–70 (Boehm, J., concurring in result)).

145. *Id.* at *15–16.

146. Meredith v. Pence, 984 N.E.2d 1213, 1230–31 (Ind. 2013).

147. *Id.*

148. *Id.* at 1217.

149. *Id.* at 1220.

150. *Id.* at 1220–21 (quoting Bonner v. Daniels, 907 N.E.2d 516, 520 (Ind. 2009)).

151. *Id.* at 1224.

To reach its conclusion, the Court noted that the duty to encourage contained broad, discretionary language to fulfil that responsibility "by all suitable means."[152] The Court looked to the history of the 1816 and 1851 constitutions and discovered that each of the duties could be met separately and independently of the other.[153] Because the CSP fell under the duty to encourage, and the duty to provide common schools could be met independently of the other, the Court did not find the plaintiffs' arguments convincing.[154] The Court reasoned against the plaintiffs' argument about the CSP's capacity to educate 60% of Indiana's student population, and therefore outnumbering the public schools' enrollments, by rationalizing that a public school system would still exist and satisfy the constitutional command.[155] In that determination, the Court indicated that if the "'uniform' public school system, 'equally open to all' and 'without charge'" remained, the legislature's public school duty was met, regardless of the school's enrollment numbers.[156]

The CSP funding concerns were dismissed in a footnote of the decision where the Court noted how yearly school funding allotments previously changed according to the number of students enrolled, so risk was "equally [present] when a student transfers to another public or charter school, withdraws to attend a private school using personal funds, or withdraws to homeschool."[157] This observation was valid when the case was decided because the CSP only offered vouchers to students leaving a public school and would not increase the state's expense.[158] The same is not true today because the CSP no longer requires that a student previously attended public school to be eligible for a voucher.[159]

2. Article 1, Section 4.—The next question addressed Indiana's compelled support provision and briefly dispensed the plaintiffs' contentions.[160] The Court considered the provision's history and indicated that the historical context provided "little from the convention debates to amplify [] understanding of the language of Section 4."[161] As a result, the Court reasoned that the Section 4 text necessarily provided the "primary source for discerning the common understanding of the framers and ratifiers."[162] With only the text to guide it, the Court indulged the plaintiffs' arguments by providing a few definitions of words

152. *Id.* at 1222.
153. *Id.*
154. *Id.* at 1222–23.
155. *Id.*
156. *Id.* at 1223 (internal quotations omitted).
157. *Id.* at 1223 n.13.
158. *Id.*
159. IND. CODE § 20-51-1-4.5 (2011), repealed in 2013.
160. *Meredith*, 984 N.E.2d at 1225–26.
161. *Id.* at 1225 (quoting City Chapel Evang. Free Inc. v. City of South Bend, 744 N.E.2d 443, 448 (Ind. 2001)).
162. *Id.*

in the provision according to the 1856 Webster's dictionary to show how the language was understood at the time.[163]

The Court did not agree that the CSP compelled Hoosiers to support religious institutions.[164] It believed Section 4 did not aim to include compelled support by means of taxation and found that such an understanding of the provision "improperly expand[ed] the language of Section 4 and conflate[d] it with that of Section 6."[165] The Court reasoned that the text was written to avoid redundancy, with each provision "drafted to specify separate and distinct objectives."[166] Therefore, the opinion deduced that Section 4 restrained only the "government compulsion of individuals to engage in religious practices absent their consent."[167] However, the Court wrongly stated that the convention debates offered nothing to aid its understanding.[168] In fact, the convention transcripts contain a specific statement of the Section 4 provision's intended meaning, which applied the provision to taxation and explicitly prohibited compelling support with tax revenues.[169]

3. Article 1, Section 6.—The Court divided the Article 1, Section 6 inquiry into two parts, first asking "whether the program involve[d] government expenditures for benefits of the type [Section 6] prohibited" and, if so, asking "whether the [voucher] schools . . . are 'religious or theological institution[s]'" within the scope of the provision.[170] The first question prompted the Court to clarify its *Embry* rule, which referred to the benefits inquiry as a question of whether the religious institution's benefit constituted a "substantial" benefit.[171] The Court clarified that the *Embry* language should be understood as a "primary or *direct* beneficiary."[172] Thus, modifying the Court's first question to ask "whether the expenditure *directly* benefits such [religious] institution."[173]

In responding to the first question, the Court expressed doubt that the private schools represented the CSP's direct beneficiaries and concluded that the primary "actors and direct beneficiaries under the voucher program [were] . . . lower-income Indiana families with school-age children."[174] The reasoning

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163. *Id.* at 1226.

164. *Id.*

165. *Id.* at 1225.

166. *Id.* at 1226.

167. *Id.*

168. *See, e.g.*, IND. CONST. CONVENTION, 1850 JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA, TO AMEND THE CONSTITUTION 964 (1851), *reprinted in* IND. HIST. COLLECTIONS [hereinafter JOURNAL], https://iuidigital.contentdm.oclc.org/digital/collection/ISC/id/5217/rec/27 [https://perma.cc/84MR-VP5V].

169. *Id.* ("[T]o secure the rights of conscience and prevent the imposition, on the citizen, of any tax to support any ministry or mode of worship against his consent, it is provided . . . that no many shall be drawn from the treasury for the benefit of any religious or theological institution.").

170. *Meredith*, 984 N.E.2d at 1227.

171. *Id.* at 1227–28 (citing Embry v. O'Bannon, 798 N.E.2d 157, 160–67 (Ind. 2003)).

