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ON TRADITIONALISM IN FREE SPEECH LAW

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INTRODUCTION

The idea of tradition evokes our ambivalence. We have never made up our collective mind about the proper role of tradition in society, in law, in constitutional law, or in free speech law in particular.[1] For every endorsement of the importance of tradition,[2] there is a sharp critique.[3] For every expression of the indispensability of tradition,[4] there is a denunciation of tradition's supposed arbitrariness or undue constraint.[5]

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[1] This ambivalence is displayed even in what we might casually think of as largely traditionalist cultures. *Compare* LIN YUTANG, THE WISDOM OF CONFUCIUS 215 (Random House Inc. 1936) (c. 500 B.C.E.) ("Just as people who think that they can destroy an old dam because they think it is useless will certainly meet a flood disaster, so will a people who do away with the old principle of social order because they think it is useless certainly meet a moral disaster."), *and* CONFUCIUS, THE ANALECTS bk. 12, § 1 (Raymond Dawson trans., 1993) (c. 500 B.C.E.) ("Do not look at what is contrary to ritual, do not listen to what is contrary to ritual, . . . and make no movement which is contrary to ritual."), *with* HAN FEIZI, BASIC WRITINGS § 18 (Burton Watson trans., Colum. Univ. Press 2003) (c. 220 B.C.E.) ("Those who have no understanding of government always tell you, 'Never change old ways, never depart from established custom!' But the sage cares nothing about change or no change; his only concern is to rule properly. Whether or not he changes old ways, whether or not he departs from established customs depends solely upon whether such old ways and customs are effective or not."), *and* MOZI, BASIC WRITINGS 78–79 (Burton Watson trans., Colum. Univ. Press 2003) (c. 400 B.C.E.) ("[T]hose who advocate elaborate funerals and lengthy mourning say: 'If elaborate funerals and lengthy mourning are in fact not the way of the sage kings, then why do the gentlemen of China continue to practice them and not give them up?' . . . Mozi said: This is because they confuse what is habitual with what is proper, and what is customary with what is right."). Perhaps, one might add, the sage also takes transition costs into account when assessing the value of following tradition.

As well, ambivalence toward tradition is displayed even in what we might casually think of as largely revolutionary cultures. *See, e.g.*, CARL L. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS 95 (New Haven & London, Yale Univ. Press 1932) ("Did the [18th century] Philosophers . . . wish to 'break with the past?' Obviously, they wished to get rid of the bad ideas and customs inherited from the past; quite as obviously, they wished to hold fast to the good ones, if any good ones there were.").

[2] *See, e.g.*, ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION (1990). For discussion of Professor MacIntyre's conception of tradition, see, for example, Brenda Almond, *Alasdair MacIntyre: The Virtue of Tradition*, 7 J. APPLIED PHIL. 99 (1990); Tom Angier, *Alasdair MacIntyre's Analysis of Tradition*, 22 EUR. J. PHIL. 540 (2011); Julia Annas, *MacIntyre on Traditions*, 18 PHIL. & PUB. AFFS. 388 (1989); Micah Loft, *Reasonably Traditional: Self-Contradiction and Self-Reference in Alasdair MacIntyre's Account of Tradition-Based Rationality*, 30 J. RELIGIOUS ETHICS 315 (2002); and J.B. Schneewind, *MacIntyre and the Indispensability of Tradition*, 51 PHIL. & PHENOMENOLOGICAL RSCH. 165 (1991).

[3] Most familiarly, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

[4] *See, e.g.*, Douglas B. Klusmeyer, *Hannah Arendt On Authority and Tradition*, *in* HANNAH ARENDT: KEY CONCEPTS 138, 142 (Patrick Hayden ed., 2014); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066 (1990); and J.W.N. Watkins, *Political Tradition and Political Theory*, 2 PHIL. Q. 323, 331 (1952) ("' Ceaseless' criticism of moral habits will tend to destroy confidence in the moral tradition and so paralyse moral behaviour.").

[5] *See, e.g.*, THOMAS PAINE, REPRESENTATIVE SELECTIONS 209 (Henry Hayden Clark ed., 1944) (1791) ("Government by precedent, without any regard to the principle of the precedent, is one of the vilest systems that can be set up."); G.W.F. Hegel, letter to C.G. Zellman of January 23, 1807, *in* John Glassford, Nihilism and Modernity: Political Responses in a Godless Age 92 (Nov. 20, 1998) (Ph.D. dissertation, The Open University), http://oro.open.ac.uk/57953/1/268258.pdf

Assessing the limitations of a traditionalist approach to constitutional law, and to free speech law in particular, is a more manageable enterprise. This Article contrasts constitutional traditionalism, and free speech traditionalism in particular, with what might be called constitutional and free speech purposivism.[6] The overall preferability of purposivism to traditionalism in these contexts is explored and developed below. The comparison between traditionalism and purposivism involves, first, a critical exposition of the scholarly defense of traditionalist constitutional methodologies. This exposition is followed by a critique of the Supreme Court's use of traditionalism in free speech contexts, and then by an elaboration of the relative deficiencies of traditionalism in some important public forum speech cases in particular.

I. THE SCHOLARLY DEFENSE OF CONSTITUTIONAL TRADITIONALISM

Whatever its distinctive elements, free speech traditionalism[7] nests within constitutional traditionalism[8] more generally. The leading contemporary exponent of constitutional traditionalism, Professor Marc O. DeGirolami, has said that "[t]raditionalist constitutional interpretation takes political and cultural practices of long age and duration as constituting the presumptive meaning of the text."[9] In this sense, the primary focus of traditionalist constitutionalism is on the text of the relevant constitutional provision,[10] particularly as distinct from some sort of abstract moral or political principle.[11] More substantively, constitutional traditionalism holds that the sustained traditionality of a practice that interprets a

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[https://perma.cc/R7YB-EMZS] ("Thanks to the bath of [its] [r]evolution, the French Nation has freed [itself] of many institutions which the human spirit had outgrown like the shoes of a child" and which therefore weighed on it, as others still do, as fetters devoid of spirit.).

[6] Constitutional purposivism, and free speech purposivism, can be contrasted not only with traditionalism, but with various sorts of formalism. *See, e.g.*, Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). For a sense of legal purposivism in general, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 102 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958). In the criminal law context, see Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958). The distinct practice of statutory purposivism tends to focus, understandably, on the statutory text, in ways we do not follow below. See, for example, John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011). For a useful further discussion, see John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70 (2006).

[7] *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020).

[8] *See* Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2024), (https://ssrn.com/abstract=4205351) [https://perma.cc/D2HC-A5S7]; Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020).

[9] DeGirolami, *supra* note 7, at 1653. *See also* Louis J. Virelli, III, *Constitutional Traditionalism in the Roberts Court*, 73 PITT. L. REV. 1, 1 (2011) ("traditionalism . . . looks for meaning in present manifestations of longstanding practices or beliefs. . . .").

[10] *See* DeGirolami, *supra* note 7, at 1653.

[11] *See id.* at 1653; DeGirolami, *Traditionalism Rising*, *supra* note 8, at 7.

constitutional text tends to bestow political or legal legitimacy on that practice.[12] The most relevant such practices, on Professor DeGirolami's theory, tend to be ground-up rather than top-down, decentralized rather than centralized in character, sustained rather than intermittent or sporadic, long-established rather than relatively novel, popular rather than elite-imposed, widely instantiated rather than geographically limited, and frequent or dense in their manifestations.[13]

On this view, the interpretative authority, and any other kind of moral or legal authority, of a tradition is presumptive, or defeasible.[14] In particular, a traditional practice loses its text-interpreting force if the practice in question is somehow deemed to violate, or conflict with, the relevant text,[15] or else if it is deemed to be overridden "by a very powerful moral principle that runs against the tradition."[16]

Any theory of constitutional traditionalism would ultimately require a book-length exposition and defense. In particular, we would eventually need the best realistically available theory of what would count as a very powerful moral principle, in contrast with the content of a traditional practice. Could a cost in sheer utility that is lost by following a tradition ever count as a matter of a powerful moral principle? But then, perhaps traditionalism should defer to a very powerful moral principle only in the absence of any other moral principle, of whatever gravity, that may support or align with the tradition in question.

The most important context in which an arguably well-established constitutional tradition has evidently conflicted with moral principle is that of equal protection and non-discrimination. As Professor DeGirolami clearly appreciates, "many traditions . . . are vile and pernicious."[17] In particular, "[a]partheid, antisemitism, racism of all sorts are, after all, highly traditional practices."[18] American "racial segregation was a multigenerational project that depended . . . on the next generation . . . to preserve it . . . ."[19]

More broadly, a well-established tradition may itself "reinforce or facilitate dominance and alienation."[20] We should expect dominant groups, whatever their moral character, to reinforce popular traditions that operate to sustain and legitimize those dominant groups. The irony in American constitutional law is that "some provisions of the Constitution were enacted in order to *destroy* long-

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[12] *See* DeGirolami, *supra* note 7, at 1656. Something of the democratic populist element of Professor DeGirolami's approach is captured by the view that "the history of tradition requires that we listen to the choruses and not only to the soloists." JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 17 (1984).

[13] *See generally* DeGirolami, *Traditionalism Rising*, *supra* note 8.

[14] *See id.* at 32; DeGirolami, , *supra* note 7 and accompanying text.

[15] *See* DeGirolami, *First Amendment Traditionalism*, *supra* note 7, at 1659.

[16] *Id.*

[17] Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 261 (1986).

[18] *Id.*

[19] David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1056 (1991). Classically, see the separate but equal case of Plessy v. Ferguson, 163 U.S. 537 (1896).

[20] Felipe Jimenez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMAN. 59, 70 (2022).

standing traditions"[21] in areas bearing upon individual rights.[22] In this respect, then, determining the value of a traditionalist approach to any particular constitutional provision will require a comparison with some at least equally well-developed alternative approach.

As Professor DeGirolami recognizes, traditionalism, like most alternative approaches, must confront problems of indeterminacy, manipulability, and arbitrariness in identifying, characterizing, and applying the most relevant traditional practices.[23] The Supreme Court has yet to successfully address the classic problem of the proper level of generality or specificity with which to formulate any potentially relevant tradition.[24] Of course, the specific alternative to traditionalism of a more or less open-ended, multi-part, largely intuitive constitutional balancing test[25] can hardly claim a decisive advantage over traditionalism in this respect.

As well, the Supreme Court has done little to meaningfully distinguish between recognizing a tradition and, in contrast, choosing to judicially prefer tradition on extrinsic, substantive value grounds. Thus, it has been argued that

> the Court doesn't say how many historical laws and regulations are necessary to establish a tradition, how old examples can get before they are too old, or where to draw the line between founding or Reconstruction-era laws that clarify . . . meaning versus those that are unacceptably modern. This failure to provide guidance isn't an accident. It gives the Court the flexibility to treat the evidence in a manner that supports its desired conclusion.[26]

One might wonder whether the Supreme Court should ever take into account, to any degree, what it believed to be the likely consequences of its recognizing a tradition, or the lack thereof. Perhaps recognizing a tradition may tend to legitimize, and further entrench, that tradition.[27] But it is also possible that judicially recognizing and giving constitutional effect to that tradition may catalyze opposition to—and hasten the demise of—that very tradition.[28] As a result of a hostile cultural and legal response, a future Court might later reverse

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[21] Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami's Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2024), (https://ssrn.com/abstract=4383680) [https://perma.cc/3PKC-H386].

[22] *See id.*

[23] *See* DeGirolami, *Traditionalism Rising*, *supra* note 8, at 28, 30.

[24] *See id.* at 28 nn.121–22.

[25] In the free speech context, see United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring in the judgment).

[26] Michael Smith, *Choosing History*, MICHAEL SMITH'S L. BLOG, (Aug. 10, 2022, 8:35 AM), https://smithblawg.blogspot.com/2022/08/choosing-history.html [https://perma.cc/4ZWR-4W7N]. For an elaborate critique of the purported guiding and constraining power of tradition in substantive due process cases, see Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006).

[27] *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023).

[28] *Id.* at 1482.

its own traditional precedent.[29] Perhaps all of this should be irrelevant to a conscientiously traditionalist Court. But one might wonder about the likelihood, in practice, of such judicial indifference to consequences.

Much more fundamentally, though, traditionalism as a method of interpreting constitutional texts raises a variety of concerns. To begin with, it would seem that the value of traditionalism as a way to interpret constitutional texts must vary dramatically with the nature of the particular constitutional text in question. Suppose we have a question about whether Congress is empowered to engage in some general kind of activity. In such a case, the text of the Constitution[30] may not be decisive. But specific constitutional, textual elaborations will, for many kinds of such possible activities, provide a substantial degree of determinateness.[31]

In contrast, though, suppose that we have a question about whether Congress, or any other federal or state agency, is textually empowered to abridge, or otherwise restrict, a private party's freedom of speech. Whatever the status of free speech as a constitutional tradition, the constitutional text of the Free Speech Clause tells us little about such a constitutional tradition, or the proper limits thereof.[32]

Admittedly, some free speech cases are indeed about the meaning of "speech" in the Free Speech Clause,[33] and one possible way to make such a determination is to look to constitutional tradition.[34] But most free speech cases are not crucially about the constitutional text, and traditionalism in textual interpretation is irrelevant in all such cases.

Where constitutional traditionalism does come into play, it is, again, contrasted with comparable level appeals to abstract general moral rule and principle.[35] The distinction, though, between constitutional traditionalism and constitutional level abstract principle is not exhaustive. Other approaches, descriptive or normative, to constitutional adjudication are also possible.

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[29] *Id.*

[30] See the specific textual elaborations in U.S. CONST. art. I, § 8.

[31] Merely for example, coining money, adopting bankruptcy laws, and building post roads are all clearly authorized by the text, whatever the inevitable further interpretive controversies. *Id.*

[32] U.S. CONST. amend. I; *see*, classically, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1st ed. 1988).

[33] See, for example, the house architectural style case of Burns v. Town of Palm Beach, 999 F.3d 1317, 1335 (11th Cir. 2021) and the provision-of-food-as-speech cases of Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 910 F.3d 1235, 1240–41 (11th Cir. 2018) and Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1032 (9th Cir. 2006) (en banc). For broad elaboration of speech versus non-speech problems, see, for example, MARK TUSHNET ET AL., FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT (2017); R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010) (emphasizing the basic purposes or values justifying the scope and limits of the free speech clause, along with useful general rules, mid-level heuristics, and contextual sensitivity, etc.).

[34] *But see* Wright, *supra* note 33 (emphasizing alternative approaches, with an emphasis on the purposes or values animating the constitutional status, at any historical point, of freedom of speech).

[35] *See* DeGirolami, *Traditionalism Rising*, *supra* note 8.

In particular, one might seek to decide constitutional cases in general, or free speech cases specifically, in accordance with what one took to be the relevant purpose, or purposes, underlying the Constitution or the constitutional provision in question. Call this purposivism. By contrast, traditions, legal and otherwise, need not have any purpose. In some instances, the purpose or purposes of a provision might be reducible, without distortion or oversimplification, to matters of abstract principle. In the simplest case, one might argue that the Equal Protection Clause is about the principle of equality, in one context or another. Or that the Free Speech Clause is about the principle of liberty, again, in context.

But in many constitutional cases, the purposes that are thought to underlie the provision in question are not reducible to any single abstract principle, or to any set of such principles. Of course, the idea of an abstract principle could be stretched so that even the congressional power to coin money could be said to embody some abstract principle.[36] But the more natural account of that provision would instead be that the provision was somehow intended to, or does in fact serve, with whatever degree of success, one or more purposes. And not all purposes are reducible to matters of principle.

On this approach, the provision would be purposive, rather than principle-driven, or at least more the former than the latter. One might, controversially, think of the Constitution as a whole as more purposive than principled. We need not herein take sides on that particular question. But we can at least say, for example, that ordinary contracts, entered into by two or more parties, are typically less a matter of abstract principle, and more a matter of the purposes of the parties involved. And by the term 'purposes,' we may include the goals, points, aims, aspiration, or values of parties, apart from any abstract principle.

Ordinary life also exhibits voluntary conduct—think of a social get-together, for example—that is undertaken either for its own sake, with no real purpose, or less mysteriously, for one or more unarticulated purposes, such as sheer collegiality, comradeship, or fun. No abstract principle is necessary to explain or justify the social get-together.

On our approach, the Free Speech Clause in particular fits the purposive model. The clause was, is, or should be, somehow a matter of purpose, as distinct from either abstract principle or tradition. It is possible to say that the Free Speech Clause should, as a matter of abstract principle, or else of purpose, embody some tradition. But it is clearly possible to hold that the purposes of the Free Speech Clause are not exhausted by—and need not even include—any concern for any tradition.

What the purposes—as distinct from either abstract principles, or traditions—underlying the Free Speech Clause actually are, or should be, is a separate question, discussed elsewhere herein.[37] But whatever the purposes of the Free Speech Clause may be, a traditionalist critic might well request a justification for choosing those purposes rather than others. Justifying one's chosen purposes, in any context, is of obvious importance. Similarly, of course, choosing to be guided by tradition, however ultimately ennobling or embarrassing, also requires a justification. For our purposes herein, though, the question of the underlying

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[36] U.S. CONST. art. I, § 8.

[37] *See infra* note 89 and accompanying text.

justification for one set of purposes rather than another in the free speech context can, actually, be largely set aside.

It is certainly proper to critique any set of purposes thought to underlie the Free Speech Clause. But suppose we assume, presumably along with the constitutional traditionalist, that the Constitution, and the Free Speech Clause itself, are somehow sufficiently morally justified. It is then hard to see how no set of purposes, in adopting the Constitution, or in adjudicating free speech cases, could possibly be morally justifiable.[38] If, more prosaically, it is proper for someone to, say, make a dental appointment, it is then hard to see how there could be no proper purpose in doing so.

Identifying some satisfactory set of purposes underlying the Constitution, or the Free Speech Clause, may be more, or less, difficult than identifying some relevant constitutional tradition. The complications are almost endless. Merely for example, there may be traditions with counter-traditions, and conflicts within a tradition.[39] But we may, on the other hand, cling to a set of purposes thought to underlie the free speech clause even after the real cultural meaningfulness of those purposes has evaporated.[40] Some constitutional traditions are worthy, and others profoundly shameful. A purposive analysis, in contrast, has the potential to minimize elements of shamefulness. We can revise our official understanding of the purposes of a right or practice faster than we can revise any sustained underlying tradition. As soon as the Court recognizes the shamefulness of a purpose, it can abandon that purpose, and rely on other purposes. Traditions, in contrast, carry great momentum.

On this basis, we can begin to consider the case law on free speech and tradition.

II. THE SUPREME COURT ON SPEECH REGULATION TRADITIONS VERSUS THE LOGIC OF PURPOSE

The Supreme Court's devotion to tradition, and to traditional practice, in many free speech contexts, is conspicuous. Consider, as an initial example, the question of whether speech in public airport terminals should be regulated only in ways consistent with the regulation of speech in public parks, sidewalks, or streets.[41]

Given such a question, the Court might conceivably have focused on the relevant purposes, or uses, of the various sorts of public properties under consideration. Perhaps even a large airport terminal is, given its purpose or purposes, relevantly distinguishable from, say, a public sidewalk. And the Court has, indeed, taken the government's purpose, or intention, in operating airports into account.[42]

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[38] Both purposivists and traditionalists would have to make appropriate accountings of the risks and costs of their respective normative approaches.

[39] See classically, the free exercise, child-raising, and autonomy case of Wisconsin v. Yoder, 406 U.S. 205 (1972).

[40] *See* R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235 (2020).

[41] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

[42] *Id.* at 680–81.

But the Court's more fundamental concern has, instead, been that public airports are a relatively recent historical phenomenon.[43] Unlike public parks, sidewalks, or streets, airports have not, through long tradition,[44] or "immemorially . . . time out of mind,"[45] been purposed for expressive activity by the public.[46] Thus, "there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice,"[47] favors the airport speaker. In this public forum context, tradition, in more than one sense, undermines the constitutional claim of the would-be speaker.

Elsewhere, Justice Scalia emphasized the dual nature of the focus on tradition in many public forum doctrine cases.[48] In particular, per Justice Scalia, "the category of a 'traditional public forum' . . . must remain faithful to its name and derive its content from *tradition* . . . . [R]estrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot."[49]

Recourse to traditional practices in restricting speech is certainly not confined to public forum cases. Thus, for example, "anonymous pamphleteering is . . . an honorable *tradition* of advocacy and of dissent."[50] Much more broadly, the Court has recently and repeatedly focused on traditionality in determining the scope and limits of governmental authority to regulate speech.[51]

Thus, in the animal cruelty video case of *United States v. Stevens*[52] the Court declared that traditionally, and from the 1791 founding in particular,[53] free speech

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[43] *Id.* at 680.

[44] *See id.*

[45] *Id.* (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

[46] *See id.*

[47] *Id.* at 681.

[48] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment).

[49] *Id.*

[50] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1992) (emphasis added). This language is quoted in the anonymous public university student speech case of Just. For All v. Faulkner, 410 F.3d 760, 764 (5th Cir. 2005). In contrast, though, consider the assertion by Justice Thomas that the judicial requirement in libel cases that "public figures . . . establish actual malice bears 'no relation to the text, *history*, or structure of the Constitution.'" Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of cert.) (emphasis added) (quoting Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)). One problem is that the longer and more consistently the actual malice rule is cooperatively applied, the more clearly the actual malice rule becomes a constitutional tradition.

[51] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–69 (2010), *superseded by statute*, Preventing Animal Abuse and Torture Act, Pub. L. No. 116-72 133, Stat. 1151 (2019) (animal cruelty is not obscene for the purposes of unprotected speech); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) (nor are violent video games); United States v. Alvarez, 567 U.S. 709, 717–18, 722, 723 (2012) (nor are false statements); City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464, 1469 (2022) (sign regulations are not automatically content based); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022) (private flags on city flagpoles are not government speech). *See also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (free speech case in which the Court addressed historic and traditional practices as the crucial element of an Establishment Clause inquiry).

[52] 559 U.S. at 468.

[53] *Id.*

law has permitted content-based restrictions of speech in only a few traditionally-recognized,[54] limited contexts and categories, including obscenity, defamation, fraud, incitement to violence, child pornography, speech that is inseparable from criminal activity, and 'fighting words.'[55] The Court in *Stevens* found no similar traditional exception for speech that depicts cruelty to animals.[56] The Court rejected an alternative approach in the form of a very broad categorical balancing of speech benefits and harms.[57] But no further inquiry into any set of purposes, or aims, that might animate free speech protection and its limits was undertaken.[58]

The Court in *Stevens* did consider that there might be other categories of speech, beyond those recognized above, that have historically been unprotected from regulation,[59] but not yet formally or explicitly recognized as unprotected.[60] But in any event, the speech category of depicting animal cruelty was said not to constitute any such traditionally unprotected category.[61] And the cases after *Stevens* have reinforced the approach to speech regulation adopted therein.[62]

The Court's focus on traditions of regulation raises the controversial question of a one-way ratchet in the free speech cases. Let us simply assume that a category of speech cannot be regulated unless there is a sustained tradition of doing so. Let us also assume that the particular category of speech in cases such as *Stevens*,[63] *Brown*,[64] and *Alvarez*[65] has not traditionally been thus regulated. Thus, speech within all such categories cannot be regulated on the basis of its content, perhaps apart from some overriding moral principle or some moral emergency.

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54 *Id.* (quoting R.A.V. v. St. Paul, 505 U. S. 377, 382–83 (1992)).

55 *Id.* at 468–69, 471. The *Alvarez* case added the unprotected category of "true threats." 567 U.S. at 717.

56 *Stevens*, 559 U.S. at 469. Correspondingly, in *Brown*, the Court declared that "California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none." 564 U.S. at 795. Voluntary, if uniform, movie theater rating systems, including depictions of violence, presumably did not count as a social or legal tradition of the relevant sort, however longstanding or consistent.

57 *Stevens*, 559 U.S. at 470–71.

58 *Id.* at 472.

59 *Id.*

60 *Id.*; *e.g.*, *Brown*, 564 U.S. at 792; *Alvarez*, 567 U.S. at 722.

61 *Stevens*, 559 U.S. at 472.

62 *See supra* note 51. Even the cases that do not explicitly require a broad traditional speech regulatory practice emphasize the role of tradition in context. *E.g.*, *City of Austin*, 142 S. Ct. at 1469 ("American jurisdictions have regulated outdoor advertisements for well over a century."); Shurtleff v. City of Boston, 142 S. Ct. 1583,1589–90 (2022) (in distinguishing between government speech and private party speech in a public forum, "the history of the expression at issue" is one of three considerations). For further discussion, see, for example, Girgis, *supra* note 27, at 1512–18; Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 906 (1993); Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical Free Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1346 (2015); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023).

63 559 U.S. at 468–69.

64 564 U.S. at 791.

65 567 U.S. at 717–18, 721, 723.

This would mean, most crucially, that no court could ever ask, of any traditionally unregulated category of speech, whether that category, or general kind, of speech ever promotes, to any degree, any one or more of the purposes, goals, or interests thought by anyone to underlie the constitutional protection of speech in general. Or whether a category of speech once had some positive relation to some set of free speech purposes, but no longer does. Or whether the particular category of speech actually undermines those purposes, or impairs the speech of others, without violating any overriding moral principle. Questions of purpose-fulfilment or nonfulfillment, in the absence of any overriding moral principle, are thus deemed irrelevant.

But the other side of the one-way ratchet question has to do with the openness of any tradition-oriented speech analysis with respect to well-established, perhaps even exceptionlessly invoked traditions of speech restriction of any given sort. We know that in general, traditionally unregulated speech categories should not be subject, now, to content-based restrictions. But how much, if at all, should a traditionalist respect, or defer to, a strong tradition of legal restrictions on a category of speech? Wouldn't it be awkward for the traditionalist to recur to any possible purposes for protecting speech only in that context, and not elsewhere?

Think, for example, of the well-established tradition of allowing severe restrictions on speech that is thought to amount to subversive advocacy. Such cases might include, classically, *Schenck v. United States*,[66] *Frohwerk v. United States*,[67] *Debs v. United States*,[68] *Abrams v. United States*,[69] *Gitlow v. New York*,[70] *Whitney v. California*,[71] and *Dennis v. United States*.[72] One might deny that this line of cases amounts to, or recognizes, a tradition of restricting subversive advocacy. But the price of that denial would be one of increased murkiness as to how we are to recognize a tradition in the first place.

In any event, as of 1969, in *Brandenburg v. Ohio*,[73] the Court was willing to set an apparent speech-restrictive tradition aside in the subversive advocacy context.[74] Was there, in 1969, a well-established constitutional tradition of treating speech-restrictive traditions less deferentially than speech-protective traditions in the subversive advocacy cases? This seems unlikely.

Perhaps one could instead try to argue that the one-way ratchet tradition operated at a much more general level, such that liberty-restrictive traditions were more suspect than no better-established liberty-protective restrictions. But this response would, again, re-open the problem of how, and at what level of generality, traditions are to be envisioned.

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66 249 U.S. 47 (1919).

67 249 U.S. 204 (1919).

68 249 U.S. 211 (1919).

69 250 U.S. 616 (1919).

70 268 U.S. 652 (1925).

71 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

72 341 U.S. 494 (1951).

73 395 U.S. 444 (1969).

74 *Id.* at 449.

Or one might say instead that by 1969, courts had identified some overridingly important moral principles bearing upon subversive advocacy in particular that we had not recognized until then. But it is unclear just what overriding moral principle was recognized in *Brandenburg* in 1969 that was not already articulated in, merely for example, Justice Brandeis's stirring concurrence in *Whitney*.[75] One might much more justifiably claim that Justice Brandeis's *Whitney* opinion focuses, rather, on the logic of the crucial purposes, or values, underlying freedom of speech itself.[76]

In fact, one might argue that to the extent that the Court in free speech cases refers to tradition, the logic and justification for doing so inevitably points to the acknowledged or unacknowledged purposes that freedom of speech might be thought to serve. For example, the Court in *McIntyre* focused on the vitality of the tradition of anonymous pamphleteering,[77] or anonymous election-related speech.[78] But the Court in this instance recognized that the value of such a free speech tradition is not fundamental, or independent of more basic animating and motivating considerations. The underlying value of a free speech tradition is, in the main, one of purpose-fulfillment.[79]

In particular, the anonymous pamphleteering tradition "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[80] Much more generally, "it is surely fantastic to cut moral rules adrift from purposes . . . ."[81] All the more is this true of clearly purposive social institutions such as; social contracts,[82] the Constit-

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[75] 274 U.S. at 372–80 (Brandeis J., concurring).

[76] *See id.*

[77] McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 357 (1995).

[78] *Id.*

[79] *Id.* While traditions need not have purposes, they may well have functions, including latent functions.

[80] *Id. See, e.g.*, Nathan W. Kellum, *If It Looks Like a Duck . . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 24 (2005) ("[t]radition itself offers no reason and fails to recognize the reality that those in the past maintained a rationale for allowing speech in certain areas and not in others"). For an influential discussion of tolerance as a fundamental value, and of the inculcation of tolerance as a First Amendment purpose and practice, see LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

[81] H.J.N. Horsburgh, *Purpose and Authority in Morals*, 31 PHIL. 309, 310 (1956).

[82] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 124 (C.B. MacPherson ed., Hackett Publ'g. Co. 1980) (1690) ("The great and chief end . . . of men's . . . putting themselves under government, is the preservation of their property [including their lives, liberties, and estates, *id.* at § 123]); *id.* §§ 95, 222.

ution in general,[83] constitutional rights and the Bill of Rights,[84] and the First Amendment and freedom of speech.[85]

It has been thoughtfully observed in particular that the essence of the defense of freedom of speech is not a "nostalgic regard"[86] for esteemed free speech practices, but a sensitivity to past, current, and future constitutional value.[87] The descriptive and normative questions of the most crucial purposes underlying freedom of speech have clearly attracted substantial attention among scholars.[88] There is something of a consensus as to the most commonly cited purposes of protecting freedom of speech. Something like the optimal social pursuit of truth; the effective functioning of meaningfully democratic self-government; and the value of self-realization or self-fulfillment are most typically cited.[89] Admittedly, some prominent theorists focus on, or even deny the relevance of, one or more such possible purposes.[90] And the consensually prominent such purposes may well lose their cultural meaningfulness over time.[91]

So, on this basis, one might conclude that there is a workable consensus on the basic reasons that are, or should be, recognized as justifying constitutional protection of speech. But it is certainly possible to deny that there is any sufficient consensus on the purposes underlying freedom of speech.[92] Perhaps one could

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[83] *See, e.g.*, U.S. CONST., Preamble; THE FEDERALIST NO. 45 (Alexander Hamilton, James Madison, and John Jay) (Terence Ball ed., 2003) (on the constitutional purpose of promoting the public happiness); *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts'") (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

[84] For cases explaining the purpose of the Bill of Rights, see Fulton v. Phila., 141 S. Ct. 1868, 1917 (2021); McCreary Cnty. v. ACLU, 545 U.S. 844, 884 (2005); Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring), *superseded in statute*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796; *Barnette*, 319 U.S. at 638 (referring expressly to "[t]he very purpose of a Bill of Rights").

[85] *See infra* note 88 and accompanying text.

[86] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988).

[87] *See id.* The volume's editor, the son of Harry Kalven, Jr., reported that the relevant tradition, in the author's mind, resided "not in one or another set of contending views, but in the controversy itself."

[88] *See*, classically, GERTRUDE HIMMELFARB, ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL (Random House, 1974) (1859). For documentation, defense, and critique of the most prominently cited such purposes, see THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–54 (1982); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687 (2016); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015 (2015).

[89] See the sources cited *supra* note 88. Of course, purposes may be more or less complex. *See* John Laird, *"It All Depends Upon the Purpose . . ."*, 1 ANALYSIS 49, 49 (1934). And our purposes certainly may evolve over time. *See* Morris Ginsberg, *The Category of Purpose in Social Science*, 23 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 245, 246 (1923).

[90] *See* KALVEN JR., *supra* note 86.

[91] *See* Wright, *supra* note 40.

[92] Certainly, a critic might work through the rationales cited in Greenawalt, *supra* note 88, denying or minimizing one or more, and endorsing one or more others.

then say that we have no cultural agreement on the most fundamental purposes of constitutionally protecting speech.

And if so, one might then conclude that in this respect, if not elsewhere, the free speech purposivist is no better off than the free speech traditionalist. That is, the determinacy of any recourse to the presumed basic purposes underlying free speech protection is no greater than the determinacy in identifying and applying tradition. Perhaps judicial inquiries into speech traditions are indeed typically doubtful. But is this any worse than seeking a consensus on basic free speech purposes that may well not exist?

Actually, yes. A traditionalist approach to free speech needs a consensus on the most relevant tradition, or traditions, more than a free speech purposivist approach needs a consensus on underlying free speech purposes. Traditionalist and purposivist approaches are not roughly parallel in this respect.

Crucially, the traditionalist must, on the traditionalist's own understanding, somehow find, or discover, and characterize the most relevant historic traditions. Such traditions are thus to be identified or recognized by, and not generated by, the court. The court's own independent normative preferences as to good and bad traditions do not, at this stage, enter into detecting and characterizing the most relevant traditions. To the degree that a court's own normative preferences dictate, or even inform, the process of identifying the most relevant traditions, the court is not employing traditionalism.

In contrast, a free speech purposivist court may, but, crucially, need not feel at all analogously bound to seek out, successfully or not, any consensus on underlying free speech purposes. There is nothing logically illegitimate in a free-speech purposivist court's embracing any sufficiently plausible understanding of such purposes, with or without any traditional or contemporary descriptive or normative consensual support.

Suppose that a court simply invented, out of whole cloth, and in the current year, the notion that freedom of speech is necessary for meaningful democracy. The court could certainly do so, consistent with purposivism, even in the absence of any supportive consensus. If other courts disagree, they may all offer their own alternative free speech purposive-interpretive jurisprudential products in the marketplace of ideas.[93] The legitimacy of such an approach could be preserved if the court in question could reasonably said to be responsibly interpreting and promoting the constitutional free speech text.

As it happens, though, the typically cited free speech purposes, however they might be ranked, tend with remarkable consistency to support, or at least not materially contradict, one another in practice. Where the courts find, say, the pursuit of truth, they also tend to find, if only minimally, the value of democracy, and of self-realization,[94] where any such purposes are relevant.

In contrast, the recent traditionalist constitutional cases, including the abortion case of *Dobbs*,[95] the gun permitting case of *Bruen*,[96] the sign regulation

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[93] *See* Abrams v. United States, 250 U.S. 616, 624, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

[94] See the authorities cited *supra* note 88.

[95] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[96] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

case of *City of Austin*,[97] and the Establishment Clause public meeting invocation case of *Town of Greece v. Galloway*,[98] among other cases, amount largely to a battle of conflicting, and unreconciled, accounts of the most relevant traditions. There is a greater sense of diametric opposition, and of basic incompatibilities, among the purported traditions than one ordinarily finds in the typically more mutually compatible, if not mutually supportive, purposive free-speech cases.[99]

The complication is that often the same or some alternative free speech-related traditions, as well as commonly cited free speech purposes, can actually be found on both the speaker's side, as well as the regulating government's side, of the free-speech case.[100] Such complications would thus seem to afflict both traditionalist and purposive approaches to the free-speech cases.

Finally, though, judicial inquiry into the nature and limits of traditions across decades, if not centuries, can pose formidable research problems, naturally calling upon the expertise of typically divided specialists.[101] It is not clear that lower federal courts, or state courts, can realistically draw on sufficient dispassionate professional expertise. But no comparable problems arise for any purpose-oriented court. There is, again, certainly ongoing professional debate over the purposes underlying freedom of speech.[102] But any court, at any level, can get a sufficient sense of the commonly cited such purposes, and apply the most plausible such purposes, in an afternoon of ordinary, open-access research.[103]

III. FREE SPEECH TRADITIONS IN CONTEXT: THE UNIVERSITY CAMPUS PUBLIC FORUM DOCTRINE CASES

The idea of tradition strikingly presents itself at several points in the campus public forum doctrine cases. Most obviously, courts may have to decide whether the campus space in question should count as a 'traditional' public forum[104] or instead as some other type of forum for speech purposes.[105] Also, judicially determining the type of forum at issue may turn on how the university has traditionally treated the space in question.[106] Courts may then look, as well,

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97 City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464 (2022).

98 572 U.S. 565 (2014).

99 It is worth bearing in mind that even very different and conflicting traditions may, within limits, be fairly compared and evaluated. *See* ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY 145–46 (1990).

100 For discussion, see R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335 (2001). The extent to which any designated free speech purposes actually appear on both sides of the free speech case will inevitably vary.

101 *See*, classically, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

102 *See supra* notes 88–89, and accompanying text.

103 A Google search for references to Greenawalt, *supra* note 88, for example, would typically suffice.

104 *See, e.g.*, Keister v. Bell, 29 F.4th 1239, 1251–52 (11th Cir. 2022).

105 *Id.* at 1252.

106 *Id.* But it is also held that a traditional public forum, in the form of a public street or sidewalk, can be briefly transformed into a limited public forum by a new and specific government intent. *See, e.g.*, Sessler v. City of Davenport, 640 F. Supp. 3d 841, 857 (S.D. Iowa Nov. 10, 2022) (citing Powell v. Noble, 798 F.3d 690, 700 (8th Cir. 2015)).

to long-established traditional legal tests, or else to untraditional legal tests, in addressing the campus public forum doctrine cases.[107] Finally, courts must bear in mind that a legal test that has traditionally been applied need not itself focus on tradition, as distinct from, say, contemporary interest balancing. And a new or non-traditional test, conversely, may focus substantively on the value of tradition.[108]

Among the most recent, intriguing, and illuminating of the public university campus public forum doctrine cases is the Eleventh Circuit case of *Keister v. Bell*.[109] The *Keister* case raises each of the potential roles for tradition noted above.[110] *Keister* thus seeks to distinguish a 'traditional' public forum from, respectively, "the designated public forum, the limited public forum, and the non-public forum."[111] In particular, the *Keister* court sees the forum classification question as whether a particular sidewalk within or adjacent to the public university campus is "a traditional public forum or [a] limited public forum."[112]

Tradition may then play a role in determining whether the public space, in this case a particular sidewalk, should be classified as either a traditional or as a limited public forum.[113] Specifically, "[a]ssessing the type of forum of a particular piece of government property may be requires us to consider "the traditional uses made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics."[114]

One might suppose that the traditional uses made of the particular space in question would reflect, at least generally, the purposes of the government owning and controlling that space. But these two considerations are treated

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107 *See Keister*, 29 F.4th at 1251.

108 Thus, one might argue that the Supreme Court's recently adopted tests emphasizing the role of tradition were not themselves traditional, and not continuous with the Court's prior approaches to adjudicating such cases. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–47 (2022) (tradition of abortion regulation as a crucial constitutional focus); New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–33 (2022) (emphasizing history and traditions of regulation rather than levels of scrutiny, means-end analysis, or balancing tests); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2248 (2022) (emphasizing history and tradition at the expense of a more analytical focus on the purposes or effects of government practices that bear upon religious freedom); City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464, 1474–75 (2022) (emphasizing tradition regarding local governmental regulation of various sorts of signs near public highways). In contrast, the by now well-established, traditional test for subversive advocacy refers not to history and tradition, but to several contemporaneous circumstances. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam). For background on the distinction between a test being traditionally applied and the non-traditional substance of that test, see Edward Shils, *Tradition*, 13 COMPAR. STUD. SOC'Y & HIST. 122, 133–34 (1971).

109 29 F.4th at 1239.

110 *See supra* notes 104–109 and accompanying text.

111 *Keister*, 29 F.4th at 1251. The number of categories and subcategories, terminology, and distinctions among fora have been chronically muddled and indeterminate. *See, e.g.*, Turning Point USA at Ark. State Univ. v. Rhodes, 973 F.3d 868, 876 (8th Cir. 2020) (referring explicitly to a "limited designated public forum").

112 *Keister*, 29 F.4th at 1252.

113 *Id.* at 1251. For a critical treatment of the jurisprudence of a limited public forum, see Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009).

114 *Keister*, 29 F.4th at 1251 (quoting Bloedorn v. Grube, 631 F.3d 1218, 1233 (11th Cir. 2011)).

differently by the case law.[115] Herein, our concern is to analytically separate the idea of tradition from any other possible underlying justification in deciding public forum cases, and all other sorts of free speech cases.

Keister refers to the category of the traditional public forum as encompassing "fully"[116] municipal streets, parks, and sidewalks.[117] Traditional public fora have been held "immemorially,"[118] or "time out of mind,"[119] for use by the general public in speaking, among other activities.[120] Restrictions on speech in a traditional public forum are disfavored to one degree or another.[121]

Somewhat misleadingly, the Court in *Keister* then declares that "[w]hen we evaluate a government regulation on speech in a traditional public forum, we apply strict scrutiny."[122] More accurately, courts typically apply strict scrutiny only to content-based restrictions of speech in traditional public fora.[123]

Keister conceives of a mid-level scrutiny test in such cases, as requiring, in contrast, a "significant"[124] governmental interest, narrow tailoring of the restriction to serve that significant interest,[125] and, as well, the further condition that the speech restriction "leave[s] open ample alternative channels of communication."[126] Any difference between the degrees of narrow tailoring required by strict scrutiny and by mid-level scrutiny is therein left judicially unclarified.[127]

Among the contrasts to traditional public fora, and the type that turns out to be of distinctive interest to the court in *Keister*, is the "limited public forum."[128] A limited public forum, as its name implies, is not open to discussion of any and

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115 *See id.*

116 *Id.* at 1252. The qualifier of being 'fully' public evidently plays a role in the court's disposition of the case.

117 *Id.* at 1252–53. Noting that in certain situations, those typically traditional places can be deemed limited as was in this case.

118 *Id.* (quoting Walker v. Tex. Div. Sons of Confederate Veterans, Inc., 576 U.S. 200, 215 (2015)).

119 *Id.*

120 *Id.*

121 *See id.*

122 *Id.* (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983)).

123 Thus "[a] content-based restriction on speech within a traditional public forum must be necessary to serve a compelling government interest and be narrowly drawn to achieve that interest." Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) (citing *Perry*, 460 U.S. at 425.) *Keister* itself recognizes a form of mid-level scrutiny as appropriate for content-neutral restrictions in traditional public fora. *See id.* For background, see R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

124 *See Keister*, 29 F.4th at 1252.

125 *See id.*

126 *Id.* (quoting Bloedorn v. Grube, 631 F.3d 1218, 1233 (11th Cir. 2011); Students for Life USA v. Waldorf, 162 F. Supp. 3d 1216, 1222 (S.D. Ala. 2016). The real need for narrow tailoring, if ample alternative speech channels are indeed left available for the regulated speaker, is left undiscussed. For background, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

127 *See* Wright, *supra* note 126; Wright, *supra* note 123.

128 29 F.4th at 1252.

all subjects or by any and all possible speakers.[129] Instead, a limited public forum is available to either a defined class of speakers such as university students, or for discussion by anyone of some more or less officially pre-defined topic—university events and policies, perhaps.[130]

Assuming that a court can accurately determine the scope of the limited public forum in question, *Keister* then declares the test for speech restrictions that are thought to fall within that scope is modest. Specifically, restrictions of speech within the scope of the limited forum must only be "reasonable" and "viewpoint neutral."[131] Thus both content-neutral and content-based restrictions within the limited forum are permissible, apparently without regard to tailoring, or alternative available speech channels, if the speech restriction is reasonable and not based on any relevant viewpoint.[132]

What this means, doctrinally, is that the modest constitutional test for restrictions on speech in limited public fora should be the same as that for speech in what are called non-public fora, or non-forums.[133] The same degree, or rigor, of speech protection thus applies to many public sidewalks on a state university campus as would be applied in the case of groups seeking to demonstrate in the White House War Room, a meeting room of the National Security Agency, or a corridor between offices of the CIA. No doubt what counts as a 'reasonable' restriction in all such cases may vary. But it is hardly clear that the same free speech test should be applied both to all limited fora and to non-public fora.

Regardless, though, the crucial point is that in this and other contexts, "the traditional uses made of the property,"[134] along with any other reference to tradition, lead either to dubious legal conclusions or to no meaningfully determinate outcomes at all.

It is possible that a public university may have a long and consistently sustained intention with regard to how a particular limited forum, such as a public street, within or adjacent to the campus, is to be used and by whom, with regard to speech. In any such case, the university intention may come to be known, or inferred, through its own developing practices in regulating speech or in a developing tradition of regulating speech in the space in question.

But even in such cases, tradition serves mostly as a marker, whether accurate or not, of a supposedly consistent intention on the part of the university. We can, however, understand intention only by reference to one or more purposes

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129 *Id.*

130 *Id.* (citing Barret v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1224 (11th Cir. 2017); *Bloedorn*, 631 F.3d at 1231.

131 *Keister*, 29 F.4th at 1252 (citing *Bloedorn*, 631 F.3d at 1232). *Bloedorn* in turn cites Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Restrictions based on viewpoint are at least strongly disfavored, if not absolutely prohibited, in any type of forum. *See, e.g.*, Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1178 (9th Cir. 2022).

132 For discussion, see, for example, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678–80 (1998); *Cornelius*, 473 U.S. at 809–10; Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45–46; Bourgault v. Yudof, 316 F. Supp. 2d 411, 420 (N.D. Tex. 2004) (making no reference to alternative speech channels).

133 See Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 216 (2015), the authorities cited *supra* notes 131–132, and *Keister*, 29 F.4th at 1251.

134 *Keister*, 29 F.4th at 1251.

or goals that the university assumedly seeks to further through its speech policy. A tradition in this context is thus, at best, an indicator, more or less accurate, of an assumed university intention or purpose in regulating speech in the space in question.