172. *Id.* at 1228 (emphasis added).

173. *Id.* at 1227.

174. *Id.* at 1228.

provided that, because low-income families could not afford private school tuitions before the CSP and because the CSP alleviated such barrier to their access, the low-income families were primary benefactors.[175] This necessarily made any other beneficiaries, including private religious schools, an "ancillary and incidental" CSP beneficiary as their benefits "derive[d] from [a] private, independent choice . . . not the decree of the State."[176]

On the second question of the Section 6 inquiry, the Court concluded the terms "religious or theological institution" in the provision did not limit expenditures for the institutions that provided education.[177] The Court's reasoning noted that, historically, "to the extent that primary and secondary education was available to Indiana children, it was predominantly provided by private or religious entities."[178] The Court noted how the Board of Education included the Bible in its recommended texts during the 1850s and 1860s.[179] Therefore, the Court asserted, "the framers did not manifest an intent to exclude religious teaching from [] publicly financed schools."[180]

Without a comprehensive understanding of the Court's precedent or conducting research of Indiana's historical records, the *Meredith v. Pence* opinion may seem reasonable.[181] However, understanding the Supreme Court's analytical approach to constitutional questions is vital to comprehending the nature of its decisions.[182] When reviewing the *Meredith* decision in its proper context, it becomes increasingly obvious how the Court misapplied or ignored critical history from the Indiana Constitution's drafting to locate approval for the CSP.

III. PUTTING *MEREDITH V. PENCE* IN ITS LEGAL & HISTORICAL CONTEXT

A. The Court's Analytical Approach

When the Court reviews a claim involving one or more provisions of Indiana's Constitution, it always employs the same method of review that searches history "for the common understanding of both those who framed [the Constitution] and those who ratified it."[183] The majority of the Court's decisions outline this search as one where "the intent of the framers of the Constitution is paramount in determining the meaning."[184] The Court's analytical approach aims "to give life to [the framers' and ratifiers'] intended meaning" by treating

175. *Id.* at 1229.
176. *Id.*
177. *Id.* at 1230.
178. *Id.* at 1229 (citing Embry v. O'Bannon, 798 N.E.2d 157, 162 (Ind. 2003)).
179. *Id.* at 1230 (citation omitted).
180. *Id.* (citing *Embry*, 798 N.E.2d at 163 n.5).
181. *See id.*
182. City Chapel Evang. Free Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001).
183. *Id.*
184. *Id.*

the language of each provision "as though every word had been hammered into place."[185] To accomplish this analytical task, the Court discerns meanings from dictionary definitions and other documents from similar times.[186]

By this approach, the Court can uncover "the old law, the mischief, and the remedy" sought by including the provision.[187] Consistent with a provision's history and contextual meaning, the Court will assess "the language of the text . . . the purpose and structure of our constitution, and case law interpreting the specific provision[]."[188] Applicable precedents are primarily from Indiana's case law on the provision, though the Court may consider case law from other jurisdictions with a related provision and similar time of adoption.[189]

B. Introduction to Indiana Constitutional History

In ascertaining the meaning of a constitutional provision, the Court often begins its search by reviewing any differences in the text or location of the provision between Indiana's 1816 and 1851 Constitutions, as well as other possible origins.[190] Two of the three provisions at the center of the *Meredith v. Pence* litigation have roots dating back to the Northwest Ordinance of 1785.[191] The Northwest Ordinance was the governing body of law across Indiana, Ohio, Michigan, Illinois, Wisconsin, and portions of Minnesota for over thirty years before each attained statehood.[192] Accordingly, the Ordinance was influential for the drafting of Indiana's 1816 Constitution and much can be learned from what parts were added, modified, and removed between the two documents.[193]

1. The Education Clause.—It is in the Northwest Ordinance that Indiana's first education endorsement was written: "[r]eligion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[194] The Ordinance provision guided the drafters of the 1816 Constitution, which adopted a similar provision:

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185. *Id.*

186. *See, e.g.*, *id.* at 448.

187. *Id.* at 447.

188. *Id.*

189. *See, e.g.*, *id.* at 449.

190. *See, e.g.*, *id.* at 447 ("Sections 2, 3, and 4 of the 1851 Indiana Constitution's Bill of Rights did not differ substantially from their predecessor provisions in Indiana's first Constitution, adopted in 1816.").

191. IND. HIST. BUREAU, BROADSIDES: INDIANA, THE EARLY YEARS: RESOURCE GUIDE 138, 141 (1987).

192. *Id.*; *The Northwest Ordinance (1787)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/the-northwest-ordinance#:~:text=thousand.%20.%20.%20.-,Art.,labor%20or%20service%20as%20aforesaid [https://perma.cc/9KHA-MTVM] (last visited Aug. 29, 2025).

193. *See, e.g.*, IND. HIST. BUREAU, *supra* note 191, at 141, 143.

194. *Id.* at 141.

> [k]nowledge and learning generally diffused, through a community, being essential to the preservation of a free Government . . . it shall be the duty of the General Assembly to provide, by law, for the improvement of such lands . . . for the use of schools, and to apply any funds which may be raised from such lands . . . to the accomplishment of the grand object for which they are or may be intended.[195]

Notably, the drafters dropped the first word of the clause, indicating an intent to exclude *religion* from state education and the Constitution's Education Clause.[196]

Following the first few decades of statehood, problems in the state government prompted a second constitutional convention to rewrite portions of the Indiana Constitution.[197] In 1851, the state ratified its second constitution, which remains the constitutional text still today.[198] The text drew much from the previous Education Clause while modifying parts of the text.[199] The revised clause states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly *to encourage*, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and *to provide*, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.[200]

The new textual provisions regarding the General Assembly's education duty included both a duty "to encourage, by all suitable means"[201] and a duty "to provide, by law" for the common schools.[202] After modifying the clause, the 1851 constitutional drafters provided a statement to the public regarding the formal differences and indicated its principal change as "the abolition of county

195. IND. CONST. of 1816, art. IX, § 1.
196. IND. HIST. BUREAU, *supra* note 191.
197. *Id.* at 143.
198. *Id.*
199. *Compare* IND. CONST. of 1816, art. IX, § 1, *with* IND. CONST. art. VIII, § 1.
200. IND. CONST. art. VIII, § 1 (emphasis added).
201. *Id.*
202. *Id.*

seminaries, and the application of the funds to common schools."[203] Subsequent case law determined the "uniform common schools" meant "public schools."[204]

2. The Religious Freedom Clauses.—The current language of Article 1, Section 4 is also traceable to the Northwest Ordinance but remained relatively similar to the first constitutional text.[205] In the 1816 Constitution, various parts of Article 1 were included in a single clause that was later divided into a few provisions in the current Indiana Bill of Rights.[206] The 1816 Indiana Constitution wrote these provisions, in part, stating that "no man shall be compelled to attend, erect, or support any place of Worship, or to maintain any ministry against his consent . . . [a]nd that no preference shall ever be given by law to any religious societies, or modes of worship."[207] The 1851 provision of Article 1, Section 4 similarly stated that "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."[208]

The 1851 Indiana Constitution provided, for the first time, the protections in Article 1, Section 6, which states "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution."[209] Though not provided for in Indiana's 1816 Constitution, the convention and surrounding historical context may similarly provide guidance when interpreting the provision.[210] When the 1851 Constitution drafters announced their changes to the public, they noted Article 1, Section 6 as providing an additional guarantee in the Bill of Rights.[211]

C. The Framers' Constitutional Intentions

The 1851 Indiana Constitution's ratifiers often expressed their intentions through public announcements regarding a provision's purpose and what prompted an alteration.[212] To understand the meaning of a provision in the

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203 . *Address to the Electors of the State February 8, 1951*, IND. HIST. BUREAU, https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/constitution-of-1851-as-originally-written/address-to-the-electors-of-the-state-february-8,-1851/ [https://perma.cc/7TM4-2UTZ] (last visited Aug. 29, 2025).

204. *E.g.*, Nagy *ex rel.* Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 489 (Ind. 2006) (noting "the term 'common school' was widely understood to mean 'public school'"); State v. O'Dell, 118 N.E. 529, 530 (Ind. 1918) (providing all public Indiana K-12 schools were included in the meaning of common schools).

205. IND. CONST. art I, § 4; IND. CONST. of 1816, art. I, § 3.

206. See *id.*

207. IND. CONST. of 1816, art. I, § 3.

208. IND. CONST. art. I, § 4. "Man" was amended to "person" in 1984.

209. IND. CONST. art. I, § 6.

210. IND. HIST. BUREAU, *supra* note 203.

211. JOURNAL, *supra* note 168, at 964.

212. *See, e.g.*, *id.*

context of the times, the Court often searches the transcript of the 1850–51 convention debates.[213] The convention report offers insight into the drafters' intentions through its comprehensive record, and thus, "is paramount in determining the [text's] meaning."[214]

Before Indiana's second constitutional convention began, the Indiana General Assembly hosted education-specific discussions "for the purpose of 'consulting and devising the best course to be pursued to promote common school education' in Indiana."[215] These meetings came to be known as "The Free Common School Debate" and consisted of six lectures before the General Assembly and the convention of delegates between 1846 and 1852.[216] Public education advocate and professor Caleb Mills spearheaded the debates and addressed the delegate meetings.[217]

Mills's advocacy for the free common schools during the lead-up to Indiana's second constitutional convention prompted his legacy as the "father of the Indiana common school system."[218] As a professor and founder of the private school Wabash College, Mills appeared both as an educator and Presbyterian minister.[219] Nevertheless, in Mills's advocacy, he consistently argued for creating the free common schools and offered less support to the idea that Indiana should continue to fund the existing private schools.[220]

Between the first and second constitutions, if a child attended school, the school was a private institution.[221] The cost of private school tuition often exceeded what Hoosiers could afford in the pioneer days, leading to disparate educational opportunities based on income.[222] Therefore, many Hoosier children went uneducated or joined homeschool groups with neighbors to receive an education, though minimal.[223] Before the second constitutional convention, the state legislature provided some funding to private education in an attempt to honor the 1816 Constitution's education provision.[224] However,

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213. *See, e.g.*, Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 990 (Ind. 2005) (Dickson, J., concurring in result) ("There was no discussion at the 1850–51 Constitutional Convention suggesting or implying . . . ."); City Chapel Evang. Free Inc. v. City of South Bend, 744 N.E.2d at 447 ("The remarks of the delegates during the 1850–51 Constitutional Convention amplify our understanding of the framers' purposes . . . .").

214. *City Chapel Evang.*, 744 N.E.2d at 447.

215. Nagy *ex rel*. Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 486 (Ind. 2006) (internal citations omitted).

216. *Id.* at 485.