Typically, there will be many public streets and sidewalks on or adjacent to a public university campus for which a tradition is either non-existent, mixed, uselessly unclear, or unrecognized, and thus realistically, hardly a tradition at all.[135] No doubt traditions can emerge without clear starting points,[136] and can, at least within limits, evolve over time.[137] But realistically, a court may have no, few, or apparently random, data points with regard to campus policy as to a particular forum. In such cases, either no relevant tradition exists, or the tradition is at best unclear or contested.

Even if we might, in some cases, wish to say that a tradition regarding the use of a particular campus speech forum has somehow crystallized, and that a court can, through inductive reasoning, determine the scope of that speech tradition, we would even then have made little progress. The courts have been clear that limited-purpose fora, as well as designated public fora, cannot be created by tradition, or by a number of instances, in the absence of the government's intention precisely to create a designated or limited-purpose forum.[138] Such fora cannot be created by government inadvertence, inattention, or neglect of an emerging speech-use pattern.[139] Intention on the part of the government with regard to the scope and limits of the forum is required. And ultimately, intention can be intelligible only in light of purposes or goals.

Public universities, in particular, are purposive institutions.[140] They have purposes, whether such purposes are universal, more or less widely shared with other universities, controversial, contested, evolving, or multiple.[141] Hierarchies, and priorities, among public university purposes may be difficult to identify.[142] But clearly, public universities in general, and each public university in particular, seek, however effectively or ineffectively, to pursue some set of basic purposes, values, goals, or missions.[143] Because of this, intention on the part of the

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[135] *See* Shils, *supra* note 108, 126, 145. Interestingly, Shils considers law schools to be among "those institutions . . . established to maintain and stabilize traditional beliefs on the basis of the study of sacred texts." *Id.* at 154.

[136] Consider that while public school student recitation of one version or another of the Pledge of Allegiance may have been statutorily adopted, that practice's status as a tradition might pre-date or post-date any such formal adoption.

[137] *See, e.g.*, Shils, *supra* note 108, at 151–52.

[138] Note the discussion of governmental intent to create a designated, as well as a limited, public forum in *Walker*, 576 U.S. at 215–16 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[139] See the authorities cited *supra* note 138.

[140] *Keister*, 29 F.4th at 1252 (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).

[141] For discussion, see R. George Wright, *Campus Speech and the Functions of the University*, 43 J. COLL. & U. L. 1 (2017).

[142] For discussion, see R. George Wright, *University Missions and Legal Limitations on Campus Speech*, 52 J.L. & EDUC. 222 (2023).

[143] *Keister*, 29 F.4th at 1252; Wright, *supra* note 141.

government with regard to the scope and limits of the forum is required. And ultimately, intention can be intelligible only in light of purposes or goals.

Uncontroversially, public university purposes are generally incomparable with setting aside all of its spaces, physical and cyber, for speech by anyone, on any topic, within the bounds of criminal and civil law more generally. A public university's purposes are not as open-ended as those of, say, a public auditorium or a civic meeting hall. A public university's policies and intentions,[144] however effectively or ineffectively pursuing university purposes, will inevitably result in distinctions among free and open public fora, designated fora, limited public fora, and non-public campus fora.[145]

The university's relevant purposes may vary in particular with respect to whether a particular space is thought to be at the "heart"[146] or core of the campus, or within a distinctive campus enclave,[147] or instead at the periphery or boundary of the campus and non-campus public territory.[148] Or there may be a university policy intent to reserve, even at the heart of the campus, a wall or a board for more or less uninhibited speech.[149]

In the *Keister* case, the Eleventh Circuit concluded that the relevant sidewalk was "unambiguously within campus,"[150] and that the university had no intent "to open the [sidewalk in question] up to unchecked expressive activity by the public at large."[151] On this basis, the sidewalk in question, as distinct from barely off-campus sidewalks,[152] was deemed to be only a limited public forum,[153] and thus subject to reasonable regulation not based on viewpoint.[154]

It is certainly possible to object to *Keister* not on the grounds that it pays too much attention to tradition, in one sense or context or another, but that it pays too little attention to tradition. Consider the Supreme Court's declaration, with respect to spaces near its own building: "[t]raditional public forum property occupies a special position in terms of First Amendment protection and will not

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144 *Keister*, 29 F.4th at 1248.

145 *Id.* at 1251.

146 *Id.* at 1254.

147 *Id.* at 1249, 1254.

148 *Id.* at 1253, 1255 (referring to places on the perimeter of, or abutting, the government property in question).

149 *See, e.g.*, *Freedom Wall*, CMTY. PEPP. UNIV., https://community.pepperdine.edu/seaver/studentactivities/sga/freedom-wall.htm [https://perma.cc/YQ79-NEY2] (last visited Apr. 1, 2023), for an example of a specifically constructed "free speech" board or wall policy adopted by the private Pepperdine University.

150 29 F.4th at 1256.

151 *Id.* at 1255. In contrast, a public university might also decide, in light of how it understood its own purposes or institutional mission, to more broadly extend free speech protection in campus spaces. *See, e.g.*, Just. For All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005). A purposive state statute may require a similar result. *See* Hershey v. Curators of Univ. of Mo., No. 2:20-CV-04239-MDH, 2022 WL 1105743 (W.D. Mo. Apr. 13, 2022).

152 *Keister*, 29 F.4th at 1256.

153 *Id.* at 1256–57. *But see* McGlone v. Bell, 681 F.3d 718, 732 (6th Cir. 2012) (campus perimeter sidewalks as traditional public fora, with other campus open areas being classified as designated public fora).

154 *See Keister*, 29 F.4th at 1257; *accord* Gilles v. Garland, 281 F. App'x 501, 511 (6th Cir. 2008) (unpublished opinion).

lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression."[155]

Thus traditional use of a traditional public forum should, on such a view, count for more than just one consideration among others.[156] A distinctive focus on First Amendment tradition, more broadly, is taken up in Keister's own petition for a writ of certiorari.[157] That petition poses the crucial issue in these terms: "[w]hether the status of a public sidewalk as a protected traditional public forum should be determined by the text, history, and tradition of the First Amendment rather than by an indeterminate multi-factor balancing test."[158]

Presumably, the objection here is actually to any test, whether multi-factor, or interest-balancing, or not, that does not focus on the First Amendment's text, history, and tradition. While a focus on the university's purposes or mission would not necessarily involve a multi-part balancing test, any such consideration of university purpose, apart from tradition, would still be thought irrelevant for free speech purposes.[159] A court might choose to emphasize traditional elements of a university's basic purposes. But the best reason to do so is not that the university's purpose is historic or traditional, but that the university's purpose is instead appropriate, socially worthy, or otherwise legitimate. Thinking about the university's traditions may or may not contribute to that later inquiry.[160]

Thus, the distinction between First Amendment history or tradition and a multi-factor balancing test in the campus public forum cases hardly exhausts the range of defensible approaches to campus forum cases. Public fora that are left undefined cannot possibly embody any specific campus speech tradition. The constitutional weight of any broader free speech tradition a court may choose to embrace should crucially reflect the broad purposes underlying free speech protection in general.[161]

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155 United States v. Grace, 461 U.S. 171, 180 (1983). For discussion of *Grace*, see Brister v. Faulkner, 214 F.3d 675, 681–82 (5th Cir. 2000).

156 As in Bloedorn v. Grube, 631 F.3d 1218, 1233 (11th Cir. 2011) on which *Keister* relies, ("[W]e look to the traditional use made of the property, the government's intent and policy concerning the usage, and the presence of any special characteristics.").

157 *See* Petition for Writ of Certiorari, *Keister*, 29 F.4th 1239 (No. 22-388), *cert. denied*, 2022 WL 14813879.

158 *Id.* at *i.

159 *See id.* at *15 ("[T]he Eleventh Circuit irrelevantly emphasized the 'educational mission' of [the university] and its adjacent buildings.").

160 Often, the real contours, scope, and boundaries of a limited public forum remain underdeveloped, and unclarified, over time. In such cases, there may be no objectively ascertainable campus tradition that would be of any use in deciding the case. And there may well be cases in which a public university seeks to abolish, or clarify the scope of, a vaguely defined limited forum solely to exclude an undesirable speaker or an undesirable topic. *See, e.g.*, Krasno v. Mnookin, 638 F. Supp. 3d 954, 963–66 (W.D. Wis. 2022). Merely opportunistic attempts to crystallize forum policy, after the fact, are unlikely to reflect either any distinctively relevant campus tradition or the fundamental purposes of either the university or of the First Amendment. Perhaps the most authoritative case in this context is Koala v. Khosa, 931 F.3d 887, 903 (9th Cir. 2019) ("If the government could define the contours of a limited public forum one way at its [sic] inception, then redefine its scope [or abolish the forum] in response to speech it disfavors, the government would be free to zero-in and selectively silence any voice or perspective.").

161 Including, typically, the pursuit of truth, democracy, and self-realization.

The campus public forum case law thus cannot be convincing if it ignores the most basic purposes of the university as a social institution.[162] A public university is inescapably and fundamentally a purposive institution. Put negatively, "a university's function is not to provide a forum for all persons to talk about all topics at all times."[163] More positively, and very generally indeed, we might say that a public university's most basic purpose, however it may be further elaborated, is "education and the search for knowledge."[164] The university's basic purposes, along with the purposes of freedom of speech itself, should be decisive in the campus public forum cases.[165] Campus practices, whether fleeting, or well-established and traditional, may in some cases create reliance interests.[166] But even if they are traditional, campus practices themselves cannot be constitutionally decisive.

CONCLUSION

All else equal, then, we seem to be better off with a purposive, as distinct from a traditionalist, approach to the scope and limits of freedom of speech. Setting aside all the other problems we have seen with traditionalism, this is the bare minimum concern: our free speech traditions may indeed embody greater wisdom than we can grasp and articulate. But it is also possible that our established free speech traditions, even insofar as they do not violate any overridingly important moral principle, are in need of critique and reform in many respects, in light of our most fundamental values. Even if courts can consistently pick out and articulate the most relevant free speech traditions at stake in a given case, we must then further ask whether those traditions reflect our most basic values, as constrained by the constitutional text. In contrast, our purposes in protecting freedom of speech may well reflect our best considered judgments, again, as constrained by the text, as to why speech should, ultimately, be protected or not. At the very least, then, free speech purposivism, unlike free speech traditionalism, steers our attention directly and immediately to what most essentially matters.

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162 At some level of specificity, the purposes underlying public universities vary, and are typically thought to be multiple. For background, see Wright, *supra* note 141.

163 Bowman v. White, 444 F.3d 967, 978 (8th Cir. 2006).

164 *Id. See* ACLU v. Mote, 423 F.3d 438, 445 (4th Cir. 2005) ("[T]he purpose of the University is the education of the students."); Spears v. Arizona Bd. of Regents, 372 F. Supp. 3d 893, 911 (D. Ariz. 2019) (referring to "an institute of higher learning that is devoted to its mission of public education."); Gilles v. Blanchard, 477 F.3d 466, 470 (7th Cir. 2007) (referring generally to a public university's "educational mission").

165 Professor Robert C. Post has observed that "universities are not Hyde Parks. . . . [T]hey can support student-invited speakers *only* because it serves university purposes to do so. And these purposes must involve the purpose of education." Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests [https://perma.cc/WNY3-3AHR].

166 Imagine a student group that has bought, at its own expense, an expensive structure for display, temporarily or permanently, on a campus space it was clearly led to believe would be available for such speech.

PAY DIFFERENCES IN THE ABSENCE OF DISCRIMINATION: LEGISLATIVE FALLACIES AND STATISTICAL TRUTHS

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CONTENTS

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The [Equal Pay] Act does not prohibit variations in wages; it prohibits discriminatory variations in wages.[1]

INTRODUCTION

"There are lies, damned lies, and statistics," so the saying goes,[2] but what are we to make of legislatures and courts that ignore mathematical truisms and impute discriminatory motives to statistical inevitabilities? This is a unique and increasingly relevant concern with the Equal Pay Act (EPA) and corresponding state law litigation.[3] Because large pay differences abound among employees in the *same* demographic group doing similar work, the failure to distinguish between these benign differences and discriminatory sources of inequality will lead to attributing liability and exaggerated remedies in instances where no discrimination has occurred.[4] For example, the laws of at least seven states require employers to account for the entirety of any pay difference between employees of different demographic groups or face liability.[5] But, as we will explain, this standard generally will be impossible to satisfy regarding all employees in any demographic group, making liability all but inevitable.[6]

Because equal pay laws typically confer strict liability, once a plaintiff proves a pay difference exists between protected demographic groups, an employer is presumed to have acted discriminatorily unless it establishes one of the affirmative

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1 Hein v. Oregon Coll. Educ., 718 F.2d 910, 916 (9th Cir. 1983).

2 "The phrase was popularized in the United States by Mark Twain (among others), who attributed it to the British prime minister Benjamin Disraeli. However, the phrase is not found in any of Disraeli's works and the earliest known appearances were years after his death. Several other people have been listed as originators of the quote, and it is often attributed to Twain himself." *Lies, Damned Lies, and Statistics*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lies,_damned_lies,_and_statistics [https://perma.cc/WK3R-NEHK] (last visited Feb. 20, 2023).

3 *See* Daniela Porat, *State Equal Pay Laws Will Alter Litigation Landscape*, LAW360 (Mar. 13, 2023, 9:46 PM), https://www.law360.com/employment-authority/articles/1585145/state-equal-pay-laws-will-alter-litigation-landscape [https://perma.cc/X32F-KKLX].

4 *See* Daniela Porat, *State of Pay: Approaches to Gender-Based Disparity*, LAW360 (Aug. 13, 2021, 2:56 PM), https://www.law360.com/employment-authority/articles/1412768/state-of-pay-approaches-to-gender-based-disparity [https://perma.cc/8TNG-GPHH] (citing practitioner's argument that employers will continue to face challenges "because of the myriad of [sic] circumstances, contexts and compensation systems among different employers and even different workers in one company").

5 CAL. LAB. CODE §§ 1197.5(a)(1)(D), (3) (West 2023) ("The one or more factors relied upon account for the entire wage differential."); COLO. REV. STAT. § 8-5-102(1)(c) (2022) ("[E]ach factor relied on in subsection (1)(a) of this section accounts for the entire wage rate differential. . . ."); 820 ILL. COMP. STAT. ANN. 112/10(a)(4)(C) (West 2023) ("accounts for the differential"); MD. CODE ANN., LAB. & EMPL. § 3-304(c)(7)(iii) (West 2022) ("accounts for the entire differential"); N.J. STAT. ANN. § 10:5-12(t)(4) (West 2023) ("[O]ne or more of the factors account for the entire wage differential. . . ."); WASH. REV. CODE ANN. § 49.58.020(3)(a)(iii) (West 2023) ("Account for the entire differential. More than one factor may account for the differential."); OR. REV. STAT. § 652.220(2)(I) (West 2022) ("Any combination of the factors described in this paragraph, if the combination of factors accounts for the entire compensation differential.").

6 *See* Porat, *supra* note 3. Most of the following discussion will be in terms of sex discrimination because that is prohibited by the Equal Pay Act and corresponding state law; however, the same considerations apply to comparisons between all demographic groups.

defenses specified by statute.[7] Yet, pay differences within the same job prevail *within* any demographic group, and the overwhelming evidence is that these differences are not entirely accounted for by factors designated as affirmative defenses.[8] But if employers are unable to account entirely for pay differences *within* any demographic group, premising a finding of discrimination on a similar inability to account for pay differences *between* demographic groups makes little sense. From this perspective, many of the most recent equal pay laws passed in various states are not "anti-discrimination laws" but laws that prohibit unaccounted-for pay differences, whether or not they stem from discrimination.[9]

Additionally, in drawing pay comparisons between members of different demographic groups, it must be determined whether an employer is obligated to pay all employees the same as the best-paid member of an allegedly favored group, or just the average—or perhaps median—member of that group. In other words, must Jane be paid the same as *any* Tom, Dick, or Harry, or the average or median of the three?[10] We will explain that the *any* Tom, Dick, or Harry rule (i.e., the single comparator rule) permits an employee to cherry-pick her comparator, which leads to extreme results that could not have been intended by courts or legislatures.

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[7] This is especially important because when considering a plaintiff's prima facie evidence, courts are required to be mindful of the "broad remedial purpose" of the Equal Pay Act. 29 C.F.R. § 1620.14(a) (2022). *See also* 29 C.F.R. § 1620.34 (2022) ("These rules and regulations shall be liberally construed to effectuate the purpose and provisions of this Act and any other Act administered by the Commission.").

[8] This is particularly true of states, such as Massachusetts, that limit the "permissible" set of factors that legitimately may account for pay differences. As we demonstrate, factors iv through vii fail to account for a large portion of the pay differences among employees in any demographic group, raising the question of why the failure to account for similar differences between advantaged and disadvantaged groups is a reasonable measure of pay discrimination. *See, e.g.*, MASS. GEN. LAWS ch. 149, § 105A(b) (West 2023) ("No employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work; provided, however, that variations in wages shall not be prohibited if based upon: (i) a system that rewards seniority with the employer; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.").

[9] *See* Porat, *supra* note 3 (quoting Melinda Koster, chair of Sanford Heisler Sharp LLP's discrimination and harassment practice group, "[i]n this new equal pay landscape, there are going to be more questions about whether factors that have historically been recognized as neutral defenses against pay disparities are in fact discriminatory").

[10] Jurisdictions that permit comparisons to *any* Tom, Dick, and Harry are said to follow the "single comparator rule," which allows a plaintiff to identify the particular employee of the opposite sex deemed an appropriate comparator. *See, e.g.*, Eisenhauer v. Culinary Institute of America, No. 19-cv-10933 (PED), 2021 WL 5112625 (S.D.N.Y. Nov. 3, 2021) (determining that "identifying a single comparator would be sufficient to make a prima facie case"), *aff'd in part on other grounds and remanded*, 2023 U.S. App. LEXIS 27508 (2d Cir. Jan. 26, 2023). *But see* Cantu v. Google LLC, No. 21CV392049 (Santa Clara Sup. Ct., Feb. 19, 2023) (denying Defendant's Motion to Strike Private Attorneys General Act claim) (concluding that the plaintiff need not find a "specific, appropriate comparator" at the pleading stage, although it determined that "at some point . . . Plaintiff will need to show specific, relevant comparators").

I. A FRAMEWORK FOR DEFINING EQUAL PAY[11]

Part I posits a model of a hypothetical non-discriminating employer to serve as a benchmark against which unequal pay allegations can be assessed. Because this hypothetical employer should be judged a non-discriminator by any reasonable standard, equal pay laws and judicial decisions that nevertheless would find this employer liable for pay discrimination or required to respond to a prima facie case have overreached.

Consider a thought experiment in which a company hires only male and female twins. Each brother and sister have exactly the same job-related qualifications, experience, and training, and possess equally all other productivity-related traits. Each pair of siblings is paid precisely the same, so there is no pay difference between the siblings. As a result, there are an equal number of men and women at each pay level. The average pay of males and females must be the same, as well as the median pay or any other measure describing the distribution of pay between these groups. Mathematically, these groups of males and females are known as "equal subsets" of the employee population.[12]

Notwithstanding this equality, an employee of either sex may be able to prove a prima facie case of unequal pay, as construed by several courts and some legislatures.[13] The scenario described above is depicted in a simple diagram in Figure 1, which indicates an employee's pay as a function of his or her experience with the employer. Each point on the graph represents two employees—twin siblings—who are paid exactly the same. But not all pairs of siblings are paid equally—Bob and Mary, who are paid the same, may be paid less than Steve and Barbara, who also are paid the same as each other.[14] Even employees with the same experience may be paid differently, but for reasons unrelated to sex.[15] We know this about our hypothetical because for every male who is paid above average, his sister is paid the same. The same is true for every female who is paid less than others—she has a brother who suffers the same fate.

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[11] Although this discussion focuses on gender pay differences, the same framework and observations would apply to pay differences regarding racial, ethnic, and other protected groups. For convenience, we use illustrative examples of gender pay comparisons throughout this Article.

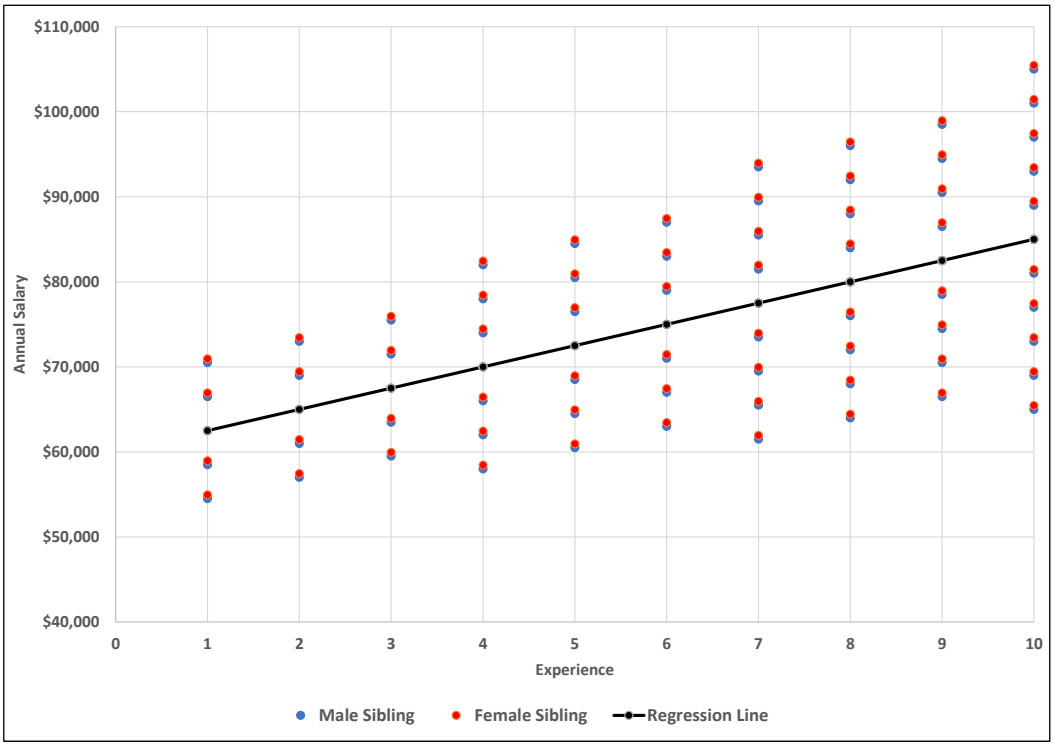
[12] *See, e.g.*, Pamini Thangarajah, *Subsets and Equality*, LIBRETEXTS: MATHEMATICS, www.math.libretexts.org [https://perma.cc/GWK7-G9EH] (last visited Mar. 29, 2023).

[13] This is true under the simplest circumstances. In a dynamic workplace, employees are hired, resign, and are promoted and disciplined. An employee's hypothetical twin may join or leave the company, or get promoted out of the group of comparators, thereby destroying the balance that otherwise would prevail, through no fault of the employer.

[14] This dispersion in pay is included in our example to capture the variations in pay that are described more fully in Part III.

[15] *See, e.g.*, Porat, *supra* note 3 (quoting Liz Washko, co-chair of Ogletree Deakins Nash Smoak & Stewart PC's pay-equity practice group, "[i]t's easy enough to say on a particular day that one person is paid more than another, but digging into the reasons for that is complicated for both sides").

FIGURE 1. HYPOTHETICAL EMPLOYEE'S PAY AS A FUNCTION OF EXPERIENCE



A well-conceived law should permit this employer to escape liability and, importantly, should not permit a female plaintiff to premise a prima facie case on the fact that some male comparator is paid more.[16] In this example, every highly paid male has a sister paid exactly the same, and each lower-paid female has a brother who earns what she earns. Judicial rulings that would find a prima facie case under these circumstances conflate mere pay differences with discriminatory pay differences. Whether this non-discriminating employer will ultimately escape liability depends on its ability to prove these pay differences reflect a factor other than sex, and in at least seven states the employer must account fully for these pay differences. Ironically, in a single-comparator jurisdiction, this employer cannot defend by proving all siblings are paid the same.

The Supreme Court construes the Equal Pay Act's prohibition against unequal pay to apply irrespective of the employer's discriminatory motivations.[17] The offense consists of paying an employee less than an employee of the opposite sex and failing to account for this pay difference in neutral terms. But this creates a false dichotomy; either pay differences are discriminatory, or they can be accounted for by one of the four affirmative defenses. This excludes the nondiscriminatory, but unaccounted for, differences in pay of our benchmark case. In that example, some female employees are paid less than both males and other females,

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[16] We refer to whether an equal pay law recognizing no liability in a case in which men and women who are identical siblings are paid the same, notwithstanding the general dispersion in pay, as the "sibling test." *See infra* Part VI.

[17] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 641 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

for reasons unrelated to sex, but which may not satisfy one of the affirmative defenses prescribed by the EPA or its state law counterparts.[18]

Figure 1, described above, does double–duty because each point is assumed to represent the pay of hypothetical male and female siblings. Accordingly, it depicts the range of inequality that exists among males performing similar work, and because each male has an identical female sibling, the same dispersion in pay exists among female employees. Although it is reasonable to assume that pay differences among males do not reflect gender bias, empirical studies of pay differences among males fall well short of accounting in neutral terms for the entirety of these pay differences (i.e., reasons recognized as affirmative defenses under equal pay laws).[19] Consequently, it is wrong for unexplained pay differences of the same magnitude that arise between men and women to be construed as (conclusive) evidence of sex discrimination. Rather, it is the *differential* ability of neutral factors to account for pay differences that may evidence discrimination under the EPA and state equal pay laws.

II. THE FEDERAL EQUAL PAY ACT

The Equal Pay Act was enacted in 1963, as an amendment to the Fair Labor Standards Act, to ensure equal pay to men and women engaged in interstate commerce who perform equal work.[20] More specifically, the law provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work . . .[21]

The EPA defines "equal work" in terms of the skill, effort, and responsibilities a job requires, which is performed under similar working conditions.[22] The Act broadly defines the compensation it covers to include salary, overtime pay, bonuses, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.[23]

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[18] This observation raises the question of whether the nondiscriminatory but unaccounted for differences in pay between men and women are large enough to undermine the method of proof required by these statutes. *See infra* Part III.

[19] 29 C.F.R. § 1620.13 (2022). *See infra* Part VI and accompanying citations to empirical studies regarding residual differences in earnings among males that remain after accounting for job-related differences.

[20] For guidance regarding the pertinent considerations determining who is engaged in interstate commerce, see 29 C.F.R. §§ 1620.1–1620.7 (2022).

[21] 29 U.S.C. § 206(d)(1) (2018).

[22] 29 C.F.R. § 1620.13 (2022).

[23] *See* 29 C.F.R. § 1620.10 (2022).

The Department of Labor was charged with issuing regulations interpreting the statute.[24] These are elaborated in the Code of Federal Regulations, which better illustrates what equal skill, effort, and responsibility do not mean rather than explaining, for example, when two jobs, although distinct, are presumed to require the same skill.[25] The regulations also fail to indicate how skills are to be measured and compared. The following is illustrative:

> 29 C.F.R. § 1620.15 Jobs requiring equal skill in performance.
>
> (a) In general. The jobs to which the equal pay standard is applicable are jobs requiring equal skill in their performance. Where the amount or degree of skill required to perform one job is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job. If an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the EPA as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job. Possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill. The efficiency of the employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill.
>
> (b) Comparing skill requirements of jobs. As a simple illustration of the principle of equal skill, suppose that a man and a woman have jobs classified as administrative assistants. Both jobs require them to spend two-thirds of their working time facilitating and supervising support-staff duties, and the remaining one-third of their time in diversified tasks, not necessarily the same. Since there is no difference in the skills required for the vast majority of their work, whether or not these jobs require equal skill in performance will depend upon

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[24] The Department of Labor initially had enforcement responsibilities until 1979 when the enforcement responsibility was transferred to the EEOC (*see* Proclamation No. 12144, 44 Fed. Reg. 37193 (June 26, 1979)). *See also* EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1192 (5th Cir. 1984) ("The plan thus effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC.").

[25] *See, e.g.*, 29 C.F.R. § 1620.14 (2022) ("Testing equality of jobs[:] (a) In general. What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration.").

> the nature of the work performed during the latter period to meet the requirements of the jobs.[26]

Importantly, the regulations are silent regarding the Tom, Dick, and Harry question raised above, yet this issue is critical in identifying violations of the EPA. The question is whether a plaintiff can prevail by proving she is paid less than *any* higher paid male or must she demonstrate as well (or instead) that females as a group are paid less than a comparable group of males. As framed by many courts, the issue is whether a plaintiff can prove an EPA violation by referencing a single male comparator or if she must also demonstrate that women generally suffer in comparison to the larger group of similarly situated males.[27] We refer to this as the "single-comparator question."

The Ninth Circuit appears to be the first appellate court to address the issue in *Hein v. Oregon Coll. of Educ.*[28] The case was brought by female faculty members of the college who complained they were paid less than male comparators. To decide the case, the Ninth Circuit had to determine whether the trial court correctly considered the pay of just one higher-paid male performing similar work, or if the pay of all comparable males was the appropriate benchmark.

The appellate court rejected the single comparator, finding the pay of other similarly situated males also must be considered. It explained why it rejected one cherry-picked male as a comparator:

> We do not believe that the Equal Pay Act is subject to such manipulation. The Act does not prohibit variations in wages; it prohibits discriminatory variations in wages. If it should turn out that Dr. Campbell earns more than males performing substantially equal work, it is axiomatic that the Equal Pay Act does not afford her relief. We thus agree with the Eighth Circuit that "a comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness." There were 13 men teaching in the Physical Education Department at the time of suit, yet the plaintiffs here, as in *Heymann*, chose a single employee for comparison apparently because he was the highest paid employee performing substantially equal work, not because he was the only comparable employee.
>
> We believe that the proper test for establishing a prima facie case in a professional setting such as that of a college is whether the plaintiff is receiving lower wages than the average of

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[26] 29 C.F.R. § 1620.15 (2022).

[27] Matthew J. Gagnon, *Equal Pay Litigation Trends Update: One Comparator, Two Comparators, Three Comparators, More? Courts Revisit the One-Comparator Rule*, SEYFARTH (July 12, 2022), https://www.seyfarth.com/news-insights/equal-pay-litigation-trends-update-one-comparator-two-comparators-three-comparators-more-courts-revisit-the-one-comparator-rule.html [https://perma.cc/JCG7-PAN2] (examining how courts are resolving the ambiguity of whether "an equal pay plaintiff [can] establish his or her prima facie case of pay discrimination by pointing to just one comparator who was paid more, even though there are other comparators who were paid less or whose pay would otherwise contradict that narrative").

[28] 718 F.2d 910 (9th Cir. 1983).

> wages paid to all employees of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage scale. This recognizes that in a professional setting, wage variations may stem from a multitude of factors that do not implicate sex discrimination. This conclusion is also in harmony with the language of the Equal Pay Act, which requires comparison to "employees" of the opposite sex. The Act speaks of employees only in the plural.[29]

Based on this reasoning, the Ninth Circuit concluded that "Dr. Campbell [the female plaintiff] may establish a prima facie case only if her wages are less than the average paid to Mr. Boutin, Mr. Carey, and any other appropriate male comparator. The average male wage, if still above the wages paid to Dr. Campbell, should also be used as the benchmark figure for damages calculation."[30] This last observation will be highly relevant to the discussion in subsequent sections.

But other courts failed to follow the Ninth Circuit's lead. For example, a federal district court in Michigan found a plaintiff established a prima facie case under the EPA on the basis of a single comparator.[31] The Second, Third, Fourth, Fifth, and Eleventh Circuits also balked at following the Ninth Circuit.[32] The position of Second Circuit courts on this issue was recently affirmed by the Southern District of New York, which noted that precedent shows "identifying a single male comparator is sufficient to make out a prima facie case prior to trial."[33] The court stated that its interpretation was consistent with other Second Circuit decisions as well.[34]

The single-comparator rule was considered by a federal district court in the Western District of Pennsylvania. After reviewing decisions in the Third Circuit, the court rejected the argument that a plaintiff must prove she was paid less than the average of comparable males. "To the Court's knowledge, this [average] rule has almost never been adopted in this Circuit. To the contrary, several district courts in this Circuit have held that a plaintiff may elect "one single comparator if they so choose."[35]

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[29] *Id.* at 916 (first quoting Heymann v. Tetra Plastics Corp., 640 F.2d 115, 122 (8th Cir. 1981); and then citing Melanson v. Rantoul, 536 F. Supp. 271, 291 (D.R.I. 1982)). Note that *Heymann*, was decided under Title VII of the Civil Rights Act of 1964. *Heymann* also involved comparisons among blue-collar workers so its holding should have applicability beyond the "professional setting" referenced in *Hein.* Additionally, the empirical literature discussed below indicates that the degree of dispersion in earnings is greater among the highly educated, as the Ninth Circuit suggests, but exists to a lesser degree among those with less education.

[30] *Id.* at 917. *See Melanson*, 536 F. Supp. at 291.

[31] Morrow v. L & L Prods., 945 F. Supp. 2d 835, 846 (E.D. Mich. 2013).

[32] The cases supporting this conclusion are identified in this and subsequent paragraphs.

[33] Eisenhauer v. Culinary Inst. of Am., 2021 U.S. Dist. LEXIS 212822, at *15 (S.D.N.Y. 2021), *aff'd on other grounds*, 84 F.4th 507 (2d Cir. 2023).

[34] *Id.* at *14–16.

[35] Barthelemy v. Moon Area Sch. Dist., 2020 U.S. Dist. LEXIS 67990, at *37 n.29 (W.D. Pa. 2020).

A similar rule appears to prevail in the Fifth Circuit. In *Mullinex v. University of Texas Austin*,[36] the magistrate judge reviewed Fifth Circuit precedents and concluded: "[t]herefore, under Fifth Circuit precedent, a plaintiff need only identify one comparator in a position requiring equal skill, effort, and responsibility under similar working conditions as the plaintiff."[37]

This same view has been advanced by the United States Equal Employment Opportunity Commission (EEOC),[38] which has relied on its guidance to explain in recent amicus filings, "[t]here is no requirement that the complainant show a pattern of sex-based compensation disparities in a job category."[39] Similarly, in *EEOC v. Maricopa Cnty. Cmty. Coll. Dist.*, the court found that the existence of higher-paid women in the same job category as the male comparators 'does not … defeat the plaintiff's prima facie showing of wage discrimination.'"[40] The California Court of Appeals decision in *Allen v. Staples, Inc.* confers similar latitude on plaintiffs who sue under its equal pay statute.[41] Defenders of this approach argue that this latitude is important not only because of the EPA's remedial purposes, but also because a requirement for a plaintiff to identify more than a single comparator could create a significant burden that then undermines such remedial purposes.[42]

Our objective in citing these cases is not to provide a comprehensive review of precedent nor state law, but to demonstrate we are not tilting at

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[36] No. 19-cv-01203-LY, slip op. at 8 (W.D. Tex. Nov. 19, 2021).

[37] *Id.* at 8 (first quoting Weaver v. Basic Energy Servs., L.P., 578 F. App'x 449, 451 (5th Cir. 2014) ("[Plaintiff] "must identify *someone* with circumstances 'nearly identical' to her own, such that the court can evaluate her claim of unfair treatment.") (emphasis added); then citing Vasquez v. El Paso Cnty. Cmty. Coll. Dist., 177 F. App'x 422, 425 (5th Cir. 2006) (holding that plaintiff failed to show a prima facie case where he did not identify "any evidence that suggests a *female* in a similar position earned a higher wage than he did.") (emphasis added); and then citing Gillis v. Turner Indus., 137 F.3d 1349 (5th Cir. 1998) (holding that a prima facie case was not shown when Plaintiff "did not submit any evidence that she had been treated differently on the basis of gender than any other similarly situated *employee* of the opposite sex.") (emphasis added)).

[38] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, No. 915.003, EEOC COMPLIANCE MANUAL § 10-IV: COMPENSATION DISCRIMINATION IN VIOLATION OF THE EQUAL PAY ACT (2006) (explaining that a prima facie case under the EPA requires showing, inter alia, that "the complainant receives a lower wage than paid to an employee of the opposite sex in the same establishment"); *id.* § 10-IV(E)(1) ("A prima facie EPA violation is established by showing that a male and a female receive unequal compensation for substantially equal jobs within the same establishment. A complainant cannot compare herself or himself to a hypothetical male or female; rather, the complainant must show that a specific employee of the opposite sex earned higher compensation for a substantially equal job.").

[39] *Id.*

[40] 736 F.2d 510, 515 (9th Cir. 1984). This text is excerpted from the Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant at 24, Eisenhauer v. Culinary Inst. of Am., 2023 U.S. App. LEXIS 27508 (2d Cir. 2023) (No. 21-02919). *See also* Patrick Hoff, *EEOC Asks 2nd Circ. to Revive Culinary School Pay Bias Suit*, LAW360 (Mar. 11, 2022, 6:57 PM), https://www.law360.com/employment-authority/articles/1473230 [https://perma.cc/N8S2-4V7V].

[41] 84 Cal. App. 5th 188, 195 (2022) (citing Dubowsky v. Stern, 922 F. Supp. 985, 990 (N.J. 1996)). But as we have seen, federal courts are divided on this issue and this California trial court chose to rely on an opinion of a New Jersey district court, interpreting Eleventh Circuit law, rather than the Ninth Circuit's opinion in Hein v. Oregon Coll. of Educ. 718 F.2d 910, 916 (9th Cir. 1983).

[42] *See* Porat, *supra* note 3.

windmills—a point we deem essential because the implications of the single-comparator rule are profound. The following example demonstrates that a rule that may seem sensible when applied to an individual plaintiff is a folly when applied in aggregate litigation.[43] The problem is illustrated in the following table, which indicates the annual pay of each hypothetical employee. The question is which employees can state a claim under the EPA by means of the single-comparator rule? Note that Mary and Sarah are paid more than Bob, and the average pay of females is $94,500 and the average pay of males is $85,000 (average pay for both men and women is $90,000).

TABLE 1. HYPOTHETICAL PAY CHART

NAME	PAY
MARY	$100,000
JOHN	$100,000
SARAH	$90,000
TOM	$90,000
JANE	$80,000
BOB	$80,000

Under the single-comparator rule, the answer is everyone but John and Mary. Female employees can point to John as their comparator and prove a prima facie case. But if the employer attempts to remediate these pay differences by paying Sarah and Jane the same as John, then Tom and Bob can compare themselves to their female counterparts and state a claim as well. This employer avoids defending against a prima facie case only by paying all employees the same salary. The single-comparator rule therefore motivates employers to extinguish pay differences, not pay discrimination.

III. THE "ENTIRE DIFFERENTIAL" RULE CONFERS LIABILITY IN THE ABSENCE OF DISCRIMINATION

Despite the generosity of the single comparator rule, a consensus remains that the Equal Pay Act, and its state counterparts, have been ineffective in eliminating pay discrimination. This view is stated explicitly in the legislative findings accompanying the 2015 amendments to California's Equal Pay Act.

> California has prohibited gender-based wage discrimination since 1949. Section 1197.5 of the Labor Code was enacted to redress the segregation of women into historically undervalued occupations, but it has evolved over the last four decades so that it is now virtua-

[43] *But see* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 455 (2016) ("the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'"); *see also* Rules Enabling Act, 28 U.S.C. § 2072(b) (2018).

> lly identical to the federal Equal Pay Act of 1963. However, the state provisions are rarely utilized because the current statutory language makes it difficult to establish a successful claim.[44]

Although California boasted of enacting the toughest equal pay law in the nation,[45] its inspiration was not necessarily home grown. Beginning in 1997, Congress has regularly considered amendments to the federal Equal Pay Act and Title VII of the Civil Rights Act of 1964. The recurring title of these proposed amendments has been the Paycheck Fairness Act, which over the years was reintroduced, each time with expansive modifications. In each instance, the intent was to remove "[a]rtificial barriers to the elimination of discrimination in the payment of wages on the basis of sex [that] continue to exist more than three decades after the enactment of the Fair Labor Standards Act of 1938 and the Civil Rights Act of 1964."[46] Although the earliest proposed amendments did not change the gender pay comparisons required by the Act, they sought to add compensatory and punitive damages to the law's backpay remedy.

The version of the bill introduced in 2001 was the first in a series of proposals to heighten the employer's burden in proving that a gender pay differential was attributable to "any factor other than sex." It would delete "any" from the forgoing and substitute in its place "bona fide." It then would define a bona fide factor in terms associated with disparate impact claims under Title VII. To wit: this factor must be job-related and consistent with business necessity, and the employer's defense would fail if the plaintiff established there was a less-discriminatory alternative available to the employer.[47] In addition, the proposed amendment eliminated the requirement that pay comparisons must be limited to employees in the "same establishment."[48]

These amendments were included in bills introduced in each subsequent congressional session through 2015, when a change was introduced that resonates through the present. Rather than placing the burden on the plaintiffs to demonstrate that equally effective pay-setting criteria would result in a smaller pay gap, the proposed amendment would require employers to prove that job-related criteria that account for a gender difference in pay account for the *entire* pay difference, or else the affirmative defense fails. Compare the text of the 2013–2014 version of the amendment with the 2015–2016 version, in which the added text is italicized.

> The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and

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[44] Act of Oct. 6, 2015, ch. 546, S.B. No. 358, 2015 Cal. Stat. 4605. Prior to amendment the state law resembled the federal Equal Pay Act.

[45] *See* P. McGreevy & C. Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. TIMES (Oct. 6, 2015, 8:15 PM), https://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html [https://perma.cc/37RQ-F7M9].

[46] H.R. 2023, 105th Cong. § 2(4)(A) (1997).

[47] H.R. 781, 107th Cong. § 3 (2001).

[48] *Id.*

> (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.[49]
>
> *******
>
> The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and *(iv) accounts for the entire differential in compensation at issue.* Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.[50]

This revision has influenced legislation beyond what one normally expects from a frequently rejected amendment and has been adopted by at least seven state legislatures. The same year the requirement to account for "entire differential" was introduced in Congress, it was proposed in the California legislature and quickly signed into law.[51] This was followed more recently by amendments passed by legislatures in six additional states, and similar provisions are pending elsewhere.[52]

IV. THE "ENTIRE DIFFERENTIAL" AS REQUIRED BY SEVEN STATES

These sections review the seven states that have limited the factors considered for the bona fide defense by requiring the employer to show that it accounted for the entire differential in compensation at issue.

A. The California Rule[53]

The California Fair Pay Act enumerates four affirmative defenses to an employee's prima facie case of pay discrimination. The one with broadest applicability requires an employer to prove the pay differential results from "[a] bona fide factor other than sex, such as education, training, or experience….[t]he one

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[49] H.R. 377, 113th Cong. § 3(a)(3)(B) (2013–2014).

[50] H.R. 1619, 114th Cong. § 3(a)(3)(B) (2015–2016).

[51] Act of July 18, 2018, ch. 127, A.B. No. 2282, 2018 Cal. Stat. No. 2255 (made effective Jan. 1, 2019).

[52] *See infra* Part IV. *See, e.g.*, S.B. 742, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (allowing a bona fide factor defense if the employer "account[s] for the entire wage differential.").

[53] CAL. LAB. CODE §§ 1197.5(a)(1)(D), (3) (West 2023).

or more factors relied upon account for the entire wage differential."[54] What is unclear and unguided by regulations is whether an employer that can *partially* account for the wage differential nevertheless is liable for the differential in its entirety or just the portion unaccounted for. As an example, suppose a male employee is paid $10,000 more than a female employee performing substantially similar work. At trial, the employer is able to account for $8,000 of that differential. Is the employer liable for the remaining $2,000 or, having failed to establish the defense in its entirety, is it liable for $10,000?[55]

B. The Colorado Rule[56]

Colorado's affirmative defenses against wage discrimination are even more circumscribed. It prohibits paying employees of one sex less than an employee of the opposite sex for substantially similar work, but limits an employer's affirmative defense to a short list of permissible considerations:

> (1)(a) That the wage rate differential is based on:
>
> (I) A seniority system;
>
> (II) A merit system;
>
> (III) A system that measures earnings by quantity or quality of production;
>
> (IV) The geographic location where the work is performed;
>
> (V) Education, training, or experience to the extent that they are reasonably related to the work in question; or
>
> (VI) Travel, if the travel is a regular and necessary condition of the work performed; … and
>
> (c) That each factor relied on in subsection (1)(a) of this section accounts for the entire wage rate differential.

As we will explain, these enumerated factors would be most unlikely to account for the entire wage differential among employees of the *same* sex, and they therefore provide a dubious benchmark for determining whether pay differences between male and female employees are discriminatory. This statute too is silent regarding whether the failure to account for the entire wage difference defeats the affirmative defense or whether the employer that accounts for a fraction of the wage difference mitigates liability to that extent.

C. The Illinois Rule[57]

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[54] *Id.*

[55] A number of the states have historically issued opinion letters, notably California, to address such uncertainties. Perhaps some additional clarity could be provided by that means. *See* Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171 (2021).

[56] COLO. REV. STAT. § 8-5-102(1)(c) (2022).

[57] 820 ILL. COMP. STAT. ANN. 112/10(a)(4)(C) (West 2023).

The Illinois Equal Pay Act provides a defense to wage differences between employees of the opposite sex if the employer proves the following:

> (4) a differential based on any other factor other than: (i) sex or (ii) a factor that would constitute unlawful discrimination under the Illinois Human Rights Act, provided that the factor:
> (A) is not based on or derived from a differential in compensation based on sex or another protected characteristic;
> (B) is job-related with respect to the position and consistent with a business necessity; and
> (C) accounts for the differential.[58]

The Act is silent regarding the consequence of only partially accounting for sex or racial pay differences.

D. The Maryland Rule[59]

Maryland also requires an employer's affirmative defenses to account for the entire pay difference:

> (c) Except as provided in subsection (d) of this section, subsection (b) of this section does not prohibit a variation in a wage that is based on:
> (1) a seniority system that does not discriminate on the basis of sex or gender identity;
> (2) a merit increase system that does not discriminate on the basis of sex or gender identity;
> (3) jobs that require different abilities or skills;
> (4) jobs that require the regular performance of different duties or services;
> (5) work that is performed on different shifts or at different times of day;
> (6) a system that measures performance based on a quality or quantity of production; or
> (7) a bona fide factor other than sex or gender identity, including education, training, or experience, in which the factor:
> (i) is not based on or derived from a gender–based differential in compensation;
> (ii) is job related with respect to the position and consistent with a business necessity; and
> (iii) accounts for the entire differential.

E. The New Jersey Rule[60]

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58 *Id.*

59 MD. CODE ANN., LAB. & EMPL. § 3-304(c)(7)(iii) (West 2022).

60 N.J. STAT. ANN. § 10:5-12(t)(4) (West 2023).

New Jersey lists five elements to its affirmative defense to pay differences:

> (1) That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
> (2) That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
> (3) That each of the factors is applied reasonably;
> (4) That one or more of the factors account for the entire wage differential; and
> (5) That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

As in her sister states, New Jersey's statute is silent as to whether an employer that fails to account for the entire pay difference is liable for only the unaccounted-for portion of the pay difference.

F. The Oregon Rule[61]

Oregon also limits employers to an exclusive set of affirmative defenses:

> (a) An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:
> (A) A seniority system;
> (B) A merit system;
> (C) A system that measures earnings by quantity or quality of production, including piece-rate work;
> (D) Workplace locations;
> (E) Travel, if travel is necessary and regular for the employee;
> (F) Education;
> (G) Training;
> (H) Experience; or
> (I) Any combination of the factors described in this paragraph, if the combination of factors accounts for the entire compensation differential.

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[61] OR. REV. STAT. ANN. § 652.220(2)(I) (West 2022).

As noted previously, it will be the rare case in which employers who have not adopted a compensation system that rigidly ties pay to prescribed metrics can account fully for pay differences within any demographic group, let alone between groups. Indeed, the overwhelming evidence is to the contrary, as discussed in Part III. This statute is also silent regarding the employer's failure to account for the entire compensation differential.

G. The Washington Rule[62]

Washington is more expansive than Oregon in providing, in addition to a list of explicit considerations that excuse pay differences between the sexes, a catch-all phrase, permitting pay differences reflecting "bona fide job-related factors":

> (3)(a) Discrimination within the meaning of this section does not include a differential in compensation based in good faith on a bona fide job-related factor or factors that:
>
> (i) Are consistent with business necessity;
>
> (ii) Are not based on or derived from a gender-based differential; and
>
> (iii) Account for the entire differential. More than one factor may account for the differential.
>
> (b) Such bona fide factors include, but are not limited to:
>
> (i) Education, training, or experience;
>
> (ii) A seniority system;
>
> (iii) A merit system;
>
> (iv) A system that measures earnings by quantity or quality of production; or
>
> (v) A bona fide regional difference in compensation levels.
>
> (c) A differential in compensation based in good faith on a local government ordinance providing for a minimum wage different from state law does not constitute discrimination under this section.
>
> (d) An individual's previous wage or salary history is not a defense under this section.
>
> (e) The employer carries the burden of proof on these defenses.

Washington is the only state that explicitly provides that an employer that partially accounts for a pay difference is liable only for the portion that is unaccounted for: "[i]f any employee receives less compensation because of discrimination on account of gender in violation of this section, that employee is entitled to the remedies.[63] In such action, however, the employer shall be credited with any compensation which has been paid to the employee upon account."[64]

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62 WASH. REV. CODE ANN. § 49.58.010 (West 2023).

63 *Id.* §§ 49.58.060, 49.58.070.

64 *Id.* § 49.58.010.

V. THE "ENTIRE DIFFERENTIAL" RULE MAKES LIABILITY VIRTUALLY INEVITABLE

The problem with a strict liability rule regarding pay discrimination is that the same pay differences these statutes prohibit between the sexes are commonplace among employees of the same sex, even those performing similar work.[65] This observation applies to comparisons by race, ethnicity, and other demographic groups encompassed by the equal pay laws of the seven states. These within-group differences in pay obviously do not arise "on the basis of sex" or any other demographic characteristic. As important, within-group differences are not entirely explained by measurable considerations.[66] Yet the equal pay laws of seven states establish liability when pay differences of similar magnitude are found for unexplained reasons *between* members of different demographic groups.

The "entire differential" rule introduces a quantitative dimension to what employers must prove to defend against a claim of unequal pay. In the absence of an "entire differential" requirement, an employer might be able to prevail by establishing an employee's pay is less than a putative comparator based on a variety of unmeasured considerations, such as unexplained absences, poor attention to detail, inattention to customers, frequent errors, excessive tardiness, etc. These sources of pay inequality could be introduced anecdotally. Although a plaintiff might dispute these characterizations, and whether the pay difference is commensurate with these deficiencies, the evidence regarding these deficiencies would be submitted to the jury, which could consider the question holistically.

The seven states recognize a successful defense to an equal pay violation only if the employer is able to account *quantitatively* for the entire pay disparity. However, these statutes are silent regarding how this accounting is to be made. Legislators appear to envision a labor market in which a non-discriminating employer sets an ascertainable "price" for an employee's job-related qualities, such as education, tenure, and general labor market experience, then accurately measures the quantity of each and every trait and pays according to this formula. In this imaginary case, it is simple to determine whether an employee is paid similarly to others and—because all objective differences have been considered and weighed—it may be reasonable to consider discrimination a primary reason for any remaining pay difference.

For example, an employer may determine that each additional year of education should provide an employee $10,000; an additional year of experience, an additional $5,000; an additional year of general labor market experience, an additional $3,000; and no other attributes, skills, or behaviors are valued. If so, then all employees would be perfectly aligned by these metrics, and discrimination would be indicated to the extent a pay differential between demographic groups remained after accounting for these metrics.[67]

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65 *See* Porat, *supra* note 3.

66 *Id.*

67 Of course, this assumes that the appropriate compensation formula is explicit. Otherwise, although each factor may be explicit, an employer may value experience differently when it is accompanied by higher education, or vice versa. This illustrates that the determinants of pay may be "interactive," meaning that a simple enumeration of pay-related factors would be insufficient.

But that is not how employees are compensated and few, if any, employers base compensation solely on factors so readily measurable.[68] For example, how many additional dollars should be paid to the employee who is always punctual relative to one who invariably is late? Is a higher salary to be paid to the employee at the top of his or her college class than to a colleague who finished at the bottom? If so, how large is a permissible differential and how is it determined? Reasonable minds may differ, and the data discussed below indicate that in fact pay differs in these ways, both among employees in the same demographic group and between employees in different demographic groups. Thus, differences in compensation are relevant measures of discrimination between groups only to the extent they exceed what would prevail *within* the allegedly more favored group.

Although education, training, and experience affect pay, employers rarely maintain a price list regarding the value of these factors. Rather, particularly in litigation under Title VII, employers challenged to explain their pay structure generally rely on data to determine the implicit price they pay for each of the job-related characteristics of their employees. A common methodology for ascertaining those prices is multiple regression analysis.[69] As an example, that method can estimate how much, on average, one additional year of workforce experience increases an employee's pay, controlling for other neutral influences. The same is true for other job-related factors.

But these imputations are approximate for a variety of reasons: data are misreported, the employer may consider the nature of an employee's experience in addition to the number of years, and employers must weigh how closely an employee's current position resembles their previous jobs. Also relevant are labor market conditions in locations where employees are hired, which may be more localized than any published data reflect. As a consequence, no statistical model regarding any demographic group will provide a perfect fit—it will err by overstating what some employees are expected to earn and understating what others should be paid. This will be true among employees in the *same* demographic group, as well as employees in different demographic groups. Indeed, every statistical estimation procedure explicitly measures the extent of unaccounted-for (perhaps random or unmeasurable) causes of pay differences.[70]

The amounts by which the statistical model fails to account for each employee's pay rate is known as the residual variance, which is akin to a margin of error. These residuals will be positive and negative in equal measure, corresponding to those whose pay differs from the estimates of the statistical model. Yet the statutes in the seven states identified above, if read literally, would brand all

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[68] We concede an exception exists in the unionized sector of the economy, where unions long have sought to take "wages out of competition." *See* Kim Moody, *A Pattern of Retreat: The Decline of Pattern Bargaining*, LAB. NOTES (Feb. 16, 2010), https://labornotes.org/2010/02/pattern-retreat-decline-pattern-bargaining [https://perma.cc/MF68-4ZJG] ("The age-old goal of unions has been to 'take wages out of competition,' as an economist put it more than a hundred years ago."); *see also* Lawrence Mishel, *The Structural Determinants of Union Bargaining Power*, 40 INDUS. LAB. REL. REV. 90 (1986).

[69] *See, e.g.*, Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 303 (3d ed. 2011).

[70] In ordinary least-squares regression, a common estimation procedure, the ratio of the "explained" variance in the dependent variable, in our case, earnings, relative to the overall variance, is denoted as "R-squared." *Id.* at 355.

those with negative residuals—roughly one-half of all employees—as "discriminatees."

VI. THE EMPIRICAL EVIDENCE REGARDING THE "ENTIRE DIFFERENTIAL"

The fallacy baked into "entire differential" laws is that, in the absence of discrimination, all employees who perform work requiring substantially the same skill, effort, and responsibility would be paid the same, subject to the defenses enumerated in these laws. But that presumption is false, as proven by the wide range in pay among white males who perform similar work. These differences are ubiquitous for reasons unrelated to gender or race, since they are common among white males, and they are unaccounted for in their entirety even in the detailed studies cited below, in which white males are stratified by a narrow occupational definition, their level of education, and full-time, full-year employment.

Consider a slight variation of the statistical model posed by Professors Kaye and Freedman:[71] salary = $a + b \times$ education + $c \times$ experience + e.[72] This model may be used to estimate the additional salary associated with additional education (b), and experience (c), relative to a baseline of (a), the hypothetical pay of those whose education and experience are zero. These parameters often are estimated using ordinary least-squares regression.[73] The term (e) is referred to as an "error" term and is included because "[s]alaries are not going to be predicted very well by linear combinations of variables such as education and experience."[74] The value of (e) indicates the amount by which an individual's pay differs from expected pay according to the model (the model's predictions).[75] The difference between actual pay and estimated or predicted pay is referred to as the regression residual.[76] With regard to any individual in the sample, the residual is an estimate of (e), the "error" in accounting for the pay of that individual.[77] The residual from a linear regression model can be calculated for each individual and must sum to zero across all individuals, as a necessary feature of ordinary least-squares estimation.[78]

Although typically it is supposed that the residuals from a regression model are the outcomes of a random process, it is well known that "the summary effect of the excluded variables shows up as a random error term in the regression model, as does any modeling error" so "[t]echnically, the omission of explanatory

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71 David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 280 (3d ed. 2011).

72 We omit the "gender" term from the Kaye-Freedman model because we will refer solely to estimates regarding the pay of males.

73 Kaye & Freedman, *supra* note 71, at 280.

74 *Id.*

75 *Id.*

76 *Id.* at 295 ("Residual: The difference between an actual and a predicted value. The predicted value comes typically from a regression equation, and is better called the fitted value, because there is no real prediction going on.").

77 Rubinfeld, *supra* note 69, at 352 (defining the error term as "[a] variable in a multiple regression model that represents the cumulative effect of a number of sources of modeling error.").

78 *See, e.g.*, PETER KENNEDY, A GUIDE TO ECONOMETRICS 49 (6th ed. 2008) ("[T]he sum of the OLS residuals . . . equals zero.").

variables that are correlated with the variable of interest can cause biased estimates of regression parameters."[79]

There is strong evidence that the residual or unaccounted variance in pay reflects far more than the effects of discrimination. Although these nondiscriminatory influences often are not directly observed or even observable, they cast shadows on the dispersion in pay, even among males, that mark their presence. For example, it is well-documented that the residual variance is greater among males with the highest levels of education and experience, and smaller among those with the least education and experience. Further, the residual earnings variance does not increase uniformly with experience, but is lower within cohorts of employees who left school within the past seven to ten years, compared to those with less or more experience since leaving school.[80]

An additional set of findings casts further doubt on the usefulness of residual differences as a measure of discrimination. Researchers have performed numerous studies in which they considered an expanded list of employee and job characteristics, included as affirmative defenses in the state statutes we have identified. For example, the quality of schooling, as well as the years of schooling,[81] an employee received has been shown to influence that employee's subsequent earnings. Similarly, both an employee's willingness to move to a higher-paying job, as well as the impediments to mobility, affect an employee's compensation.[82] To cite a third example, the socioeconomic environment in which an employee was raised may influence future earnings.[83]

These studies are significant because, in the absence of data that captures these considerations, these influences will manifest as unaccounted-for differences in pay rather than omitted determinants. Because the unaccounted-for portion of pay differences inevitably will reflect the influence of legitimate, omitted factors, as well as any discriminatory treatment, it is impossible to disentangle the two. Consequently, this makes it impossible to distinguish the effects of omitted considerations from the effects of the employer's discrimination. Attributing the

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79 Rubinfeld, *supra* note 69, at 314 n.32.

80 *See, e.g.*, Jacob Mincer, *The Distribution of Labor Incomes: A Survey With Special Reference to the Human Capital Approach*, 8 J. ECON. LITERATURE 1 (1970); Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, 82 J. POL. ECON. S76 (1974) (explaining gender differences in the residual variance in earnings). It is important to note that patterns described in this Article, and generally in the economics literature, apply to the natural logarithm of earnings, which essentially considers earnings differences in percentage terms, thereby controlling for scale effects.

81 *See, e.g.*, Paul Wachtel, *The Effects on Earnings of School and College Investment Expenditures*, 58 REV. ECON. & STAT. 326 (1976); Terence J. Wales, *The Effect of College Quality on Earnings: Results from the NBER Thorndike Data*, 8 J. HUM. RES. 306 (1973); Burton A. Weisbrod & Paul Karpoff, *Monetary Returns to College Education, Student Ability, and College Quality*, 50 REV. ECON. & STAT. 491 (1968).

82 *See* Jacob Mincer, *Family Migration Decisions*, 86 J. POL. ECON. 749 (1978).

83 JERE R. BEHRMAN ET AL., SOCIOECONOMIC SUCCESS: A STUDY OF THE EFFECTS OF GENETIC ENDOWMENTS, FAMILY ENVIRONMENT, AND SCHOOLING 14 (D.W. Jorgenson et al. eds., 1980) ("Whether or not some measure of ability is included, generally significant coefficients are obtained for socioeconomic background variables related to the parents such as their income, occupational status, and education.").

entire unexplained difference to "discrimination" is therefore arbitrary and likely overstates the true extent of discrimination.

Residual earnings therefore should be viewed as the component of earnings that cannot be explained by observed factors available to the statistician. The size of this residual will be specific to each individual in the statistical sample. For some, the residual will be large and positive in that they are paid much more than the statistical model predicts. For others, the residual may be large and negative in that they are paid much *less* than the model predicts. Just as with pay, the residual differences in pay will have both an average and a variance.

Economists measure dispersion in residual earnings in percentage terms to account for the effects of inflation in a time series and the effects of scale in a cross-section—that is, a $10 an hour pay difference should be viewed differently among employees who average $20 per hour than those who average $100 per hour. In publicly available data there is considerable dispersion in residual earnings. For example, using Census (American Community Survey) data from 2016–2020, and comparing men in the same occupation and state, with the same level of educational attainment, and the same age, a man at the 75th percentile of the earnings distribution earns 87.2% more than a man at the 25th percentile of the earnings distribution.[84] Economists attribute much of the variation in residual earnings between observationally equivalent workers to unobserved differences in workers' skills and productivity.

Since at least the early 1990s, economists have found that earnings inequality has been increasing. The increase is partly due to factors that are readily observed and measured, such as the growing earnings differential between college graduates and high school graduates (or workers without a high school diploma). However, much of the growth in inequality is due to growing dispersion in residual earnings, meaning the underlying cause is unmeasured and unknown. An influential paper by Lemieux corroborated that dispersion in earnings is higher for more experienced—meaning older—and highly educated workers.[85] The aging of the US workforce between the 1980s and the 2000s, and the increase in the share of the workforce with a college degree, increased the share of workers in the United States with relatively high dispersion in residual earnings and decreased the share of workers with low dispersion in residual earnings.

Since Lemieux's paper, many authors have reported similar findings. For example, Autor, Katz, and Kearney state that "changes in the distribution of education or experience of the labor force can lead to changes in wage dispersion" because "earnings trajectories fan out as workers gain labor market experience. Hourly wage dispersion is also typically higher for college graduates than for less-educated workers."[86]

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[84] The corresponding difference for women is 74.7%. This general calculation was based off data collected over five years by the U.S. Census Bureau. *See American Community Survey 2016-2020 5-Year Data Release*, U.S. CENSUS BUREAU (Mar. 17, 2022), https://www.census.gov/newsroom/press-kits/2021/acs-5-year.html [https://perma.cc/2MHG-7NF9].

[85] Thomas Lemieux, *Increasing Residual Wage Inequality: Composition Effects, Noisy Data, or Rising Demand for Skill?*, 96 AM. ECON. REV. 461, 462 (2006).

[86] David. H. Autor et al., *Trends in US Wage Inequality: Revising the Revisionists*, 90 REV. ECON. & STAT. 300, 313 (2008).

An important finding in Lemieux's study is that, all else equal, residual pay inequality is higher for men than it is for women. For example, after grouping workers in his data by potential experience and educational attainment categories,[87] he finds that the dispersion in pay for men is higher in percentage terms than for women within each group. This finding is critical to our argument because it questions the wisdom of relying on unaccounted-for pay differences as a measure of discrimination when the demographic group with largest unaccounted for differences in pay is the least likely to have experienced discrimination.

This finding regarding the relative dispersion in earnings is so pivotal to our argument against "entire differential" statutes that we have investigated this empirical foundation further. For purposes of this Article, we use the Census's American Community Survey data for the period of 2016 to 2020 to compare the dispersion in residual earnings for men and women within similar educational attainment and potential experience groupings as Lemieux used in his study of pay inequality. We first estimate annual earnings regressions for men and women who were full-time and full-year employees, using age, educational attainment, occupation, and state of residence as explanatory factors. We then obtain residual earnings for each worker and calculate the standard deviation (the square-root of the variance) of residual earnings for men and women in different educational attainment and potential experience groups. For most educational attainment and potential experience groups, we found significantly greater dispersion in residual earnings for men than for women.

Table 2 shows an example of our results for 2016–2020 and compares them to Lemieux's earlier findings for 2000–2002. We focus on high school graduates and college graduates grouped into categories of 1–10, 11–20, and 21–30 years of potential experience. We also compare the dispersion in residual earnings across all men and all women, regardless of educational attainment and potential experience.

We find that the dispersion in residual earnings is 11.2% higher for men than women, among all full-time and full-year workers, while Lemieux found the dispersion in pay was 8.2% higher for men. Within each education and potential experience group, we find the dispersion in residual earnings is between 5.7% and 12.7% higher for men. This shows that pay differentials that cannot be attributed to previously considered explanatory factors are relatively more important for men than women.

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[87] *Id.* at 303–05.

TABLE 2. MALE–FEMALE DIFFERENTIAL IN RESIDUAL EARNINGS DISPERSION

GROUP	LEMIEUX	2016–2020
OVERALL	8.1%	11.2%
HIGH SCHOOL GRADUATE 1–10 YEARS POTENTIAL EXPERIENCE	9.7%	7.5%
HIGH SCHOOL GRADUATE 11–20 YEARS POTENTIAL EXPERIENCE	7.4%	5.7%
HIGH SCHOOL GRADUATE 21–30 YEARS POTENTIAL EXPERIENCE	6.7%	9%
COLLEGE GRADUATE 1–10 YEARS POTENTIAL EXPERIENCE	10.9%	9.3%
COLLEGE GRADUATE 11–20 YEARS POTENTIAL EXPERIENCE	3%	12%
COLLEGE GRADUATE 21–30 YEARS POTENTIAL EXPERIENCE	8.8%	12.7%

These results reflect comparisons between men and women in the workforce at large, yet all equal pay laws premise liability on whether employees are paid equally by the same employer. It behooves us, therefore, to consider studies of the dispersion in pay based on matched employer and employee data. That research finds substantial dispersion in pay within the typical firm, which also has grown over time. Most studies using US data rely on longitudinal data from either the Census Bureau or the Master Earnings File within the Social Security Administration. Most researchers use the empirical methodology developed by Abowd, Kramarz, and Margolis to estimate the impact of both worker characteristics and firm policies and practices on earnings inequality.[88] The research shows that a substantial majority of earnings inequality in the economy is due to the dispersion in pay within firms. For example, Lazear and Shaw state that the empirical evidence indicates "there is very high wage dispersion within firms."[89] Abowd, Haltiwanger, and Lane find "tremendous variation in the dispersion of log wages within firms" so that a one-standard deviation pay differential at a firm with "low" within-firm pay dispersion still amounts to a 49% earnings differential among employees at the firm.[90]

A relatively recent study using longitudinal data from the Master Earnings File shows that about one-third of the increase in earnings inequality between 1978 and 2013 occurred within firms.[91] The other two-thirds of the increase in inequality was due to increased pay differences between firms caused by increased sorting of workers into firms, and separation of high-wage and low-wage workers across firms. Importantly, for our purposes, the authors report some empirical results separately by men and women and find higher dispersion in pay for men relative to women even after accounting for whether a worker is employed at a high-wage or low-wage firm. For example, they find that between 2007 and 2013, the standard deviation, that is, the dispersion, of pay among men

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88 John M. Abowd et al., *High Wage Workers and High Wage Firms*, 67 ECONOMETRICA 251 (1999).

89 Edward P. Lazear & Kathryn L. Shaw, *Wage Structure, Raises, and Mobility: An Introduction to International Comparisons of the Structure of Wages Within and Across Firms*, *in* THE STRUCTURE OF WAGES: AN INTERNATIONAL COMPARISON 1, 11 (Edward P. Lazear & Kathryn L. Shaw eds., 2009).

90 *Id.* at 91. "Log" refers to the natural logarithm and this measure is commonly used in studies of earnings. Log differences essentially measure percentage differences.

91 Jae Song et al., *Firming Up Inequality*, 134 Q.J. ECON. 1, 1 (2019).

was eleven percent higher than the standard deviation of pay among women.[92] In other words, the pay differential among men is significantly larger than the corresponding pay differential among women. While Song, Price, Guvenen, Bloom, and von Wachter use a different approach to measuring pay inequality than Lemieux, they also find that, all else equal, pay differentials among men tend to be larger than pay differentials among women.

In summary, the empirical evidence we have considered provides no support for adopting an "entire differential" approach to measure pay discrimination. Inherent in the regression approach commonly used to measure pay differences, is the construct that roughly one-half of all persons in the sample will have negative, unexplained differences relative to the model's prediction. Further, the size of these unexplained differences depends on the extent to which nondiscriminatory reasons for gender differences in pay are amenable to measurement. Finally, the magnitude of unaccounted-for pay differences is greater among men than women, suggesting that an unmeasured, nondiscriminatory component of pay differences looms large in pay comparisons even *within* groups of employees for reasons unrelated to gender. These findings suggest that unaccounted-for differences in pay should be anticipated in comparisons between demographic groups as well. Whether these between-group differences evidence discrimination depends on whether they are greater than what would be found under nondiscriminatory circumstances. Although estimating the latter may pose challenges, we are confident that these unaccounted-for differences would be greater than zero, the value implied by "entire differential" statutes.

VII. TOWARDS A SENSIBLE INTERPRETATION OF EQUAL PAY LAWS

In our view, a reasonable interpretation of the equal pay mandate must pass the sibling test described above. Any interpretation that fails this test unjustly will confer liability on non-discriminating employers. As we have explained, the two villains of this piece are the single-comparator rule and the entire differential rule.

Reforming the single-comparator rule is relatively simple because the doctrine is judge-made. Whatever its merits when applied to an individual employee, it overstates an employer's potential liability to a group of employees. As demonstrated above, it fails the sibling test by making pay differences, as well as pay discrimination, unlawful.

One fix is to recognize an additional prong to the elements of proof. If a plaintiff were required first to prove that women as a group are paid significantly less than their male counterparts, the cause of action would satisfy the sibling test. No employer who paid siblings equally would be required to rebut a prima facie case because the average pay of male and female employees would be the same. In addition, the employee still must prove that *some* comparator of the opposite sex was paid more. In rebutting that proof, the employer would be able to contest the aptness of that comparison and adduce evidence, both statistical and anecdotal,

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[92] *Id.* at 35–37. This is based on dispersion in pay among men and women from both observed and unobserved worker characteristics that do not change over time, accounted for by a person-specific fixed effect.

that accounted for—in neutral terms—the difference in pay. This is a simple change that would eliminate an obvious problem.

Remedying the "entire differential" rule requires courts to read more into the statute than appears at first blush. But courts must strain to avoid interpretations that yield absurd results.[93] And, as we have seen, if interpreted literally, the "entire differential" would violate the sibling rule and confer liability on a non-discriminating employer regarding large swaths of its workforce—an unreasonable result. Instead, courts should acknowledge that the failure to explain the entire differential affects approximately half the employees in any demographic group—those who inevitably fall below the regression line. The relevant question is whether any particular demographic group falls *disproportionately* (relative to the favored group) below the pay level predicted by the regression.

For example, male and female siblings who are paid less than predicted by the model would fall equally far from the regression's prediction. Accordingly, the employer should not be liable because it failed to account for the entire pay difference. But if females, as a group, were to lie farther below predicted values than their male counterparts, then the failure to account for the entire differential should result in liability. Thus, it is only when the enumerated defenses provide a *poorer* approximation to the pay of females than males that the "entire differential" rule should to that extent provide the measure of liability.[94]

Activist courts may take things a step further and rule these laws unenforceable based on vagueness and impossibility doctrines.[95] It is beyond the scope of this Article to consider the intricacies of these defenses, but we sketch out the arguments as follows. Although vagueness arguments traditionally were confined to criminal statutes, Professor Eugene Volokh has written that the Supreme Court's decision in *FCC v. Fox Television Stations*,[96] "is a reminder that even non-criminal rules can be struck down as unconstitutionally vague,"[97] thus this constitutional principle may apply to the equal pay laws we have considered. Professor Michael J. Zydney Mannheimer argues that the impossibility doctrine is akin to the "vagueness prohibition."[98] As an example, consider a law that would penalize those unable to solve the equation $50X=0$ for positive values of X, which has no solution. Analogously, "[w]here a legislature has compelled compliance with unknowable facts or entirely subjective impressions of third parties, it has, in effect, commanded the impossible."[99]

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93 *See, e.g.*, CAL. CIV. CODE § 3531 (West 2023) ("The law never requires impossibilities.").

94 There are formal, statistical tests that can decide whether the residual variance regarding pay differences among women exceeds the residual variance among males, and similarly for other demographic comparisons.

95 *E.g.*, CIV. § 3531.

96 576 U.S. 239 (2012).

97 Eugene Volokh, *The Void for Vagueness Doctrine / Fair Notice Doctrine and Civil Cases*, VOLOKH CONSPIRACY (June 21, 2012, 12:19 PM), https://volokh.com/2012/06/21/the-void-for-vagueness-fair-notice-doctrine-and-civil-cases/ [https://perma.cc/2GXS-9G3H]. *See also* the examples of civil cases cited therein.

98 Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1050 (2020).

99 *Id.* at 1054.

The "entire differential" rule falls prey to this doctrine. Although we have noted that multiple regression analysis is a common vehicle for estimating the determinants of pay differences, it is agnostic regarding the variables that are appropriate in making that determination. In other words, multiple regression does not come equipped with a standard model of pay that can applied by each employer, just as no yardstick describes what is to be measured. Moreover, even if there is a consensus on the considerations that are included in the regression equation, the measure of compensation may be entered in either an arithmetic or semi-logarithmic form,[100] and the determinants of pay often are considered in their linear or quadratic forms.[101] But what if one form of the regression entirely accounts for the differential, but an alternative model does not? Is it for the jury to select the model that is most apt? One certainty is that no form of the regression will account for the entire pay difference in each group of substantially similar jobs.

This is what Professor Zydney Mannheimer refers to as liability premised on the failure to conform to normative standards.

> A number of the [Supreme] Court's cases, especially its earlier ones, have involved statutes that require conformance of one's conduct to certain objective facts. Whether a statute has been deemed vague has largely depended upon whether those facts were knowable, in which case the statute was considered not vague, or unknowable, in which case the statute was considered vague.[102]

Another reason equal pay laws may be problematic is that the appropriate statistical model changes as employees come and go or change roles within their companies, and thus the model to which the employer must conform its behavior changes as well.[103]

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[100] *See, e.g.*, Jacob Mincer, *The Distribution of Labor Incomes: A Survey with Special Reference to the Human Capital Approach*, 8 J. ECON. LITERATURE. 1, 9–10 (1970).

[101] *Id.* at 17 n.28.

[102] Zydney Mannheimer, *supra* note 98, at 1103–04.

[103] Although a court or jury may be capable of deciding this issue, indeed they must if it is handed the case, this delegation of decision-making raises questions regarding the separation of powers and the delegation of authority from the legislature to the judicial branch. *Id.* at 1051 ("vague statutes violate separation-of-powers and rule-of-law principles by delegating too much authority to police, prosecutors, judges, and juries to make law, a core legislative function."). An alternative avenue of attack might be premised on the potential conflict between the mandates of these equal pay laws and the provisions of Title VII. *See* Allan G. King, *Does Title VII Preempt State Fair Pay Laws?*, 32 A.B.A. J. LAB. & EMP. L. 65 (2016).

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THERE'S A LAW FOR THAT: EXAMINING THE NEED FOR PERSONAL FINANCE EDUCATION LEGISLATION AND ITS IMPACT ON RETIREMENT IN A POST COVID-19 WORLD

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CONTENTS

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AN INTRODUCTION TO A PROBLEM WORTH FIXING

If you ask a high school student what they are thinking about for their future, their answer probably would not be retirement. Instead, they might respond they are more concerned about financing their college education. While understandable, this is worrisome given that many individuals state we are in a "retirement crisis."[1] Specifically, there is fear that people are not saving enough for retirement, concern that inflation is deterring people from contributing to their private or employer-sponsored accounts, and uneasiness that Social Security will be unable to provide to everyone its promised benefits starting in 2034.[2] Additionally, the job of the average citizen has changed substantially, with temporary work rising in popularity. While there have been many proposed solutions to these problems, there is one problem that policymakers do not focus on enough: America's financial literacy rate.

There are many concerns regarding how individuals understand—or fail to understand—the various retirement options available to them.[3] Recent studies indicate many American workers do not possess knowledge of basic financial concepts, with one survey estimating only fifty-seven percent of Americans are financially literate.[4] Considering many schools in the United States do not teach retirement saving or any kind of personal finance, these studies make sense.[5] Financial literacy is also not exclusive to one age group. While a person's level of financial literacy tends to increase as they age, it also tends to decrease later in life as a result of natural human decline.[6] Thus, fixing any broad societal financial literacy problem is no easy feat; fixing this problem for older workers getting

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[1] *See* HEATHER KERRIGAN, THE RETIREMENT CRUNCH 4 (CQ Press 2019) (quoting average Americans who are worried they have not saved enough for retirement and that government funding may deplete soon).

[2] *Id.* at 8.

[3] *See* Doug McMillon & John Hope Bryant, *Financial Literacy Education Could Help Millions of Americans*, TIME (June 10, 2022, 10:53 AM), https://time.com/6186290/americans-financial-literacy/ [https://perma.cc/PR6L-A56Y].

[4] OSCAR CONTRERAS & JOSEPH BENDIX, FINANCIAL LITERACY IN THE UNITED STATES 8 (Milken Inst. 2022), https://milkeninstitute.org/report/financial-literacy-united-states [https://perma.cc/Y38J-YX5Z] (In determining the percentage of Americans that are financially literate, Standard & Poor factored in knowledge of four basic financial concepts: risk diversification, numeracy, inflation, and compound interest.).

[5] *See* Shahar Ziv, *Should High Schools Teach Financial Literacy? More States Say Yes*, FORBES (Oct. 6, 2022, 8:15 AM), https://www.forbes.com/sites/shaharziv/2022/10/06/should-high-schools-teach-financial-literacy-more-states-say-yes/?sh=52bb9efd4c56 [https://perma.cc/JAK2-XU4C] ("Numerous studies have shown that high school students. . . display a strikingly low level of financial sophistication."); *see also* Dr. Beth Bean, *Are Americans Financially Educated on Retirement Savings?*, SOC. SEC. ADMIN., https://blog.ssa.gov/are-americans-financially-educated-on-retirement-savings/ [https://perma.cc/B4FQ-UAD7] (Nov. 2, 2023) ("80% of US adults said they wish they were required to complete a . . . course focused on personal finance education . . . and 88% think their state should require a . . . course for high school graduation.").

[6] Michael S. Finke et al., *Old Age and the Decline in Financial Literacy*, 63 MGMT. SCI. 213, 214 (2017).

ready to leave the workforce might require a different solution than what is necessary for younger workers just entering the workforce.[7]

While solving any financial literacy deficit will not be easy, fixing this problem is a worthy cause and can have a positive impact on retirement outcomes, especially as the employment landscape continues to evolve.[8] In recent years, many people have turned away from traditional jobs in favor of other work due in part to the COVID-19 pandemic.[9] The so-called gig economy has offered numerous benefits to many groups looking for flexibility, including mothers needing to stay at home with children because of childcare access issues, students supporting themselves during college, and many more.[10]

While the gig-economy has offered benefits, many gig workers do not have equitable access to retirement.[11] Employment can be an integral component of an individual's retirement planning, as the income one earns from employment drives most of that individual's financial decisions, and employers may offer retirement benefits.[12] That said, gig workers often do not work for employers who offer them retirement benefits; in fact, many of these workers are not even considered "employees" but rather "independent contractors," who often do not have access to an employer-sponsored plan.[13] This access gap not only reflects a socioeconomic disparity but, because many of these workers also tend to be members of

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[7] *See, e.g.*, Jing Jian Xiao et al., *Age Differences in Consumer Financial Capability*, 39 INT'L J. CONSUMER STUD. 1, 3–4 (2015).

[8] For further discussion of how employment in America has shifted over the past century, see *infra* notes 18–38 and accompanying text.

[9] *See generally* Alison Aughinbaugh & Donna S. Rothstein, *How Did Employment Change During the COVID-19 Pandemic? Evidence From a New BLS Survey Supplement*, U.S. BUREAU OF LAB. STAT. (Jan. 4, 2022) (exploring changes to the employment landscape during COVID-19).

[10] For further discussion on how the pandemic has dramatically altered the workforce and how it has impacted various groups, see *infra* notes 31–38 and accompanying text.

[11] *See* Alessandra Malito, *Gig Workers Are Worried About Running out of Money in Retirement–Here's How to Take Initiative*, MARKETWATCH (Sept. 21, 2022, 10:08 AM), https://www.marketwatch.com/story/gig-workers-are-worried-about-running-out-of-money-in-retirement-heres-how-to-take-initiative-11663769329 [https://perma.cc/6636-CNRL] (exploring retirement savings issues gig workers face and how most of these workers do not have access to employer-provided retirement plans).

[12] *See* Derek Thompson, *Workism Is Making Americans Miserable*, THE ATLANTIC (Feb. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441/ [https://perma.cc/4S5Y-UTCG]; *see also* Rebecca Riffkin, *In U.S., 55% of Workers Get Sense of Identity From Their Job*, GALLUP (Aug. 22, 2014), https://news.gallup.com/poll/175400/workers-sense-identity-job.aspx [https://perma.cc/2CN9-L9Q6].

[13] Burton J. Fishman, *DOL and NLRB Agree 'Gig' Workers are Independent Contractors*, 16 FED. EMP. L. INSIDER 1 (2019) (exploring worker classification issues gig workers previously faced). *But see* Michael T. Maroney et al., *New Proposed Rule on Independent Contractors to Impact Trucking, Gig Economy and Other Companies*, HOLLAND & KNIGHT TRANSP. BLOG (Oct. 14, 2022), https://www.hklaw.com/en/insights/publications/2022/10/new-proposed-rule-on-independent-contractors-to-impact-trucking-gig [https://perma.cc/859P-JSXP] (noting the Biden Administration's recent proposed rule to change the independent contractor definition).

vulnerable populations, this gap also unintentionally perpetuates existing racial,[14] ethnic,[15] gender,[16] and age disparities.[17]

This Article addresses how requiring personal finance education in schools can narrow the retirement access gap for young people entering an ever-evolving workforce by first looking to evidence that demonstrates the effectiveness of personal finance education. From there, it specifically argues that states should adopt legislation reflecting both the finance course requirements found in many Alabama high schools and Idaho's pending financial literacy general public initiative. Part II provides a background on the current state of employment in the United States, as well as the gig economy, and how those workers save for retirement. Part III then provides a survey of education law and financial literacy legislation both at the federal and state levels. From there, Part IV addresses and critiques proposals to fix the weak financial literacy rate, analyzing evidence regarding personal finance education's effectiveness and assessing whether such education can help retirement outcomes. Part V opines that personal finance education can have a positive effect, even if that effect is not directly tied to retirement. The Article then concludes by recommending a hybrid of Alabama's high school graduation requirement and Idaho's general public initiative to serve as model legislation and noting other aspects to consider in improving retirement outcomes.

I. YOUR DRIVER IS APPROACHING: A BACKGROUND ON THE HISTORY OF EMPLOYMENT AND RETIREMENT

A. History of Employment in America

While employment in the United States has continuously evolved throughout the nation's history, gig work has been a fundamental part of American society since the early 1900s.[18] Essentially, the differences between now and the past

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[14] *See* David C. John, *Disparities for Women and Minorities in Retirement Saving*, BROOKINGS (Sept. 1, 2010), https://www.brookings.edu/articles/disparities-for-women-and-minorities-in-retirement-saving/ [https://perma.cc/2377-QCCY] (noticing racial and gender differences in labor force, particularly with respect to those who choose part-time work).

[15] *See* Rep. Rosa L. DeLauro & National Journal, *To Strengthen Retirement Security, Close the Pay Gap*, THE ATLANTIC (Aug. 5, 2014), https://www.theatlantic.com/politics/archive/2014/08/to-strengthen-retirement-security-close-the-pay-gap/431187/ [https://perma.cc/SW8M-K3P9] (examining how gender pay gap has perpetuated struggles women face when saving for retirement).

[16] *See* Arianne Renan Barzilay, *Discrimination Without Discriminating? Learned Gender Inequality in the Labor Market and Gig Economy*, 28 CORNELL J.L & PUB. POL'Y 545, 549–50 (2019); *see also* John, *supra* note 14.

[17] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105342: OLDER WORKERS: RETIREMENT ACCOUNT DISPARITIES HAVE INCREASED BY INCOME AND PERSISTED BY RACE OVER TIME (2023), https://www.gao.gov/assets/gao-23-105342.pdf [https://perma.cc/2ZSP-NLVL] ("Households of all other races than White and households with children had about 28 and 20 percent smaller [retirement] balances, respectively.").

[18] Meghna Chakrabarti, *The Origin Story of the Gig Economy*, WBUR, https://www.wbur.org/onpoint/2018/08/20/gig-economy-temp-louis-hyman [https://perma.cc/XD89-RL38] (Aug. 20, 2018) (providing history of gig economy and employment in the United States).

are the options available for gig work. The past century or so, though, has witnessed drastic changes in the employment landscape regarding workers' rights, the kinds of work available to citizens, and other critical employment benefits.[19]

It is a misconception that gig work is a new concept solely associated with modern-day employment: the idea that an individual would take multiple jobs to generate income is not exclusive to the present.[20] Indeed, many people have taken sporadic employment of all kinds throughout the nation's history.[21] In fact, many historians have noted that the gig economy started in the early 1900s, with jazz musicians using the word "gig" to describe their performances, which were essentially the jobs they relied upon to generate income.[22] The Great Depression later made it virtually impossible for approximately twenty-five percent of the population at the time to find steady work; much of the work that was available during this time was not guaranteed to be long-lasting because companies faced major budget shortfalls and could not afford to keep workers.[23]

For example, the farming industry illustrates an institution facing such challenges during this period. The Depression's impacts of "falling prices" and other non-economic challenges, such as drought, forced farmers to sell their land.[24] Because steady work was hard to come by, many farmworkers who worked exclusively for those farmers instead migrated from farm to farm and did not have one long-lasting employer.[25]

Not much later, the 1940s also saw an increase in the availability of and participation in temporary work.[26] What are now known as "temp agencies" began to rise, eventually becoming a critical institution in the nation's economy.[27] About fifty years later, one in ten Americans held jobs in "alternative employment." The rise of the Internet from the late 1990s through the 2000s has only served to increase individuals' ability to find part-time work, as many jobs only require that workers have access to a laptop and a reliable Wi-Fi or Ethernet connection.[28] Direct selling as a means of generating income has also played an

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[19] For further discussion of changes in employment patterns, see *infra* notes 22–37 and accompanying text.

[20] Micha Kaufman, *The Gig Economy: The Force that Could Save the American Worker?*, WIRED, https://www.wired.com/insights/2013/09/the-gig-economy-the-force-that-could-save-the-american-worker/ [https://perma.cc/V6GW-AS22] (last visited Oct. 10, 2022).

[21] Chakrabarti, *supra* note 18.

[22] Brian Wallace, *The History and Future of the Gig Economy*, LINKEDIN (Dec. 8, 2019), https://www.linkedin.com/pulse/history-future-gig-economy-brian-wallace#:~:text=Since%202009%2C%20%E2%80%9Cgig%20economy%E2%80%9D,gig%E2%80%9D%20to%20refer%20to%20performances [https://perma.cc/Z8BD-BB2B].

[23] Gabrielle Pickard-Whitehead, *The History and Future of the Gig Economy*, SMALL BUS. TRENDS, https://smallbiztrends.com/2019/11/the-history-and-future-of-the-gig-economy.html [https://perma.cc/8MKF-JWJ3] (Feb. 6, 2022).

[24] *Id.* (detailing the impact Great Depression had on farmworkers, creating more instances of temporary work).

[25] *Id.*

[26] *Id.* (exploring the rise of temporary agencies for people with clerical skills to find temporary employment).

[27] *Id.*

[28] *See id.*

integral part in modern history, as demonstrated by individuals contracting with companies like Mary Kay, Tupperware, and Avon.[29]

Today, gig work has become much more prevalent thanks in part to social media and smartphone apps.[30] Companies like Uber and DoorDash have made it easy for those looking for temporary, part-time work.[31] Importantly, gig workers have played a vital, if not "essential," role during the recent COVID-19 pandemic, especially in 2020 when most workplaces shut down and many individuals worked exclusively from home.[32] The early months of the pandemic saw an unprecedented reliance on gig workers as people felt uncomfortable frequenting establishments like grocery stores and restaurants.[33] Many employers also laid off employees because of pandemic-related budget shortages, forcing many unemployed individuals to seek alternatives in the gig economy.[34]

According to a 2021 Pew Research study, those who currently or who have recently performed gig work constitute about nine percent of the US population.[35] The percentage of those who have ever used online platforms to generate income, like Uber and DoorDash, is slightly higher at sixteen percent.[36] The vast majority of those who have performed gig work include adults under the age of thirty, those of Hispanic descent, and those with lower incomes.[37] Evidence also shows that women have increasingly performed gig work compared to what women had

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[29] *See The Business of Direct Selling*, AMERICAN EXPERIENCE, PBS, https://www.pbs.org/wgbh/americanexperience/features/tupperware-direct/ [https://perma.cc/J8MT-N2RD] (last visited Nov. 20, 2022) (exploring history of direct selling in the country, noting historical prevalence of women in the direct selling market). Notably, the Direct Selling Association, the leading trade association in the United States, opposes current efforts to presume workers are employees. *See Protecting Independent Contractor Status Is Key to Direct Selling*, DIRECT SELLING ASS'N, https://www.dsa.org/docs/default-source/advocacy-resource-page/independent-contractor-position-paper.pdf?sfvrsn=e966cca5_5 [https://perma.cc/SP3W-A6CQ] (last visited Nov. 20, 2022); Richard Reibstein, *Direct Selling and Door-to-Door Sales Under Attack: May 2021 IC News Update*, JDSUPRA (June 11, 2021), https://www.jdsupra.com/legalnews/direct-selling-and-door-to-door-sales-6279805/ [https://perma.cc/KFH6-MJS5].

[30] *See generally* Lauren M. Thompson, *Striking a Balance: Extending Minimum Rights to U.S. Gig Economy Workers Based on E.U. Directive 2019/1153 on Transparent and Predictable Working Conditions*, 31 IND. INT'L & COMP. L. REV. 225, 225–27 (2021) (arguing for the United States to enact law based on recent E.U. Directive).

[31] *But see* Kate Conger et al., *Pandemic Erodes Gig Economy Work*, N.Y. TIMES, https://www.nytimes.com/2020/03/18/technology/gig-economy-pandemic.html [https://perma.cc/Y9D3-Y4UW] (Apr. 4, 2020) (emphasizing that gig workers became more essential than ever before during the pandemic and arguably lost flexibility benefits).