217. *Id.*

218. *Id.* (internal quotation omitted).

219. Embry v. O'Bannon, 798 N.E.2d 157, 162–63 (Ind. 2003) (plurality); Beth Swift, *Caleb Mills–Activist*, WABASH COLL. (Feb. 27, 2015), https://blog.wabash.edu/dearoldwabash/2015/02/27/caleb-mills-activist/ [https://perma.cc/JVN2-JJ9H].

220. *Embry*, 798 N.E.2d at 163 n.5.

221. BOONE, *supra* note 18.

222. *Id.* at 23.

223. *Id.* at 22, 121.

224. *Id.* at 122.

there were few funds to spare and minimal interest in childhood education, curtailing the state's efforts to support education.[225]

Unsurprisingly, the debate over the free common schools weighed the idea of increasing the funds appropriated for the existing private schools instead of the daunting task Mills sought.[226] Mills's advocacy both opposed state funding of private schools and called for the legislature's funding and creation of the free common schools, today known as the public school system.[227] By the end of his addresses, Mills successfully persuaded representatives in the thirtieth through thirty-sixth Indiana General Assemblies to establish a tuition-free system of public education.[228] However, the free common school movement was not without opposition.[229]

The problems facing common schools under the 1816 Constitution were not mere opposition to education but opposition to taxation to fund it.[230] The education budget was almost nonexistent from 1816 to 1851, and the available funds were ineffectively spent or poorly supervised.[231] As a result, state funding for the schools required increasing Hoosiers' taxes.

Many poor Hoosiers in the mid-nineteenth century opposed a tax for the schools because they were simply uninterested in education outside the home, let alone "pay[ing] for the education of wealthy children."[232] Lower-income Hoosiers saw potential taxation as helping fund education for the rich, who did not need free school as wealthy children already attended and paid private school tuition.[233] Meanwhile, the wealthiest Hoosiers similarly opposed free schooling because it would render education "too common, decreasing the value of [their] privately funded education."[234] Others took issue with a system of free common schools as it could be dangerous to religious freedom.[235] One Hoosier echoed that fearful sentiment at the time, which claimed, "[t]he bait is to give our children an education; the [] object is to religiously traditionalize them, and [] unite [c]hurch and state."[236]

Other efforts were made to support education before Indiana's second constitutional convention. The House of Representatives passed legislation similar to the 1851 constitutional language, though the Senate failed to act.[237]

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225. *Id.* at 122–23.

226. Embry v. O'Bannon, 798 N.E.2d 157, 163 n.5 (Ind. 2003) (plurality).

227. *Id.* at 163.

228. Nagy *ex rel*. Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 486 (Ind. 2006) ("[Mills] addressed the Indiana General Assembly six times between 1846 and 1852 . . . .").

229. *Id.*

230. *Id.*

231. BOONE, *supra* note 18, at 89.

232. *Nagy*, 844 N.E.2d at 487.

233. *Id.*

234. *Id.* at 486.

235. *Id.* at 487.

236. *Id.* (citation omitted).

237. *Id.*

Instead, the Senate submitted the question to the people with an 1848 ballot referendum that only asked, "Are you in favor of free schools?"[238] Opposition to the referendum and the common schools was displayed in acts of voter intimidation at the polls during the 1848 election.[239] Despite the opposition, the 1848 referendum returned results with 56% of voters supporting the free common schools.[240] However, the battle continued as legislative enactments were either insufficient to support the financial needs of the common schools, or the laws were generally ineffective and had little impact on the problem.[241]

Richard Boone's book, *A History of Education in Indiana*, offers one of the more comprehensive records on Indiana's educational history.[242] Boone lauded Indiana's education article as "one of rare excellence" because "the basis of the free-schools idea was purely secular."[243] The book outlines every School Law from the General Assembly from Indiana's founding until a successful system formed.[244] Boone criticized the 1849 School Law, the last education law under the first constitution, as ineffective legislation because "the State adoption of private schools . . . frequently [made] the State [] only a follower, leaving the initiative to be taken by private and local enterprise."[245]

In the 1816 constitution's final years, Boone observed that out of the "nearly three hundred thousand children of school age in the State[,] less than fifty thousand were in any sort of school."[246] Like Caleb Mills, Boone rejected policies that provided unequal and inadequate funding to the common schools before 1851 and in the decade following the second Constitution's ratification.[247] He described the lack of state control that led to a far from uniform system as "one of the most vicious" problems of the educational endeavor.[248] Boone observed that the legislature's failures regarding the education system inevitably meant that "[t]here was no State system."[249]

Caleb Mills's common school advocacy ignited efforts in the General Assembly and highlighted a larger "evil" facing Indiana at the time—widespread illiteracy.[250] The second constitutional convention and redrafting of the Education Clause aimed to remedy "a lack of education and the subsequent problem of illiteracy among Indiana's citizens."[251] At the convention, one

238. BOONE, *supra* note 18, at 101–02.
239. *Nagy*, 844 N.E.2d at 486.
240. *Id.* at 487.
241. *Id.*
242. BOONE, *supra* note 18.
243. *Id.* at 12.
244. *Id.* at 1.
245. *Id.* at 121.
246. *Id.* at 87.
247. *Id.* at 120–21.
248. *Id.* at 121.
249. *Id.*
250. Nagy *ex rel.* Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 484 (Ind. 2006); BOONE, *supra* note 18, at 87–88.
251. *Nagy*, 844 N.E.2d at 484.