[32] *Id.*

[33] Which had a chain reaction, forcing business owners who catered to working commuters to shut down and enter the gig economy. *Id.*

[34] *Id.* (discussing the many citizens who looked to gig work in the early stages of the COVID-19 pandemic at their own peril).

[35] Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/ [https://perma.cc/YE9P-M9MK].

[36] *Id.*; Risa Gelles-Watnick & Monica Anderson, *Racial and Ethnic Differences Stand Out in the US Gig Workforce*, PEW RSCH. CTR. (Dec. 15, 2021), https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/ [https://perma.cc/9QV4-3ETM].

[37] Anderson et al., *supra* note 35.

performed in prior years because of childcare issues during the COVID-19 pandemic.[38] Ultimately, while the gig economy is not new, it has evolved into a different employment scheme from its roots in the 1900s and has brought along new issues to contemplate, one of which involves retirement.

B. Retirement Background and How Gig Workers Save for Retirement

In the United States, there are three general sources of retirement income, including individual savings, employer benefits, and government programs.[39] These three sources create a "three-legged stool."[40] Income from all three often yields secure retirement benefits, especially in the face of uncertainty regarding Social Security.[41]

Employers offer retirement savings plans to their employees as a benefit as a way to entice workers.[42] Many companies today offer plans to their employees, with some even offering generous matching programs.[43] As a way to regulate these plans, the Employee Retirement Income Security Act (ERISA)[44] serves to ensure employer-sponsored retirement plans meet basic standards for private employers.[45] It is important to note that ERISA does not protect workers without

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[38] *Id.*; *see also* Jack Kelly, *Indeed Study Shows Women Took Gig Work, Preferring Flexibility Over Stability During the Pandemic*, FORBES (Mar. 8, 2022, 10:30 AM), https://www.forbes.com/sites/jackkelly/2022/03/08/indeed-study-shows-women-took-gig-work-preferring-flexibility-over-stability-during-the-pandemic/?sh=749443003ccf [https://perma.cc/FWP2-SW34] (noting pandemic's impact on women); Caroline Lewis Bruckner & Jonathan Barry Forman, *Women, Retirement, and the Growing Gig Economy Workforce*, 38 GA. ST. U. L. REV. 259, 376–77 (2022) (highlighting the pandemic's impact on women, regarding retirement savings in addition to the childcare issues caused by the pandemic).

[39] *See* Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PENN. L. REV. 851, 856–59 (1987) (examining the "tripartite" retirement income system).

[40] KERRIGAN, *supra* note 1, at 6 ("Retirement security traditionally was focused on the idea of a three-legged stool, where the retiree relies on pension benefits, Social Security and individual savings.").

[41] *See id.* Because this Article addresses access to employment-related retirement savings, it will not focus on Social Security.

[42] *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 686–88 (2001) (outlining early history of employer-sponsored retirement plans); *see generally* Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331–32 (2007) (explaining reasons employers shifted from defined benefit to defined contribution plans).

[43] *See generally* William A. Nelson, *Allowing States to Help Workers Save for Retirement: Department of Labor's Proposed Rulemaking That Provides a Safe Harbor for State Savings Programs Under ERISA*, 18 MARQ. BEN. & SOC. WELFARE L. REV. 65, 71–72 (2016) (mentioning how state payroll deduction savings programs fit into the employer-sponsored retirement plan scheme).

[44] Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified primarily in scattered sections of 26 U.S.C. and 29 U.S.C.) (providing provisions protecting employer-sponsored pension plans).

[45] *Id.* (setting standards employers must follow in offering and overseeing plans they offer to employees); *see generally* Wooten, *supra* note 42, at 739 (providing background on ERISA and noting President Ford signed ERISA into law in 1974).

access to an employer-sponsored retirement account.[46] Thus, workers relying on a different retirement model other than the common three-legged stool must rely on individual oversight over their own 401(k) or alternative individual account as well as federal oversight over government benefits such as Social Security.[47]

While access to an employer-sponsored plan can be helpful, there are still many choices individuals must make. As mentioned previously, a major component of the modern-day retirement scheme stems from what employers are willing to provide their employees. It is important to note that employers are not required to provide their employees any retirement benefits whatsoever. Employers that do, though, often provide a defined contribution plan in the form of a 401(k) account (or an alternative account, such as a 403(b) plan for nonprofit organizations)[48]. Further, larger employers typically offer a matching program, where an employer offers to match an employee's contributions up to a certain percentage.[49] Those with employer-sponsored plans do not have as many choices to make, as plan fiduciaries typically handle more sophisticated aspects of retirement accounts; however, those individuals still need to decide how much they want to contribute, which option from a menu of options to choose from, and how to allocate their investments.[50]

Because gig workers are often classified as independent contractors, they tend to not have as much access to the same "securit[ies]" and "benefits" as those who are considered "employees."[51] That said, gig workers do have some options in saving for retirement.[52] For example, gig workers can open an individual retirement account (IRA) or a Roth IRA, and they can even open a solo 401(k) or, if

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[46] *See generally* Tracy Snow, Note, *Balancing the ERISA Seesaw: A Targeted Approach to Remedying the Problem of Worker Misclassification in the Employee Benefits Context*, 79 GEO. WASH. L. REV. 1237, 1240–41 (2011) (introducing workers misclassification issues under ERISA).

[47] This is not to say Congress has not created any laws specifically protecting Individual Retirement Accounts. *See, e.g.*, 26 U.S.C. § 408 (2018) (providing requirements and limitations on individual retirement accounts); 26 U.S.C. § 408A (2018) (providing regulations related to Roth IRAs). As there are various laws as part of the tax code regulating various individual retirement accounts, the IRS plays a critical role in overseeing and regulating these accounts. *See* Mary Podesta & Elena Barone Chism, *The Comprehensive Regulatory Framework Around IRAs*, ICI: INV. CO. INST. (July 28, 2011), https://www.ici.org/viewpoints/view_11_ira_regs [https://perma.cc/FX24-BBCN] (acknowledging IRS's prevalent role in regulating individual retirement accounts).

[48] *See* Christy Bieber, *Employer-Sponsored Plans for Retirement*, THE MOTLEY FOOL, https://www.fool.com/retirement/plans/employer-sponsored/ [https://perma.cc/UE7T-J3XP] (Nov. 21, 2023, 4:28 PM).

[49] *See id.*

[50] Though it is generally easier for individuals obtaining a retirement benefit from their employer, there are still challenges those individuals face. Thus, this Article also posits that personal finance education can help non-gig workers as well.

[51] *See* Adejoke Adeboyejo, *Creating Security for Gig Economy Workers*, ADP (Feb. 1, 2022), https://rethinkq.adp.com/security-gig-economy-workers/ [https://perma.cc/3VZX-CDEJ] (exploring ways to help gig economy workers secure benefits like healthcare and retirement savings plans).

[52] *See* Robin Hartill, *6 Ways Gig Workers Can Invest for Retirement*, THE MOTLEY FOOL (Apr. 8, 2021, 5:45 AM), https://www.fool.com/investing/2021/04/08/6-ways-gig-workers-can-invest-for-retirement/ [https://perma.cc/HHY7-6K2U]; *see generally* Paul M. Secunda, *Uber Retirement*, 2017 U. CHI. LEGAL F. 435, 452–58 (2018) (proposing additional retirement plan option of multiple employer plans).

the worker exceeds a Roth IRA's income limitations, a Simplified Employee Pension IRA (SEP-IRA).[53] Essentially, someone who solely does gig work of any kind is the driver of their own retirement savings, meaning those workers must create individual accounts.[54] As more states have implemented laws guaranteeing state-sponsored private-sector retirement savings programs, there are now even more opportunities for gig workers to participate in retirement plans.[55]

While the retirement account options described above provide gig workers the opportunity to save for retirement, many gig workers feel a sense of intimidation when it comes to non-employer sponsored plans.[56] For one, financial planning is extremely individualized, as how much one saves for retirement depends on how much income that person generates.[57] Evidence suggests that those with lower incomes are less likely to be close to financial advisors compared to those with higher incomes and who are deemed "employees."[58] Cost may also pose a barrier, as it can be the driving reason why a gig worker does not seek out a financial advisor.[59] Further, gig workers often generate different amounts of income per pay period compared to those working for an employer who offers a 401(k) plan and a matching program, making it difficult for gig workers to determine how much to save for retirement.[60] There is also evidence demonstrating gig

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[53] *See* Harthill, *supra* note 52.

[54] *Id.*

[55] *See* Austin R. Ramsey, *Growing Pool of Gig Workers Left Out of State Retirement Plans*, BLOOMBERG L. (May 3, 2022, 6:00 AM), https://news.bloomberglaw.com/daily-labor-report/growing-pool-of-gig-workers-left-out-of-state-retirement-plans [https://perma.cc/6JRK-XQX8] (noting recent state-sponsored retirement plans and how some exclude independent contractors and gig workers). As of July 2023, there are seventeen states and two cities that have established state retirement programs. *See* Debbie Tam, *Trendspotting: State-Run Retirement Programs*, THOMSON REUTERS: TAX & ACCOUNTING (July 20, 2023), https://tax.thomsonreuters.com/news/trendspotting-state-run-retirement-programs/ [https://perma.cc/EX6S-XZM5].

[56] *See* Malito, *supra* note 11 (explaining worries gig workers feel regarding saving for retirement).

[57] *See, e.g.*, *A Retirement Plan That's All About You*, VANGUARD, https://investor.vanguard.com/investor-resources-education/retirement/planning-retirement-plan-advice [https://perma.cc/38QZ-79P7] (Sept. 24, 2023) (suggesting retirement planning depends on an individual's specific circumstance).

[58] *See* Michelle Fox, *99% of Americans Don't Use a Financial Advisor–Here's Why*, CNBC (Nov. 11, 2019, 9:43 AM), https://www.cnbc.com/2019/11/11/99percent-of-americans-dont-use-a-financial-advisor-heres-why.html [https://perma.cc/VDS9-D4ZR] (citing reasons such as increased access to advice online and rising loan debt as contributing to reason people do not seek professional advice); *see generally* Ben Le Fort, *Why Rich People Get Professional Advice and You Don't*, THE MAKING OF A MILLIONAIRE (June 11, 2020), https://themakingofamillionaire.com/why-rich-people-get-professional-advice-and-you-dont-6b840473147f [https://perma.cc/X598-89ZR] (emphasizing financial advisors typically only work for those who can afford them and proposing a new model for financial planning).

[59] *See generally* Julie Pinkerton, *What to Know About Financial Advisor Fees and Costs*, U.S.NEWS: MONEY (July 27, 2023, 4:42 PM), https://money.usnews.com/financial-advisors/articles/financial-advisor-fees-and-costs [https://perma.cc/58KR-TQQV] (noting financial advisors on average cost $193 per hour in 2022).

[60] *See generally* Ray Martin, *How Gig Economy Workers Can Save for Retirement*, CBS NEWS: MONEY WATCH (July 3, 2019, 1:34 PM), https://www.cbsnews.com/news/how-gig-economy-workers-can-save-for-retirement/ [https://perma.cc/33WD-348Q] (exploring ways gig economy workers can save and set aside percentage of income toward retirement).

workers either are not aware of their retirement account options or, if they are, do not feel adequately prepared to create an account on their own.[61]

Additionally, gig workers with retirement accounts may face other barriers in managing them. Setting up a retirement account often requires individuals to connect with a broker, brokerage firm, or bank; while there are options available online, a simple Google search for "how to set up a retirement account" offers a plethora of results and can be overwhelming for those who do not know where to look first. Moreover, individuals must decide which kind of account they want to open and how to invest their money. Virtual robo-advisors can help those who want to be hands-off in their investing, though individuals might be skeptical of this technology, especially if they are older.[62] Once an individual has decided where to open an account, the individual must then input personal details such as their social security number, birth date, employment information, and contact information. Essentially, while there has been progress in including gig workers in retirement schemes, gig workers still face a myriad of issues accessing retirement savings.

II. A POTENTIAL SILVER BULLET: AN OVERVIEW OF EDUCATION LAW AND FINANCIAL LITERACY LEGISLATION

As this Article previously demonstrates, there are serious issues regarding how gig workers might feasibly save for retirement. Many gig workers are not aware of their retirement savings options.[63] This sentiment does not only ring true for gig workers, but also for many Americans who work traditional jobs with access to an employer-provided retirement plan.[64] Indeed, the Standard & Poor's Global Financial Literacy Study shows that only fifty-seven percent of Americans are financially literate.[65] In response to this lack of awareness, legislators across

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[61] Jodie Norquist, *Encouraging Retirement Saving in the Gig Economy*, ASCENSUS (Aug. 18, 2022), https://thelink.ascensus.com/articles/2022/8/17/encouraging-retirement-saving-in-the-gig-economy [https://perma.cc/6J8D-G852] (noting gig workers are not necessarily sure what options they have to save for retirement and may need guidance).

[62] Erin El Issa, *Humans vs. Robots: Americans Prefer Financial Advisors over Algorithms*, NERDWALLET, https://www.nerdwallet.com/article/investing/robo-advisor-survey [https://perma.cc/3FV7-VN4V] (Mar. 17, 2020) (eighty-four percent of Americans would rather work with a human advisor than a robo-advisor). *But see* Press Release, Oracle, Global Study: People Trust Robots More Than Themselves with Money (Feb. 10, 2021), https://www.oracle.com/news/announcement/money-and-machines-021021/ [https://perma.cc/M2MK-A7LS] (One study shows sixty-seven percent of consumers and business leaders trust a robot more than a human to manage finances due to anxiety surrounding financial complexity. Seventy-seven percent of business leaders trust robots over their own finance teams.).

[63] For discussion of awareness issues, see *supra* notes 58–63 and accompanying text.

[64] For discussion of financial literacy education across the country, see *infra* notes 99–119 and accompanying text.

[65] LEORA KLAPPER ET AL., FINANCIAL LITERACY AROUND THE WORLD: INSIGHTS FROM THE STANDARD & POOR'S RATINGS SERVICES GLOBAL FINANCIAL LITERACY SURVEY 25 (Standard & Poor 2016).

the nation have introduced legislation requiring financial literacy programs in high schools.[66]

Next Gen Personal Finance (Next Gen), the nation's leading nonprofit advocacy organization for personal finance education, has evaluated current state standards for all fifty states and the District of Columbia.[67] Importantly, the organization ranks schools based on whether personal finance coursework is required, offered as an elective, embedded in another course, or not offered at all.[68] According to Next Gen, schools requiring personal finance as a graduation requirement meet the "Gold Standard." These schools require "all students take a standalone, one semester personal finance course" before graduating high school.[69] Out of approximately 24,000 public high schools in the country, only about 1,313 schools currently meet this standard, signifying a potential opportunity for legislation to play a key role in increasing access to personal finance education and, in turn, improving the country's financial literacy rate.[70]

A. National Programs

There have been various attempts, both legislatively and non-legislatively, to nationalize public education in the United States over the past two decades.[71] Recognizing that not all students attending public schools in the country have the same access to quality education, these proposals have set standards to make public education equitable. While the federal government has not mandated personal finance education, it has increasingly prioritized this education over the past seventy years and has actively encouraged states to develop programming. Legislators at the state level have responded to this and have taken the lead in

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66 *Financial Literacy 2022 Legislation*, NCSL: NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/financial-services-and-commerce/financial-literacy-2022-legislation.aspx [https://perma.cc/2TUK-6Q37] (Sept. 12, 2022); *Financial Literacy 2023 Legislation*, NCSL: NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/financial-services/financial-literacy-2023-legislation [https://perma.cc/84CK-KT5C] (May 2, 2023); *Which States Require Financial Literacy for High School Students?*, RAMSEY SOLUTIONS (Apr. 10, 2023), https://www.ramseysolutions.com/financial-literacy/states-require-financial-literacy-in-high-school [https://perma.cc/KSA8-NDBS].

67 STATE OF FINANCIAL EDUCATION REPORT (NGPF: NEXT GEN PERS. FIN.), https://www.ngpf.org/state-of-fin-ed-report-2021-2022/ [https://perma.cc/FU3Z-7CDV] (last visited Oct. 17, 2022) [hereinafter FINANCIAL EDUCATION REPORT] (providing insight into current state of personal finance education across nation).

68 *Id.* at 8.

69 *What's A Gold Standard School?*, NEXT GEN PERS. FIN. (Nov. 15, 2017), https://www.ngpf.org/blog/advocacy/whats-a-gold-standard-school/ [https://perma.cc/7WUU-FU9R] (explaining what makes schools meet "Gold Standard").

70 *Who Has Access to Financial Education in America Today?*, NEXT GEN PERS. FIN., https://d3f7q2msm2165u.cloudfront.net/aaa-content/user/files/Files/NGPF_NationwideFinancialEducationAccess_2017.pdf [https://perma.cc/U2MQ-UZZL] (Apr. 6, 2018); *see Got Finance? School Search*, NEXT GEN PERS. FIN., https://wwtw.ngpf.org/got-finance/ [https://perma.cc/Y8Q7-7XFK] (last visited Nov. 20, 2022). This information includes only schools in states where the legislation has gone into effect. At the time of this Article, eight states had passed legislation that had yet to be fully implemented and thus that data is not reflected here.

71 For further discussion on legislative and non-legislative attempts to nationalize public education, see *infra* notes 73–88 and accompanying text.

introducing legislation requiring personal finance education in schools.[72] The following examples serve to provide a background to the recent legislative push for personal finance education.

1. Elementary and Secondary Education Act, No Child Left Behind, and Subsequent Federal Legislation

Legislators at both the state and federal levels have been concerned about public education equity for years. While the Civil Rights Movement highlighted various disparities in the nation's public education system in the 1960s, the national poverty rate at the time led President Lyndon B. Johnson to declare a "War on Poverty"; this included federal initiatives and legislation to combat the poverty crisis, such as the Economic Opportunity and Food Stamp Acts of 1964.[73] In addition to those Acts, one important piece of legislation was the Elementary and Secondary Education Act (ESEA),[74] which provided more government funding to primary and secondary education.[75] Specifically, the federal government designated ESEA funding to programs related to professional development, though ESEA did not require such programs to include personal finance education.[76]

Since ESEA's passage in 1965, subsequent federal legislation has amended the Act.[77] ESEA's biggest amendment was the No Child Left Behind Act (NCLB),[78] which President George W. Bush signed into law in 2002.[79] NCLB's goal was to provide standards-based education "reform" and thus required states to establish assessments that would reliably measure student performance and

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[72] *See supra* note 66.

[73] Economic Opportunity Act, Pub. L. No. 88-452, 78 Stat. 508 (1964) (repealed 1981); Food Stamp Act, Pub. L. No. 88-525, 78 Stat. 704 (1964) (codified as amended primarily in 7 U.S.C.); *see* Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1865 (2017).

[74] Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (expanding federal government's authority to regulate public elementary and secondary schools across the nation).

[75] *Id.* (explaining where federal funding was to be designated).

[76] *See* Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VCU LIBRARIES: SOC. WELFARE HIST. PROJECT, https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/ [https://perma.cc/4C8M-WPNB] (last visited Oct 10, 2022) (providing history and purpose of Johnson Administration's ESEA).

[77] For further discussion of federal legislation amending and replacing ESEA, see *infra* notes 78–86 and accompanying text.

[78] Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered section of 20 U.S.C.).

[79] *Id.*; *see No Child Left Behind*, U.S. DEP'T OF EDUC. https://www2.ed.gov/nclb/landing.jhtml [https://perma.cc/K7JE-DY85] (last visited Oct. 17, 2022). While President Bush's No Child Left Behind Act did not specifically address personal finance education, Bush did express concern about Social Security and led the 2005 Social Security Initiative, encouraging individuals to enroll in voluntary personal retirement accounts. *See generally* William A. Galston, *Why the 2005 Social Security Initiative Failed, and What it Means for the Future*, BROOKINGS (Sept. 21, 2007), https://www.brookings.edu/research/why-the-2005-social-security-initiative-failed-and-what-it-means-for-the-future/ [https://perma.cc/79RE-ST5B] (providing history on President Bush's 2005 Social Security initiative).

promote higher achievement in basic skills.[80] NCLB only required states to create standards of measurement to ensure students graduated with proficient understanding of basic skills; similar to ESEA, NCLB also did not mandate districts provide personal finance education.[81] Though the federal government passed NCLB, the Act gave states discretion in creating their own assessments and standards by which to measure student performance.[82] States, educators, legislators, and other advocates have criticized NCLB for failing to adequately measure student performance, leading to the next major amendment: the Every Student Succeeds Act.

The last significant piece of national legislation to note is the Every Student Succeeds Act (ESSA),[83] which a bipartisan Congress passed and which President Barack Obama signed into law in 2015.[84] ESSA's primary goal was to ensure schools prepared students for college and that students had the opportunity for a future "fulfilling" career.[85] Despite those goals, ESSA also did not require any personal finance education at the national level, though it did award grants for programs including "financial literacy and [f]ederal financial aid awareness activities."[86]

While the federal government has not required personal finance education, it has taken steps to promote this programming in schools. Notably, the Fair and Accurate Credit Transactions Act of 2003 established the Financial Literacy and Education Commission (the "Commission").[87] The Fair and Accurate Credit Transactions Act required the Commission to create a federal financial education strategy, and the Commission has created a freely accessible website where anyone can obtain information about personal finance.[88] Since 2003, the Commission has also produced reports detailing strategies to combat the country's relatively weak financial literacy rate, with oversight from the United States Department of the

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[80] Pub. L. No. 107-110, 115 Stat. 1425 (2002) (expressing how law would improve student performance in public schools and create adequate standards to measure success).

[81] *Id.* (setting requirements for states to create adequate standardized tests to measure student performance).

[82] *Id.*

[83] Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.) (revising NCLB standards to shift more control to states).

[84] *Id.* (providing main education law for public schools).

[85] *See id.*

[86] *See, e.g.*, ESSA § 4107(a)(3)(A)(iii) (codified at 20 U.S.C. § 7117) (mentioning government would fund financial awareness programs in certain situations); ESSA at § 4201(a)(2) (codified at 20 U.S.C. § 7171); ESSA at § 4205(a)(3) (codified at 20 U.S.C. § 7175); ESSA at § 4503(b)(7) (codified at 20 U.S.C. § 7243).

[87] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, sec. 513, 117 Stat. 1952 (codified in 15 U.S.C. §§ 1681-1681x) (establishing Commission and providing goals to improve financial literacy as codified in 20 U.S.C. § 9702). It is important to note the Fair and Accurate Credit Transactions Act does not mandate public schools to provide personal finance education.

[88] *Id.* (detailing members of Commission); *see* MYMONEY.GOV, https://www.mymoney.gov/ [https://perma.cc/5QBE-4KPM] (last visited Nov. 20, 2022) (providing free resources for individuals to better understand their finances).

Treasury and the Bureau of Consumer Financial Protection.[89] Ultimately, while this law has not required schools to teach personal finance education, it does signify the federal government has made personal finance education a priority.

2. Common Core

The federal government has also participated in shaping national curricula through non-legislative mechanisms. One of the most important mechanisms in recent years has been the Common Core State Standards Initiative, an educational initiative that sets academic standards with the purpose of improving academic achievement and "college readiness."[90] It is important to mention the Common Core standards are not in themselves binding legislation, though various states have adopted the Common Core standards with slight modifications in their own state legislation.[91] Various organizations participated in drafting the Common Core standards, which were meant for every state in the country, though advocates understood the states would decide whether to adopt the standards.[92] States that adopted the Common Core standards were eligible to receive increased grant money from the United States Department of Education.[93]

Notably, the Common Core standards only apply to required mathematics, language arts, and literacy classes. Like the federal legislation described previously, the Common Core standards do not set standards for personal finance. Some states, like Massachusetts, however, have adopted the Common Core standards and, in doing so, have attempted to interweave financial literacy education into their legislatively required curricula.[94]

Many parents, teachers, and advocates have attempted to fight the Common Core standards.[95] In 2014, the Louisiana Governor, Piyush Jindal, sued the federal government for allegedly "strong-arming" states into adopting the standards by effectively conditioning large amounts of federal grant money upon

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[89] *See, e.g.*, U.S. NATIONAL STRATEGY FOR FINANCIAL LITERACY 2020 (Fin. Literacy & Educ. Comm'n 2020).

[90] *See* Judson N. Kempson, *Star-Crossed Lovers: The Department of Education and the Common Core*, 67 ADMIN. L. REV. 595, 607–09 (2015) (providing history of Common Core standards).

[91] *See id.* at 624 (acknowledging states have option in shaping state's education policy).

[92] *Id.* (addressing process in shaping Common Core standards and state discretion).

[93] *See* Ryan Lee, *Federal Government Coerces the Adoption of Common Core: Keeping America's Youth Common Among the World's Elite*, 49 J. MARSHALL L. REV. 791, 809–18 (2016) (funding policy "coerce[d]" states into adopting Common Core standards even if such state did not want to implement Common Core).

[94] *See* MASS. GEN. LAWS ANN. ch. 69, § 1R (West 2023).

[95] *See, e.g.*, Lyndsey Layton, *Louisiana Gov. Bobby Jindal Sues Obama Over Common Core State Standards*, WASH. POST (Aug. 27, 2014, 5:45 PM), https://www.washingtonpost.com/local/education/louisiana-gov-bobby-jindal-sues-obama-over-common-core-state-standards/2014/08/27/34d98102-2dfb-11e4-bb9b-997ae96fad33_story.html [https://perma.cc/L2S7-4JGJ] (reporting on Louisiana case); Andrew Ujifusa, *Common Core Faces Kentucky Legal Challenge, Questions About 'Rebranding'*, EDUCATIONWEEK (Nov. 18, 2013), https://www.edweek.org/teaching-learning/common-core-faces-kentucky-legal-challenge-questions-about-rebranding/2013/11 [https://perma.cc/2N4T-XN6B] (exploring Kentucky case where plaintiff was ultimately unsuccessful).

a state adopting the Common Core standards.[96] His successor, Governor John Bel Edwards, announced he would drop the lawsuit, stating the litigation was a waste of taxpayer resources.[97] While litigation surrounding the Common Core standards has tapered in the past few years, many opponents still worry about any future federal education mandates, especially as the COVID-19 pandemic has negatively impacted students' learning and progress in school.[98]

B. Financial Literacy Legislation

While the Common Core standards do not set goals for personal finance education, many states have proposed and passed legislation requiring students to take financial literacy courses. 2022 was a banner year for states proposing personal finance initiatives, with over 100 financial literacy bills being proposed across most states.[99] Pending legislative proposals increased in 2023.[100] As numerous studies have indicated, a majority of the nation supports implementing financial education in schools, demonstrating the fundamental principle that public opinion often drives political action.[101]

Currently, twenty-three states require high school students take a personal finance course before graduating.[102] Of those twenty-three states, there are eig-

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96 *See generally Jindal v. U.S. Dep't of Educ.*, No. 14–CV–534, 2015 WL 854132 (M.D. La. 2015) (holding Governor alleged sufficient facts to show court had jurisdiction and declining to rule on merits of Common Core).

97 *Gov. Edwards Announces End to Common Core Lawsuit after New Congressional Act*, OFF. OF THE GOVERNOR (Feb. 04, 2016), https://gov.louisiana.gov/news/gov-edwards-announces-end-to-common-core-lawsuit-after-new-congressional-act [https://perma.cc/Y7KC-WHZ5] (announcing Governor Edwards would be dropping lawsuit Governor Jindal initiated against Department of Education regarding coerciveness of Common Core).

98 *But see* Alaina Goschke, *Virtual Learning in a Pandemic and its Effect on Lower-Income Students: How the Education Gap is Widening Beyond Repair*, 19 IND. HEALTH L. REV. 157, 176–84 (2022) (analyzing state-by-state school re-openings and COVID-19's detrimental impact on students). Goschke's article implies students in various states are not necessarily at the same education level as peers in the same grade but in other states, and Goschke ultimately argues all children, regardless of their location, have a right to in-person education. *See id.* (examining school closure's specific impact on low-income families and children).

99 *Financial Literacy 2022 Legislation*, *supra* note 66.

100 *Id.*

101 *Polls*, NEFE, https://www.nefe.org/research/polls/default.aspx [https://perma.cc/BMD3-RWAQ] (last visited Nov. 14, 2023) (giving links to a variety of financial education and literacy polls); *High School Personal Finance Poll: March 17-21, 2022*, NEFE, https://www.nefe.org/research/polls/Financial-Capability-Month-Poll-summary.pdf [https://perma.cc/9F2J-URRQ] (last visited Dec. 22, 2023) (showing eight in ten Americans support formal personal finance education in school).

102 *Which States Require Financial Literacy in High School?*, RAMSEY SOLS., https://www.ramseysolutions.com/financial-literacy/states-require-financial-literacy-in-high-school/ [https://perma.cc/H4AD-TSY5] (Oct. 27, 2023) (noting as of October 2023, there are twenty-three states in the country requiring students take a financial literacy course as a graduation requirement). These states include: Alabama, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and West Virginia. *Id.* (listing states with standalone course requirement); *see also* FINANCIAL EDUCATION REPORT, *supra* note 67.

ht states that currently require a semester long personal finance course and nine states that are in the beginning stages of implementing this requirement with educators and school districts.[103] According to financial literacy advocates, these seventeen states are meeting the "Gold Standard" of financial literacy, whereby students are guaranteed access to personal finance education.[104] These states require students take separate courses in personal finance as a high school graduation requirement, rather than allow schools to teach personal finance as part of a preexisting class, which other states have required via legislation.

Various financial literacy advocacy organizations have analyzed personal finance education requirements, looking at factors such as whether the state requires a standalone personal finance course as a graduation requirement, whether teachers receive specialized personal finance training, the administration of standardized tests to assess a program's effectiveness, and other funding and educational resources available to school districts.[105] As previously mentioned, Next Gen Personal Finance awards those schools requiring high school students take a standalone personal finance course by naming them a "Gold Standard" school. Schools that offer a personal finance class as an elective but do not require it meet the "Silver Standard," while schools with personal finance embedded into another course meet the "Bronze Standard."[106]

Alabama is one example of a state meeting the ideal "Gold Standard" and has received high praise from various personal finance education proponents.[107] In 2022, Alabama proposed legislation that would legally require all high school students in the state to take a career preparedness course.[108] Moreover, the state's Department of Education provides educators guidelines on teaching personal finance related topics, uniquely including retirement as part of lessons on saving and investing.[109] Other states who have joined Alabama in requiring a standalone

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[103] FINANCIAL EDUCATION REPORT, *supra* note 67, at 3 (differentiating between states with existing programming and those currently developing programming).

[104] *Id.* at 5 (providing overview of gold, silver, and bronze standards organization utilizes to assess state legislation and curriculum). As of March 10, 2023, the "Gold Standard" states include: Alabama, Florida, Georgia, Iowa, Kansas, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Utah, and Virginia. *Id.*

[105] *Id.* at 3–6 (analyzing state requirements regarding financial literacy and assessing program's effectiveness).

[106] *See Got Finance? School Search*, *supra* note 70 and accompanying text.

[107] *Id.*

[108] H.R. 259, 2022 Reg. Sess. (Ala. 2022). The 2022 bill unfortunately died in the House and was replaced in 2023 by H.B. 164, 2023 Reg. Sess. (Ala. 2023) (to be codified as amended at ALA. CODE § 16-40-12 (2023)). See Brandon Moseley, *Alabama House Passes Financial Education Legislation*, ALA. TODAY (Apr. 19, 2023), https://altoday.com/archives/51036-alabama-house-passes-financial-education-legislation [https://perma.cc/YYC9-PRT2] for more information about H.B. 164.

[109] Personal Finance, *Alabama Course of Study: Career and Technical Education*, 557–59, https://www.alabamaachieves.org/wp-content/uploads/2021/05/Personal-Finance.pdf [https://perma.cc/T3VJ-C4TV] (last visited Nov. 17, 2023).

course in personal finance include Mississippi, Missouri, Iowa, North Carolina, Tennessee, Utah, and Virginia.[110]

The American Public Education Foundation, another nonprofit advocacy organization, has established "The Nation's Report Card on Financial Literacy," which grades states on personal finance education requirements.[111] While the organization marked Alabama highly, it did not award Alabama an "A" grade because Alabama does not require financial literacy education from grades kindergarten through eighth grade.[112] As mentioned, though, Alabama does focus on career preparedness and many, if not all, schools in the state already require retirement education as part of the personal finance curriculum for high school students.[113]

While some states have not necessarily required a standalone personal finance education course, many have required at least some interwoven personal finance education. Many of these states allow high school students to take a personal finance elective as a graduation requirement.[114] Alternatively, other states include personal finance education in mathematics courses.[115] In 2022, twenty-six states had legislation pending in their respective states proposing required personal finance education.[116] In 2023, there were twenty-seven states and the District of Columbia introducing a combined seventy-one bills that would create a requirement for high school students and an additional one-hundred and twenty-eight bills concerning financial literacy more generally for grades kindergarten through twelfth grade.[117]

Though there are many bills that propose implementing such programming in high schools, there are other pieces of legislation proposing a broader outreach beyond high school.[118] In 2022, Idaho House Bill 535 contemplated duties upon the treasurer to include the financial education of the general population.[119] While that bill is still pending, the Idaho legislature enacted its own

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110 *Id.* The full list of states with legislation requiring a standalone personal finance course as a graduation requirement include the following: Alabama, Connecticut, Florida, Georgia, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, and Virginia, and West Virginia. *See Which States Require Financial Literacy for High School Students?*, *supra* note 66.

111 *The Nation's Report Card on Financial Literacy*, AM. PUB. EDUC. FOUND., https://www.thenationsreportcard.org/ [https://perma.cc/7SR4-DT9W] (last visited Oct. 17, 2022).

112 *Id.* (noting improvements Alabama can make in implementing financial education in lower grades).

113 ALA. ADMIN. CODE r. 290-3-1-.02(8)(a) (2023).

114 *See* STATE OF FINANCIAL EDUCATION REPORT, *supra* note 67, at 11 (examining Silver Standard schools).

115 *Id.* at 4.

116 *See Financial Literacy 2022 Legislation*, *supra* note 66.

117 Emma Donahue, *Stand-alone and Flexible: A 2023 Legislative Review of K-12 Financial Education Requirements*, NAT'L ENDOWMENT FOR FIN. EDUC. (Sept. 25, 2023), https://www.nefe.org/news/2023/09/a-2023-legislative-review-of-k12-financial-education-requirements.aspx [https://perma.cc/GQ9R-9PF7].

118 *Id.*

119 H.B. 535 § 13, 66th Leg., 2d Reg. Sess. (Idaho 2022) (including provision explicitly speaking to retirement education).

separate personal finance law in 2023 that affects high schoolers.[120] Ultimately, Idaho's pending bill contemplates the financial literacy of the entire population while Alabama's standards as seen in 2022 focused on helping high school students enter adulthood with a solid grasp of financial concepts.

III. DOES FINANCIAL LITERACY EDUCATION IMPROVE RETIREMENT OUTCOMES? ARGUMENTS FOR AND AGAINST

There are various arguments as to whether implementing required financial literacy education will help workers plan for retirement. While many believe financial literacy education can only help students, others believe requiring this education would be ineffective because studies show the impact is minor.[121]

Those in favor of formal financial literacy education believe proper education can enable the nation as a whole to combat the effects of events like recessions.[122] For those who may be considered a "vulnerable borrower," personal finance education can help in navigating challenging financial obstacles because it provides those individuals an understanding of marketplace activity and other financial services.[123] Ultimately, financial literacy advocates emphasize that learning about certain concepts early on allows students to better understand more sophisticated financial concepts as they progress through adulthood, which may include retirement-related areas such as maintaining a diversified stock portfolio.[124]

Additionally, proponents of financial literacy education point to evidence demonstrating a correlation between related coursework and better financial outcomes, such as individuals taking on less consumer and student loan debt.[125] In 2002, a Federal Reserve Bulletin detailed several studies on whether there existed a correlation between financial literacy education and positive financial behavior.[126] The study found that individuals who received personal finance education had saved more money and had better wealth management on average.[127]

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[120] 2023 Idaho Sess. Laws 197. The law, however, does not mention retirement education. *See* IDAHO CODE § 33-1615 (2023).

[121] Sandra Braunstein & Carolyn Welch, *Financial Literacy: An Overview of Practice, Research, and Policy*, FED. RSRV. BULL. 445, 451–52 (Nov. 2022).

[122] *See* Kathryn Reed Edge, *Readin', Writin' and Financial Literacy*, 47 TENN. BUS. J. 29, 39 (2011) (arguing financial literacy can be critical in times of financial woes and illustrating how lawyers potentially fit into current financial illiteracy paradigm when advising clients).

[123] Joseph A. Smith, Jr., *Financial Literacy, Regulation and Consumer Welfare*, 8 N.C. BANKING INST. 77, 98 (2004) (outlining how financial literacy improves outcomes).

[124] Edge, *supra* notes 122, at 29.

[125] *See* Liz Frazier, *5 Reasons Personal Finance Should Be Taught in School*, FORBES (Aug. 29, 2019, 6:58 PM), https://www.forbes.com/sites/lizfrazierpeck/2019/08/29/5-reasons-personal-finance-should-be-taught-in-school/?sh=3abf99351784 [https://perma.cc/YCU6-GGDN].

[126] Braunstein & Welch, *supra* note 121, at 452 (presenting researcher surveys that, among other things, collected national samples on the effect of financial literacy across various demographics, age groups, and worker groups).

[127] *Id.*

Notably, the study also revealed those individuals participated more in retirement programs.[128]

Since 2002, other organizations have conducted studies showing personal finance coursework improves financial behaviors. In a study conducted by the FINRA Investor Education Foundation, students in Georgia, Idaho, and Texas who had taken a personal finance class improved their credit scores on average by 3.2% three years after having taken the class.[129] Further, a joint study from FINRA Investor Education Foundation and the National Endowment for Financial Education found a clear correlation between financial education and improved financial behaviors.[130] Specifically, the meta-analysis showed positive effects in financial knowledge, credit, budgeting, saving, insurance, and remittances.[131] Importantly, the study did not present any evidence that these positive effects diminish over time, and the study concluded personal finance education is a cost-effective way to improve financial behaviors.[132]

Conversely, those who criticize personal finance education point to contrary research and believe it is ineffective. In a 2009 study commissioned by Mandell and Klein, evidence suggested those who took a personal finance course were no more financially literate than those who had not taken coursework.[133] Further, the students from the study did not report feeling more confident in their financial behaviors than others.[134] The study did not, however, report that students exhibited worse financial behaviors after taking a personal finance class, and the consensus of more recent research since 2009 is that personal finance education does indeed improve financial behaviors, even if the improvement is small.[135]

Other critics have expressed skepticism over whether high school is the appropriate age to teach personal finance, as some research indicates personal finance education is more effective when the learner is trying to accomplish a specific financial goal.[136] Similarly, those same critics often express that personal

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[128] *Id.*

[129] *See* Michelle Fox, *From Saving Money to Paying Down Debt, Here's Why Financial Literacy is So Important*, CNBC (Apr. 1, 2022, 9:00 AM), https://www.cnbc.com/2022/04/01/why-financial-literacy-is-so-important.html [https://perma.cc/7QMZ-WTQ6].

[130] Tim Kaiser et. al., *Financial Education Matters: Testing the Effectiveness of Financial Education Across 76 Randomized Experiments*, FINRA INV. EDUC. FOUND. & NAT'L ENDOWMENT FOR FIN. EDUC. 4 (Mar. 2022) (finding "clear" correlation between improved financial behaviors and personal finance education).

[131] *Id.* at 5. The meta-analysis showed general financial knowledge improved most at a standard deviation of .204 while credit improved least at a standard deviation of .0402. However, these behaviors only improved and, importantly, did not worsen after a student took a personal finance class.

[132] *See id.* at 6.

[133] Lewis Mandell & Linda Schmid Klein, *The Impact of Financial Literacy Education on Subsequent Financial Behavior*, 20 J. FIN. COUNSELING & PLAN. 15, 21–22 (2009) (also pointing out that positive financial literacy scores and behavior may have resulted from education received post high school).

[134] *Id.* at 22.

[135] Carly Urban et al., *The Effects of High School Personal Financial Education Policies on Financial Behavior*, 78 ECON OF EDUC. REV. 1 (2020).

[136] *See* Melody Harvey & Carly Urban, *Is High School the Right Time to Learn About Retirement?*, TIAA INST. (Feb. 2022), https://www.tiaainstitute.org/sites/default/files/presentati

finance education will do little to narrow any existing economic barriers or gaps.[137] Critics also often argue what is actually needed is better economic policies that result in better financial outcomes.[138]

Moreover, there is concern regarding whether legislation is the proper mechanism to solve this problem.[139] In the United States, a large component of the population is skeptical of either too much federal overreach or too much state discretion.[140] In terms of federal overreach, a national personal finance legislative initiative may undergo deep scrutiny just by its very nature of being a federal bill or program.[141] As previous laws like ESSA and NCLB have undergone scrutiny, any potential federal program will likely need to survive similar challenges.[142] With regard to the opposite, where states would have discretion, people often point out that in some situations, disparate state-by-state results often exacerbate existing negative patterns.[143] Essentially, while many believe in the benefits of personal finance education, there are also many who worry about whether it is effective and how to best implement it.

While critics make valid points, most research demonstrates there are indeed positive effects associated with exposure to formal personal finance education.[144] Though these effects may not always be as large as one might hope, there are ways to maximize the positive impacts of personal finance education, one being requiring classroom instruction before graduation. Further, although federal legislation may not be the ideal mechanism for enforcing such a requirement, states can still pass similar legislation to one another. Additionally, a federal initiative has existed since 2003 through the Financial Literacy and Education

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ons/2022-01/TIAA%20Institute_Does%20financial%20education%20in%20high%20school_TI_Harvey%20Urban_February%202022.pdf [https://perma.cc/PN8T-26AL].

137 Kat McKim, *The Financial Literacy Gap Doesn't Exist*, FORTUNE (Nov. 10, 2021, 12:00 PM), https://fortune.com/2021/11/10/financial-literacy-gap-doesnt-exist-wealth-gap-inequality/ [https://perma.cc/6FTY-NB3C] (arguing there is no "gap" because students across "'income spectrum' have similar levels of financial knowledge").

138 *See* Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 267–68 (2008) (proposing alternatives to financial education such as more substantive regulation of financial products, increasing resources available to consumers, better framing financial decisions, and aligning sellers' incentives with consumers' needs).

139 *See* Heise, *supra* note 73, at 1863 (outlining concerns of too much federal oversight over public education and arguing parental control is more effective).

140 *See id.* at 1895 (implying both federal and state governments need to embrace school choice).

141 *See id.*

142 For a discussion on ESSA and NCLB, see *supra* notes 73–88 and accompanying text.

143 *See generally* Dan Kadlec, *Why We Want–But Can't Have–Personal Finance in Schools*, TIME (Oct. 10, 2013), https://business.time.com/2013/10/10/why-we-want-but-cant-have-personal-finance-in-schools/#:~:text=Education%20is%20run%20at%20the,clarity%20before%20they%20sign%20on [https://perma.cc/8X6U-6UMU] (stating concerns about state discretion in personal finance education); *see also* Urban et al., *supra* note 135, at 11 (concluding that varying results should not be read by "policy vs. no policy" but rather how states are implementing their policies effectively).

144 For further discussion of research demonstrating the positive impacts of personal finance education, see *supra* notes 125–132 and accompanying text.

Commission.[145] While it is unclear whether the public supports the Commission, there is no evidence suggesting the contrary. Lastly, while better economic policies may have a more pronounced effect on retirement savings, providing equitable access to personal finance education can play a significant role for an individual trying to understand their own finances.

IV. REQUESTING MORE THAN AN UBER: WHY FINANCIAL LITERACY EDUCATION CAN HELP GIG WORKERS PLAN FOR RETIREMENT

This Article urges states to adopt a hybrid of Alabama's high school course requirement and Idaho's pending general public initiative that includes a specific provision for retirement.[146] This model legislation would offer a comprehensive approach to financial literacy education that would allow people without equitable access to retirement to gain relevant education. For one, Alabama's curriculum requires a comprehensive course, and the state's 2022 proposal included coursework specifically regarding retirement.[147] While students may not necessarily be worrying about retirement while in high school, exposure to financial literacy concepts arguably makes it easier for people to absorb information later in life when they start planning for retirement.[148] While it might be more feasible to implement personal finance coursework in existing classes, a standalone course like Alabama's has the effect of reinforcing the importance of the topic.

While Alabama's state requirement offers a formal, comprehensive option for all public-school students, Idaho's general public requirement ensures personal finance education is accessible to everyone in the state, especially those seriously considering retirement planning.[149] A provision that includes outreach to the public like Idaho proposes helps ensure more people have access to more resources, which would be especially important if an event like the COVID-19 pandemic were to ever happen again. Further, providing access to the public means more households will be able to engage in a more candid and transparent discourse concerning retirement saving, which can be beneficial to all generations within a family. Additionally, an effective law should include a provision requiring retirement education to ensure everyone has awareness and knowledge of related concepts. Supplementing a standalone course requirement where retirement savings is specifically taught with community resources can ensure all communities regardless of age, race, ethnicity, or gender have the opportunity to become financially literate; such a combination might even help dismantle the existing aforementioned trends.[150] As students in America figure out how a post-pandemic world will operate, having access to the right kind of financial literacy education

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145 Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, sec. 513, 117 Stat. 1952 (codified in 15 U.S.C. §§ 1681-1681x).

146 ALA. CODE § 16-40-12 (2022); H.B. 535 § 13, 66th Leg., 2d Reg. Sess. (Idaho 2022).

147 For discussion of Alabama's current curriculum requirements, including curriculum specifically concerning retirement planning, see *supra* notes 107–112 and accompanying text.

148 For further discussion on the benefits of early personal finance education exposure, see *supra* notes 125–132 and accompanying text.

149 ALA. CODE § 16-40-12 (2022); H.B. 535 § 13, 66th Leg., 2d Reg. Sess. (Idaho 2022).

150 For discussion on these trends, see *supra* notes 13–17 and accompanying text.

can help prepare them—and those already out of school—for any potential situation they encounter, which may, in the evolving job market, include gig work.

Ensuring equitable access to personal finance education can help gig workers who primarily rely on that type of work in saving for retirement. After all, evidence indicates many of those people come from households that are unlikely to engage in personal finance conversations or provide access to relevant knowledge.[151] Likewise, it is highly unlikely someone relying primarily on gig work comes from any kind of generational wealth, meaning they may have never discussed income savings principles with a parent or other trusted adult.[152] As mentioned, evidence shows at least some correlation between personal finance classes and more rational financial decisions.[153] Conversely, there is scant evidence suggesting someone receiving financial literacy education has suffered as a result. Thus, state legislatures should include retirement education as part of personal finance classes. Further, states across the nation should note how financial literacy programming can serve to eliminate retirement savings gaps, many of which result in unintentional socioeconomic and demographic disparities.

There are a couple of potential issues states must consider when drafting legislation. One, it is important that qualified teachers be leading financial literacy programs.[154] Teachers often encounter difficulties performing their jobs as educators adequately due to budget constraints, meaning it might be difficult for states without sufficient resources to ensure school districts can provide teachers with the tools they need to implement a successful curriculum.[155] Additionally, it is worth mentioning that the burden is still on workers themselves to make appropriate financial decisions; therefore, providing financial literacy education does not necessarily ensure every student will make the financial decisions such programming encourages.[156]

CONCLUSION: THANK YOU FOR YOUR BUSINESS

Solving any retirement gap is no easy feat. While personal finance education can play an important role in curbing issues as to who has access to retirement,

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151 *See* Min Zhan et al., *Financial Knowledge of the Low-Income Population: Effects of a Financial Education Program*, 33 J. SOCIO. & SOC. WELFARE 53, 55 (2006) (acknowledging problems low-income individuals face regarding helpful resources).

152 *See* Anderson et al., *supra* note 35.

153 For further discussion of how personal finance education can lead to better retirement outcomes, see *supra* notes 122–132 and accompanying text.

154 *See* Sarah O'Brien, *States that Require Personal Finance Classes Should Not Overlook Teacher Training, Experts Say*, CNBC (Apr. 5, 2021, 8:00 AM), https://www.cnbc.com/2021/04/05/states-requiring-personal-finance-classes-need-to-train-teachers-too.html#:~:text=Grow.-,States%20that%20require%20personal%20finance%20classes,overlook%20teacher%20training%2C%20experts%20say&text=(State%20of%20financial%20education%3A%20Many,was%20taught%20earlier%20in%20school [https://perma.cc/NJ3N-PMND] (arguing school districts must adequately prepare and provide resources to those teaching personal finance); *see generally* Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1607–08 (2016) (outlining why quality teaching is vital in education).

155 *See id.* (pointing out struggles teachers often face).

156 *See* Willis, *supra* note 138, at 267–68 (opining financial literacy education will not necessarily change future outcomes and emphasizing future financial events are unknown).

this programming can only work with other economic help.[157] Individuals will still make their own financial choices, and personal finance education cannot guarantee individuals will indeed make better financial decisions.[158] But, giving all people the tools to think critically about retirement planning—and ensuring access to such knowledge is not limited to an elite few—provides a solid starting framework to tackle the retirement gap many people are facing today.[159]

As evidence demonstrates, exposure to personal finance education can play a critical role in helping young people evaluate how they are spending and accumulating debt. Recent studies overwhelmingly agree not only that personal finance coursework improves financial behaviors, but that it is a cost-effective way of doing so. Though some critics are skeptical of the degree to which personal finance education is effective, any positive impact is a step in the right direction. Further, though personal finance education may not have a direct tie to better retirement outcomes, helping younger individuals navigate other financial decisions like student loan and consumer debt earlier in life can help them save more for their future retirement.

Alabama and Idaho should be the models for crafting relevant personal finance education. Providing students in high school access to a course that teaches them about financial planning—and specifically providing students with courses that discuss retirement planning—increases the chances those same students will make better, more educated decisions later in life when they enter the workforce. As the workforce has become much more diverse and with gig work becoming increasingly attractive, those starting to work will have a better chance of creating a successful retirement plan.[160]

Ultimately, financial literacy education alone will not solve any "retirement crisis". It also will not eradicate unfortunate demographical impacts or guarantee every individual makes the best financial decisions. As every individual who takes a personal finance course still has the freedom to choose how to manage their income, there is only so much that law and policy can do. That said, financial literacy education can deepen students' awareness of what to consider before they start working, and this education evens the playing field between students who have access to this information and those who do not. Requiring personal finance education in the classroom can help society navigate our "retirement crisis" and increase the nation's financial literacy rate—a worthy cause indeed.

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157 *See id.* at 267 (emphasizing stronger regulatory oversight and policies are necessary as opposed to financial literacy education).

158 *See id.* at 267–68 (noting financial decisions are personal).

159 For further discussion on how required personal finance education can eliminate existing inequities, see *supra* notes 151–153 and accompanying text.

160 For background on how the current employment landscape has shifted, see *supra* notes 18–37 and accompanying text.

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CONTROLLING MORAL HAZARD IN LIMITED LIABILITY WITH THE CONSUMER SALES PRACTICES ACT

Nathaniel Vargas Gallegos[*]

The few states that have passed the Model Consumer Sales Practices Act have common definitions and case law regarding the definition of a "supplier." This definition is broad enough to include managers of companies in limited liability entities in the states that have adopted the model act. The practicality is that business principals, owners, and managers can be held personally liable for deceptive practices under the state acts. But this is not a piercing of the corporate veil or of the limited-liability company. This Article is meant to accomplish four purposes: (1) exhibit the origins of the act, (2) show examples from three states that have adopted the model legislation in their interpretation of the term "supplier," (3) contrast the differences between a claim for piercing the entity veil as opposed to an action for supplier liability under state laws that have adopted the model legislation, and (4) examine the full effects in an economic framework regarding moral hazard.

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INTRODUCTION

The field of state consumer protection has been growing since the 1960s with the push of "Nader's Raiders," defective designs like the Chevrolet Corvair, and the ABA Commission reports coming from Richard Posner.[1] In response, every state has enacted, or tightened, its own version of consumer sales practices legislation. This marked the end of the *caveat emptor* business model and acknowledged that industry self-regulation was not working in the marketplace.[2] Like the authority given to the Federal Trade Commission by Congress, state legislatures passed consumer protection acts covering many areas in the marketplace from sales practices, debt-management, pawn broker activities, and telephone solicitations.[3] It is the consumer sales practices act that will be the focus of this article.

Consumer sales practices acts clarify whether specific business practices are legal, define what businesses can and cannot claim in their advertisements, and outline the legal remedies available when businesses break the law.[4] Most states have enacted their own organic legislation for consumer sales practices or rely on a close analogue in the Uniform Deceptive Trade Practices Act, but three states have adopted the consumer sales practices model legislation. In application of case precedent, any holding may be persuasive if on–point, but the case law from these three jurisdictions is especially apt and conducive to accomplishing the express purposes of all model legislation in the application of these rules across jurisdictions.

There is a common question in the application of how the consumer sales practices acts apply the definition of "supplier." As will be shown, the definition in the acts is very broad and has unique applications in each of the three states that have adopted the model legislation. The practicality is that business principals, owners, or managers can be held personally liable for deceptive practices under the state acts. This raises the question of whether these deceptive practices can pierce an entity's limited liability veil. It will be shown this is not the case. The legal actions are different by simple fact that one is statutory and the other a common law claim, and one is the express action of a legislature while the other is brought in equity.

Thus, this Article is meant to accomplish four purposes: (1) exhibit the origins of the act, (2) show how the three states that have adopted the model legislation have interpreted the term 'supplier,' (3) contrast the differences between a piercing of the entity's limited liability veil claim against supplier liability under state laws that have adopted the model legislation, and (4) apply economic theory from Kenneth Arrow's framework of moral hazard. The consumer sales practices

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[1] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 167 (2011).

[2] *See* Robert S. Tongren & Margaret Ann Samuels, *The Development of Consumer Protection Activities in the Ohio Attorney General's Office*, 37 OHIO ST. L.J. 581, 583 (1976).

[3] For instance, the Utah Division of Consumer Protection administers and enforces over twenty separate state consumer protection acts as of 2023. UTAH CODE ANN. § 13-2-1(2) (West 2023).

[4] *See Ohio Consumer Law Overview*, OHIO ATTORNEY GENERAL, https://www.ohioattorneygeneral.gov/Business/Services-for-Business/Business-Guide/Ohio-Consumer-Law-Overview [https://perma.cc/59CH-9C7U] (last visited Jan. 9, 2021).

acts are not the only family of state consumer protection acts to hold disreputable company managers accountable, and this Article is but one example.

I. THE MODEL ACT

The Uniform Consumer Sales Practices Act ("Model Act") traces back to 1970 with the National Conference of Commissioners on Uniform State Laws.[5] A form of the Model Act was adopted in three states: Kansas in 1973, Utah in 1973, and Ohio in 1972.[6] The Model Act has overlap with the Federal Trade Commission Acts as well as the Uniform Commercial Code and the Uniform Deceptive Trade Practices Act.[7] The Model Act had nineteen sections with section commentary covering basic definitions, enforcement, rule–making, and private remedies to recover actual damages as well as class actions. The goals and purposes of the Model Act were to clarify consumer sales practices, protect consumers from deceptive suppliers, promote fair trade practices, create a workable state version of the Federal Trade Commission decisions and rules, and make uniform the consumer sales laws among the states that adopt the Model Act.[8] It is the second goal mentioned at § 1(2) regarding the purpose of the Model Act protecting consumers from the deceptive acts of suppliers that is of most interest.

A supplier is defined in § 2(5) as "a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer."[9] The commentary mentions that "[i]n addition to manufacturers, wholesalers, and dealers, debt collection agencies and advertising agencies fall within this definition."[10] This definition is very broad and loops in parties to lease agreements in addition to traditional sales transactions. But the commentary to § 2(5) also mentions that § 14 defines some boundaries to the application of the act.[11]

Section 14(a) of the Model Act defines the boundaries of application to any practice allowed under federal or state law, the publication or broadcast of information that is done in conformance with the Model Act, wrongful death or product liability claims arising out of a consumer transaction under the Model Act, or the

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5 UNIF. CONSUMER SALES PRACS. ACT (UNIF. L. COMM'N 1970).

6 *Id.* (Kansas Consumer Protection Act, ch. 217, 1973 Kan. Sess. Laws 804 (1973) (codified as amended at KAN. STAT. ANN. § 50-624 (West 2022)); Utah Consumer Sales Practices Act, ch. 188, 1973 Utah Laws 562 (1973) (codified as amended at UTAH CODE ANN. § 13-11-1 (West 2022)); Ohio Consumer Sales Practices Act, 1972 Ohio Laws 134 (1972) (codified as amended at OHIO REV. CODE ANN. § 1345.01 (West 2023))).

7 The Uniform Consumer Sales Practices Act defines practices that are deceptive under § 2(a)(5) of the Uniform Deceptive Trade Practice Act. UNIF. CONSUMER SALES PRACS. ACT § 3(b)(1) (UNIF. L. COMM'N 1970).

8 *Id.* § 1; *see also* Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended in 15 U.S.C. §§ 41–58).

9 *Id.* § 2(5).

10 *Id.* § 2 cmt. 5.

11 *Id.* § 14. However, the limitation of application is not part of the Utah act. *See* § 13-11-1.

terms of credit that would be under the Model Act.[12] In § 14(b), the burden of establishing an exemption from the Model Act is on the supplier.[13]

The Model Act is consumer friendly as illustrated by the broad definition of a supplier in § 2(5) and the onerous burden on the supplier to prove an exemption from the act in § 14. This may be the reason that it was not wholly adopted in the 1970s. However, the states that have enacted the supplier definition into their consumer protection statutes have created an isolated characteristic for business law for a handful of jurisdictions that can impose personal liability on individual company principals even with limited liability entity shields.

II. THE STATE ADOPTIONS

The Model Act has only been formally adopted in Kansas, Utah, and Ohio,[14] but there has been a widespread adoption of consumer protection statutes in all states. Aligning well with the Model Act, at least four other states have adopted organic consumer protection statutes: Indiana,[15] Maryland,[16] Wisconsin,[17] and Washington.[18] These statutes mirror the interpretation of supplier liability in the formal adoption states.[19] This is not unknown as there was an obvious push in the 1960s and 1970s for state legislatures to adopt consumer protection measures that complemented the Federal Trade Commission's movement against deceptive practices.[20]

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[12] UNIF. CONSUMER SALES PRACS. ACT § 14(a).

[13] *Id.* § 14(b).

[14] "Utah, Ohio, and Kansas have consumer protection laws derived from the same Uniform Consumer Sales Practices Act." Brown v. Constantino, No. 2:09CV00357DAK, 2009 U.S. Dist. LEXIS 100552, at *5 (D. Utah Oct. 26, 2009).

[15] *See* IND. CODE ANN. § 24-5-0.5-2 (West 2022); *see also* Classic Car Ctr., Inc. v. Haire Mach. Corp., 580 N.E.2d 722, 723 (Ind. Ct. App. 1991), *superseded by statute,* Act of May 13, 1997, 1997 Ind. Acts 18, *as recognized in* Liberty Publ'g, Inc. v. Carter, 868 N.E.2d 1142, 1145 (Ind. Ct. App. 2007).

[16] *See* 2023 Md. Legis. Serv. § 13-101 (West) (note that Maryland uses the term "merchant" instead of supplier but the definitions are similar).

[17] "[M]any if not all of the other states adopted similar statutes patterned on a number of model laws such as the Unfair Trade Practices and Consumer Protection Law, the Uniform Deceptive Trade Practices Act and the Uniform Consumer Sales Practices Act." Uniek, Inc. v. Dollar Gen. Corp., 474 F. Supp. 2d 1034, 1037 (W.D. Wis. 2007).

[18] WASH. REV. CODE ANN. § 19.86.010 (West 2023) (Washington's Unfair Business Practices–Consumer Protection Statute defines "person" broadly enough to cover any business organization engaged in "commerce.").

[19] There are many other states that have modeled their own consumer protection acts after the Uniform Consumer Sales Practices Act such as: Indiana ("The Deceptive Consumer Sales Act borrows extensively from the Uniform Consumer Sales Practices Act." *Classic Car Ctr.*, 580 N.E.2d at 723; and Tennessee (*see* Sherwood v. Microsoft Corp., No. M2000-01850-COA-R9-CV, 2003 Tenn. App. LEXIS 539, at *110 (Tenn. Ct. App. July 31, 2003). However, states like Maine do not align with the Model Act. New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 178 n.24 (D. Me. 2004) ("I do not look to the Uniform Consumer Sales Practices Act for guidance in interpreting the ADTPA because, although both statutes prohibit enumerated deceptive and unconscionable practices, the language of the two statutes differs considerably.").

[20] "State legislatures beginning in the early 1960s enacted broad new measures to compliment Federal Trade Commission prosecution of deceptive practices. Most laws were modeled after uniform model codes—the Uniform Trade Deceptive Practices Act (UTPA), the

The analysis of the statutory definitions and court application reveals the nuance to supplier liability in these states.

A. The Utah Consumer Sales Practices Act[21]

Many Utah state court and federal court cases acknowledge that Utah's Consumer Sales Practices Act is derived from the Model Act.[22] The Utah Consumer Sales Practices Act (UCSPA) gives a definition for a supplier in line with the Model Act. "'Supplier' means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer."[23] It is broad enough to cover almost any actor conducting a commercial transaction, thus, putting all business under the UCSPA for the state of Utah.[24] Deceptive trade practices of a supplier are regulated under Utah Code § 13-11-4.[25]

Utah is unique among the other jurisdictions in that it has a state agency, the Utah Department of Commerce, with a Division of Consumer Protection given jurisdiction to administer and enforce the UCSPA among twenty–seven other consumer protection statutes.[26] This creates a Utah state version of the Federal Trade Commission complete with its own administrative law court for adjudications.[27]

Uniform Consumer Sales Practices Act (USCSPA), and the Unfair Trade Practices and Consumer Protection Act (UTP–CPA). The broadest (followed by New York and four other states at the time) sweepingly barred all 'deceptive or unfair practices.' Robert E. Reyna, State Little FTC Acts and Unfair Methods of Competition, SB75 ALI–ABA 47 (1997) (describing evolution of Uniform Acts). Today, although they take varying forms, private rights of action exist in all states but Arkansas, Iowa, and North Dakota." Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 239 (E.D.N.Y. 2001), *rev'd*, Empire Healthchoice, Inc. v. Philip Morris USA, Inc., 393 F.3d 312 (2d Cir. 2004).

[21] This analysis is a byproduct of work done at the Utah Department of Commerce with Bruce Dibb, retired ALJ; 1973 Bachelor of Science in Political Science from Brigham Young University; 1976 Juris Doctor from the J. Reuben Clark Law School, Brigham Young University.

[22] *See* Brown v. Constantino, No. 2:09CV00357DAK, 2009 U.S. Dist. LEXIS 100552, at *5 (D. Utah Oct. 26, 2009); Utah v. GAF Corp., 760 P.2d 310, 313 (Utah 1988); Naranjo v. Cherrington Firm, 285 F. Supp. 3d 1242, 1244 n.1 (D. Utah 2018); Carlie v. Morgan, 922 P.2d 1, 7 (Utah 1996) (Howe, J., concurring); Wade v. Jobe, 818 P.2d 1006, 1014 (Utah 1991), *superseded by statute*, Utah Fit Premises Act, 1990 Utah Laws 314, *as recognized in* Carlie, 922 P.2d at 6; Martinez v. Johnson, No. 2:11cv157-DN, 2013 U.S. Dist. LEXIS 35826, at *42 (D. Utah Mar. 14, 2013); Iadanza v. Mather, 820 F. Supp. 1371, 1379 (D. Utah 1993); and Miller v. Basic Rsch., L.L.C, 285 F.R.D. 647, 655 (D. Utah 2010); Copeland v. Albion Lab'ys, Inc., No. C15-585 MJP, 2015 U.S. Dist. LEXIS 154757, at *7 (W.D. Wash. Nov. 16, 2015).

[23] UTAH CODE ANN. § 13-11-3(6) (West 2022).

[24] The breadth also includes attorneys that work in debt collection. *See Brown*, No. 2:09CV00357DAK, 2009 U.S. Dist. LEXIS 100552, at *13 (D. Utah Oct. 26, 2009).

[25] UTAH CODE ANN. § 13-11-4 (West 2022).

[26] *Id.* §§ 13-2-1, 13-2-6.

[27] *Id.* §§ 13-2-6, 13-1-11 (using administrative law judges to conduct hearings for the department).

Although there is a private right of action under the UCSPA,[28] the bulk of the UCSPA cases are handled pursuant to administrative informal proceedings.[29] After an agency review procedure, judicial review is conducted in *de novo* hearings in a Utah District Court.[30]

A 1988 federal district court case, *Utah v. B & H Auto*,[31] dealt with a situation of a deceptive original supplier, an innocent middleman merchant, and an aggrieved consumer. The court stated the purpose of the UCSPA "is to be construed liberally 'to protect consumers from suppliers who commit deceptive and unconscionable sales practices.'"[32] Further, the court held that "[t]o interpret 'supplier' narrowly to include only those in privity with the consumer would defeat the clear purpose of the act, and could not have been intended by the Utah legislature."[33] While the deceptive supplier does not directly deal with the consumer, his actions significantly impact the later consumer transaction. Clearly it is the consumer who is victimized by the original supplier and is indirectly "engaging in" the later transaction between the middleman and the consumer. The UCSPA employs a broad definition of supplier to find liability along the chain of the transaction.

Thirty years after *B & H Auto*, a Utah district court confirmed the broad application of the term "supplier." It came on judicial review of an informal proceeding handled by a Utah Department of Commerce administrative law judge. In *Tub City L.L.C. v. Utah Division of Consumer Protection*, the principal member of an LLC was found personally liable for UCSPA violations of warranty misrepresentations and deceptive practices of the entity.[34] The district court agreed with the Utah Department of Commerce that under the Utah Code there is personal liability "whether or not he deals directly with the consumer."[35]

In the *Purdue Pharma* opioid agency action filed by the Utah Division of Consumer Protection in 2019, claims under the UCSPA for deceptive practices were brought against two individuals in the Sackler family, who were executive officers and directors of Purdue Pharma.[36] No allegation was made that these two individuals were engaged in any actual sales of opioids to consumers; however, the Division of Consumer Protection's citation alleged that these particular individuals were central to directing the deceptive sales practices related to the opioids sold by the Purdue entity and its affiliates. These individual respondents brought motions to dismiss, denying personal liability under the UCSPA. The motions to dismiss were extensively briefed on the issue of personal liability of principals of

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[28] *Id.* § 13-11-19 (providing a right of action for a consumer as under the UCSPA).

[29] "All adjudicative proceedings within the Division are designated as informal proceedings." UTAH ADMIN. CODE r. 152-6-1(A) (LexisNexis 2022). Any party to a proceeding may request that the action be converted from an informal proceeding to a formal proceeding under UTAH CODE ANN. § 63G-4-202(3) (West 2022). These requests to convert are liberally granted.

[30] UTAH CODE ANN. § 63G-4-402(1)(a) (West 2022).

[31] 701 F. Supp. 201 (D. Utah 1988).

[32] *Id.* at 204 (quoting UTAH CODE ANN. § 13-11-2 (West 2022)) (emphasizing that the UCSPA should be liberally construed).

[33] *Id.*

[34] Civ. No. 170902052 (Utah 3d. Jud. Dist. 2018).

[35] § 13-11-3(6); *see* Civ. No. 170902052.

[36] Order on Motion to Dismiss of Respondents, Purdue Pharma, Inc., CP-2019-005, (July 15, 2019).

a business engaged in alleged deceptive practices. The Order denying the motions to dismiss stated that

> [T]he Sackler Respondents are suppliers within the meaning of the statute, and clearly cannot be dismissed on this basis at the motion to dismiss stage of these proceedings [sic]. Whether defined as suppliers or merchants under the respective statutes in Utah, Ohio, Maryland, Washington or Wisconsin,[37] ample authority exists to hold officers and directors liable under the UCSPA or similar consumer protection statutes.[38]

A Utah Division of Consumer Protection administrative agency case made its way to *de novo* judicial review in the Utah Fifth District Court.[39] The matter concerned a filling station in a remote area of central Utah. The filling station employed mechanics that were paid on a commission basis. Customers from all over the country would stop to get gas and be confronted by service center mechanics recommending costly repairs. Much of the UCSPA was found to be violated at the agency level, and the Utah Fifth District Court also found that an individual, an officer of the respondent entity, was personally liable for the entity's violations of the UCSPA.[40] The district court decision was appealed to the Utah Court of Appeals, but the supplier issue was inadequately briefed and was not substantively reviewed.[41] The district court's review of supplier liability stands as the controlling precedent and affirmance of supplier liability in the state of Utah.

Utah applies a broad definition of the term supplier, as well as a liberal application of the UCSPA.

B. The Kansas Consumer Protection Act

There are two Kansas state cases that acknowledge the origins of the Kansas Consumer Protection Act (KCPA) with the Model Act.[42] The KCPA keeps the Model Act's supplier definition with the inclusion of a Uniform Commercial Code concept of a person acting "in the ordinary course of business" to supplement the Model Act's definition.

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[37] Although the referenced states of Maryland, Washington and Wisconsin have not adopted the Model Act, each has adopted specialized consumer protection legislation that imposes statutory personal liability on principals or managers of businesses when the entities that they direct are engaged in deceptive practices. *See id.*

[38] *Id.* at 33, *see also id.* at 13–16 for further discussion.

[39] Heath v. Utah Div. of Consumer Prot., Nos. 170500129, 180500155 (Utah 5th Jud. Dist. 2018).

[40] *Id.* at 31, 33.

[41] Heath. v. Div. of Consumer Prot., 530 P.3d 170, 179 (Utah Ct. App. 2023).

[42] *See* Williamson v. Amrani, 152 P.3d 60, 69 (Kan. 2007), *superseded by statute*, Act of May 11, 2007, 2007 Kan. Sess. Laws 194, *as recognized in* Kelly v. VinZant, 197 P.3d 803 (Kan. 2008); *see also* State *ex rel.* Miller v. Midwest Serv. Bureau of Topeka, Inc., 623 P.2d 1343, 1348 (Kan. 1981).

> "Supplier" means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer.[43]

Again, this definition is broad and covers all conceivable consumer transactions. Deceptive trade practices by a supplier are broadly covered under Kansas Statutes Annotated § 50-626.[44] The Attorney General of Kansas has the power to enforce the KCPA,[45] though there are also private remedies available under the act.[46]

Personal supplier liability may be found for principals of a company under the KCPA. In *Kahn v. Denison State Bank*,[47] a buyer gave a mortgage to a bank for what the consumer thought was one home. The bank actually took a mortgage on another home the consumer owned without her notice or approval. The consumer sued the bank and the vice president of the bank for common law fraud as well as deceptive acts of a supplier under the KCPA. The Kansas Appellate Court found that there was sufficient legal justification for the action against the bank vice president to survive a motion to dismiss.[48]

The case law for a supplier definition is expansive to include the solicitation of consumer transactions. In *Alexander v. Certified Master Builders Corp.*, a trade agency that informed or accommodated its members in a transaction was a supplier for promoting the industry, distributing brochures, and advertising its programs in newspapers.[49] In *Cooper v. Zimmer Holdings, Inc.*, the court found supplier liability for soliciting medical implants.[50]

In *Watkins v. Roach Cadillac, Inc.*,[51] an auto leasing company was found to be a supplier and lessees were considered consumers under KCPA.

A hog seller was considered a supplier under the KCPA in *Musil v. Hendrich*.[52] The argument that agricultural products were exempt under the act was not persuasive.[53]

In *Hayes v. Find Track Locate, Inc.*, a property tracking and locating company was found to be a supplier under the KCPA, likely due to the nature of its business in debt collection.[54]

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43 KAN. STAT. ANN. § 50-624(l) (West 2022); U.C.C. § 2-201(3)(a) (AM. L. INST. & UNIF. L. COMM'N 1977).

44 KAN. STAT. ANN. § 50-626 (West 2022).

45 KAN. STAT. ANN. § 50-628 (West 2022).

46 KAN. STAT. ANN. § 50-634 (West 2022).

47 Kahn v. Denison State Bank, No. 113,248, 2016 WL 687728 (Kan. Ct. App. 2016).

48 *Id.* at *1–3, 8.

49 1 P.3d 899, 909 (Kan. 2000).

50 320 F. Supp. 2d 1154, 1163 (D. Kan. 2004).

51 637 P.2d 458, 462–63 (Kan. Ct. App. 1981).

52 627 P.2d 367, 371 (Kan. Ct. App. 1981).

53 *Id.* at 371–74.

54 60 F. Supp. 3d 1144, 1153 (D. Kan. 2014); *see also* State *ex rel.* Miller v. Midwest Serv. Bureau of Topeka, Inc., 623 P.2d 1343, 1348 (Kan. 1981).

Privity is not required under the KCPA.[55] The *Lynd v. Brickie* court found that the KCPA is to be construed liberally to promote certain public policies, including the protection of consumers from deceptive and unconscionable practices.[56]

One clear exemption is that banks, trust companies, and lending institutions are exempt from the KCPA.[57] "The plain text of the KCPA states that [these entities] are not included in the definition of supplier if the [entity] is subject to state or federal regulation related to disposition of repossessed collateral."[58]

Kansas and its KCPA have a broad application of the 'supplier' definition, having interesting exemptions for certain banking transactions. Kansas state precedent also supplies agricultural applications of the Consumer Sales Practices Act that are not found in Utah or Ohio case precedent.

C. The Ohio Consumer Sales Practices Act

Ohio has a relatively large body of case law in comparison to Utah and Kansas. There are many Ohio state decisions and federal Sixth Circuit cases that affirm that the Ohio Consumer Protection Act (OCSPA) follows the Model Act.[59] The OCSPA provides,

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[55] "The court finds that nothing in the Kansas Consumer Protection Act requires privity of contract as a basis for liability as a supplier under the Act." Lynd v. Brickie, No. 89-4193-S, 1990 U.S. Dist. LEXIS 16509, at *6 (D. Kan. 1990).

[56] *Id.* at *6–7.

[57] Cmty. First Nat'l Bank v. Nichols, 443 P.3d 322, 330 (Kan. Ct. App. 2019) ("[The counterplaintiffs] assert that this court has already 'disposed of the blanket exemption argument by examining the facts at issue, and [held] banks *are* suppliers under the KCPA, except in cases dealing with the disposition of repossessed collateral.'") (internal quotations omitted); *see also In re* Larkin, 553 B.R. 428, 442 (Bankr. D. Kan. 2016).

[58] *Cmty. First Nat'l Bank*, 443 P.3d at 331.

[59] There are thirty-four Ohio cases that acknowledge the origins of the OCSPA with the Model Act: Frank v. WNB Grp., L.L.C., 135 N.E.3d 1142, 1145 (Ohio Ct. App. 2019); Taylor v. First Resol. Inv. Corp., 72 N.E.3d 573, 601 (Ohio 2016); Powers v. Green Tree Servicing, L.L.C., No. 102753, 2015 WL 4987744, at *4 (Ohio Ct. App. Aug. 20, 2015); Sterling Constr., Inc. v. Alkire, No. CA2013-08-028, 2014-Ohio-2897, at *4 (Ohio Ct. App. June 30, 2014) (Bloomberg Law); OneWest Bank v. Ruth, No. CV 2012-07-4287, 2014 Ohio Misc. LEXIS 2, at *30 (Ohio Ct. Com. Pl. Feb. 6, 2014); Anderson v. Barclay's Capital Real Est., Inc., 989 N.E. 2d. 997, 1001 (Ohio 2013); Ferron v. Echostar Satellite, L.L.C., 727 F. Supp. 2d 647, 649 (S.D. Ohio 2009), *aff'd*, 410 F. App'x 903, 907 (6th Cir. 2010); Shumaker v. Hamilton Chevrolet, Inc., 920 N.E.2d 1023, 1030 (Ohio Ct. App. 2009); Culbreath v. Golding Enters., 872 N.E.2d 284, 290 (Ohio 2007), *reconsideration denied*, 903 N.E.2d 327 (Ohio 2009); Burdge v. Kerasotes Showplace Theatres, L.L.C., No. CA2006-02-023, 2006 WL 2535762, at *5 (Ohio Ct. App. Sept. 5, 2006), *cert. denied*, 861 N.E.2d 144 (Ohio 2007); Marrone v. Philip Morris USA, Inc., 850 N.E.2d 31, 38 (Ohio 2006) (Grady, J., concurring); Ferron & Assoc., LPA v. U.S. Four, Inc., No. 05AP-659, 2005 WL 3550760, at *4 (Ohio Ct. App. Dec. 29, 2005); Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1169 (Ohio Ct. App. 2004); Johnson v. Microsoft Corp., 802 N.E.2d 712, 721 (Ohio Ct. App. 2003); Yo-Can, Inc. v. Yogurt Exch., Inc., 778 N.E.2d 80, 84 (Ohio Ct. App. 2002); Ostrander v. Andrew, No. 19833, 2000 Ohio App. LEXIS 2290, at *2 (Ohio Ct. App. May 31, 2000); Rose v. Zaring Homes, Inc., 702 N.E.2d 952, 956 (Ohio Ct. App. 1997); Crye v. Smolak, 674 N.E.2d 779, 784 (Ohio Ct. App. 1996); Buddies, Inc. v. Fair, No. 62433, 1993 Ohio App. LEXIS 2386, at *9 (Ohio Ct. App. May 6, 1993); Keiber v. Spicer Constr. Co., 619 N.E.2d 1105, 1108 (Ohio Ct. App. 1993); Couto v. Gibson, Inc., No. 1475, 1992 Ohio App. LEXIS 756, at *12 (Ohio Ct. App. Feb. 26, 1992); State *ex rel.* Celebrezze v. Howard, 602 N.E.2d 665, 669 (Ohio Ct. App. 1991); Jackson v. Krieger Ford,

> "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.[60]

The state of Ohio adopted the Model Act, incorporating it into its Ohio Consumer Sales Practices Act (OCSPA), in 1973.[61] The impact of Ohio's supplier definition is expected given the relative size of the state and the number of reported cases.[62] The supplier definition contains language familiar to the Model Act's definition but there are significant additions, including a specific reference to certain transactions related to residential mortgages.[63] The OCSPA also specifically provides that a "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.[64] A supplier's deceptive practices are prohibited under Ohio code.[65] The Ohio Attorney General's office is given power to bring actions,[66] enforcing the OCSPA, and there is also a means for private remedies.[67]

Inc., No. 88AP-1030, 1989 Ohio App. LEXIS 1201, at *9 (Ohio Ct. App. Mar. 28, 1989); Heritage Hills, Ltd. v. Deacon, No. 1423, 1988 Ohio App. LEXIS 2946, at *9 (Ohio Ct. App. July 22, 1988), *aff'd*, 551 N.E.2d 125 (Ohio 1990); Renner v. Procter & Gamble Co., 561 N.E.2d 959, 965 (Ohio Ct. App. 1988); Bierlein v. Bernie's Motor Sales, No. 9590, 1986 Ohio App. LEXIS 7181, at *6 (Ohio Ct. App. June 12, 1986); Peterman v. Waite, No. 79-CA-19, 1980 WL 131229, at *3 (Ohio Ct. App. June 25, 1980); Pomianowski v. Merle Norman Cosms., Inc., 507 F. Supp. 435, 438 (S.D. Ohio 1980); Thomas v. Sun Furniture & Appliance Co., 399 N.E.2d 567, 569 (Ohio Ct. App. 1978); Toledo Metro Fed. Credit Union v. Ted Papenhagen Oldsmobile, Inc., 381 N.E.2d 1337, 1339 (Ohio Ct. App. 1978); Potter v. Dangler Mobile Homes, 401 N.E.2d 956, 958 (Ohio Ct. Com. Pl. 1977); Weaver v. J.C. Penney Co., 372 N.E.2d 633, 634 (Ohio. Ct. App. 1977); Santiago v. S.S. Kresge Co., No. 948069, 1976 Ohio Misc. LEXIS 64, at *3–4 (Ohio Ct. Com. Pl. Mar. 2, 1976); Clayton v. McCary, 426 F. Supp. 248, 261 (N.D. Ohio 1976).

60 OHIO REV. CODE ANN. § 1345.01(C) (West 2023).

61 Ohio Consumer Sales Practices Act, 1972 Ohio Laws 134 (1972) (codified as amended at OHIO REV. CODE ANN. § 1345.01 (West 2023))).

62 Ohio is the seventh largest state by population with a 2022 US Census estimate of 11,756,058. *Quick Facts: Ohio*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/OH [https://perma.cc/4RG7-38Y6] (last visited Oct. 18, 2023).

63 *See* Todd V. McMurtry, *Is Home Construction a Consumer Transaction Under Kentucky's Consumer Protection Act?*, 24 N. KY. L. REV. 309, 312 ("The general statutory notes of the Uniform Consumer Sales Practices Act indicate that Ohio substantially adopted the major provisions of the Uniform Act with numerous variations, omissions and additions. It is important to note that the Uniform Act does not specifically exclude causes of action arising from residential construction disputes.").

64 OHIO REV. CODE ANN. § 1345.01(C) (West 2023).

65 *Id.* § 1345.02

66 *Id.* § 1345.07.

67 *Id.* § 1345.09(A).

In terms of personal liability for a principal, in *Garber v. STS Concrete Co.*, personal liability was found for both an entity and its owner as suppliers under the OCSPA.[68] The *Garber* court stated that

> [I]ndividuals can be held to answer for the actions of the company. Violations of the CSPA offer such a context. Where officers or shareholders of a company take part or direct the actions of others that constitute a violation of the CSPA, that person may be held individually liable.[69]

In addition to this characteristic, Ohio has unique applications of the supplier definition that none of the other states have. An assignee of an installment contract who provided financing for the supplier is not subject to OCSPA under the supplier definition.[70] A credit card company is not a supplier since a credit card company fits into the definition of a "financial institution,"[71] but a "collection agency" is included under the act.[72] Insurers may not be liable as suppliers for telemarketing if they have an indirect effect on a consumer transaction where an agent is acting without direction.[73]

Privity of contract is not required for supplier liability but there must be a substantive connection.[74] Substantive connection was defined in *Lester v. Wow Car Co.* where the court found that a passive, posted web advertisement could not sustain an OCSPA claim if the events were not 'in connection' with the consumer transaction. [75] "Under the express provisions of the OSCPA, a violative act must be done 'in connection with' the consumer transaction at issue."[76] Further, a car dealership may be a supplier, but a car manufacturer is not under the OCSPA due to the lack of a substantive connection with a consumer.[77]

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[68] 991 N.E.2d 1225 (Ohio Ct. App. 2013).

[69] *Id.* at 1233.

[70] Jenkins v. Hyundai Motor Fin. Co., 389 F. Supp. 2d 961, 970 (S.D. Ohio 2005).

[71] *See* Lewis v. ACB Bus. Servs., 135 F.3d 389, 412 (6th Cir. 1998) (". . . the OCSPA specifically excludes 'financial institutions' and 'dealers in intangibles.' (quoting Ohio Rev. Code § 1345.01(A))).

[72] Celebrezze v. United Rsch., Inc., 482 N.E.2d 1260, 1262 (Ohio Ct. App. 1984) ("Rather, we hold that Universal is a person engaged in the business of effecting consumer transactions (*i.e.*, payment) and, as such, is a supplier pursuant to R.C. 1345.01(C)."); *see also* Liggins v. May Co., 337 N.E.2d 816, 818 (Ohio Ct. Com. Pl. 1975).

[73] Charvat v. Farmers Ins. Columbus, Inc., 897 N.E.2d 167, 178 (Ohio Ct. App. 2008).

[74] "[T]he defendant must have some connection to the consumer transaction in question in order to be liable as a supplier for deceptive practices which violate the Ohio Consumer Sales Practices Act." Garner v. Borcherding Buick, Inc., 616 N.E.2d 283, 285 (Ohio Ct. App. 1992).

[75] No. 2:11-cv-850, 2014 U.S. Dist. LEXIS 77567, at *25 (June 6, 2014), *aff'd*, 601 F. App'x 399 (6th Cir. 2015).

[76] *Id. See also* OHIO REV. CODE ANN. § 1345.02(A) (West 2023) which provides "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." The Kansas statute has nearly identical language. *See* KAN. STAT. ANN. § 50-626(a) (West 2022). However, the Kansas cases have not focused on the "in connection" language. The Utah statute does not include similar language.

[77] Michelson v. Volkswagen Aktiengesellschaft, 99 N.E.3d 475, 478 (Ohio Ct. App. 2018) ("Although there is no requirement of privity between the supplier and the consumer for the CSPA

The OCSPA requires that the supplier be engaged in the line of work continually.[78] In the 2020 case of *Sims v. Haghighi*, a mechanic that only did work on car warranties was not a supplier of auto repairs because the mechanic did not regularly engage in that type of business.[79] The mechanic asserted that he only did minor repairs and was not a full-time auto mechanic, thus falling outside of the definition.[80] This requirement of continuous and active engagement in the work of a supplier was also found in *Moore v. Florida Bank of Commerce.*

> Although no Ohio court has defined the level of business activity required for a finding that one is "engaged in the business of" effecting or soliciting consumer transactions, the Defendant urges and the Court agrees that the phrase implies more than one isolated sale, especially when that sale is not within the seller's usual course of business. The phrase "engaged in the business of" is commonly used in statutory schemes and has generally been held to connote continuous or regular activity, rather than a singular or isolated sale.[81]

In another case, a seller that sold no more than three vehicles per year was not deemed to be a supplier under the OCSPA.[82] By contrast, where there was a dispute over payment for renovations, the court found sufficient evidence that the contractor was a supplier based on it performing work on at least one other residential project.[83]

The OCSPA also applies outside of the state of Ohio if the supplier is in Ohio. In *TolTest, Inc. v. Nelson-Delk*, Petitioner, an Ohio corporation, had its

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to be applicable, 'the defendant must have some connection to the consumer transaction in question in order to be liable as a supplier for deceptive practices which violate the Ohio Consumer Sales Practices Act.' . . . [A] party must 'have some connection to a consumer transaction, beyond merely manufacturing a product, in order to be liable for a violation of the CSPA.'" (first quoting Garner v. Borcherding Buick, Inc., 616 N.E.2d 283, 285 (Ohio Ct. App. 1992); then quoting Hahn v. Doe, No. 94APE07-1024, 1995 Ohio App. LEXIS 1057, at *25 (Mar. 23, 1995))).

[78] There is no comparable case law in Kansas or Utah on this subject. The Ohio cases rely on the language in the statute "engaged in the business" to require continuous and regular activity in the business in question. OHIO REV. CODE ANN. § 1345.01(C) (West 2023). The Kansas statute employs the phrase "in the ordinary course of business . . . engages in . . . consumer transactions." KAN. STAT. ANN. § 50-624(l) (West 2023). The Utah statute uses the more compelling language of "regularly . . . engages in . . . consumer transactions." UTAH CODE ANN. § 13-11-3(6) (West 2023). The Kansas and Utah statutes have yet to be tested on this issue.

[79] No. 2018-P-0037, 2020 WL 1000068, at *3 (Ohio Ct. App. Mar. 2, 2020).

[80] *Id.*

[81] Moore v. Fla. Bank of Com., 654 F. Supp 38, 41 (S.D. Ohio 1986) (first quoting United States v. Tarr, 589 F.2d 55 (1st Cir.1978) (the words "to engage in the business of" strongly imply more than one isolated sale or transaction) (then quoting Fillippo v. S. Bonaccurso & Sons, Inc., 466 F.Supp. 1008 (E.D. Pa.1978) ("being engaged in an activity requires more than a single act or transaction or occasional participation"); (and then quoting UFITEC, S.A. v. Carter, 20 Cal.3d 238, 571 P.2d 990, 142 Cal. Rptr. 279 (1977) (the phrase "engaged in the business of" connotes a certain regularity of participation). *See also* Perrucci v. Whittington, 118 N.E.3d 311, 340–41, (Ohio Ct. App. 2018) directly quoting *Moore* in its similar reasoning.

[82] LaVeck v. Al's Mustang Stable, 598 N.E.2d 154, 156 (Ohio Ct. App. 1991).

[83] Baaron, Inc. v. Davidson, 44 N.E.3d 1062, 1066 (Ohio Ct. App. 2015).

principal place of business in Toledo, on the northern border near Michigan.[84] It performed renovations as part of insurance work for flooding for a home in Marshall, Michigan. A material breach occurred, and multiple claims and counter claims were filed in both states. The court held, "[t]he OCSPA applies to the actions of suppliers in Ohio, even if the ultimate subject of the transaction is located outside the state and even if the supplier itself is based outside the state."[85]

The OCSPA also applies to the case of professional schools.[86] A school was found to be a supplier of services and the student found to be a consumer in a consumer transaction as defined by the statute.[87]

Similar to Utah, attorney debt buyers are considered debt collectors and fall under the OCPSA.[88] Both the debt buyer and its attorneys solicited the debtor, so the court found that they were suppliers. There was no "financial institution" exemption for the attorneys because they contracted with and represented the debt buyer.[89]

Membership organizations may be suppliers under the OCSPA. In *Knoth v. Prime Time Marketing Management, Inc.*, an organization, which sold memberships to individuals to buy furniture, was liable as a supplier under the OCSPA, although its members ordered furniture from manufacturers.[90] It does not matter whether suppliers deal directly with consumers as the scope of the OCSPA includes operations like an organization that takes orders for goods from consumers and also accepts payment of the purchase price.[91]

III. COMPARISON OF THE PIERCING OF THE ENTITY VEIL AND THE STATE ACTS

After the analysis of the states' statutes and case interpretation, the question arises as to whether this is a piercing of the entity veil. The quick answer is: no, this is not the same kind of liability that a principal would incur by simply being involved in management misfeasance; but it is very similar and may be confusing to those who do not appreciate the breadth of the Model Act.

Under the Revised Uniform Limited Liability Company Act and the Uniform Limited Liability Company Act, noncompliance with organizational formalities or requirements relating to company powers or management of a limited liability company is not grounds for imposing personal liability on the members or

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84 No. 3:03 CV 7315, 2008 U.S. Dist. LEXIS 32920 (N.D. Ohio Apr. 22, 2008).

85 *Id.* at *29–30 (quoting Detrick v. 84 Lumber Co., 2007 U.S. Dist. LEXIS 35517, at *14 (N.D. Ohio May 10, 2007)). *See also* Shorter v. Champion Home Builders Co., 776 F. Supp. 333, 339 (N.D. Ohio 1991); Arnold v. Volkswagen of Am., Inc., No. 2003 CA 102, 2005 Ohio App. LEXIS 1644, at *11 (Ohio Ct. App. Apr. 8, 2005); Brown v. Mkt. Dev., Inc., 322 N.E.2d 367, 369 (Ohio Ct. Com. Pl. 1974).