delegate referenced the 1840 census and noted that Indiana had the fifth largest population in the Union, yet it "was clearly proven to be the most ignorant *of all the free States*, and far, very far, *behind many of the slave States*."[252] The delegate then referenced the 1850 census that placed Indiana twenty-third out of the twenty-six states for literacy.[253] He noted how Indiana had fallen by six rankings in a decade to fully emphasize the futile nature of legislative efforts during the prior years and the state's inability to cure the illiteracy crisis with the existing Constitution.[254]

IV. WHAT WENT WRONG IN *MEREDITH V. PENCE*

A. Article 8, Section 1

The *Meredith* decision noted that both education duties appeared in the 1816 Constitution's text, though written as two separate sentences.[255] The current Article 8, Section 1 text provides the combination of the duties in a single sentence, joined with the word "and."[256] The *Meredith* Court reasoned that, based on the "use of the conjunction 'and' in the 1851 Constitution," the drafters strongly intended the provision to create nonetheless "separate and distinct duties."[257] By that reasoning, two separate sentences, each previously lacking influence on the other, could be made into a cohesive provision without significance.[258] The Court assumed that a combined text would not indicate the want of a combined understanding or purpose.[259] That reasoning necessarily meant that the ratifiers desired for the General Assembly to encourage education by all suitable means, though not *encourage* education in a system of common schools; the common schools were only to be *provided*.[260]

Additionally, the Court explained the importance of the common schools at ratification and highlighted the language that prevented the system's creation. The convention delegates determined that the words of qualification in the 1816 Education Clause, providing for the creation of uniform common schools "'as soon as circumstances will permit,' left [education's] promise unfulfilled by the

252. IND. CONST. CONVENTION, 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1890 (1850), *reprinted in* IND. HIST. COLLECTIONS, https://iuidigital.contentdm.oclc.org/digital/collection/ISC/id/7241/rec/31 [https://perma.cc/WN68-BH35].

253. *Id.* at 1889–90.

254. *Id.*

255. Meredith v. Pence, 984 N.E.2d 1213, 1221 (Ind. 2013); *see also* IND. CONST. of 1816, art. IX, § 1.

256. *Meredith*, 984 N.E.2d at 1221.

257. *Id.*

258. *See generally id.* at 1220–24.

259. *Id.* at 1224.

260. *Compare* IND. CONST. of 1816, art. IX, § 1, *with* IND. CONST. art. VIII, § 1.

General Assembly."[261] Therefore, the qualifying terms were removed to ensure the creation of common schools without delay.[262] The Court construed the similarities in the sentences of the old text as meaning the duties could be met separately from one another.[263] While history makes clear that the duties previously existed independently,[264] knowing that the legislature encouraged education without providing schools should not necessarily mean that changes to the provision intended no further change to the General Assembly's responsibilities.

Moreover, the Court did not mention removing a similar qualifying phrase preceding the words "to encourage" in the 1816 text.[265] The prior sentence provided that the legislature should "from, time to time" take legislative action to encourage its education goals.[266] After the second Constitution's ratification, this text became "it shall be the duty of the General Assembly to encourage, by all suitable means . . . and to provide, by law . . . ."[267] Thus, the ratifiers of the 1851 Education Clause removed two phrases of qualification, combined two sentences, and combined two duties regarding the General Assembly's previously neglected responsibility, yet the Court believed that the meanings should not merge.[268]

The *Meredith* Court's conclusion defied the very logic it employed to construe the constitutional text. It is inconsistent to claim a provision's text as being "hammered into place"[269] twice, once for each constitutional text, then interpret the new provision to have altogether the same meaning. One might sooner reason that the ratifiers' removals and additions of words or the drafters' restructuring of an entire provision sought something more than to delete a qualifying word. For example, a reader may take the combined view of this rephrasing to mean encouragement of education differently from the previous methods and instead to encourage education by *providing* a system of education.

Finally, the plaintiffs proffered an argument the Court omitted from its decision, which was indicative of the provision's understanding at the time. This argument raised the School Law of 1855, which was a piece of legislation aimed to promote education by a dual system and was quite applicable to the dual system created by the CSP legislation.[270] The 1855 dual system established two sets of schools: the common schools from the new Constitution and "public schools," though different from public schools today as they included privately

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261. Nagy *ex rel*. Nagy v. Evansville-Vanderburgh Sch. Corp., 808 N.E.2d 1221, 1226 (Ind. Ct. App. 2004), *vacated*, 844 N.E.2d 481 (Ind. 2006).

262. *Id.* at 1228.

263. *Meredith*, 984 N.E.2d at 1221–22.

264. *Id.* at 1222.

265. IND. CONST. of 1816, art. IX, § 1.

266. *Id.*

267. IND. CONST. art. VIII, § 1.

268. *Meredith*, 984 N.E.2d at 1224.

269. City Chapel Evang. Free Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001).

270. Brief of Appellants, *supra* note 50, at *39.

established schools, which were separately funded by only local tax revenues.[271] The dual system of schools was promptly struck down by the 1858 Supreme Court which stated:

> Under our former constitution, we had had two systems of common schools, the general and the local, and the local had broken down the general system, and neither had flourished . . . . This was an evil distinctly in the view of the convention . . . . [A]nd it was determined that the two systems should no longer coexist; that the one general system should be continued, strengthened by additional aids; and that the counteracting local system should go out of existence . . . .[272]

For the same reasons provided to strike the school law within a few years of the 1851 Constitution's ratification, the *Meredith* Court necessarily should have identified that the CSP was unconstitutional.[273]

B. Article 1, Section 4

The Court believed the plaintiffs' interpretation would lead to redundancy in the Constitution's text and that the ratifiers provided little indication of the provision's meaning. [274] However, there was testimony from the 1851 committee chair responsible for the provision's redrafting at the convention.[275] Not only was there testimony, but the testimony did, in fact, provide the purpose of the compelled support clause of the Indiana Bill of Rights.[276] The committee member described this modified provision in the new text as a means to prevent "the imposition, on the citizen, of any *tax to support* any ministry or mode of worship against his consent."[277] The Court's aim to prevent redundancy is a valid goal when construing the constitutional text, but this goal applies to the Court's interpretation and does not override the unequivocal statements of the Constitution's authors. If the compelled support clause is redundant by the framers, that is not for the Court to prevent. Moreover, redundancy is common when applying religious freedom clauses to a set of factual circumstances.[278]

The plaintiffs provided additional support for their understanding of Section 4, which the Court's decision did not consider. Compelled support provisions, like Section 4, have a long history in state constitutions.[279] This clause first

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271. *Id.*
272. *Id.*
273. *Id.* at *29.
274. Meredith v. Pence, 984 N.E.2d 1213, 1225–26 (Ind. 2013)
275. JOURNAL, *supra* note 168, at 964.
276. *Id.*
277. *Id.* (emphasis added).
278. Brief of Appellants, *supra* note 50, at *16 n.14.
279. *Id.*

appeared in Thomas Jefferson's 1785 *Virginia Bill for Religious Liberty*.[280] The statute opposed another proposal that sought use of the state's tax revenues to support teachers of the Christian religion.[281] Jefferson wrote that:

> to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors*, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern . . . .[282]

Virginia's Statute for Religious Freedom laid the foundation for the compelled support clause in the Indiana Constitution and opposed a similar concept to the CSP.[283] The redundancy reasoning provided in *Meredith* hardly disputes this provision's history, evidence of the compelled support clause's original purpose in Jefferson's proposal, or an express statement from the drafter of Section 4 indicating the clause's application to taxes. The possible redundancy of the compelled support provision in Section 4 may be indicative of the drafters' desire to be abundantly clear.

C. Article 1, Section 6

The Court's Section 6 reasoning is even more problematic, given the text's explicit prohibition, and the Court's untenable reasoning to justify the result. The Court's Section 6 holding illustrates this peculiarity by stating: "the prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions [] providing primary and secondary education."[284] This holding frames the Constitution's text strategically where the entire provision states: "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution."[285] The provision and the history of the constitutional convention do not indicate that a carve-out exists to approve differential treatment for "institutions and programs providing primary and secondary education."[286]

The *Meredith* Court seemed to require much more from the drafters to justify any opposing construction, reasoning that "the framers did not manifest

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280. *Id.* at *15 (citing Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 556 (Vt. 1999)).

281. *Id.* at *15–16.

282. Committee of the Virginia Assembly, *A Bill for Establishing Religious Freedom*, FOUNDERS ONLINE NAT'L ARCHIVES (June 18, 1779) https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 [https://perma.cc/F9P4-7KK8].

283. Brief of Appellants, *supra* note 50, at *16–17.

284. Meredith v. Pence, 984 N.E.2d 1213, 1230 (Ind. 2013).

285. IND. CONST. art. I, § 6.

286. *Meredith*, 984 N.E.2d at 1230.

an intent to exclude religious teaching from such publicly financed schools."[287] Such a requirement, an ex post facto condition on the drafters to stipulate every conceivable result, distorts history. In an ever-changing Indiana, the *Meredith* Court requested that the pioneers who drafted the Constitution double as prophets. Likewise, the Court's reliance on a lack of hostility—*after* 1851—toward nonsecular texts in public schools, would not necessitate approval for the CSP's funding of private schools today.[288] The Court's interpretation similarly chooses to reject the precise statements of Indiana Hoosiers present for the second Constitution's ratification.[289]

Despite the Court's purported understanding, what the framers did not offer in announcements at the convention, the text of the provision unambiguously inscribed. While the Court highlighted the framers' use of broad language in construing the Education Clause's meaning earlier in the *Meredith* decision, it foreclosed any preference to broad language when it came time to construe Article 1, Section 6.[290] Notably, in most of the Court quotations or reiterations of Section 6's text, the word "any" is nowhere to be found.[291] Yet, the location of the word "any" in Section 6 clearly indicates the word's use as a modifier of the subsequent words: "religious or theological institution."[292] Handily, in the example provided to support the Court's understanding of a Section 6 benefit, it added this modifier, writing of "*any* benefit" where the constitutional text was silent.[293]

Under Article 1, Section 6, the CSP presents the clearest example of funds withdrawn from the treasury for a religious institution.[294] Not only does the CSP involve direct payment to religious institutions, the legislation also thwarts any accountability to the state or even for the school to create an alternate bank account for depositing voucher payments.[295] Rather than acknowledging this payment, the Court subscribed to the widely discredited "primary beneficiary" theory that tangentially connects the student as the ultimate benefactor of the CSP because the student chose to participate.[296] Despite the overwhelming majority of CSP private schools being religious, the Court ignored the data and the practical limitations on a low-income family.[297]

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287. *Id.* (citing Embry v. O'Bannon, 798 N.E.2d 157, 163 n.5 (Ind. 2003)).