86 Krueck v. Youngstown State Univ., 131 N.E.3d 1030, 1034 (Ohio Ct. App. 2019).

87 *Id.*

88 Taylor v. First Resol. Inv. Corp., 72 N.E.3d 573, 577 (Ohio 2016).

89 *Id.* at 601; *see also* Kline v. Mortg. Elec. Registration Sys., Inc., No. 3:08cv408, 2010 WL 1267809, at *5 (S.D. Ohio Mar. 30, 2010) (holding that the financial-institution exemption in the OCSPA applies to national banks and not to subsidiaries of those banks).

90 No. 21431, 2006 WL 3114273, at *2 (Ohio Ct. App. 2006).

91 *Id.* at *3.

managers of the company.[92] Similarly, principals and shareholders are insulated from personal liability for corporate obligations under the Revised Model Business Corporation Act.[93]

Generally, the four factors for piercing the entity veil are: (1) fraud; (2) inadequate capitalization; (3) failure to observe company formalities; and (4) intermingling the business, finances of the company, and the owner to the point of indifference.[94] The actual cases of piercing of the entity veil are rare with a 2010 Wake Forest Law Review article finding a declining rate of 27.12% of cases resulting in principal liability.[95] Although there are no statistics for supplier personal liability under state acts, it is likely to be at a substantially higher rate.

In Utah, the law is similar: "[w]here a shareholder, officer, or director abuses the corporate form, and treats the legal entity as [the] alter ego, [the] law allows a creditor to pierce the veil" to allow claimants to go after the assets of an individual in the unusual circumstance in which the corporate entity is not really distinct from the individual.[96] This is usually applied to one–person operations.[97]

The context matters with the principal similarity being that some debtor–creditor relationship has occurred. The differences are stark when examined, as the legal analysis is different with actions under the Model Act. This brief analysis will show the similarities and differences if there is ever a question as to supplier liability being likened to a piercing claim.

A. Similar End Results

In both a Consumer Sales Practices Act action and a piercing of the corporate veil, there has been some wrong that has happened in a business transaction or a deceptive sales practice under the act,[98] and an aggrieved party is seeking redress against the principal of the entity. If the business practice is deceptive under the act, then statutorily defined damages may be recovered.

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92 REVISED UNIF. LTD. LIAB. CO. ACT § 304(b) (UNIF. L. COMM'N 2013); UNIF. LTD. LIAB. CO. ACT § 303(b) (UNIF. L. COMM'N 1996); 51 AM. JUR. 2D *Limited Liability Companies* § 20 (2023).

93 REVISED MODEL BUS. CORP. ACT § 2.02(b)(4) (AM. BAR ASS'N, amended 2016).

94 *See* Gasstop Two, L.L.C. v. Seatwo, L.L.C., 225 P.3d 1072, 1077 (Wyo. 2010), *superseded by statute*, 2010 Wyoming Limited Liability Company Act, ch. 94, 2010 Wyo. Sess. Laws 429, *as recognized in* GreenHunter Energy, Inc. v. W. Ecosystems Tech., Inc., 337 P.3d 454 (Wyo. 2014). Wyoming was the first state to recognize limited liability companies in 1977. *See* Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, *in* BUSINESS TAX STORIES 295 (Found. Press 2005).

95 Richmond McPherson & Nader Raja, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 943 (2010). "Even with its widespread use and existence, piercing the corporate veil has been 'disparaged as a confusing anomaly.' Others have pointed out that '"[p]iercing" seems to happen freakishly.' Application of the doctrine, '[l]ike lightning,' seems to be rare, severe, and unprincipled." *Id.* at 934 (first quoting Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 542 (2007); and then quoting Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985)).

96 M.J. v. Wisan, 371 P.3d 21, 35 (Utah 2016).

97 *See* Dockstader v. Walker, 510 P.2d 526, 528 (Utah 1973).

98 UNIF. CONSUMER SALES PRACS. ACT § 3 (UNIF. L. COMM'N 1970).

The thought is similar in seeking redress under pleading a piercing action in a district court. The factors are in common law, but if there was fraud in a business transaction, in addition to other factors, like under–capitalization and non–observance of structural formalities, then a piercing action may have a result similar to those under a CSPA.

The end result of personal liability and the context arising from business transactions are the end of the similarities. The legal analysis shows how different these actions are.

B. Differences in Legal Analysis

The best argument for the difference is that one is an action under a statute and the other is a claim at common law. As has been expressed under the Model Act, a supplier means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.[99] Also, as has been shown, the three states that have adopted the Model Act have established a broad application of the supplier definition. That is the ultimate point: the legislatures in all three states have enacted their own versions of the Model Act with its broad definition of suppliers and sections on deceptive acts. This removes much of the haze of common law application that is baked–in with a piercing claim.

There is some room for varied interpretation, as Ohio has shown with its Attorney General's enforcement giving the richest set of case law.[100] This is contrasted with Utah, which has few reported cases in state courts of record,[101] but has shown it has a robust application in administrative agency law that can apply the statute with great dexterity.

IV. CONTROLLING MORAL HAZARD IN LIMITED LIABILITY WITH STATE ACTS

Economic theory applies most aptly in business settings. The concept of moral hazard has its modern origins in the study of health care and insurance.[102] The basic idea is, for those who have health insurance—particularly cheap, comprehensive health insurance—there is less incentive for prognostic care, tests, or to exercise and eat right. It's the insurance that's causing the problem as stated in his article:

> The outbreak of fire in one's house or business may be largely uncontrollable by the individual, but the probability of fire is somewhat influenced by carelessness, and of course arson is a possibility, if an extreme one. Similarly, in medical policies the cost of medical care is not completely determined by the illness suffered by the

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99 UNIF. CONSUMER SALES PRACS. ACT § 2(5) (UNIF. L. COMM'N 1970).

100 *See supra* note 59 (listing thirty-four cases).

101 Utah identifies the Supreme Court, Courts of Appeals, District Courts, and Juvenile Courts as "courts of record." *See* UTAH CODE ANN. § 78A-1-101 (West 2023).

102 Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 961–63 (1963).

> individual but depends on the choice of a doctor and his willingness to use medical services. It is frequently observed that widespread medical insurance increases the demand for medical care. Coinsurance provisions have been introduced into many major medical policies to meet this contingency as well as the risk aversion of the insurance companies.[103]

The insurance framework from Kenneth Arrow is also seen in automotive insurance especially with corporate owned fleet vehicles and rental car companies.[104] It is comedy to not think about getting rental car insurance.[105]

Kenneth Arrow identified insurance as the issue. Limited liability entities have become this form of insurance. The company fails, the creditors can secure the business assets but not the personal assets of the entity managers. But there is a public policy issue when the entity uses deceptive tactics to fleece consumers with undisclosed fees, renege on warranties, refuse refunds, or use pressured, coercive tactics to achieve sales. The consumer sales practices acts used in the states that have adopted some form of the Model Act have worked to trim the moral hazard of entities. Again, it is not piercing the veil but holding the real managers and suppliers of the entities from engaging in deceptive practices liable. It also hedges against the possibility of a subsequent entity dissolution or bankruptcy stay. Moral hazard is controlled in these isolated instances.

CONCLUSION

This topic holds such intrigue due to personal liability of principals of a company being anathema to the purpose of corporations and limited liability business organizations. However, the Model Act makes it clear that there is possible personal liability under state statutory law for those directing deceptive practices, even though the individuals implicated do not deal directly with the consumer.

This Article showed the origins of the Model Act with its common language and definitions that Utah, Kansas, and Ohio have adopted. This Article has shown how the three states that have adopted the model legislation have interpreted the term "supplier." And this Article has shown the contrast between a piercing of the veil claim and a supplier liability action under state laws that have adopted the model legislation.

There is a common application of state consumer sales practices acts regarding the definition of supplier. The definition in the acts is broad and has unique applications in each of the three states that have adopted the Model Act. Principals of businesses—including owners, and managers—can be personally liable for deceptive practices under the state acts. But this is not a piercing of the veil of an entity, it is statutory liability under the adopted acts. Moral hazard is

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103 *Id.* at 961.

104 *See generally* Wayne R. Dunham, *Moral Hazard and the Market for Used Automobiles*, 23 REV. OF INDUS. ORG. 65 (2003).

105 *Seinfeld: The Alternate Side* (NBC television broadcast Dec. 4, 1991) ("Yeah, you better give me the insurance, because I am gonna beat the hell out of this car.").

limited under the consumer sales practices acts and other state consumer protection legislation to effect balance to the good that limited liability entities offer.

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NOTES

RE-IMAGINING THE POST-9/11 AUTHORIZATIONS FOR USE OF MILITARY FORCE IN THE ERA EMERGING CONSENSUS ON REFORM

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CONTENTS

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INTRODUCTION

Representative Barbara Lee was not popular on September 14, 2001. In the days following one of the most stunning attacks on the United States, Representative Lee was the sole House or Senate member to vote against the Authorization for Use of Military Force ("2001 AUMF"). Lee voted against the 2001 AUMF because she felt it gave the president "the authority to wage war in perpetuity."[1] Recent history has proven Lee's point. Since the 2001 AUMF passed, presidents across four different administrations have cited the 2001 AUMF in reports on the use of force against purported enemies across the globe.[2] The 2001 AUMF alone has justified countless numbers of military operations, such as airstrikes, that are then vaguely reported to Congress, the branch tasked with declarations of war.[3]

Over the ensuing years, Lee's argument against the 2001 AUMF has gained significant traction. A bipartisan chorus of legislators has introduced and endorsed various measures over the years that limit, curb, or remove presidential authority following strings of military actions that have questionable legality under our Constitution and the international legal system. The calls for greater congressional control over military actions have come to include another AUMF that has yet to be terminated: the 2002 Authorization for Use of Military Force against Iraq ("2002 AUMF").

Domestically, the debate surrounding the AUMFs is primarily—although not exclusively—about war powers and the separation of powers in war and military decisions. Although these AUMFs were somewhat uncontroversial at the time, high-profile members of Congress have begun publicly pushing for their legislative branch to exert greater control over the president's ability to engage in unilateral military decisions, with little restraint, by imagining a post-AUMF world.[4] Undoubtedly the greatest threat to the AUMFs came in 2021: the full House approved a measure that would rescind the 2002 AUMF from force if signed into law. While greater congressional control over the weightiest of decisions finds deep support from the members of both chambers of Congress[5] and the current administration, no one argues that the threat to homeland security is any less potent. Members of Congress propose new measures to replace the AUMFs that would retain operational flexibility for the president to take actions necessary to defend the country but give Congress a seat at the table in reviewing and permitting such actions to continue. The most popular provisions put forward

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[1] Jeremy Herb & Deirdre Walsh, *House Panel Votes to Repeal War Authorization for Fight Against ISIS and al Qaeda*, CNN (June 29, 2017, 5:00 PM), https://www.cnn.com/2017/06/29/politics/house-panel-repeal-war-authorization-isis-al-qaeda/index.html [https://perma.cc/AJ9M-LAEM].

[2] Stephanie Savell, *The 2001 Authorization for Use of Military Force: A Comprehensive Look at Where and How it Has Been Used*, *in* WATSON INST. OF INT'L & PUB. AFFS.: COSTS OF WAR 3 (Brown Univ., 2021), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf [https://perma.cc/AL4V-3MLE].

[3] *Id.* at 7.

[4] Tim Kaine & Todd Young, Essay, *War, Diplomacy, and Congressional Involvement*, 58 HARV. J. LEGIS. 195, 207 (2021).

[5] S. J. Res. 10, 117th Cong., 1st Sess. (2021).

to require this are limitations on the duration and scope of the authorization of force.[6]

The growing support for reimagining a role for Congress in military decisions comes against the backdrop of violations of the use of force by others, most notably Russia in its invasion and sham annexation of parts of Ukraine. Often with the United States leading the pack, the international community has rightfully decried Russia's moves as violations of the use of force under international law. Russia's gross violation of international law underscores the fragility of the system[7]—a system that the United States has not always respected.[8] Absent a clear need for self-defense, the charter that founded the United Nations does not allow for the unilateral use of force.[9] Such actions, regardless of spin, are clear violations of international law in the eyes of experts.[10] Consequently, Congress has found the perfect environment to successfully reimagine how the United States engages in the use of force to bring its practices in line with the dictates of constitutional and international law.

This Note will argue that the post-9/11 AUMFs must be discarded and replaced with a reimagined AUMF(s). It takes for granted many of the suggestions offered by AUMF reform advocates but demands more, particularly surrounding US international law obligations. Future AUMFs will be legitimate only with robust and enforceable provisions honoring international law obligations. Too often, this part of the debate is missed; no longer. This Note hopes to illuminate—even to the most ardent AUMF reformers—that both the international and domestic situations should be considered when crafting reform.

Part I will describe the environment that led to the passage of the AUMFs, one which marks a struggle between the legislative and the executive branches of government. Part II will show how the AUMFs have been used (and abused) by each of the administrations that have followed their passage, while Part III will illustrate the congressional response to unilateral executive decisions on the scope of the AUMFs. The current political environment has led AUMF reform advocates to finally feel success within reach. Finally, Part IV will describe a way forward by offering three provisions that should be included in any future AUMF: respect for international law obligations, sunset provisions, and other scope-limiting provisions. Such authorization should be narrowly tailored in both scope and duration and include input from international law experts to see if it is possible to bring such provisions in line with the dictates of international obligations.

I. HISTORY OF "WAR POWERS" AND THE POST-9/11 AUMFS

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[6] Kaine & Young, *supra* note 4, at 212–14.

[7] John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELS. (Feb. 28, 2022, 2:25 PM), https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law [https://perma.cc/Y2YK-PLWP].

[8] *See generally* Mary Ellen O'Connell, *Forever Air Wars and the Lawful Purpose of Self-Defence*, 9 J. USE FORCE & INT'L L. 1, 16–22 (2022) (describing how actions of the Biden administration have violated international law).

[9] *Id.* at 2; *see also* U.N. Charter art. 2, ¶ 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or independence of any state").

[10] *Id.* at 2–3.

The post-9/11 AUMFs exist against a backdrop of both constitutional and previous legislative initiatives that necessarily precipitate the form and substance of the AUMFs. The Constitution, as with numerous other powers, divides what, for lack of a better term, will be called "war powers" between the two political branches of the federal government.[11] The Constitution "vests Congress with substantial authority . . . ,"[12] including the power to "declare [w]ar."[13] At the same time, the Constitution states that the "President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."[14] Such division has raised legitimate questions about the scope of each "respective role" played by either branch.

Indeed, it was the intense pressure instigated by decades–long involvement in the Vietnam War that drove Congress to flex its muscles and exert its power by targeting a key weakness. In drafting what became a joint resolution known as the War Powers Resolution,[15] Congress was determined not to repeat the mistakes of the Vietnam War, a war which raged out "for many years without a formal congressional declaration of war."[16] Following a veto–override vote, the resolution adopted the following edict: to govern and limit the president's authority to involve the armed forces in hostilities.

> The stated purpose of the resolution was to "fulfill the intent of the framers of the Constitution of the United States and [e]nsure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . is clearly indicated by the circumstances, and to the continued use of such force in hostilities or in such situations."[17]

President Nixon is but one of many presidents to resist the War Powers Resolution (WPR). Presidents across the political spectrum have proffered that the WPR is unconstitutional while further citing the practical "need for greater flexibility" in military affairs,[18] though this matter has never been addressed directly by the Court.[19] Consequently, presidents have routinely read the law narrowly and have often pushed the bounds of its edict.[20] Notwithstanding this reality, the WPR sought to provide a check on the "executive branch's power

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[11] GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 393 (5th ed. 2021).

[12] *Id.*

[13] U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power … [t]o declare War . . .").

[14] *Id.* at art. II, § 2, cl. 1.

[15] War Powers Resolution, H.R.J. Res. 542, 93d Cong. (1973) (enacted).

[16] MAGGS & SMITH, *supra* note 11, at 394 (quoting War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §1541(a)).

[17] *Id.*

[18] Letter from the Nixon Libr. Educ. & Pub. Programs Team to Educators (July 27, 2021) (on file with the Richard Nixon Presidential Library & Museum), https://www.nixonlibrary.gov/news/war-powers-resolution-1973 [https://perma.cc/7P8T-2K4N].

[19] MAGGS & SMITH, *supra* note 11, at 395.

[20] *Id.*

when committing US military forces to an armed conflict without the consent of the US Congress."[21] To that end, it "stipulates the president must notify Congress within [forty-eight] hours of military action and prohibits armed forces from remaining for more than [sixty] days," if Congress fails to approve the action.[22] Congressional officials continue to strongly support the WPR as most feel it properly rebalances the power sharing of wartime powers envisioned in the Constitution.[23]

As a consequence of the WPR's continued validity, presidents have submitted "over 132 reports to Congress" pertaining to the uses of force.[24] However, there are numerous high-profile instances of presidential non-compliance with the notification and withdrawal requirements.[25] Although the successive years include much worth discussing, for the purposes of this Note, it is necessary to jump forward in time, to just after the turn of the century, to address the war-making powers and the balance of power in the face of a novel threat.

The environment that precipitated the 2001 and 2002 AUMFs was one of uncertainty and legitimate terror. The 2001 AUMF was introduced into Congress just three days after "the United States had endured [the] unimaginable tragedy" that was 9/11, when hijackings in three separate areas showed that the United States was under attack on its home turf.[26] Thousands of families directly impacted by the tragedy were just beginning to grieve, and the nation was in shock. Little was known about the belligerents, but it was clear that an unprecedented attack was executed by a newly emergent type of enemy: non-state terrorists.[27] Unlike previous conflicts, "the enemy in [this instance] is not associated with any particular nation-state and for all practical purposes the identity of the enemy remain[ed] undetermined."[28] A new tactical approach was necessary, one responsive to a "battlefield [that] lacks a precise geographic location and arguably

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[21] Nixon Libr. Educ. & Pub. Programs Team, *supra* note 18.

[22] *Id.*

[23] Kaine & Young, *supra* note 4, at 197 ("Congress asserted its constitutional responsibilities and institutional duties in war powers matters by enacting the War Powers Resolution over President Nixon's veto in 1973. Congress's intent to restore the constitutional balance of war-making powers is clear in the Act's Purpose and Policy section . . . .") (citing War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §1541(a)).).

[24] Nixon Libr. Educ. & Pub. Programs Team, *supra* note 18.

[25] *Id.* ("Challenges to the resolution include Ronald Reagan's deployment of troops to El Salvador in 1981, the continued bombing of Kosovo during Bill Clinton's administration in 1999, and military action initiated against Libya by Barack Obama in 2011.").

[26] Specifically referencing the attacks on "the World Trade Center, the Pentagon, and in a field near Shanksville, Penn[sylvania]." Barbara Lee, *Op-Ed: Three Days After 9/11, I Was the Lone Vote in Congress Against War*, L.A. TIMES (Sept. 13, 2021, 3:00 AM), https://www.latimes.com/opinion/story/2021-09-13/barbara-lee-aumf-afghanistan-war-vote-2001 [https://perma.cc/L3HK-P6F6].

[27] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2048–49 (2005) ("[t]he traditional concept of 'enemy alien' is inapplicable in this conflict; instead of being affiliated with particular states that are at war with the United States, terrorist enemies are predominantly citizens and residents of friendly states or even the United States.").

[28] Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons from the Vietnam War*, 53 WAYNE L. REV. 943, 951 (2007).

includes the United States."[29] Former president Bush, realizing this, famously announced to a cheering crowd of first responders struggling to hear him, "I can hear you! I can hear you! The rest of the world hears you! And the people—and the people who knocked these buildings down will hear all of us soon!"[30] Congressional officials heeded the president's calls and were unanimous in believing that some type of "military response to the 9/11 terrorist attacks" was necessary.[31] There was one dissenting voice. Rep. Barbara Lee decided to vote against the 2001 AUMF due to "concern[] [that] Congress was rushing to put its stamp of approval on a war without a clear strategy or endgame."[32] Still, Lee described the vote as "the most difficult vote [she] cast in [her] career."[33] But Lee's position was an extreme outlier during the AUMF debate. That position would also cause her to face severe threats of physical violence.[34] By September 18, 2001, exactly one week after the egregious attacks, Bush signed into law the 2001 AUMF, which passed with a vote of 420-1 in the House of Representative and a unanimous 98-0 in the Senate days earlier.[35]

The 2001 AUMF authorized the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[36] It is worth dwelling on these twenty-eight words for a moment. Critically, the 2001 AUMF provides the president with the awesome power of deciding which "'nations, organizations, or persons' satisfy the September 11 nexus requirement."[37] Importantly, the 2001 AUMF has been justifiably criticized for its expansive breadth; "[t]he law provides no expiration date, geographic limit, or process by which Congress may review the [p]resident's determinations."[38] The 2001 AUMF operates under the presumption that "once [the] war is authorized," the war–making powers recede from Congress and "rests essentially in the hands of the [p]resident."[39] The AUMF, still in effect,

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[29] Bradley & Goldsmith, *supra* note 27, at 2049.

[30] George W. Bush, Bullhorn Address to Ground Zero Rescue Workers (Sept. 14, 2001), *in* AM. RHETORIC, https://www.americanrhetoric.com/speeches/gwbush911groundzerobullhorn.htm [https://perma.cc/SS48-3DBQ].

[31] This is extrapolated from the first-hand account of the sole member of Congress to vote against the 2001 Authorization for the Use of Military Force. Since the AUMF authorized the use of force, Representative Lee's statements make Congress's view on the use of force unanimous. Austin Wright, *How Barbara Lee Became an Army of One*, POLITICO (July 30, 2017), https://www.politico.com/magazine/story/2017/07/30/how-barbara-lee-became-an-army-of-one-215434/ [https://perma.cc/4K59-87CY] (detailing an account of Barbara Lee where she stated that "there needed to be some military response to the 9/11 terrorist attacks").

[32] *Id.*

[33] Lee, *supra* note 26.

[34] Wright, *supra* note 31 (explaining that after voting against the 2001 AUMF, Representative Lee "receiv[ed] death threats" which resulted in a determination by the Capitol Police that she needed a "24-hour security detail" to "accompan[y] her everywhere").

[35] 147 CONG. REC. 17,156 (2001); 147 CONG. REC. 17,045 (2001); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[36] Minda, *supra* note 28, at 953 (quoting Authorization for Use of Military Force).

[37] *Id.* at 954 (emphasis omitted).

[38] Kaine & Young, *supra* note 4, at 198.

[39] Minda, *supra* note 28, at 948.

precipitated a decades-long armed conflict in Afghanistan in pursuit of the terrorist units that perpetuated 9/11. Simultaneously, it also served as the basis for justifying attacks far beyond those borders (and that enemy).[40]

The 2002 AUMF differs from its predecessor in many notable ways. First, the 2002 AUMF faced considerably more backlash and was enacted after a bitter debate and divided opinion both in Congress and country. The basis for the 2002 AUMF fell within the broad bounds of Bush's "War on Terror," but unlike the 2001 AUMF, the 2002 AUMF focuses on a nation–state, Iraq. At the time, government officials believed that Iraq's then leader, Saddam Hussein, had weapons of mass destruction.[41] Opponents of the 2002 AUMF questioned the threat level and "bristled at President George W. Bush's broad request."[42] The Bush administration argued that the intelligence of Iraqi possession of weapons of mass destruction was indisputable. In reality, the record showed a "divergent intelligence assessment[]" on the matter.[43] Bush lobbied hard for congressional authorization and, along the way, found enough bipartisan support in both chambers to pass the 2002 AUMF.[44] Former Senator Chuck Hagel described the mood in the country as the Iraq authorization debate raged:

> This country was really off balance and petrified and looking to the president to protect them[.] Members of Congress couldn't get too far out politically to push back on the president, to say, 'Well, I'm not sure that's that important, I'm not sure he has weapons of mass destruction.'[45]

With the widespread belief among elected officials that the president should not be "neuter[ed]"[46] when conducting the foreign policy duties of the office, the 2002 AUMF passed both houses of Congress and was signed into law on October 16, 2002.[47] In the end, 77 senators and 296 House representatives voted for the 2002 AUMF.[48] Soon after, American bombs began dropping on Iraq. Certain members described their decision to vote for the 2002 AUMF based on "Mr. Bush's reassurances of a diplomacy–first approach."[49] In fact, future President Biden, the senior senator from Delaware at the time, stated that he intended to vote for the 2002 AUMF because he "[did] not believe this [was] a

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40 Savell, *supra* note 2, at 4–5.

41 Katie Glueck & Thomas Kaplan, *Joe Biden's Vote for War*, N.Y. TIMES (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/us/politics/joe-biden-iraq-war.html [https://perma.cc/S6CV-49ZQ].

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, § 3, 116 Stat. 1498 (2002).

48 148 CONG. REC. 20,490 (2002); 147 CONG. REC. 20,276–77 (2002); *see also* Glueck & Kaplan, *supra* note 41.

49 Glueck & Kaplan, *supra* note 41.

rush to war."[50] Senator Biden continued on to state that his vote and the 2002 AUMF reflected "a march to peace and security."[51] Biden would later publicly regret his decision to rely on those assurances.[52] In reality, the 2002 AUMF:

> [E]mpowers the [p]resident to use (1) "the Armed Forces of the United States," (2) "as he determines to be necessary and appropriate," (3) without express restriction on targets, but implicitly directed at Iraq, (4) for the purpose of "defend[ing] the national security of the United States against the continuing threat posed by Iraq; and . . . enforc[ing] all relevant United Nations Security Council Resolutions regarding Iraq," and (5) with two procedural conditions: (a) the [p]resident must determine that diplomatic or peaceful means will not achieve these purposes, and that action against Iraq is consistent with the war against those responsible for the September 11 attacks; and (b) the [p]resident must report to Congress concerning the authorization every sixty days.[53]

Importantly, the 2002 AUMF, unlike the 2001 AUMF, is limited in geographic scope but "purports to give the president unlimited authority to wage war against Iraq, once [they] determine[] that war is necessary to defend the national security interests of the United States."[54] Although arguably, it is the "legislative authority allowing the president to initiate a first strike, military attack and invasion of Iraq" that provides the greatest sweep of power to the executive branch.[55] The 2002 AUMF also mentions "enforc[ing] all relevant United Nations Security Council Resolutions," which is notably absent from the 2001 AUMF.[56] The relevancy of such provision is understandably questionable given that the 2002 AUMF was authorized before the United Nations decided on the authorization for use of force. In the end, the UN vote was against authorizing such use of force.[57] Conversely, like the 2001 AUMF, the 2002 AUMF remains in force and has been relied on for the use of military force by the executive branch without congressional approval beyond Iraq's territorial borders.[58] Moreover, the 2002 AUMF is similar to the 2001 AUMF in that it includes no expiration date

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50 *Id.*

51 *Id.*

52 *Id.* (quoting Mr. Biden on NBC's "Meet the Press" in 2005, "It was a mistake to assume the president would use the authority we gave him properly.").

53 Bradley & Goldsmith, *supra* note 27, at 2076 (quoting Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501 (2002)).

54 Minda, *supra* note 28, at 957.

55 *Id.* at 956.

56 *Id.*

57 *Id.* at 958–59.

58 Kaine & Young, *supra* note 4, at 206 ("The Soleimani strike represented an escalation of the AUMF creep, for President Trump was no longer using the 2002 AUMF as duplicative of the 2001 AUMF authority to justify action solely against terrorist groups; he was using it to justify killing a general of a sovereign state other than Iraq.").

or any means for congressional review of military decisions made by the president.[59]

II. USE AND ABUSE OF THE POST-9/11 AUMFS

As mentioned, both post-9/11 AUMFs remain in force and have been relied on by successive presidents of both parties to justify the use of force around the globe.[60] The AUMFs, in many ways, have taken on a life of their own. Each commander-in-chief following the passage of the post-9/11 AUMFs has utilized them to justify the use of force in a "growing number of countries to fight a growing number of militant groups."[61] Over time, presidential administrations began to view the AUMFs as invitations to combat not just those connected with the 9/11 attacks and the Iraqi state, but any perceived terrorism "in general."[62] Under the Obama administration, the post-9/11 AUMFs were used to justify drone strikes and other cyber operations in areas "outside of active hostilities, such as Somalia, Yemen, and Syria."[63]

Of the pair, the 2001 AUMF is more often used (and abused) by presidential administrations to justify unilateral executive decisions to use force, mainly because of the breadth of the 2001 AUMF. The 2002 AUMF is "seemingly less prone to misuse" due to the Iraq nexus.[64] Unsurprisingly, subsequent presidential administrations have used the 2001 AUMF to justify the use of force in countries ranging from Djibouti to the Philippines.[65] Neither offensive had any basis nor discernable connection with the initial purpose behind the post-9/11 AUMFs. In the case of Djibouti, multiple administrations cited the 2001 AUMF as the basis for permitting the president to "[c]oordinate [counterterrorism] operations in Horn of Africa and the Arabian Peninsula."[66] A similar justification was offered for involvement in the Philippines and nearly a dozen other instances.[67] A study conducted by the Watson Institute at Brown University found that, between 2018 and 2020, the 2001 AUMF was used to justify "counterterrorism trainings" in seventy-nine countries, "US trips in combat or potential combat via surrogates" in twelve, and "air & drone strikes" in seven.[68]

Successive presidential administrations have also interpreted the post-9/11 AUMFs to justify attacks against terrorist networks and combatants that

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59 *Id.* at 199.

60 Savell, *supra* note 2, at 1–3.

61 *Id.* at 3.

62 Amy Byrne, Note, *A Dangerous Custom: Reining in the Use of Signature Strikes Outside Recognized Conflicts*, 86 GEO. WASH. L. REV. 620, 635 (2018).

63 Emmie Phillips, *Afghanistan on a Global Stage: The End of Armed Conflict and Congress's Constitutional Powers*, 53 LOY. U. CHI. L.J. 817, 833 (2022).

64 Kaine & Young, *supra* note 4, at 198–99.

65 Savell, *supra* note 2, at 4–6.

66 *Id.* at 4.

67 *Id.* at 4–6.

68 Stephanie Savell, *United States Counterterrorism Operations: 2018–2020*, *in* 2020 WATSON INST. OF INT'L & PUB. AFFS.: COSTS OF WAR (Brown Univ. 2021), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/US%20Counterterrorism%20Operations%202018-2020%2C%20Costs%20of%20War.pdf [https://perma.cc/44FS-YRPU].

were nonexistent at the time of authorization. Here, too, critics claim that the laws have been "stretched beyond recognition."[69] President Obama used the post-9/11 AUMFs to justify attacks and other military operations against the Islamic State (ISIS), even though ISIS did not exist when the AUMFs were initially drafted.[70] When then Secretary of Defense Chuck Hagel was asked by the Senate Armed Services Committee what specific statutory authorization existed for the president to decide to combat the newly formed ISIS network unilaterally, Hagel "cited the 2001 AUMF and 'probably' the 2002 AUMF" as support.[71] Obama and his successors followed Hagel's lead by continuing to cite the post-9/11 AUMFs as legitimizing the use of force against ISIS even though the main target of the 2001 AUMF was undoubtedly not ISIS. The already "attenuated connection[]" between ISIS and al-Qaeda became all the more diffused when, "in February of 2014, al-Qaeda declared that it was no longer affiliated with or related to ISIS."[72]

The most egregious invocation of the post-9/11 AUMFs came from the Trump administration in early 2020 following the successful assassination of Iranian major general Qasem Soleimani in Baghdad, Iraq.[73] When compelled to expand on the justification for an attack on an Iranian national without advanced support or consent from either Congress or our Iraqi counterparts, the Office of Legal Counsel relied on the 2002 AUMF, which authorizes the president "to use the Armed Forces . . . to . . . defend the national security of the United States against the continuing threat posed by Iraq."[74] Trump administration officials justified the attack by stating that the 2002 AUMF "has long been read, in accordance with its express goals, to authorize the use of force . . . [against] terrorist threats emanating from Iraq."[75] Moreover, the justification continued that the 2002 AUMF covered the assassination of Soleimani on Iraqi soil because "[s]uch use of force need not address threats emanating from only the Iraqi government, but may address threats also posed by militias."[76] The perceived militia threat was Iranian Hezbollah, who were "alleged to have launched a rocket, killing an American on Iraqi soil."[77] True, Soleimani was in Iraq at the time of the offensive, but as a well-known Iranian official, it is hard to see a natural connection

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69 Stephen M. Walt, *How Biden Benefits from Limiting His Own War Powers*, FOREIGN POL'Y (Mar. 11, 2021, 3:51 PM), https://foreignpolicy.com/2021/03/11/biden-aumf-limit-war-powers/ [https://perma.cc/2Z32-VJPD].

70 William W. Taub, Note, *Al Hela's Deathly Silence: The Decline of International Law's Role in Interpreting the 2001 AUMF*, 60 COLUM. J. TRANSNAT'L L. 560, 575 (2022).

71 Kaine & Young, *supra* note 4, at 201.

72 Byrne, *supra* note 62, at 640–41.

73 Phillips, *supra* note 63, at 833.

74 Fallon A. Voltolina, *Understanding Self-Imposed Limitations on the Executive as Meaningful Restrictions on Authorizations for the Use of Military Force (AUMFs)*, 83 LA. L. REV. 449, 451 (2022) (quoting Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002)).

75 *Id.* at 463 (quoting Memorandum from Steven A. Engel, Assistant Attorney General, to John A. Eisenberg, Legal Advisor to the National Security Council (Mar. 10, 2020) (on file with The United States Department of Justice), https://www.justice.gov/olc/opinions-main [https://perma.cc/D2WA-HA2N]).

76 *Id.*

77 Phillips, *supra* note 63, at 834.

between the plain text of the 2002 AUMF and the offensive ordered to take Soleimani's life. The Trump administration, when pressed further, defended the attack against Soleimani as one necessary for "deterring future Iranian attack plans."[78]

While Soleimani's demise did not disturb many Americans, the highly suspect and extremely attenuated justification under the 2002 AUMF did produce considerable consternation within the halls of Congress.[79] Senators Tim Kaine and Todd Young led a chorus of congressional pushback on the justification offered by the Trump administration. Both senators found the use of the 2002 AUMF to justify the assassination of Soleimani to be "completely misplaced."[80]

III. CONGRESSIONAL RESPONSE

The expansive interpretation of the post-9/11 AUMFs and congressional failure to meaningfully respond in kind has led many, including William W. Taub, to ask if the unilateral interpretations to justify attacks around the globe will ever end:

> The past three presidential administrations have invoked the AUMF in contexts beyond what a reader of its plain text could ever have envisioned. Further, the conflict it authorizes has gone on far longer than any war in our history, begging the question: When will it *really* end?[81]

As successive presidential administrations have illustrated, the plain text of the post-9/11 AUMFs is not enough to limit expansive interpretations of the power they vest in the Commander-in-Chief. The alarming result of the expansive reading of the AUMFs, divorced from the plain text, has given "the President the sole authority to interpret and execute [the] AUMFs in any way that he deems fit."[82]

Kaine and Young echo this critique and argue that such an argument "defies common sense and the plain meaning of any AUMF."[83] In their view, Congress did not intend to "rubber-stamp non-defensive engagements" around

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[78] O'Connell, *supra* note 8, at 14–15 (quoting Shawn Snow, et al., *Fears of New Conflict Rise After US Kills Qasem Soleimani, a Top Iranian General, in Strike on Baghdad Airport*, MIL. TIMES (Jan. 2, 2020), https://www.militarytimes.com/news/your-military/2020/01/03/iraq-rockets-fired-at-baghdad-airport-7-people-killed/#:~:text=One%20of%20Iran's%20most,conflict%20spreading%20across%20the%20region [https://perma.cc/H48W-96TH]).

[79] Kaine & Young, *supra* note 4, at 206 ("These episodes—airstrikes against ISIS, the combat deaths of US service members in Niger, and the assassination of Soleimani—represent extensive military engagement by the Executive Branch, yet at no point did congressional opposition result in a cessation of operations under the [War Powers Resolution], suggesting the [War Powers Resolution's] failure to achieve its stated goals.").

[80] *Id.*

[81] Taub, *supra* note 70, at 563.

[82] Voltolina, *supra* note 74, at 461.

[83] Kaine & Young, *supra* note 4, at 205.

the world when it passed the AUMFs.[84] Kaine and Young point to the administration statements made by the Obama administration's Department of Defense General Counsel Stephen Preston for further proof of what they call "expansions of unilateral executive war-making claims."[85] When questioned by Senator Bob Corker about the limits of AUMFs authority, Mr. Preston was hard-pressed to discern any:

> SENATOR CORKER: Are there groups today that the administration cannot go against because the AUMF does not allow you to do that? Terrorist groups.
>
> MR. PRESTON: Senator Corker, I am not aware of any foreign terrorist group that presents a threat of violent attack on this country that the president lacks authority to use military force to defend against, as necessary, simply because they have not been determined to be an associated force within the AUMF.[86]

Mr. Preston's view, from the perspective of an executive official, is far from unique. His view of the executive branch's war-making power being expansively possessed and nearly limitless permeates the executive of all post-9/11 administrations.[87] And this broad interpretation of the AUMFs' scope has had real–world implications. In the opinion of Kaine and Young, the Trump administration's highly attenuated reliance on the 2002 AUMF for justification for the Soleimani attack is an "extension of the Bush, Obama, and Trump administrations' successive expansions of unilateral executive war-making claims."[88] The still valid AUMFs have "undergirded US military operations in the Middle East for the better part of the last [thirty] years, giving presidents wide and mostly unchallenged legal authority to put boots on the ground, conduct airstrikes and more."[89] But is *"never"* the answer to Taub's question; will the use and abuse of the post-9/11 AUMFs never end?

A. Emerging Consensus Around Reform

Rep. Barbara Lee was always critical of the AUMFs. For that stance, she faced considerable pressure and bore the weight alone. Now, her position is supported by a cacophony of her colleagues, stretching across the political spectrum:[90]

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[84] *Id.*

[85] *Id.* at 206.

[86] *Id.* at 199 (quoting *Authorization for Use of Military Force after Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Rels.*, 113th Cong. 17–18 (2014) (statement of Stephen W. Preston, Gen. Couns., U.S. Dep't of Def.)).

[87] *See id.* at 205.

[88] *Id.* at 206.

[89] Andrew Desiderio, *Why Congress is Finally Starting to Claw Back its War Powers from the President*, POLITICO (July 7, 2021, 12:00 PM), https://www.politico.com/news/2021/07/07/congress-aumf-biden-498399 [https://perma.cc/8NDT-X89E].

[90] *Id.*

> For years, lawmakers who pushed to rein in presidential war powers were relegated to the fringes, and the idea was slammed as a fantasy of the progressive left. Today, as the nation grows weary of so-called forever wars, the concept has near–unanimous support in the Democratic Party and buy-in from a significant cohort of Republicans—giving Congress its best chance in a generation to re-assert its authority over matters of war and peace.[91]

While Congress had previously "taken no effective action to curb executive power" in the misuse of the AUMFs,[92] the expansive use of unilateral executive war-making claims is finally coming under considerable congressional scrutiny.[93] The current 118th Congress contains "bipartisan majorities in both chambers in support of 2002 AUMF repeal . . . ."[94] In fact, it was the 117th Congress, which entered *adjournment sine die* on January 3, 2023,[95] that first appeared to have significant support and possible movement on repeal of at least the 2002 AUMF.[96] Ardent advocates of AUMF repeal and broader reform fervently believe that had the 2002 AUMF repeal amendment received a vote in the Senate as a part of the broader omnibus National Defense Authorization Act (NDAA), passed in late December 2022, "it would have likely passed and resulted in the inclusion of identical 2002 AUMF repeal language in both the Senate and House versions of the NDAA . . . [due to the] strong bipartisan and bicameral support of the repeal of the 2002 AUMF . . . ."[97]

Possible overhaul of the AUMFs, especially the 2002 AUMF, by the Article I branch, felt within reach—it had the support of President Joe Biden.[98]

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91 *Id.*

92 Byrne, *supra* note 62, at 639.

93 *See* Desiderio, *supra* note 89.

94 Brian Finucane & Heather Brandon-Smith, *Missed Opportunities and Minor Progress: the FY 2023 National Defense Bill and War Powers*, JUST SEC. (Dec. 15, 2022), https://www.justsecurity.org/84463/missed-opportunities-and-minor-progress-the-fy-2023-national-defense-bill-and-war-powers/ [https://perma.cc/UW8U-EGPZ] ("When the 118th Congress begins, it will do so with bipartisan majorities in both chambers in support of 2002 AUMF repeal and a supportive White House.").

95 168 CONG. REC. H10,549 (daily ed. Jan. 3, 2023); 168 CONG. REC. S10,113 (daily ed. Jan. 3, 2023). "An adjournment that terminates an annual session of Congress. A '*sine die*' ('without day') adjournment sets no day for reconvening, so that Congress will not meet again until the first day of the next session. Under the Constitution, *adjournment sine die* (except when the next session is about to convene) requires the agreement of both chambers, accomplished through adoption of a concurrent resolution, which in current practice also authorizes leaders of either chamber to reconvene its session if circumstances warrant." *Glossary of Legislative Terms*, CONGRESS.GOV, https://www.congress.gov/help/legislative-glossary#glossary_adjournmentsinedie [https://perma.cc/5YWS-VFRU], (last visited Oct. 28, 2023).

96 Finucane & Brandon-Smith, *supra* note 94.

97 *Id.*

98 OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 256—REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002 (2021) ("The Administration supports the repeal of the 2002 AUMF, as the United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and repeal of the 2002 AUMF would likely have minimal impact on

As mentioned in the president's *Statement of Administration Policy*, the effort to repeal the 2002 AUMF has strong bipartisan support.[99] That strong bipartisan support was reflected in the US House vote to rescind the 2002 AUMF, which forty-nine Republicans joined all but one Democrat in supporting.[100] Notably, only eleven Republicans joined a 2020 effort to repeal the 2002 AUMF.[101] That number rose sharply to include forty-nine Republicans just a year later.[102]

In the Senate, a vote to repeal the 2002 AUMF was favorably reported out of the Senate Foreign Relations Committee by a 14-8 vote.[103] The repeal of the 2002 AUMF continues to maintain bipartisan support but still faced possible opposition from parts of the Republican caucus, who argue that repealing the AUMFs without a replacement may threaten national security. Indeed, that sentiment was reflected by Senate Minority Leader Mitch McConnell in a statement accusing House Democrats of trying to "rip out one of the key authorities underpinning" the country's ability to use force when needed by pushing for repeal of the 2002 AUMF. [104] But the general attitude towards the AUMFs, in current form, has soured considerably just within the past few years.

Significantly, the bill had the support of the powerful Senate Majority Leader Chuck Schumer, who, in a floor speech, promised to bring the bill to a full vote of the US Senate.[105] This, like many political promises was unkept. The senate version of the NDAA included no votes on amendments, the chosen vehicle intended for the 2002 AUMF repeal. Although the senate committee vote shows that Congress is "on the verge" of repealing the 2002 AUMF,[106] the Senate did not take final action to repeal the 2002 AUMF before the close of the 117th Congress.[107]

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current military operations. Furthermore, the president is committed to working with the Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework appropriate to ensure that we can continue to protect Americans from terrorist threats.").

99 *Id.* ("This bipartisan legislation would terminate the October 16, 2002, statutory authorization for the use of military force against Iraq.").

100 The final vote was 268-161. 167 CONG. REC. H2910 (daily ed. June 17, 2021); *see* H.R. 256, 117th Cong. (2021).

101 166 CONG. REC. H738 (daily ed. Jan. 30, 2020).

102 167 CONG. REC. H2910 (daily ed. June 17, 2021).

103 Scott R. Anderson, *How the 2002 Iraq AUMF Got to be So Dangerous, Part 1: History and Practice*, LAWFARE (Nov. 15, 2022, 12:24 PM), https://www.lawfareblog.com/how-2002-iraq-aumf-got-be-so-dangerous-part-1-history-and-practice [https://perma.cc/3H4N-EDZP].

104 Karoun Demirjian, *House Votes to Repeal 2002 Authorization for Military Force with Strong Bipartisan Support and a White House Endorsement*, WASH. POST (June 17, 2021, 4:07 PM), https://www.washingtonpost.com/national-security/aumf-repeal-congress/2021/06/17/1bd1ec70-cf76-11eb-a7f1-52b8870bef7c_story.html [https://perma.cc/RD82-W8HR]. *See also* Finucane & Brandon-Smith, *supra* note 89 ("However, in a repeat of last year's [National Defense Authorization Act] process, the Senate failed to hold votes on *any* individual amendments to the bill, leaving the Kaine-Young AUMF repeal amendment in the dust.").

105 Finucane & Brandon-Smith, *supra* note 94 ("Following the committee vote, Senate Majority Leader Chuck Schumer (D-NY) gave remarks on the Senate floor, saying 'I strongly and fully support repealing the 2002 authorization for the use of military force in Iraq' and pledging to hold a vote on the matter.").

106 Anderson, *supra* note 103.

107 Finucane & Brandon-Smith, *supra* note 94.

On March 29, 2023, early in the new 118th Congress, in a necessary, but largely symbolic, vote, the Senate voted in the affirmative to rescind approval of the 2002 AUMF.[108] The 66-30 vote was bipartisan:[109] eighteen Republican senators joined forty-eight Democrats to surpass the majority threshold.[110] This vote also proved strong ideological support for rewrite or repeal of the 2001 AUMF. Republican Senators Rand Paul and Mike Lee introduced amendments that mirrored much proposed by their colleagues Kaine and Young.[111] Still, these amendments were "overwhelmingly rejected" by the full Senate.[112] With divided control of Congress, the prospect of even a morsel of cooperation seems like a pipedream. Whether the new Republican Speaker of the House, Mike Johnson, is willing to divide his caucus on a vote to repeal the 2002 AUMF remains unknown. If past votes are prologue, such a move would result in significant opposition from within his own party.[113] Despite this, former Speaker McCarthy, when addressing a possible House vote on repealing the 2002 AUMF, acknowledged the bill "has a good chance of . . . getting through the committee and getting to the floor."[114] The House has—of yet—not acted on repeal in the 118th Congress: pressure for reform must persist despite the House's stonewalling. Such discussion of any AUMF repeal should necessarily include plans for a replacement. Although there is broad agreement that the 2002 AUMF is outdated and lacking in relevance, the 2001 AUMF is relied on to combat contemporary threats to US security.[115] Still, that does not, nor should it, invite successive presidential administrations to rely on a tenuous connection to prior congressional authorization of force. On this point, Kaine and Young elucidate the point well:

> In spite of our desire to revisit the 2001 AUMF, we do not want to deprive the President of the authority to defend our country, nor would we expect our congressional colleagues or President Biden to tolerate such a circumstance. We believe the 2001 AUMF should be repealed but only with the simultaneous passage of a replacement AUMF that reflects current threats, for it remains the only legal justification for certain military activities critical to our national defense.[116]

Such a replacement should work to curb executive abuse by honoring the principles of international law, including sunset provisions and other scope-limiting provisions.