288. *Id.*

289. *See* Nagy *ex rel*. Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 487 (Ind. 2006).

290. *See Meredith*, 984 N.E.2d at 1222 ("[B]road legislative discretion appears to have been the framers' intent through the inclusion of the phrase 'by all suitable means.'").

291. *Id.* at 1230.

292. *Id.* at 1227–31; IND. CONST. art. I, § 6.

293. *Meredith*, 984 N.E.2d at 1227–29 (emphasis added) (citing Embry v. O'Bannon, 798 N.E.2d 157, 167 (Ind. 2003)) ("*Embry* was not intended . . . to denote a measurable line after which any benefit to a religious or theological institution becomes unconstitutional.").

294. Brief of Appellants, *supra* note 50, at *18–20.

295. *Id.* at *5 n.4.

296. *Meredith*, 984 N.E.2d at 1227.

297. *Id.* at 1227–29; *see also* Brief of Appellants, *supra* note 50, at *6.

Instead, the Court asserted that CSP schools were "not limited to religious schools" and participating families were "not limited to choosing religious schools" before stating that the program was not required, and therefore, the parental choice to participate in the CSP divorced the private school from direct benefit.[298] The high enrollment in religious schools should not be accredited to choice, as the Court indicated, "but rather the inevitable result of a program that, for nearly all participating parents, simply offers no realistic nonsectarian choices."[299] The CSP's tendency to include only religious schools offered a symbolic decision for parents, while rendering the state and private schools the actual decision-makers.[300] Therefore, across most of the state, parents had effectively *no* choice besides the religious private schools.[301]

Finally, the *Meredith* Court relied on Justice Dickson's plurality opinion dicta and did not rectify the issues between that dicta and Justice Boehm's concurrence.[302] Justice Dickson also wrote the *Meredith* decision, which was likely unanimous due to changes in the Court's composition, absent the two justices who disputed his *Embry* opinion.[303] Justices Sullivan and Boehm no longer served on the Supreme Court when it decided *Meredith v. Pence*, allowing Dickson's revisionist history complete control.

V. WHAT NOW? OVERTURN & REPEAL

"[T]he magnitude of the problem may not nullify the principle."[304]

A. Focus on the Public Schools

Indiana's voucher program neither resolved educational deficits as legislators promised, nor did it improve statewide financial burdens. At best,

298. *Meredith*, 984 N.E.2d at 1229.

299. Brief of Appellants, *supra* note 50, at *26.

300. *Id.* at *27; *see also* Ctr. Twp. of Marion Cnty. v. Coe, 572 N.E.2d 1350, 1360 (Ind. Ct. App. 1991) ("[T]he Trustee exercises no control over the missions and makes no effort to separate the missions' sectarian purpose from the statutory benefit to the Appellees . . . . [Therefore,] the payment of public funds to religious missions which they use for religious purposes violates Article I § 6 of the Indiana Constitution.").

301. Brief of Appellants, *supra* note 50, at *27.

302. *See* Embry v. O'Bannon, 798 N.E.2d 157, 170 (Ind. 2003) (Boehm, J., concurring in result) ("[T]o the extent there is significance in the selection of 'institutions' rather than 'seminaries,' I would think that difference in language supports the conclusion that the 1851 Constitution intended to expand, not contract, the type of religious entities for which public expenditure is prohibited. Surely a school or seminary is one form of 'institution' as the term was and is commonly understood.").

303. *Compare Embry*, 798 N.E.2d 157, *with Meredith*, 984 N.E.2d 1213. Justice Boehm retired from the Court in 2010. Justice Sullivan retired from the Court in 2012.

304. Bush v. Orleans Par. Sch. Bd., 138 F. Supp. 337, 342 (E.D. La. 1956).

voucher programs show slight improvements in student test scores.[305] However, voucher programs often show only neutral results, if not worsening test scores.[306] If the CSP presented clear testing improvement and positive learning results, it might be worth the financial burden it imposed.[307]

Improving education quality and access is a laudable goal that should continue, but not with a program that repeatedly fails at its purported goals. When considering the cost of public education in a vacuum, it appears expensive, and budget cuts may look appealing. However, the cost of public education proves a valuable investment, given that well-educated communities tend to reduce state burdens, leading to "lower unemployment rates, higher wages, and a more diverse economy."[308] Indiana would be wise to consider the long-term benefits of successful public education[309] under a more thoughtful lens. The framers of the Indiana Constitution wrote the foundation for this principal decades ago when they emphasized that "[k]nowledge and learning . . . [are] essential to the preservation of a free government."[310]

B. Choice of Remedy

The 2013 Indiana Supreme Court decided *Meredith v. Pence* wrongly. However, the 2025 Supreme Court is not to blame for the *Meredith* Court's failure. While there are similar ideological leanings in the Court today, if not the presence of the very justices who decided the *Meredith* case, the CSP is not the

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305. Denise-Marie Ordway, *Private school vouchers: An explainer (with research) to help you navigate school choice policies*, THE JOURNALIST'S RES. (Jan. 31, 2024), https://journalistsresource.org/education/private-school-vouchers-school-choice-research-2/ [https://perma.cc/8DSR-2LUD].

306. Megan Austin, Joseph Waddington & Mark Berends, *Voucher Pathways and Student Achievement in Indiana's Choice Scholarship Program*, 5 RUSSELL SAGE FOUND. J. OF SOC. SCI. 20, 35–36 (2019).