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108 Barbara Sprunt & Susan Davis, *Senate Votes to Repeal Iraq War Authorization*, NPR (Mar. 29, 2023, 1:05 PM), https://www.npr.org/2023/03/29/1165581083/aumf-iraq-war-senate [https://perma.cc/8L8W-48NT].

109 *Id.*

110 *See* 169 CONG. REC. S1,007 (daily ed. Mar. 29, 2023).

111 Sprunt & Davis, *supra* note 108.

112 *Id.*

113 Finucane & Brendon-Smith, *supra* note 94.

114 Sprunt & Davis, *supra* note 108.

115 Kaine & Young, *supra* note 4, at 211.

116 *Id.*

IV. A NEW WAY FORWARD

AUMF reform should not proceed to "tie the hands of US operators overseas."[117] Rather, it is worth underscoring the intent behind AUMF reform:

> [I]s to limit the actions a single, powerful individual who can authorize the use of force outside of recognized theaters of war. Under section 2(a)(2), signature strikes in the conflicts in Iraq and Afghanistan are unambiguously permitted. Where the limitations work to prevent the use of augmented, and continually augmenting, executive authority is in regulating uses of force outside of those congressionally recognized conflicts.[118]

Against that backdrop, any AUMF reform worth supporting must further restrict the executive branch from exerting the current unilateral ability to expand its scope should limit abuse.

For AUMF reform to succeed, Congress must look to replace both the 2001 and 2002 AUMFs. As mentioned, repealing and replacing the 2001 AUMF requires an effective replacement authorization. Unlike the 2002 AUMF, the 2001 AUMF is continually relied on by US officials to repel real threats to the homeland.[119] Thus, AUMF reformers have smartly turned their attention to dismantling the 2002 AUMF, with hopes that future reforms will address the 2001 AUMF. Indeed, Kaine and Young consider repealing and replacing the 2001 AUMF a "[m]edium-[t]erm [g]oal."[120] Moreover, advocates rightly understand that whatever bipartisan support exists for AUMF reform of the 2002 authorization exists at the expense of keeping the 2001 AUMF, at least for now. Still, as presidents of both parties have used both AUMFs to abuse their authority, both must fall.

But reformers can and must be calculated in their approach. First, Congress must repeal the 2002 AUMF. It operates as a "zombie war authorization"[121] that has outlived its necessity. In its wake, Congress should pass a narrower AUMF that incorporates many of the proposals offered by Kaine and Young. With only the 2001 AUMF in effect, Congress should work through crafting an AUMF that would allow for a flexible US response to threats but also honors obligations to both domestic and international law. Hopefully, this reformed AUMF will be effective enough to allow members of Congress to consider discarding the 2001 AUMF as well. Only with a clean AUMF, free from the previous

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117 Byrne, *supra* note 62, at 652.

118 *Id.*

119 *See* Kaine & Young, *supra* note 4, at 211.

120 *Id.*

121 *Id.* at 209 (quoting Conor Friedersdorf, *Zombie Iraq War: Why Haven't We Repealed the Authorization to Fight There?*, ATLANTIC (May 29, 2013), https://www.theatlantic.com/politics/archive/2013/05/zombie-iraq-war-why-havent-we-repealed-the-authorization-to-fight-there/276315/ [https://perma.cc/B6QR-TUWB]).

pitfalls of the current AUMFs, will the United States truly honor its obligations when combating threats abroad.

If Congress takes the bold step to repeal the 2002 AUMF, a new AUMF should be introduced to cover potential weaknesses within our defense authorizations and work towards dismantling the 2001 AUMF. AUMF reformers have accurately outlined a series of proposals likely to curb executive abuse under the AUMF regime, including sunset provisions and other scope-limiting measures.

This Note suggests that these are strong (and necessary) provisions that will bring the US use of force abroad more in line with our domestic and international obligations. What the current congressional proposals fail to consider is another source of law that must be honored: international law codified by the United States. Although the United States is known for a "go it alone" approach, the United Nations Charter requires precipitating events before the use of force is permitted. The Charter, ratified by the Senate in 1945,[122] is considered binding law.[123] Despite the binding nature of this obligation, it is unlikely that international law tenets will find enough domestic support to be included in any reform AUMF. Fully aware of international law's limited support within the halls of Congress,[124] it is likely that such a provision is among the least likely to be included in a future AUMF. Nevertheless, true reformers must campaign for its inclusion.

This Note advocates for the inclusion of binding international law tenets within future AUMFs, in tandem with other provisions offered by the likes of Kaine and Young. This Note outlines three specific provisions that should be included in any future AUMF to prevent the abuse that has run rampant under the post-9/11 AUMFs. The provisions are offered in ascending order, both in that, the successive proposal is more feasible and critical for successful AUMF reform than its predecessor. First, any reform should honor international law principles. Although this is a necessary premise, alone, it may not be enough to satisfy congressional critics of the current system or prevent executive abuse. Therefore, second, allowing AUMF to sunset with reconsideration forced upon elected officials adds another layer of protection from executive abuse. Finally, any future AUMF must limit authorization to narrow geographic or group–specific criteria to prevent Commander–in–Chief abuse.

A. Honoring Principles of International Law

In the spirit of reform, it is incumbent on our elected officials to not only consider our perspective when reforming AUMFs to face continued threats to US security; the world is watching. And the United States has obligations to honor the international tenets it has adopted. The United States, as a member of the United Nations, has agreed to limits on the pre-emptive use of force. Article 51 of the UN Charter limits the permissible use of force to when "an armed attack

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[122] 91 CONG. REC. 8,190 (1945).

[123] U.N. Charter art. 2 ¶ 2, https://www.un.org/en/about-us/un-charter [https://perma.cc/BNR6-63HB] (last visited Oct. 28, 2023).

[124] *See* Frisbie & Qasim, *supra* note 138 and accompanying text.

occurs."[125] Article 51 allows the use of force in cases of self-defense in cases where a precipitating attack is lacking. Regardless, every post-9/11 president has relied on Article 51 to rationalize air and drone strikes across the globe.[126] Still, according to use–of–force expert Mary Ellen O'Connell, under no circumstances, does Article 51 permit the self-defense exception to permit US "air attacks outside armed conflict zones in Afghanistan, Iraq, Somalia, and Syria."[127] These airstrikes, O'Connell continues, are beyond the self-defense scope of Article 51 because such attacks are not supported by evidence of "halting and repelling armed attacks underway."[128]

Professor O'Connell is far from the only critic of the United States' invocation of Article 51 to rationalize near worldwide use of force under the auspice of "deterrence."[129] Around the world, strong majorities of US allies roundly opposed the Iraq War, which followed from the 2002 AUMF.[130] These concerns, from domestic experts and our allies, should inform measures that will eventually replace the current post-9/11 AUMFs.

The need to establish US credibility on the use of force reached an apex following Russia's illegal invasion of Ukraine. It is well-documented and widely accepted that Russia's invasion of Ukraine in February of 2022 violated Article 2(4) of the Charter, which prohibits the "use of force against the territorial integrity or political independence of any state."[131] And although pro-Putin voices are correct in noting previous violations of Article 2(4) of the Charter by critics of Putin's war, "instances where states have blatantly invaded other states have remained rare."[132] This has not stopped Russian President Vladimir Putin from decrying an international double standard as to the permissibility of the use of force. Putin believes there is one standard for the world and another for western democracies. In a meandering speech, delivered in late September of 2022, Putin cast western democracies as the true oppressors, saying that it was these countries that "trampled" on the principle of the "inviolability of borders," citing examples of colonialism, the slave trade, and the use of nuclear weapons by the United States

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125 O'Connell, *supra* note 8, at 2.

126 *Id.* at 6–9. Additionally, the only other meaningful exception to the ban on the use of force springs from United Nations Security Council sanctioning such use. *Id.*

127 *Id.* at 1–2.

128 *Id.* at 2.

129 *Id.* at 3.

130 *Many Europeans Oppose War in Iraq*, USA TODAY (May 20, 2005), https://usatoday30.usatoday.com/news/world/2003-02-14-eu-survey.htm [https://perma.cc/6P38-ZG2C] (finding 74% of Spanish nationals answered 'No' when asked "[a]re you in favor of military action against Iraq?"; other countries with a majority responding 'No' to the same question includes: France (60%), Luxembourg (59%), Portugal (53%), and Germany (50%)).

131 Milena Sterio, *The Russian Invasion of Ukraine: Violations of International Law*, JURIST (July 12, 2022, 8:45 AM), https://www.jurist.org/commentary/2022/07/milena-sterio-russia-war-crimes-ukraine/ [https://perma.cc/3U2T-JBD3] ("Moreover, the Russian invasion of Ukraine has been characterized by various international humanitarian law violations, such as the intentional targeting of civilian objectives, torture, rape and sexual violence. Russian actions may have given rise to several atrocity crimes, such as war crimes, crimes against humanity, genocide, and aggression. Russian leaders and soldiers, responsible for the commission of such crimes, should be held accountable and be prosecuted before a domestic, hybrid, or international tribunal.").

132 *Id.*

against Japan during World War II.[133] No rational actor should take international law advice from President Putin. Listening to voices of those such as O'Connell and our closest allies, however, is worthwhile.

Incorporating tenets that respect the scope of international law and the limits of the use of force agreed to by the United States will be a challenge. The primary obstacle facing its incorporation remains convincing political actors that the current course of action runs perilously close to an indefensible violation of Article 51. Take, for example, Harold Hongju Koh's view. As the former legal adviser at the United States Department of State under the Obama administration, Mr. Koh, in a 2010 address to the American Society of International Law, answered his own rhetorical question, one he rightly believed was on the minds of many:

> [L]et me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.[134]

Professor O'Connell disagrees: "[t]o be lawful, . . . the policies must fit the law, not the other way around."[135] O'Connell's view of the law is right—the Obama administration used the use of force in ways that did not fit the law.[136] The prevailing view of the Obama administration, followed by successive administrations, is perilously close to unjustifiable under the United States' commitment to international law. Even if those in power come to realize that US actions abroad have violated the UN Charter, it is altogether another battle to determine how to treat international law within AUMF reform. The boldest approach is also the simplest as it relies on law that already binds the United States. It is the soundest approach but also the most politically risky.

In pursuit of preventing flagrant abuse of the UN Charter, a replacement AUMF should not only acknowledge these obligations but also incorporate by reference such obligations as a United Nations member state. Any future AUMF should be clear that the United States has agreed that self-defense is a defense only when "an armed attack occurs."[137] Unfortunately, the likelihood of successfully including an incorporation by reference to the UN Charter remains slim. A likely reason for the dim odds for including international law within AUMF reform is

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[133] PTI, *Putin slams West and US for 'Double Standards'; Cites Plundering of India & Africa*, THE INDIAN EXPRESS (Oct. 1, 2022, 12:15 PM), https://indianexpress.com/article/world/putin-slams-west-us-double-standards-plundering-india-africa-8184061/ [https://perma.cc/7P39-AR3E].

[134] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 24, 2010) (transcript available at Diplomacy in Action, DEP'T OF STATE, https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc/PPC9-HC7M] (last visited Nov. 19, 2023)).

[135] O'Connell, *supra* note 8, at 10.

[136] *See id.* at 12–14.

[137] *See id.* at 2.

the lack of support for multilateralism and the actions of the United Nations within certain corners of the United States. Even though the United States was a founding member of the United Nations, less than half of Americans offered positive views on the institution. Within the Republican Party, that support stands at a mere thirty-six percent.[138] These polling numbers indicated to pollsters that "prevailing Republican sentiment suggests that a GOP–controlled Congress would pump the brakes on US reengagement with the United Nations."[139] Still, even with Republican resistance to further US engagement in multilateralism, the UN obligations remain. The United States must abide by and respect the tenets of the UN Charter, regardless of the rhetoric from certain ideological spheres.

With apathy for international law and the United Nations clear throughout the United States, incorporating the UN Charter by reference to further restrict the executive branch to align with international obligations seems farfetched. Critics may point to the inflexibility of waiting for an attack to occur before self-defense is sanctioned under the UN Charter as a reason to exclude it from future AUMFs. This reality should not deter advocates from honoring international law, in some way, within future AUMFs.

Alternatively, future AUMFs could honor principles of international law, codified in the UN Charter, while also allowing the United States to remain agile in defending the homeland by "employing a flexible approach."[140] A flexible approach could be:

> [D]raft[ed] around the rigidity of U.S. case law and . . . codify those aspects of international law that best reflect the messiness of the current conflict. For example, an authorization for conflict can condition authority on the continued existence of the factual war, with reference specifically to the *Tadić* Tribunal's characterization of a[] [non-international armed conflict] as reflecting a certain level of organization and a minimum level of intensity in the relevant hostilities.[141]

Under the *Tadić* framework, developed by the International Criminal Tribunal for the former Yugoslavia, the United States would have latitude to combat non-state actors in non-international armed conflicts if they have a "certain level

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[138] Sonnet Frisbie & Aleezah Qasim, *Despite the Body's Global Popularity, Republicans' Views of the United Nations Will Constrain US Engagement*, MORNING CONSULT (Sept. 20, 2022, 5:00 AM), https://morningconsult.com/2022/09/20/united-states-united-nations-engagement-outlook/ [https://perma.cc/7QSS-A4G8].

[139] *Id.*

[140] Taub, *supra* note 70, at 602.

[141] *Id. See also id.* at 569 ("Defining exact standards for both of these prongs has proven elusive, but attempts have been made by international tribunals and the drafters of the Rome Statute. International tribunals have considered a variety of factors in determining the level of organization, including the existence of a command structure, military and logistical capacity, a disciplinary system, and the ability for a group to speak with one voice. Factors considered in determining the intensity of hostilities include the quantity and quality of troops and weapons deployed, the types of actions, the effects on the civilian population, and whether external actors are involved.").

of organization" and "a minimum level of intensity in the relevant hostilities."[142] Non-international armed conflicts, or "NIACs," are defined as "[a]rmed conflicts not of an international character occurring in the territory of [a member's country]."[143] Conflicts that precipitated from the 2001 AUMF—think al-Qaeda or ISIS—have been widely classified as NIACs by various entities, including the US government.[144] *Tadić*, at least in theory, allows countries to engage more proactively to combat NIACs as opposed to the more measured response required when a threat comes from a peer sovereign.[145]

As most threats to the US homeland that have compelled AUMF invocation have arisen from NIACs, the flexible approach would both assuage the concerns of international law skeptics and bring the United States more in line with its international law obligations. The post-9/11 era ushered in a new age and new enemy: NIACs, and NIACs rapidly became the greatest threat to the US homeland. Thus, a future AUMF that incorporated the *Tadić* standard for engaging, while not fully fleshed out, provides more vigorous justification that the United States honors its international law obligations because the formulation came from an international tribunal applying international law.[146] Although not as powerful as an invocation of international law as incorporating the UN Charter by reference, incorporating the *Tadić* framework to combat NIACs will provide stronger footing for the United States to claim that international law must be respected truly.

A wise adage once said, "knowing is half the battle"; clearly, much work must be done to convince those in power that the current path feeds into our enemies' plan and weakens our legitimacy on the world stage. As our allies and enemies alike often have a higher regard for the United Nations and multilateralism, the eyes of the world are on the United States to see how it will treat international law.[147] In order to honor international law, US politicians must keep in mind our binding international commitments in pursuit of a healthier and more durable approach to US security. Although there is unlikely to be an appetite for full inclusion of US obligations under the United Nations in future AUMFs, some adherence to international law principles, such as adopting a view of the use of force as elucidated by the *Tadić* court, may be more appealing while remaining faithful to international law. Honoring international law will be difficult for our members of Congress, but the UN Charter is our law. It must be respected. In addition to the necessary international law considerations, any congressional reform to the current AUMF structure should consider limiting the duration of the authorization—commonly satisfied by a sunset provision.

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142 *Id.* at 569.

143 *Id.* at 568 (quoting INT'L. COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUG. 1949, Common Art. 3 (2001)).

144 *Id.* at 571.

145 *See id.* at 568–69.

146 *See id.*

147 Frisbie & Qasim, *supra* note 138 (finding that "[m]ajorities of adults in [twenty-seven] of [forty-three] countries where Morning Consult conducts daily surveys expressed favorable views of the United Nations").

B. Sunset Provisions

A more widely accepted replacement for future use of force authorizations are sunset provisions. Sunset provisions provide a mechanism for a congressional check on a president's use of force by "includ[ing] a date on which the authorization is terminated unless reauthorized by Congress."[148] In theory (and hopefully in practice), a sunset provision would provide "an expiration date after which a president could no longer use the law to justify military action."[149] Indeed, one need not look further for proof of significant support for sunset provisions in new AUMFs than Congress itself. A cursory look at past practice reveals that sunset provisions were included in "roughly one-third of past AUMFs and declarations of war."[150] Moreover, high–ranking executive branch officials from both parties have endorsed the use of sunset provisions.[151]

Fierce AUMF reform advocates, including Lee, Kaine, and Young, have all advocated for the use of sunset provisions to avoid sending a blank check to the president on matters of use of force.[152] Lee, for her part, introduced a provision that would endorse sunset provisions, to the House Appropriations Committee during the summer of 2021. The provision stated that:

> (1) the inclusion of a sunset provision or reauthorization requirement in authorizations for use of military force is critical to ensuring Congress's exercise of its constitutional duty to declare war; and
>
> (2) any joint resolution enacted to authorize the introduction of United States forces into hostilities or into situations where there is a serious risk of hostilities should include a sunset provision setting forth a date certain for the termination of the authorization for the use of such forces absent the enactment of a subsequent specific statutory authorization for such use of the United States forces.[153]

Lee's provision is a common-sense response to the executive branch's overreach in a decision that was for Congress to make and for the executive branch

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148 Tess Bridgeman, *In Support of Sunsets: Easy Yes Votes on AUMF Reform*, JUST SEC. (July 13, 2022), https://www.justsecurity.org/82312/in-support-of-sunsets-easy-yes-votes-on-aumf-reform/ [https://perma.cc/F449-FYV3].

149 Kaine & Young, *supra* note 4, at 212.

150 Bridgeman, *supra* note 148.

151 *Id.* (former CIA and Department of Defense General Counsel Stephen Preston advocated that a sunset provision shows "the United States is 'committed to the fight' and 'committed to our democratic institutions'").

152 Kaine & Young, *supra* note 4, at 212 (explaining that any AUMF replacement "should include a sunset provision"). Lee offered an amendment to the Fiscal Year 2022 Defense spending bill that includes "[s]unsetting the 2001 AUMF." Press release, Barbara Lee, Rep. for the 12th Dist. of Cal., House of Reps., Congresswoman Barbara Lee's Amendments to Stop Endless Wars Adopted by House Appropriations Committee (July 13, 2021), https://lee.house.gov/news/press-releases/congresswoman-barbara-lees-amendments-to-stop-endless-wars-adopted-by-house-appropriations-committee [https://perma.cc/QS5J-MU2K].

153 Bridgeman, *supra* note 148.

to *execute*. The benefits of sunset provisions are multifaceted. First, these provisions allow members of Congress to "review periodically how the mission has evolved since initial passage . . . ."[154] This mandatory review allows the legislative branch to re-exert its control over declarations of defense operations, bringing the use of force more in line with the Constitution's requirements. Furthermore, the legislative control over the use of force authorizations through sunset provisions also allows Congress to assess "how the current administration is using the AUMF."[155] Under the current AUMF regime, Congress has few options—other than repealing the AUMFs—to prevent a new administration from stretching the authorization well beyond what Congress intended. Sunset provisions allow Congress to recalibrate the authorization based on new information from the field and assess how much latitude should be given to the current administration based on its use (or misuse) of the "sunset" AUMF.

Still, there are multiple arguments presented against sunset provisions. While sunset provisions would allow Congress to re-exert its duty to determine whether US forces or weaponry will be used abroad, many members of Congress would rather not make those decisions. One possible reason that sunset provisions have been missing from the post-9/11 AUMFs and the debate surrounding them falls on congressional willingness (even eagerness) to "pass[] the buck" to the executive branch.[156] Congress has been ambivalent about getting involved in the granular details of the use of force and has all but "thus allowed the [p]resident to decide the important question of war and peace."[157]

Another common objection to sunset provisions follows that they may result in Congress "prematurely disengag[ing with the enemy] for the sake of brevity."[158] Instead, the proper view, offered by Kaine and Young, interprets such provisions to allow Congress "to debate whether continued engagement is in the public interest and, if so, to consider amending the authorization to meet current demands."[159] Indeed, sunset provisions allow Congress to exert its constitutional duty to authorize the use of force and allow all parties to adapt the law. It is also possible that "requiring a new vote for new authorizations every so often"[160] would curb the executive branch from stretching the authorization when it knows Congress can and must revisit it periodically.

Although requiring congressional action on any measure is indeed a risky bet, Kaine and Young's explanation that such fear is misplaced remains persuasive. Although these sentiments may be valid, the Constitution requires that members of Congress exert control over the use of force. If certain members are unwilling to fulfill this duty, Congress may not be for them.[161] Kaine and Young have

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154 Kaine & Young, *supra* note 4, at 212.

155 *Id.*

156 Minda, *supra* note 28, at 960.

157 *Id.*

158 Kaine & Young, *supra* note 4, at 212.

159 *Id.*

160 Taub, *supra* note 70, at 596.

161 These individuals would likely be welcomed with open arms by the lobbying industry, which often hires former members of Congress. *Former Members*, OPEN SECRETS, https://www.opensecrets.org/revolving/top.php?display=Z [https://perma.cc/QYT3-5EUC] (last visited

assured critics worried about the cumbersome procedure, and the political gridlock that "[a]s Congress has done with other national security legislation, a sunset provision would be coupled with expedited legislative procedures for passing a bill to renew the AUMF in the House of Representatives and, more importantly, because of the filibuster, the Senate."[162]

Rational, time–limited authorizations not only allow for greater congressional control over the executive branch but also allow elected officials to recalibrate when faced with a novel threat. Many enemies that threaten US and world security "did not exist at the time of [the post-9/11 AUMFs] enactment and about which Congress never deliberated."[163] Therefore, sunset provisions allow Congress to absorb new information and tailor any new plan to combat emerging threats. While sunset provisions would be a welcomed inclusion in any reform AUMF, there are other scope–limiting measures, such as geographic and group–specific controls, that Congress should also consider when drafting future reform AUMFs.

C. Geographic and Other Scope-Limiting Options

Arguably, the most important restriction that Congress could place on the executive in any future reform AUMF is limitations on where force is permissible and who can be targeted. When discussing where force is permissible, AUMF reform advocates rightfully point to geographic limitations as a natural method to limiting the executive ability to expand the scope of any future AUMF. Simply, geographic limitations would permit the executive branch to use force only in areas pre-authorized and agreed to by both the legislative and executive branches. Kaine and Young proposed that replacement AUMFs could be based, as they say, on a variety of geographic limitations—varying from "strict" to "flexible."[164] Mindful that each AUMF may need to be tailored to unique "parameters," both

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Dec. 11, 2023) ("Dozens of former members of Congress now receive handsome compensation from corporations and special interests as they attempt to influence the very federal government in which they used to serve.").

162 Kaine & Young, *supra* note 4, at 212.

163 Bridgeman, *supra* note 148.

164 Kaine & Young, *supra* note 4, at 214 ("Geographic limitations in a new authorization can take many forms. A strict AUMF might designate specific locations where Congress authorizes military action and forbid action elsewhere. A more flexible one may authorize action in no more than a few countries by name and require the president to submit to Congress an initial list of additional countries where he or she anticipates using military force under the AUMF; it may also allow the president to later designate new countries where he or she deems action authorized under the AUMF. Such geographic designations should be subject to similar reporting and congressional review requirements as the president's designations of new associated forces. Under such a legal regime, actions taken in far-off locales not anticipated by Congress (e.g., Niger, the Philippines) could more easily spark debate in Congress, and, if the people's representatives in Congress deem such actions not in the national interest, they could readily be halted. An even more lenient version of the authorization could include no mention of geographic limitations whatsoever if Congress deems that the nature of our enemies requires the president to have flexibility to attack them wherever they emerge. However, such liberality should be counterbalanced by strong provisions regarding the definition of 'associated forces' to prevent engagement in new theaters where combatants are only tenuously connected to those designated by the text of the AUMF.").

senators have expressed support for allowing AUMFs to "vary sizably" in terms of geographic limitations.[165] These sensible inclusions, which have support beyond the two senators, are necessary to strengthen congressional oversight over the executive's AUMF interpretation.

Indeed, the notion of limiting the president's authority to use force to specific geographic locations was proposed by former Representative Anthony Brown during the 116th Congress.[166] In a bill titled "Limit on the Expansion of the Authorization for Use of Military Force Act," Brown sought "to prevent the [e]xecutive branch from relying on the AUMF as authorization to use force in even more countries—beyond those in which the United States already is engaged in [pursuant to the current AUMFs]."[167]

While Brown's bill did not become law, there was significant bipartisan support for the measure in that Congress.[168] With support in both houses of Congress, geographic limitations could (and should) become part of a reform AUMF because, if executed properly, it would deliver a rebalancing of war powers to their original constitutional underpinning. For geographic limits to have teeth, the geographic limits must be crafted as narrowly as possible. [169] In some cases, individual provinces in lieu of the entirety of a country could be the limitation imposed by Congress if the current threat could be alleviated by imposing those conditions. Knowing that it must have a direct hand in re-evaluating where US force is authorized, Congress would require careful consideration of current threats. Thus, AUMFs are more likely to remain relevant instead of stale.[170]

Another limitation that Congress should place within any future AUMF is a "clear definition of the enemy to be defeated."[171] One of the most essential proposed "guardrails"—defining the enemy—acts to curb executive abuse that has been commonplace under the current AUMFs.[172] Thankfully, Kaine and Young's proposal would include a "clear definition" that would narrow future AUMFs, in contrast with the post-9/11 AUMFs. The current AUMFs use inarguably broad

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165 *Id.*

166 Jennifer Daskal, et al., *An Incremental Step Toward Stopping Forever War?*, JUST SEC. (July 13, 2020), https://www.justsecurity.org/71374/an-incremental-step-toward-stopping-forever-war/ [https://perma.cc/8L7S-M7P6] ("A bill introduced by a bipartisan group of lawmakers in the House of Representatives could offer some reason for hope. The 'Limit on the Expansion of the Authorization for Use of Military Force Act,' H.R. 7500, seeks to prevent the Executive branch from relying on the AUMF as authorization to use force in even more countries—beyond those in which the United States already is engaged in 'hostilities pursuant to [the AUMF]' as of the date the bill is enacted into law. Crucially, the bill is *expressly* not *ratifying the Executive branch's interpretation of where the AUMF currently applies.* Rather, it explicitly states that it does not deem the use of force in any country in which the United States is 'engaged in hostilities' to be either lawful or unlawful. Nor does it operate as an authorization to use military force in those countries. It simply seeks to limit further creep.").

167 *Id.*

168 *Id.*

169 *See generally id.* ("Now, a bipartisan group of Members is seeking to stop the Executive from using the 2001 AUMF as a blank check it can apply to ever-more theaters of conflict."); *see also* Kaine & Young, *supra* note 4, at 214.

170 Daskal, *supra* note 166.

171 Kaine & Young, *supra* note 4, at 213.

172 *See* Daskal et al., *supra* note 166.

language such as an authorization of force against those who "harbored such organizations or persons…that planned, authorized, committed, or aided the terrorist attacks that occurred on September 11" which has been relied on by presidential administrations to stretch the AUMFs beyond recognition.[173] The replacement AUMF "should specify by name the terrorist groups against which Congress authorizes the commander-in-chief to take military action and require him or her to take additional action, such as notifying Congress, in order to receive authorization to use force against 'associated forces.'"[174] In practice, this approach, also outlined by the pair of senators, is easy to implement because there is an effective enforcement mechanism. Congress could enforce any enemy–specific limitation in future AUMFs while retaining the flexibility to modify the list as needed by updating the "list of targetable groups" through the National Defense Authorization Act passed each successive year.[175]

Realizing that future presidents may similarly exploit the term "associated forces," Kaine and Young have provided the phrase would have a "narrow definition."[176] This would also help prevent future administrations from "relying on the AUMF to use force against new enemies that are inside countries where it is currently engaged in hostilities."[177] With an enemy–specific limitation included in AUMFs, future administrations would need to seek an expansion of the enemy list instead of unilaterally declaring that new groups that were not listed are deemed covered by the authorization.

Although geographic and enemy–specific limitations have found growing support within the halls of Congress, there are those who believe that "due to the nature of the adversaries of the United States, it is difficult to particularly codify a target since terrorist groups are constantly evolving, breaking off, and forming different alliances."[178] While true that future AUMFs that include these limitations may run the risk of consistently becoming obsolete or useless, such limitations would force Congress to respond. Knowing that it must have a direct hand in re-evaluating where US force is authorized, Congress is more likely to consider the bounds of current threats carefully and methodically. Thus, AUMFs are more likely to remain relevant instead of obsolete.[179] Congress, when necessity demands, can act quickly. Indeed, the 2001 AUMF was introduced and signed into law just one week after the horrific attacks on September 11.[180] If a new threat from a new enemy or a new location comes forward, Congress can act quickly to give the president the necessary authorization to proceed. Novel threats should not be an excuse for broad authorizations. Instead, new threats should engage Congress to be on alert and respond when necessary.

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173 Kaine & Young, *supra* note 4, at 213 (quoting Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

174 Kaine & Young, *supra* note 4, at 213.

175 Taub, *supra* note 70, at 597.

176 Kaine & Young, *supra* note 4, at 213.

177 Daskal et al., *supra* note 166 (emphasis omitted).

178 Byrne, *supra* note 62, at 653.

179 Daskal et al., *supra* note 166.

180 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

There is also the real possibility that a future president may still ignore Congress's role in deciding when and where to exercise the use of force. Again, regardless of the pressure from the executive branch, it is Congress—as the people's representatives—who should be responsible for deciding whether the new threat is within the national interest.[181] Under a reformed AUMF, the executive branch would need to cooperate with Congress to renew or revamp the AUMFs. It is not up to the president alone. This, in turn, would re-exert the constitutional limitations and separation of powers envisioned by our Framers.[182] This is both good policy and follows the Constitution.

Geographic and other scope-limiting provisions function similarly to sunset provisions in that such provisions allow Congress to respond to novel threats and recalibrate authorizations as necessary.[183] But geographic and other scope-limiting provisions do more. These provisions also put Congress at the center of deciding where to authorize the use of force. Narrow geographic or enemy–specific provisions would force the executive to come to Congress when a new threat arises, allowing Congress to craft a response tailored to the particular threat. In the end, while congressional involvement may delay authorizations, as more deliberation would occur, Congress knows how to act fast. Implementing geographic and other scope-limiting provisions may be the single most effective tool that Congress must use to exert greater control over use-of-force authorizations. Kaine and Young agree.[184] Hopefully enough of their colleagues do as well.

CONCLUSION

This is Barbara Lee's I-told-you-so moment. Although unlikely to speak those words, Lee is still willing to forcefully stand at the forefront of the movement to reform the post-9/11 AUMFs. Indeed, the current forecast is that Representative Lee hopes to become Senator Lee in 2024.[185] Although likely to face a difficult primary in the state of California, if elected, she would join a bipartisan group of senators that are finally ready to reconsider the post-9/11 AUMFs that every presidential administration has abused since their enactment. Senator Kaine, also recently announced that he will seek re-election, explaining that he decided to ask the people of Virginia once again to the Senate, by saying, "I got a whole lot more I want to do."[186] Undoubtedly, that includes AUMF

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181 Kaine & Young, *supra* note 4, at 214.

182 *See id.* at 214–15.

183 *See id.* at 212.

184 *See id.* at 212–15.

185 Erin Doherty & Eugene Scott, *Rep. Barbara Lee Plans to Run for Senate in 2024*, AXIOS (Jan. 11, 2023), https://www.axios.com/2023/01/11/barbara-lee-senate-bid-2024-california [https://perma.cc/A4H2-3TDF] ("Rep. Barbara Lee (D-CA) plans to run for Senate in 2024, according to a source familiar with the matter. This comes after Rep. Katie Porter (D-CA) publicly announced her bid.").

186 Marianne Levine, *Kaine Launches Senate Reelection Bid, Giving Dems a 2024 Boost*, POLITICO (Jan. 20, 2023, 12:06 AM), https://www.politico.com/news/2023/01/20/tim-kaine-launches-senate-reelection-bid-2024-00078759 [https://perma.cc/3Y6C-N7Q9] ("A member of the

reform, which, if joined by Lee, would add another voice (and an impactful one) to the cause in the Senate.

If ever there was a moment for Congress to re-exert its constitutional duty over fundamental war powers decisions, it is now, a moment of relatively little US military action abroad. At this moment, reform is possible. With a bipartisan majority in both chambers of Congress and a presidential endorsement supporting the measure, repeal and replacement of the post-9/11 AUMFs are feasible. This just may be an area in which bipartisanship can win out.

The proposals laid out by Kaine, Young, and Lee rightly point to sunset provisions and other scope-limiting provisions as effective measures to curb executive abuse in any future AUMF. But these erudite members of Congress should remember US international obligations when crafting future AUMFs. The law of the UN Charter is part of "the supreme Law of the Land."[187] Now more than ever, with threats to Ukrainian territorial sovereignty by Russian forces,[188] the United States must forcefully affirm the future authorizations on the use of force to limit not only the executive's power but also respect the limits of US unilateral action. Force should be a last resort, and future AUMFs should reflect this reality. Thankfully, these provisions will likely make the use of force by the United States legal in the eyes of the international community and will represent good domestic policy. The American people deserve to have their representatives involved in deciding when, against whom, and where the United States exerts its mighty force. It is both good policy and constitutional.

A win–win.

Senate Armed Services and Foreign Relations Committees, [Senator Tim Kaine (D-VA)] has also made limiting presidential war powers a key focus during his Senate tenure.").

187 U.S. CONST. art. VI, § 2; *The Application of the United Nations Charter to Domestic Law*, 20 FORDHAM L. REV. 91 (1951) ("[T]he United States Charter, being a duly ratified treaty, had become part of the supreme law of the land, together with the federal constitution and all the laws of the United States."); *see also* The Paquette Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law").

188 *See* Bellinger, *supra* note 7.

PRIVACY PURGATORY: WHY THE UNITED STATES NEEDS A COMPREHENSIVE FEDERAL DATA PRIVACY LAW

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CONTENTS

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INTRODUCTION

When asked how they felt about the state of data privacy and its future, a sample of Americans surveyed by the Pew Research Center in 2016 expressed feelings of general powerlessness.[1] Their answers ranged from "hopeless" and "resigned" to, vaguely, "I don't think things are hopeless, some genius will figure out how to get around all this."[2] By "all this," they referred to the ever-growing volumes of data being aggregated by and exchanged between private companies for numerous purposes,[3] including website enhancement,[4] precision marketing,[5] and the generation of profit from user data.[6] By 2019, about six in ten American adults did not think it possible to live each day without their data being collected by companies or the government.[7] By 2023, a majority of Americans now say they are "concerned, lack control and have a limited understanding about how the data collected about them is used."[8]

While one popular argument in favor of such data collection is that it enables companies to provide free or reduced-price services,[9] widespread and rapidly evolving methods of data collection combined with myriad loopholes in the legal regime have created something of a "wild west" environment in the world of data privacy.[10] There is no federal law dictating when a company must notify consumers that it is selling or sharing their data—in fact, there is no comprehensive

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1 Lee Rainie & Maeve Duggan, *Privacy and Information Sharing*, PEW RSCH. CTR. (Jan. 14, 2016), https://www.pewresearch.org/internet/2016/01/14/privacy-and-information-sharing [https://perma.cc/L8HB-JQVU].

2 *Id.*

3 Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (and Why It Matters)*, N.Y. TIMES: WIRECUTTER (Sept. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/ [https://perma.cc/D2MW-6PU2].

4 *What is a Cookie? How it Works and Ways to Stay Safe*, KASPERSKY: RES. CTR., https://www.kaspersky.com/resource-center/definitions/cookies [https://perma.cc/6FWA-SG8P] (last visited Oct. 8, 2022) [hereinafter *What is a Cookie?*].

5 *See* Max Eddy, *How Companies Turn Your Data Into Money*, PC MAG. (Oct. 10, 2018), https://www.pcmag.com/news/how-companies-turn-your-data-into-money [https://perma.cc/8AHT-HQ9Y].

6 *Id.*; For a general overview of the regulations and issues concerning the practices of cookies and privacy as elaborated further in this Note, see *Cookie Benchmark Study*, DELOITTE RISK ADVISORY B.V. (Apr. 2020) (U.K.), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/risk/deloitte-nl-risk-cookie-benchmark-study.pdf [https://perma.cc/FK9K-GUJN].

7 Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR., (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/SLP4-ECKN].

8 Colleen McClain et al., *How Americans View Data Privacy*, PEW RSCH. CTR. (Oct. 18, 2023), https://www.pewresearch.org/internet/2023/10/18/how-americans-view-data-privacy/ [https://perma.cc/UZW7-QRRW].

9 Eddy, *supra* note 5; Kassandra Polanco, Note, *Trimming the Fat: The GDPR as a Model for Cleaning up Our Data Usage*, 36 TOURO L. REV. 603, 603 (2020); Louise Matsakis, *The WIRED Guide to Your Personal Data (and Who Is Using It)*, WIRED MAG. (Feb. 15, 2019, 7:00 AM), https://www.wired.com/story/wired-guide-personal-data-collection/ [https://perma.cc/MZZ4-5DLL].

10 Casey Rentmeester, *Kant's Ethics in the Age of Online Surveillance: An Appeal to Autonomy*, *in* EVERYDAY LIFE IN THE CULTURE OF SURVEILLANCE 200 (Lars Samuelsson et al. eds., 2023).

federal privacy law at all.[11] Outside the federal realm, minimal laws exist requiring companies to notify users of precisely how their data is being used, but meanwhile the world of data brokerage has grown exponentially over the past decade.[12] For data breach notification, the problem is inverted. Every state has its own requirement dictating the number of consumers and, more obscurely, the type of data that should trigger the dispersion of a notice, resulting in a complex maze of requirements companies must adhere to on top of the many stressors of a breach.[13]

While it is no simple matter to vindicate privacy rights as a "data subject"[14] anywhere in the world, this is particularly true in the United States, where lack of data privacy regulation provides companies all kinds of opportunities to misuse people's data. For example, there is a now-common practice, that of using "dark patterns," for obtaining user consent, in which companies present information in a way that subtly coaxes users toward a particular response.[15] Companies use the strategy to design the notifications that ask users to give consent for "cookies."[16] Dark patterns make the cookie-accepting process "as opaque, unpractical and time-consuming as possible—just to make you click 'accept.'"[17] In 2021, the Federal Trade Commission—the executive body in charge of enforcing data privacy regulations—reiterated its commitment to treat dark patterns as unfair

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[11] Klosowski, *supra* note 3.

[12] *See generally* Kalev Leetaru, *What Does it Mean for Social Media Platforms to "Sell" Our Data?*, FORBES (Dec. 15, 2018, 3:56 PM), https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data/?sh=4d86a602d6c4 [https://perma.cc/XVU5-9TV2] (illuminating the expansive industry that is data brokerage).

[13] *See* Security Breach Notification Chart, PERKINS COIE, https://www.perkinscoie.com/images/content/2/4/246420/Security-Breach-Notification-Law-Chart-Sept-2021.pdf (Sept. 2021) [https://perma.cc/JLU4-PS62]. The variation in type of data that triggers notification can be problematic when residents of many states are affected. For example, some states count passwords as personal information (often in combination with a financial account number). If a breach of only usernames and passwords affected residents of all fifty states, a company must gauge the wisdom of notifying residents of all states, including those that do not require notification in such a case.

[14] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 4(1), 2016 O.J. (L 119) 1 (EC) [hereinafter GDPR] (defining data subject as "an identified or identifiable natural person.").

[15] *See* Isha Marathe, *Proposed CPRA Rules Show 'Dark Patterns' a Growing Focus for State Privacy Laws*, LEGALTECH NEWS (June 13, 2022, 10:30 AM), https://www.law.com/legaltechnews/2022/06/13/proposed-cpra-rules-show-dark-patterns-a-growing-focus-for-state-privacy-laws/ [https://perma.cc/LS7K-5VFV].

[16] "Cookies" are those infamous files with small pieces of data that can be deposited onto a user's computer in response to a single click. They allow companies to track a user's online presence, collect their data, and sell it. For more information, see *What Is a Cookie?*, *supra* note 4.

[17] *Most Cookie Banners Are Annoying and Deceptive. This Is Not Consent.*, PRIVACY INT'L (May 21, 2019), https://privacyinternational.org/explainer/2975/most-cookie-banners-are-annoying-and-deceptive-not-consent [https://perma.cc/5MH8-2GYU] [hereinafter *Most Cookie Banners Are Annoying*]; *Cookie Benchmark Study*, *supra* note 6, at 6 (finding that 43% of all websites investigated "nudged" users to provide consent for all cookies, including by graphically designing cookie notifications to indicate that users should accept).

business practices in violation of the FTC Act.[18] Despite its admirable stance, the agency released a report in 2022 showing that the use of dark patterns is actually increasing.[19] Additionally, the lack of comprehensive data privacy legislation in the United States means that companies can safely interpret a user's consent to the placement of cookies by third parties like Meta or Google on one website as "global consent,"—or an agreement to be tracked across the web by such third parties for advertising purposes.[20] Where consent management platforms are used,[21] consent to third party cookies on one site with a global consent request may be interpreted as consent on all other sites with similar requests.[22] In short, "this means that users accept tracking on hundreds of websites in a single click, often obtained out of users' frustration."[23] *The New York Times* called this understandable frustration "notification fatigue."[24] There are a few meager ways data subjects can take back a modicum of control: apps have been made to block the ever-prevalent cookie notices, though some of them "block" by automatically providing consent.[25]

Many Americans say they wish they could do more to protect their privacy but do not know how to do so,[26] and technology experts predict few citizens will have the "energy or resources to protect themselves from 'dataveillance' in the coming years."[27] A hard look at the reality of being a data subject in the United States makes it clear that there is a real need for protection via regulation.

Just as the life of a data subject can be burdensome, organizations that process data face difficulties too.[28] Between January 2020 and December 2023,

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18 Press Release, Fed. Trade Comm'n, FTC to Ramp Up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions, (Oct. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions [https://perma.cc/NDF8-7KMC]; Federal Trade Commission Act, ch. 311, §1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58, 57(a) (2018)).

19 *See* FTC REPORT SHOWS RISE IN SOPHISTICATED DARK PATTERNS DESIGNED TO TRICK OR TRAP CONSUMERS, FED. TRADE COMM'N (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers [https://perma.cc/2TMK-3H3R].

20 *See Most Cookie Banners Are Annoying*, *supra* note 17.

21 *See* Kaya Ismail, *What is a Consent Management Platform?*, CMSWIRE (Mar. 14, 2019), https://www.cmswire.com/information-management/what-is-a-consent-management-platform/ [https://perma.cc/4CYL-7BV4].

22 *See Most Cookie Banners Are Annoying*, *supra* note 17.

23 *Id.*

24 Klosowski, *supra* note 3.

25 *See* Nelson Aguilar, *How to Block Those Annoying Cookie Consent Notices from Appearing on Websites in Safari*, GADGET HACKS (Jan. 28, 2021, 3:52 PM), at 1–2, https://ios.gadgethacks.com/how-to/block-those-annoying-cookie-consent-notices-from-appearing-websites-safari-0384278/ [https://perma.cc/C4M7-FQ9S].

26 *See* PEW RSCH. CTR., *The State of Privacy in Post-Snowden America*, (Sept. 21, 2016), https://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/ [https://perma.cc/FM2T-BXH6].

27 *Id.*

28 *See* GDPR, *supra* note 14, art. 4(2) ("'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage . . .").

five different comprehensive state privacy laws went into effect, all with slightly different requirements for the treatment of data and all with substantial impacts on business compliance.[29] Similar laws from other states are set to take effect after 2023.[30] Organizations will need to assess whether the laws apply to them and subsequently determine compliance measures. Remaining in compliance with the patchwork of state and federal laws may be difficult for a new company but could be extremely resource-draining for established businesses. Even for businesses that can afford to hire an outside firm to ensure compliance, the process of establishing and maintaining compliance is highly complex and can be cost-intensive.[31] Some law firms and other companies have published guidance on how to reach compliance with the new comprehensive laws; the process involves an extremely detailed review of how all data is used and secured, from whom it is collected, and to whom it is sent, as applied to each state in question.[32] Having one primary set of rules would provide clarity and stability to the legal landscape, giving companies a better chance of complying and decreasing the opportunity for error in handling individuals' data. Despite these benefits, the realization of a federal privacy law remains in a purgatory-like state of inertia even as Americans' sense of powerlessness grows.