307. *See* Megan Austin, Mark Berends & R. Joseph Waddington, *Indiana's Choice Scholarship: Participation & Impact on Achievement*, UCLA CIVIL RIGHTS PROJECT (Mar. 5, 2018), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/indiana2019s-choice-scholarship-participation-impact-on-achievement [https://perma.cc/GG9J-NVZ4].

308. *The Importance of Public Education*, LOC. EDUC. & ACTIVITIES FOUND. (Nov. 6, 2024), https://leaf742.org/blog/the-importance-of-public-education/#:~:text=Communities%20with%20a%20well%2Deducated,improved%20economic%20stability%20and%20growth.&text=Schools%20are%20where%20young%20people,world%0beyond%20their%20immediate%20circles [https://perma.cc/4UK4-GMSL].

309. *See* Terry Spradlin, *How tax dollars work in public schools*, IND. CAPITOL CHRONICAL, (Feb. 27, 2025, 7:00 ET), https://indianacapitalchronicle.com/2025/02/27/how-tax-dollars-work-in-public-schools/ [https://perma.cc/2K33-9BBJ] ("Adequate funding for schools helps perpetuate our democracy, benefits local communities, provides opportunities for our youngest citizens, and drives economic and job growth. Successful schools produce law-abiding, tax-paying citizens ready for postsecondary education, military enlistment, or high-wage careers.").

310. IND. CONST. art. VIII, § 1.

same piece of legislation today.[311] The readily available remedy to this constitutional issue is in the legal profession and its members who value education or religious freedom enough to mount a challenge.

The constitutional requirements on education are not impractical; the text's demand is simple. The text provides the General Assembly's prerogative: "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."[312] The primary hurdle to achieving a constitutional system of K-12 education is undoing almost fifteen years of permissible violation. However, the CSP's timeline of existence does not indicate its validity; it merely indicates a lack of questioning.

In 2019, the Chief Justice of the Indiana Supreme Court, Loretta Rush, wrote that "new legislation may raise questions about its own constitutionality."[313] Chief Justice Rush wrote to encourage attorneys to embrace state constitutions and develop the undeveloped.[314] Rush also noted that the "laws that have been on the books for years may be subject to constitutional challenges induced by shifts in the population, governmental responses to those shifts, or escalating public awareness and concern for certain issues."[315] At minimum, the Chief Justice's words tend to undermine any claim that the CSP is constitutional under *Meredith*.

There is no reason to believe that the CSP, in its 2025 form, is without question or want of litigation. The *Meredith* decision stopped protecting the CSP from question two years later when the General Assembly passed new CSP legislation.[316] The aforementioned history should not indicate any unwillingness from the Court to hear arguments against the CSP in 2025; rather, it should encourage efforts for achieving a constitutionally permissible system.

The first step is to challenge the CSP in court. It is not easy to challenge the government. It is time-consuming, expensive, and requires legal assistance, but it remains possible. Despite the challenges that come with litigation, the path is already paved. The *Meredith* decision provides what not to argue and where to not waste time.[317] The litigation also outlines the opposition, who or what organizations are likely to write supporting the state's brief, and the anticipated arguments from the opposition. The *Meredith* decision, though opposing the former challengers' goal, nonetheless offers the future challenger's course of action. *Meredith* provided that "so long as" the uniform public school system

311. *See* Meredith v. Pence, 984 N.E.2d 1213, 1230 (Ind. 2013); *see also* IND. CODE § 20-51-4-1 to 20-51-4-12 (2025).

312. IND. CONST. art. VIII, § 1.

313. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1380 (2019).

314. *Id.*

315. *Id.* at 1381.

316. *See* H.E.A. 1003, 118th Gen. Assemb., Reg. Sess. (Ind. 2013).

317. *See, e.g.*, Meredith v. Pence, 984 N.E.2d 1213, 1223–25 (Ind. 2013) (comparing the Florida and Wisconsin education provisions to Indiana's but disagreeing with the argument that the Florida provision, which prohibited school vouchers, was akin to Indiana's provision).

exists that is equally open, available to all, and free of charge, the legislative duty is done.[318] As a result, the Indiana General Assembly will not be questioned until the public schools are lost or a full-scale change in the electorate occurs.

Additional remedies may be found in the legislature. The Indiana General Assembly should repeal the CSP legislation in its entirety. The legislation's repeal will necessarily require a phase out period, allowing CSP enrolled families a reasonable time for adjustment and similarly allowing public and private schools affected to plan accordingly. Although this remedy is ideal for most parties involved, it is unlikely to occur anytime soon. The legislative and executive branches engage in active efforts to universalize the CSP, even with financial burdens challenging the ability to provide the funding.[319] Legislative remedies provide the most efficient solution to preserve the principles of religious freedom in the Indiana Constitution and to honor the almost 175-year-old educational system, even if sooner remedies could be found in the Court.

CONCLUSION

This Note has argued that the Indiana Supreme Court case, *Meredith v. Pence*, granting constitutional approval to the CSP, was wrongly decided and the program remains unconstitutional today. By following the Supreme Court's analytical approach to constitutional questions and properly contextualizing the history of education in Indiana, this Note has provided an alternate interpretation that showcases the Court's unconstitutional reasoning. The state's highest court failed to check or balance the CSP in 2013, but it is never too late to right a constitutional wrong.

318. *Id.* at 1223.

319. Salata, VanDriessche & Williams, *supra* note 13.