This Note presents an overview of the leading models of privacy regulation most relevant for the United States: beginning with the General Data Protection Regulation (GDPR) and its data protection principles, moving to the current patchwork of federal and state laws in the United States, and analyzing a proposed comprehensive federal privacy law. Next, it establishes why the United States ought to adopt the model of a comprehensive federal law rather than leaving states to create an ever-increasing web of regulation. Finally, it briefly engages with arguments surrounding privacy regulation and First Amendment free speech concerns, for any federal law must clear constitutional hurdles.

I. OVERVIEW OF PRIVACY LAW IN UNITED STATES AND EUROPE

A. Europe's Omnibus Approach: The General Data Protection Regulation

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[29] *See Key Dates from US Comprehensive State Privacy Laws*, INT'L ASS'N OF PRIV. PROS., https://iapp.org/media/pdf/resource_center/key_dates_us_comprehensive_state_privacy_laws.pdf [https://perma.cc/9S92-25RP] (Sept. 2022).

[30] For a compilation of up-to-date coverage of national legislation concerning individual data privacy rights, see Andrew Folks, *US State Privacy Legislation Tracker*, IAPP, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/#enacted-laws [https://perma.cc/SL5F-ZVUF] (Oct. 20, 2023).

[31] *See Cookie Benchmark Study*, *supra* note 6, at 23–25. Of note, these comprehensive state laws largely apply only to companies that collect large amounts of data or derive a threshold percentage of revenue from data sales. *See e.g.*, COLO. REV. STAT. § 6-1-1304 (2022).

[32] *See, e.g.*, Gretchen A. Ramos & Michael Wertheim, *Is it Secret, Is it Safe? What Employers Need to Know About the California Privacy Rights Act*, GREENBERG TRAURIG: DATA PRIV. DISH (Aug. 18, 2021), https://www.gtlaw-dataprivacydish.com/2021/08/is-it-secret-is-it-safe-what-employers-need-to-know-about-the-california-privacy-rights-act/ [https://perma.cc/HAM9-H7M9]; Abi Tyas Tunggal, *9 Ways to Prevent Third-Party Data Breaches in 2022*, UPGUARD (Aug. 8, 2022), https://www.upguard.com/blog/prevent-third-party-data-breaches [https://perma.cc/DXH9-9MQN].

As the capacity for widespread collection of data has ballooned, Europe has consistently set the universal tone for the vindication of individual data privacy rights. The right to privacy was recognized worldwide in the United Nations' Universal Declaration of Human Rights of 1948,[33] reinforced in 1950 by the European Convention on Human Rights.[34] The world's first comprehensive data privacy statute was passed in Germany in 1970,[35] and the GDPR (passed in 2016)[36] and its predecessor statutes have created a legislative domino effect across the globe. A brief look at European history illuminates why it is a world leader in this area: in Nazi Germany, personal data was aggregated and weaponized for horrific purposes.[37] In the 1930s, census workers gathered data from citizens that they then used to identify Jews and other groups the government wished to destroy.[38] When Germany was partitioned into East and West after World War II, the East German secret police continued to use the data to intimidate and control citizens.[39] In 1970, the West German state of Hesse passed the world's inaugural comprehensive privacy law,[40] followed by Germany's 1977 Federal Data Protection Act.[41] Upon reunification, all German citizens were able to claim the rights within the federal law, which included the right of "self-determination over personal data."[42]

The GDPR, Europe's current trend-setting data privacy regulation, followed the European Union's 1995 Data Protection Directive, which was less comprehensive and allowed individual nations to decide how to achieve the listed goals.[43] At its core, the GDPR is centered on foundational principles of data privacy and its requirements are oriented toward enforcing those principles, which include "lawfulness, fairness, and transparency; purpose limitation; data minimiza-

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[33] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948).

[34] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

[35] DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS 7 (6th ed. 2022); Datenschutzgesetz [Data Protection Act], Oct. 7, 1970, GESETZ-UND VERORDNUNGSBLATT [GVBL.] II 300-10 (Hesse) (Ger.).

[36] GDPR, *supra* note 14.

[37] Olivia B. Waxman, *The GDPR Is Just the Latest Example of Europe's Caution on Privacy Rights. That Outlook Has a Disturbing History*, TIME (May 24, 2018, 7:12 PM), https://time.com/5290043/nazi-history-eu-data-privacy-gdpr/ [https://perma.cc/45DX-U5MB].

[38] *Id.*

[39] *Id.*

[40] *See* Datenschutzgesetz [Data Protection Act], Oct. 7, 1970, GESETZ-UND VERORDNUNGSBLATT [GVBL.] II 300-10 (Hesse) (Ger.).

[41] Bundesdatenschutzgesetz [Federal Data Protection Act], Feb. 1, 1977, BGBl I at 201 (Ger.); Waxman, *supra* note 37.

[42] Waxman, *supra* note 37.

[43] Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, repealed by GDPR, *supra* note 14, art. 94; Stefan Ducich & Jordan L. Fischer, *The General Data Protection Regulation: What U.S.-Based Companies Need to Know*, 74 BUS. LAW. 205, 206 (2019).

tion; accuracy; storage limitation; and integrity and confidentiality."[44] The law divides those who handle data into controllers[45] and processors,[46] with the main difference being that controllers, appropriately, have full control over how data is used and why, shouldering the burden of legal responsibility by default.[47] The data in question, or "personal data," is broadly defined to include "'any information relating to an identified or identifiable natural person,' whether directly or indirectly."[48] Among other things, the GDPR requires controllers to notify data subjects of their data collection and processing activities;[49] provide certain rights to access;[50] delete,[51] correct,[52] and object to the processing of data subjects' personal data;[53] implement data security measures;[54] and report data breaches.[55] Controllers must bind organizations that process personal data on their behalf to use data only for purposes covered by the parties' contract.[56] The GDPR mandates that controllers report certain data security incidents to regulators within seventy-two hours of discovery and requires highly detailed post-breach assessments that include reasoning behind any decision not to report a breach.[57] Lack of compliance is enforced by a tier-system of fines, with the lower tier comprising two percent of an entity's worldwide annual revenue (or ten million euros, whichever is greater).[58]

While the above requirements may sound daunting, arguably the most formidable and controversial aspect of the GDPR is its extraterritorial impact. Article 3 of the GDPR applies the regulation even to controllers or processors "not established in the Union" when the processing of data relates to "(a) the offeri-

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[44] Ducich & Fischer, *supra* note 43, at 209 (quoting GDPR, *supra* note 14, art. 5(1), at 35–36). The GDPR also has recitals that act as advisory notes, written to clarify the Regulation. *Id. at* 206; Leonard Wills, *A Very Brief Introduction to the GDPR Recitals*, A.B.A. (July 1, 2019), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2019/a-very-brief-introduction-to-the-gdpr-recitals/ [https://perma.cc/Z4DF-5X4H].

[45] Ducich & Fischer, *supra* note 43, at 208 (quoting GDPR, *supra* note 14, art. 4(7)) (defining "controller" as "an entity that 'determines the purposes and means of the processing of personal data.'").

[46] *Id.* (quoting GDPR, *supra* note 14, art. 4(8)) (defining "processor" as "'a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.'").

[47] *Id.* (noting that while controllers are liable for processors' compliance, "processors are liable only for their compliance and for the compliance of any sub-processors they bring into the data transaction.").

[48] *Id.* at 206 (quoting GDPR, *supra* note 14, art. 4(1)). Note that the analogous American term, "personally identifiable information," is defined similarly but the information is protected sector by sector.

[49] GDPR, *supra* note 14, art. 13–14.

[50] *Id.* at art. 15.

[51] *Id.* at art. 17.

[52] *Id.* at art. 16.

[53] *Id.* at art. 18.

[54] *Id.* at art. 32.

[55] *Id.* at art. 34.

[56] *Id.* at art. 28(3).

[57] Ducich & Fischer, *supra* note 43, at 212.

[58] *Id.* at 213.

ng of goods or services . . . to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union."[59] In simplified terms, US-based companies must comply with the GDPR if the data they process relates to advertising to EU residents or the monitoring of residents' behavior. In our global economy, in which the vast majority of business is conducted online and websites are accessible to almost anyone, even small US businesses that collect consumer data could risk "targeting" EU residents for sales[60] or monitoring residents (because any data about consumer preferences could conceivably fall under the latter category).[61] Thus, the bottom line is that as soon as the GDPR was passed, it has been wise for US organizations to evaluate whether their practices arguably could come within the coverage of the GDPR and, if so, collect and process individuals' data in compliance with the regulation to avoid the hefty fines. The European Union recognizes certain rights of privacy that are more specific than those in the United States,[62] so the stringent requirements of the GDPR may be unfamiliar, but the extraterritorial language of the GDPR nonetheless makes the law broadly applicable.

Domestic law in the United States has occasionally clashed with the GDPR. *United States v. Microsoft Corp.*[63] highlighted the extreme tension between the United States' typical stance toward international law and the real need for coordination among nations in dealing with data privacy. In *Microsoft*, the corporation (no doubt wary of fines) received a search warrant from the US government, but argued that the GDPR prevented it from turning over the data stored in its data center in Dublin, Ireland.[64] The Supreme Court dismissed the case as moot under the Clarifying Lawful Overseas Use of Data (CLOUD) Act,[65] but the European Commission—the executive cabinet of the European Union—filed an amicus brief strongly asserting the primacy of the GDPR and pointing to Article 48, which states that a domestic judgment arising from a country outside the European Union requiring disclosure of personal data is enforceable only if based on a formal international agreement.[66] In short, even when trying to comp-

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[59] GDPR, *supra* note 14, art. 3(2).

[60] *See* GUIDELINES 3/2018 ON THE TERRITORIAL SCOPE OF THE GDPR (ARTICLE 3), VERSION 2.1, EUROPEAN DATA PROTECTION BOARD 13–18 (Jan. 7, 2020) (including a list of factors to determine intent to target, such as use of currency "other than that generally used in the trader's country" or the use of "a top-level domain name other than that of the third country in which the controller or processor is established," such as ".fr" or ".eu." However, the report qualifies that any one of those factors taken alone may not be enough to clearly indicate intent to target.).

[61] *See id.* at 19–20.

[62] *See* Charter of the Fundamental Rights of the European Union, art. 8, 2012 O.J. (C 326) 397.

[63] 138 S. Ct. 1186 (2018) (per curiam).

[64] *See* Ducich & Fischer, *supra* note 43, at 214.

[65] 18 U.S.C. § 2713 (2018) (requiring organizations to produce information in their "possession, custody, or control, regardless of whether such . . . information is located within or outside of the United States.").

[66] GDPR, *supra* note 14, art. 48. Notably, the United States and European Union attempted to broker such an agreement, the E.U.-U.S. Privacy Shield Framework, but the agreement was invalidated by the Court of Justice of the European Union in 2020 (*see* Case C-311/18, Data Prot. Comm'r v. Facebook Ireland (Schrems II), ECLI:EU:C:2020:559 (July 16, 2020)).

ly with the GDPR, a US-based company could find itself in violation of domestic law as it currently stands.[67]

B. The United States' Sectoral Approach: A Federal and State Law Patchwork

While many other western countries have facilitated transactions with residents of the European Union by adopting comprehensive laws similar to the GDPR, the United States is ambling along with the sectoral approach, protecting privacy rights in certain sectors or industries rather than holistically.[68] The United States has some federal and state laws regulating data collection and processing, but no single overarching law to fill the inevitable gaps.[69] The framework is (with the exception of the recent comprehensive state laws) a patchwork of regulations covering "'specific types of data, like credit data or health information, or . . . specific populations like children, and regulat[ing] within those realms.'"[70] Because only certain sectors are regulated, this has created overlapping and sometimes contradictory protections.[71] The FTC is the executive body charged with enforcing privacy regulations under its ability to penalize companies for unfair business practices, but its powers are limited.[72]

Unlike Europe, the development of the United States' data privacy framework has been more reactionary than preventative and is not rooted in the fear of gruesome history repeating itself. In the United States, privacy as a legal right began with the Fourth Amendment to the Constitution,[73] but the privacy framework pertaining to data began in earnest with the Fair Information Practices of 1973, a report containing a set of regulatory goals proposed by the Department of Health, Education, and Welfare.[74] The report was motivated by the realization that a societal shift from the family to the individual (for tax and social security purposes) combined with rapidly developing computer technology could lead to

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67 *See generally* Diane D. Reynolds et al., *Is a Company Permitted to Transfer PI From Europe to the US for a Discovery Request?*, GREENBERG TRAURIG (Nov. 8, 2022), https://www.gtlaw.com/en/insights/2022/11/published-articles/is-a-company-permitted-to-transfer-pi-from-europe-to-the-us-for-a-discovery-request [https://perma.cc/62B4-5XMC] (outlining the requirements of transferring personal information from Europe to the United States).

68 *See Reforming the US Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN REL. (Jan. 30, 2018), https://www.cfr.org/report/reforming-us-approach-data-protection [https://perma.cc/Q5YC-3NQX] [hereinafter *Reforming the US Approach*]; SOLOVE & SCHWARTZ, *supra* note 35, at 7–8.

69 Klosowski, *supra* note 3.

70 *Id.* (quoting Amie Stepanovich, executive director at the Silicon Flatirons Center at Colorado Law).

71 *See Reforming the US Approach*, *supra* note 68 (discussing the tangle of federal regulations regarding health information).

72 *See id.*

73 *See* U.S. CONST. amend. IV.

74 *See* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, at xxxii (1973); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 510 (2006).

enormous potential for centralization, and thus compromise, of individuals' data.[75] In 1974, the Federal Privacy Act was passed,[76] requiring federal agencies retaining personal data to establish appropriate safeguards and inform citizens of their purpose for collecting data.[77] The Act also provided citizens with the right to access data stored by the agencies.[78] From there, regulatory statutes multiplied, covering sectors deemed at particular risk of compromising the personal data they collect. For example, the Fair Credit Reporting Act of 1970 "provides citizens with rights regarding the use and disclosure of their personal information by consumer reporting agencies."[79] The Family Educational Rights and Privacy Act of 1974 protects school records.[80] The Health Insurance Portability and Accountability Act of 1996 "gives the Department of Health and Human Services . . . the authority to promulgate regulations governing the privacy of medical records."[81] The Gramm-Leach-Bliley Act of 1999 "requires privacy notices and provides opt-out rights when financial institutions seek to disclose personal data to other companies."[82] These and many more make up the United States' privacy landscape at the federal level.

When focusing on this list of positive law, it may appear that solid limits have been placed upon data collection and processing. But in comparison with the GDPR, the gaps are obvious and glaring. In states that do not have explicit laws against the practice, organizations not covered by the federal laws can still use, share, or sell any data without notifying individuals.[83] On the cybersecurity side, there is no national standard for when a company must notify consumers if their data has been breached.[84] And if a company shares consumer data with third parties, those parties can share or sell it without notifying the consumer.[85]

There are also sectoral laws at the state level, though they have historically focused on cybersecurity rather than data privacy. The most common are "breach notification laws," which require companies to notify individuals if their informat-

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[75] Solove, *supra* note 74, at 510; *see* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *supra* note 74. For a more detailed discussion of these goals, which also underpinned the United States' Privacy Act of 1974 (5 U.S.C. § 552a), see CHAPTER 7—PRIVACY AND CONFIDENTIALITY, POLICY MANUAL, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2023), https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7 [https://perma.cc/CUP8-VW9T]. Solove, *supra* note 74, at 517–19.

[76] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a).

[77] Solove, *supra* note 74, at 517–19.

[78] *Id.* at 523.

[79] SOLOVE & SCHWARTZ, *supra* note 35, at 4; Fair Credit Reporting Act (FCRA), Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 15 U.S.C. § 1681).

[80] *See* Family Educational Rights and Privacy Act (FERPA), Pub. L. No. 93-380, 88 Stat. 571 (1974) (codified at 20 U.S.C. § 1232g).

[81] SOLOVE & SCHWARTZ, *supra* note 35, at 5; Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.).

[82] SOLOVE & SCHWARTZ, *supra* note 35, at 5; Gramm-Leach-Bliley Act of 1999 (GLBA), Pub. L. No. 106-102, 113 Stat. 338 (codified in scattered sections of 15 U.S.C. and 12 U.S.C.).

[83] *See* Klosowski, *supra* note 3.

[84] *Id.*

[85] *Id.*

ion is compromised, whether due to a cyberattack, a corporate error, or other incident.[86] All states have breach notification laws, but each state differs in its specific requirements.[87] Therefore, organizations must be able to ascertain how many residents of that state could be affected in a breach. State breach notification laws vary substantially regarding the precise method of notification to residents,[88] the type of data that triggers notification,[89] and next steps if sensitive data is exposed.[90] As an example of the tangled web of requirements companies must keep track of, consider the following three states: Arizona requires that 1,000 residents be affected before notification must be made to the state attorney general;[91] Georgia does not require notification to state authorities, but does mandate that if over 10,000 residents are affected, the breached entity must notify all consumer reporting agencies;[92] New Jersey requires that any breaches whatsoever must be reported to the Division of State Police within the New Jersey Department of Law and Public Safety, and the notification must occur *prior* to the notice to the affected residents.[93] These requirements are a mere snapshot of the full body of mandates within each state's breach notification law.[94] With the extraordinary level of minute variation between states, it is no wonder companies are lobbying Congress to simplify matters on the data privacy side with a comprehensive federal framework.[95]

With respect to data privacy, some state legislatures have responded even more strongly to the lack of federal initiative, taking it upon themselves to create comprehensive laws that remedy the gaps left by the federal government. The

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86 Ian C. Ballon, *Cybersecurity: Information, Network and Data Security*, *in* 4 E-COMMERCE AND INTERNET LAW: LEGAL TREATISE WITH FORMS 274–81 (2d ed. Thomson/West Pub., 2009), *reprinted as Complying with U.S. State and Territorial Security Breach Notification Laws*, *in* DAILY J. CYBERFORUM (2019) (explaining the purpose and breach application of state breach notification laws).

87 *See Security Breach Notification Chart*, PERKINS COIE (Oct. 2022), https://www.perkinscoie.com/en/news-insights/security-breach-notification-chart.html [https://perma.cc/Y78G-KHYP].

88 *See id.* Compare Minnesota's options for notification to state residents (written or electronic notice) with New Hampshire's (written; telephonic with log of all notifications; electronic if that is the entity's primary means of communication with customers; or any method pursuant to entity's internal notification procedures).

89 *See id.* Compare Alabama's definition of personal information pertaining to medical history ("[a]ny information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional") with Alaska's (nothing about medical information), Illinois's (includes health insurance information and related identifiers), and Delaware's (includes "deoxyribonucleic acid profile").

90 *See id.* Connecticut, Delaware, the District of Columbia, and Massachusetts each require organizations to provide free access to credit monitoring if residents' social security numbers are exposed.

91 ARIZ. REV. STAT. ANN. § 18-552 (2022).

92 GA. CODE ANN. § 10-1-912(d) (2022).

93 N.J. STAT. ANN. § 56:8-163 (2023).

94 For a full summary of these laws, see *Security Breach Notification Chart*, *supra* note 87.

95 *See* Letter from Chief Executives of Leading Companies across industries to Congressional and Committee Leadership (Sept. 10, 2019), https://s3.amazonaws.com/brt.org/BRT-CEOLetteronPrivacy-Finalv2.pdf [https://perma.cc/U8XK-DSBL] (letter from various chief executives advocating for the passage of a federal privacy law to US Congressional leaders).

approach has its positive points. Until very recently, the prospect of the passage of a comprehensive federal law was slim to none, so states aiming to protect their residents had few other options. The strategy even seemed reasonable when California, the first state to pass a breach notification law,[96] became the first state with a comprehensive privacy law, enacting the California Consumer Privacy Act in 2018.[97] Because so many companies transact business with California residents and collect their data, the effect of the CCPA on the whole nation was similar to that of the GDPR. Companies nationwide simply adopted California's requirements, creating policies that would align them with the CCPA.[98]

California did not retain its position of domination over the legal landscape for long, though, and the influx of comprehensive laws has begun to raise red flags. In 2021, Virginia enacted its Consumer Data Protection Act which went into effect on January 1, 2023.[99] This law is similar to the CCPA,[100] but differs in material ways similar to the manner in which state notification laws differ and some experts have noted its relative weakness compared to the CCPA.[101] California's law remains the strongest protection for its residents, requiring companies that sell personal information to offer a global opt-out option, giving California residents control over the extent to which their data is resold.[102] California also offers its residents a private right of action where certain types of their sensitive personal information are disclosed in a data breach.[103] Moreover, California's law extends to residents in their capacity as employees or when their personal information is collected as part of a business transaction.[104] Virginia's law, on the other hand, contains no private right of action and requires residents to affirmatively object to certain types of processing for each individual instance.[105]

After Virginia, more threads of the state data privacy law patchwork began to weave together. In July 2021, Colorado enacted its own comprehensive law,

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96 2002 Cal. Stat. 5778 (codified as amended at CAL. CIV. CODE § 1798.29 (West 2023)); *Reforming the US Approach*, *supra* note 68;

97 California Consumer Privacy Act (CCPA), 2018 Cal. Stat. 1807, *amended by* California Privacy Rights Act (CPRA), 2020 Cal. Stat. A-84 (current version at CAL. CIV. CODE § 1798.100 (West 2023)); David Harrington, *US Privacy Laws: The Complete Guide*, VARONIS (Sept. 2, 2022), https://www.varonis.com/blog/us-privacy-laws [https://perma.cc/N8WE-7BLR]; *see* F. Paul Pittman, *U.S. Data Privacy Guide*, WHITE & CASE (Aug. 31, 2022), https://www.whitecase.com/insight-our-thinking/us-data-privacy-guide [https://perma.cc/BT78-C6ZH].

98 *See* Natasha Singer, *What Does California's New Data Privacy Law Mean? Nobody Agrees*, N.Y. TIMES (Dec. 29, 2019), https://www.nytimes.com/2019/12/29/technology/california-privacy-law.html [https://perma.cc/97XH-CGKN].

99 Virginia Consumer Data Protection Act (VCDPA), 2021 Va. Acts 74 (codified at VA. CODE ANN. §59.1-575 (2022)).

100 As amended ineffective January 1, 2023 by the CPRA, 2020 Cal. Stat. A-84 (codified at CAL. CIV. CODE § 1798.100).

101 Klosowski, *supra* note 3 (quoting Kate Ruane, senior legislative counsel for the First Amendment and consumer privacy at the ACLU).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

the Colorado Privacy Act;[106] in 2022, Utah passed the Utah Consumer Privacy Act,[107] and Connecticut enacted the Connecticut Data Privacy Act.[108] More states have passed comprehensive laws since these ones, all with their own variations.

Each of the aforementioned statutes are legislative attempts to do for state residents what the CCPA did for Californians and what the GDPR did for Europeans: respond to concerns about lack of visibility and control over how companies are using their data and try to solve the problem. These comprehensive laws and their sectoral counterparts have been useful for raising standards of privacy across the nation,[109] but the recent proliferation of statutory schemes has created a real problem for organizations. The tangled web of breach notification statutes is one matter; a whole body of privacy legislation that differs in minute ways for each state is a logistical nightmare. Experts also note the real possibility of burnout among privacy professionals. Law firms and other organizations charged with helping companies stay compliant are overwhelmed with the rapidly changing statutory landscape.[110] When the law changes substantially almost every month in a manner affecting the entire nation, it is a clear sign that standardization is needed.

C. A Federal Bill with Promise: The American Data Privacy Protection Act

To solve the mess of data privacy laws in the United States, the House Committee on Energy and Commerce has been diligently working toward compromise on a bill known as the American Data Privacy Protection Act (ADPPA) aimed to serve as a GDPR analog for the entire country and bring the United States up to speed with peer nations.[111] The bill has garnered rare bipartisan support and in July 2022 was even on track to head to the House floor for a vote, a first in the history of such bills advocating for comprehensive data privacy reform.[112] With the transition to a new congressional session, ADPPA appears to

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106 *See* Colorado Privacy Act (CPA), 2021 Colo. Sess. Laws 3445 (codified at COLO. REV. STAT. § 6-1-1301 (2022)).

107 *See* Utah Consumer Privacy Act (UCPA), 2022 Utah Laws 3799 (codified at UTAH CODE ANN. § 13-61-101 (West 2022)).

108 Connecticut Data Privacy Act (CTDPA), 2022 Conn. Pub. Act No. 22-15; *Key Dates from US Comprehensive State Privacy Laws*, INT'L ASS'N OF PRIV. PROS. (Sept. 2022), https://iapp.org/resources/article/key-dates-from-us-comprehensive-state-privacy-laws/ [https://perma.cc/C4TN-ZGLB] (also see accompanying infographic); Anokhy Desai, *U.S. State Privacy Legislation Tracker*, INT'L ASS'N OF PRIV. PROS. (Oct. 7, 2022), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/2AAU-25LT].

109 *See* Klosowski, *supra* note 3.

110 *See id.*

111 American Data Privacy Protection Act (ADPPA), H.R. 8152, 117th Cong. (2022); *see* Anne Toomey McKenna, *Bill Would Increase Data Privacy Protections—and Make Businesses Change How They Handle Data*, N.H. BULL. (Aug. 29, 2022, 5:30 AM), https://newhampshirebulletin.com/2022/08/29/a-new-us-data-privacy-bill-aims-to-give-you-more-control-over-information-collected-about-you-and-make-businesses-change-how-they-handle-data/ [https://perma.cc/5UC2-24TR].

112 *See* Cameron F. Kerry, *Federal Privacy Negotiators Should Accept Victory Gracefully*, THE BROOKINGS INST. (Aug. 12, 2022), https://www.brookings.edu/blog/techtank/2022/08/12/federal-privacy-negotiators-should-accept-victory-gracefully/ [https://perma.cc/6WU2-A6WP].

have lost steam; on December 30, 2022, it was placed on the House's Union Calendar at number 488 where it has stayed ever since.[113] Regardless, ADPPA marks a promising shift toward helpful federal regulation of data collection and processing, and ought to be given serious consideration.

The move toward a comprehensive federal privacy law began during the Obama administration with the Consumer Privacy Bill of Rights,[114] based on the Fair Information Practice Principles identified back in the 1970s.[115] The bill lost momentum, though, and data privacy retreated from the forefront of the national consciousness for several years, especially because the Trump administration was not inclined to pass sweeping federal regulation of any kind.[116] Public attention is now turned toward privacy once more, in part because of the influx of comprehensive state laws in the last few years. There are, of course, intense debates over the content of a potential federal law: the loudest voices resistant to compromise due to concern over weak protections are those among the California Privacy Protection Agency, which enforces the state's privacy act, and Democratic congressmembers like Washington Senator Maria Cantwell, chair of the Senate Committee on Commerce, Science, & Transportation (through which ADPPA would need to pass) and the primary voice of congressional opposition to ADPPA.[117] In 2018, Senator Cantwell and Senator Roger Wicker, a Republican from Mississippi who remains a member of Senator Cantwell's committee, kicked off privacy progress in earnest with separate draft bills.[118] The bills were materially different, sharply diverging on the issue of whether to preempt comprehensive state laws, and to what extent.[119] Senator Cantwell was a particularly prominent voice of caution, pointing out loopholes and suggesting improvements for ADPPA.[120] Recently, though, the latest drafts of Senator Cantwell's bill and the finalized version of ADPPA converged to become, as the Brookings Institution puts it, "virtually identical," marking a dramatic trend toward resolution.[121] ADPPA now includes specific provisions that it does not preempt California citizens' rights to private action after a breach, nor Illinois laws

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113 H.R. 8152, 2022 Sess. (Dec. 30, 2022), *All Actions*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/8152/all-actions?q=%7B%22search%22%3A%22H.R.+8152+american+data+privacy%22%7D&s=2&r=1&overview=closed#tabs [https://perma.cc/6K4J-VPY7] (last visited Nov. 29, 2023). As of November 29, 2023, this remains the latest action on ADPPA.

114 *See* THE WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY (Feb. 2012), https://obamawhitehouse.archives.gov/sites/default/files/privacy-final.pdf [https://perma.cc/7Z5X-2XV5] (containing the Consumer Privacy Bill of Rights).

115 *Reforming the US Approach*, *supra* note 68; U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *supra* note 74.

116 *See Reforming the US Approach*, *supra* note 68.

117 Kerry, *supra* note 112; Editorial Board, Opinion, *Democrats and Republicans Agree on this Tech Privacy Bill. But Can it Pass?*, WASH. POST (Dec. 8, 2022, 2:38 PM), https://www.washingtonpost.com/opinions/2022/12/08/tech-privacy-bill-bipartisan-congress/ [https://perma.cc/AH82-TNN7].

118 Kerry, *supra* note 112.

119 *Id.*

120 *Id.*

121 *Id.*

related to biometric and genetic information.[122] If reintroduced and passed, it would create a Bureau of Privacy within the FTC for enforcement, and violations would be treated as unfair or deceptive acts under the FTC Act.[123]

Experts and commentators have analyzed ADPPA's content, predicting what the bill might achieve for the US privacy field. ADPPA applies to "covered" entities, meaning any entity that collects, processes, or transfers covered data to another entity.[124] Nonprofits and some common carriers are included within this definition.[125] Data covered under the statute is any information or device that can be reasonably linked to a natural person.[126] ADPPA carves out a special category of sensitive data, such as biometric, health, financial, and geologic information, all which is subject to heightened requirements.[127] There is also a special category of entities, called "large data holders," which are organizations that meet certain thresholds of revenue or data processing.[128] Those entities are subject to stricter requirements.[129] Likewise, smaller entities that fall under a specified threshold of revenue derived from data transfers are exempt from certain requirements of ADPPA.[130]

For the most part, the framework of laws in the United States has been what leading privacy scholar Daniel J. Solove calls "rights-based,"[131] where the legislature provides individuals with laws they can use to assert privacy rights in case of violation.[132] The ball is in the data subjects' court; they must act as guardians of their own freedom and point to the law as an enforcement mechanism.[133] A purely rights-based model is rooted in the provision and withdrawal of user consent, but ADPPA incorporates some elements of what Solove calls a "structural" model, where the law places restrictions upon data collection regardless of consent.[134] As currently written, ADPPA mandates that "covered entities may

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[122] Biometric Information Privacy Act (BIPA), 740 ILL. COMP. STAT. ANN. 14/1 (West 2023); Genetic Information Privacy Act (GIPA), 410 ILL. COMP. STAT. ANN. 513/1 (West 2023).

[123] *See* Niketa K. Patel et. al., *The American Data Privacy and Protection Act: Is Federal Regulation of AI Finally on the Horizon?*, MAYER BROWN (Oct. 21, 2022), https://www.mayerbrown.com/en/perspectives-events/publications/2022/10/the-american-data-privacy-and-protection-act-is-federal-regulation-of-ai-finally-on-the-horizon [https://perma.cc/C7P2-DZ4P]; *see also* 15 U.S.C. § 57(a) (2018).

[124] *See* McKenna, *supra* note 111.

[125] *Id.*

[126] *Id.*

[127] STAFF OF COMM. ON ENERGY & COM., 117TH CONG., JUNE 10, 2022 MEMORANDUM 3–5 (Comm. Print 2022).

[128] *Id.* at 4.

[129] *Id.*

[130] *Id.*

[131] *See* Daniel J. Solove, *The Limitations of Privacy Rights*, 98 NOTRE DAME L. REV. 975 (2023).

[132] *Id.* at 983. Solove notes that a rights-based model of privacy protection is less effective than a structural approach, which would focus on placing the burden on organizations collecting data. Given that the rights-based approach currently dominates the legal landscape, my paper will focus on considerations of rights-based legislation.

[133] *Id.*; *Reforming the US Approach*, *supra* note 68 (discussing the United States' practice of placing the burden upon individuals to be vigilant about their own privacy rights).

[134] *See* Solove, *supra* note 131, at 993.

not collect, process, or transfer covered data beyond what is reasonably necessary, proportionate, and limited to provide specifically requested products and services or communicate with individuals in a manner they reasonably anticipate."[135] Covered data must also be permanently deleted once no longer necessary for its original purpose.[136] The Act also includes a civil rights component, containing "broad anti-discrimination protections to protect consumers irrespective of consent."[137] In comparison with the current landscape of privacy in the United States in which almost anything goes, incorporating the structural model of regulation could mark a drastic change in the status quo, especially if enforcement is effective.

Preemption has been a hotly contested issue, and ADPPA leans directly into the matter. The bill states that it should not be construed to preempt state laws regarding general consumer protection, civil rights laws, employee privacy laws, and many other specific areas.[138] Given the construction of the statute, it will preempt some aspects of the CCPA and CPRA, which is why some Californians in state government are skeptical.[139] But states are free to legislate more strictly in specific areas, so the Illinois Biometric Information Privacy Act[140] will not be affected.[141]

In summary, ADPPA requires that data collection be as minimal as possible, allowing covered entities to collect and share data only when reasonably necessary.[142] For the most part, ADPPA is a rights-based law, granting users nationwide an avenue to correct inaccuracies and delete data, but it sets up a framework of structural guardrails as a less flexible system to rein in misuse of data.[143]

D. First Amendment Considerations Inherent in a Comprehensive Federal Privacy Law

Like so much legislative change, ADPPA's development has been far from a unanimous process, with constitutional concerns underpinning many debates about the bill. The drive to pass ADPPA or a bill like it is derived from concern over individuals' privacy; on the other side, some companies desiring to collect, process, and use data have relied on the argument that regulation would infringe upon their freedom of speech.[144] Boiled down, the main tensions of ADPPA could

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135 *See* STAFF OF COMM. ON ENERGY AND COMMERCE, 117TH CONG., *supra* note 127, at 4.

136 *Id.*

137 *Id.*

138 American Data Privacy Protection Act (ADPPA), H.R. 8152, 117th Cong. §§ 404–06 (2022).

139 McKenna, *supra* note 111.

140 Biometric Information Privacy Act (BIPA), 740 ILL. COMP. STAT. ANN. 14/1 (West 2023).

141 McKenna, *supra* note 111.

142 *Id.*

143 *See id.*

144 *See* Margot E. Kaminski & Scott Skinner-Thompson, *Free Speech Isn't a Free Pass for Privacy Violations*, SLATE (Mar. 9, 2020, 2:53 PM), https://slate.com/technology/2020/03/free-speech-privacy-clearview-ai-maine-isps.html [https://perma.cc/DHE9-9MJW].

be characterized as a Fourth[145] and First Amendment[146] standoff. At first glance it may seem as though compromise cannot be reached: how can a right to privacy in one's personal data be reconciled with a company's purported right to "speak" by using or sharing data? There is a strong line of American legal precedent recognizing that speech and privacy are interdependent and exist on a spectrum.[147] In particular, responding to the argument that using and sharing data is protected speech, scholars have noted that there is a recognized concept of privacy in public that outweighs freedom of speech.[148] The interplay of privacy and free speech was demonstrated recently when a company called Clearview AI argued in 2020 that it is protected free speech to "scrape" photographs of people's faces posted on public social media platforms for compilation in a gigantic facial recognition database.[149] However, when Clearview moved to dismiss the case, the ACLU argued that scraping these "faceprints" is not speech,[150] but regulatable conduct, as defined by *United States v. O'Brien*.[151] In Clearview's case, privacy won the day over a warped understanding of free speech. The case reached a settlement permanently restricting Clearview AI from making its faceprint database available to most private entities nationwide.[152]

The fate most likely for ADPPA, should it once again gain momentum, is that lawmakers will need to ensure it can pass a balancing test, something akin to the one recognized by the Supreme Court in *Sorrell v. IMS Health, Inc.*[153] In that case, the Court held that for commercial speech (which may turn out to be the correct category for the majority of data processing and sharing)[154], the burden is on the lawmaker to show that the statute "directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."[155] On the other side of this kind of test, the inquiry is about harm to the data subject, so the balance is between government interest and harm to the individual. An increasing

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145 *See* U.S. CONST. amend. IV.

146 *See* U.S. CONST. amend. I.

147 Kaminski & Skinner-Thompson, *supra* note 144.

148 *See id.*

149 Defendant's Motion to Dismiss at 3, ACLU v. Clearwater AI, Inc., No. 2020-CH-04353 (Ill. Cir. Ct. 2020).

150 Plaintiffs' Response to Defendant's Motion to Dismiss at 14–15, ACLU v. Clearwater AI, Inc., No. 2020-CH-04353 (Ill. Cir. Ct. 2020).

151 391 U.S. 367, 377 (1968).

152 ACLU v. Clearview AI, Inc., No. 2020-CH-04353 (Ill. Cir. Ct. 2020); *ACLU v. Clearview AI*, ACLU (May 11, 2022), https://www.aclu.org/cases/aclu-v-clearview-ai [https://perma.cc/C6AY-4RYJ]. For a general discussion of this dispute, see Vera Eidelman, *Clearview's Dangerous Misreading of the First Amendment Could Spell the End of Privacy Laws*, ACLU, NEWS & COMMENT. (Jan. 7, 2021), https://www.aclu.org/news/privacy-technology/clearviews-dangerous-misreading-of-the-first-amendment-could-spell-the-end-of-privacy-laws [https://perma.cc/7P32-MZCN].

153 564 U.S. 552 (2011).

154 Because, according to leading privacy scholar Eugene Volokh, "the Court's most common definition of commercial speech is 'speech that explicitly or implicitly propose[s] a commercial transaction.'" Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1081 (2000) (quoting Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976)).

155 Sorrell v. IMS Health, Inc., 564 U.S. 552, 553–54 (2011).

number of courts have explored this "harm" aspect of the test. For example, in *Patel v. Facebook*, the Ninth Circuit Court of Appeals, concluded "that an invasion of an individual's biometric privacy rights 'has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.'"[156] For ADPPA, legislators will need to establish that the legislation is warranted because the harm to individual privacy without ADPPA is greater than the interest of covered entities in unrestricted collecting and processing.[157]

II. THE UNITED STATES NEEDS A COMPREHENSIVE FEDERAL DATA PRIVACY LAW

A. The Patchwork Model is Unsatisfactory

Perhaps the most obvious reason Congress ought to give ADPPA serious consideration is the breadth and number of parties in favor of a federal law—and this law in particular. Countless parties have articulated why a federal law would be beneficial for the United States, citing concerns for individual privacy rights and the confusion and expense for businesses if the patchwork of laws was allowed to continue. For example, unlikely though it may seem, the head executives of major companies including Amazon, AT&T, Accenture, American Express, and Bank of America signed a joint letter to Congress in 2019 pleading for a federal privacy law.[158]

Without a federal law, there are several options to move forward, but none are satisfactory. The states could continue to pass a mix of sectoral and comprehensive laws. There has been a trend among many states authoring data privacy bills to base the text of their laws on the Washington Privacy Act, a bill that has not yet passed, but has nonetheless gained significant traction as a model template.[159] Nevertheless, whether states were to use the Washington Privacy Act or ADPPA, the material differences among the five most recent comprehensive state laws are a good indicator that the gaps of the patchwork approach wou-

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[156] 932 F.3d 1264, 1273 (9th Cir. 2019) (quoting Spokeo Inc, v. Robins, 578 U.S. 330, 341 (2016)).

[157] Eidelman, *supra* note 152. For another example of a balancing test that could be relevant for ADPPA, see United States v. O'Brien, 391 U.S. 367 (1968) (finding that for regulations of conduct with an incidental effect on speech [which could be another fitting category for data collection]).

[158] Letter from Chief Executives of Leading Companies across industries, *supra* note 95 (writing "We urgently need a comprehensive federal consumer data privacy law to strengthen consumer trust and establish a stable policy environment in which new services and technologies can flourish within a well-understood legal and regulatory framework. Innovation thrives under clearly defined and consistently applied rules.").

[159] Washington Privacy Act, S.B. 6281, 66th Leg., Reg. Sess. (Wash. 2020); David Stauss, *State Data Privacy Legislation: Takeaways from 2022 and What to Expect in 2023*, INT'L ASS'N PRIV. PROS. (Aug. 23, 2022), https://iapp.org/news/a/state-data-privacy-legislation-takeaways-from-2022-and-what-to-expect-in-2023/ [https://perma.cc/3DUF-4C54].

ld not be eliminated.[160] Another option for state lawmakers is simply to wait for Congress to pass a law, whether ADPPA or not, and do nothing in the meantime. This is not likely, nor is it wise. Until recently, the only rules requiring companies to dispose of their massive stockpiles of old consumer data were the comprehensive state laws, meaning years of data has been at risk of exposure in a breach. The FTC recently updated its Safeguard Rule to mandate that companies dispose of customer information "two years after the last time the information is used in connection with providing a product or service to the customer unless the information is required for a legitimate business purpose," effective December 9, 2022.[161] State lawmakers are taking action as well: in the 2022 legislative cycle alone, the legislative bodies of twenty-nine states and the District of Columbia either introduced or carried over data privacy bills. Experts watching this legislative activity have remarked upon the unusually high level of attention to data privacy among states, an encouraging trend that will hopefully incentivize federal action.[162]

Reviewing the differences among the comprehensive state laws, one may wonder whether there could be a good reason for the differences—would a federal law do more harm than good, taking away states' ability to customize provisions like applicability thresholds, private rights of action, and amounts of fines? Interestingly, it is rare to find a practice-oriented article that even reaches the question of why the laws have material differences; they focus instead on how to keep track of the differences (a reality that may be due to the sheer struggle to keep up with the ever-changing legal landscape).[163] Likewise, scholarly articles on data privacy are generally oriented toward more theoretical questions about the legality and constitutional underpinnings of privacy and free speech.[164] But examining the laws themselves for trends is helpful, and yields further support for the passage of a federal law. The reason for the differences is likely more policy-oriented than anything; for example, Utah's act is the most business-friendly of the laws, allowing organizations considerable latitude to collect, process, and use data.[165] Connecticut's and Colorado's privacy acts are among the most consumer friendly (exceeded, of course, by the CCPA's strong consumer protections), with

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160 *See Data Privacy Laws by State: Comparison Charts*, BLOOMBERG LAW (Feb. 2, 2022), https://pro.bloomberglaw.com/brief/data-privacy-laws-in-the-u-s/ [https://perma.cc/4L6H-J8W2].

161 *See* Standards for Safeguarding Customer Information, 16 C.F.R. § 314 (2022).

162 *E.g.*, *Data Privacy Laws by State*, *supra* note 160; Mark Smith, *Five Subtle Ambiguities in Virginia's New Privacy Law*, BLOOMBERG L. ANALYSIS (June 9, 2021, 4:01 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-five-subtle-ambiguities-in-virginias-new-privacy-law [https://perma.cc/8KAZ-G4T7]; *Comparing the 5 Comprehensive Privacy Laws Passed by U.S. States*, CLIENT ALERTS, KRAMER LEVIN NAFTALIS & FRANKEL (June 10, 2022), https://www.kramerlevin.com/en/perspectives-search/comparing-the-5-comprehensive-privacy-laws-passed-by-us-states.html [https://perma.cc/9QMH-CQMV]; Sheila A. Millar & Tracy P. Marshall, *The State of U.S. State Privacy Laws: a Comparison*, NAT'L L. REV. (Dec. 23, 2022), https://www.natlawreview.com/article/state-us-state-privacy-laws-comparison [https://perma.cc/U9TM-VYMD].

163 *See* Stauss, *supra* note 159.

164 *E.g.*, Volokh, *supra* note 154; Solove, *supra* note 131; Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559 (2000).

165 *See* Stauss, *supra* note 159.

requirements for opting out and prohibitions against dark patterns.[166] The tension between freedom for businesses and protection for consumers will always be at the heart of the privacy debate, but the benefits of a federal law will far outweigh the benefits of allowing states to diversify.

B. Addressing Arguments Against the Passage of a Federal Law

Scholars arguing against the GDPR and the passage of a federal law modeled after it tend to focus on the costs of compliance and the potential curtailing of technological progress. The below arguments represent the most prominent ones that could be brought against the passage of ADPPA, but they do not outweigh the benefits of passing the federal bill.

Matthew R. A. Heiman, Director of Planning at George Mason University's National Security Institute, wrote an article summarizing many of the main arguments against the GDPR which can be and have been levied at ADPPA as well.[167] He argues first that the key terms in the GDPR are either vaguely defined (such as "collect" and "store") or too expansive (such as "personal data," which is defined as "any information relating to an individual, whether it relates to his or her private, professional, or public life.").[168] Heiman highlights that vagueness in terminology is especially unforgivable in light of the significant penalties the GDPR includes for noncompliance.[169] But by virtue of the GDPR being passed first, the House Energy and Commerce Committee has been given the opportunity to cure major vagueness present in the GDPR when drafting ADPPA, and any leftover vague or overbroad terms must either be construed as intentional or a necessary evil of drafting a comprehensive statute. ADPPA's drafters seem to have been careful to minimize vagueness, defining covered entities to include nonprofits and specific groups of common carriers, defining sensitive data, and defining large data holders via thresholds.[170] And even if some key terms in ADPPA do remain ambiguous after its passage, covered entities and those charged with keeping them compliant can use the same interpretive strategies and doctrines used for every ambiguous legal provision.[171]

Heiman, like others,[172] notes that small businesses could struggle to meet the requirements of a sweeping law like the GDPR, citing a report saying that to

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166 *See id.*

167 *See* Matthew R. A. Heiman, *The GDPR and the Consequences of Big Regulation*, 47 PEPP. L. REV. 945 (2020).

168 *Id.* at 949.

169 *Id.* at 950.

170 *See supra* section I.C.

171 For example, if plain meaning is ambiguous, practitioners can look to legislative history or similar guidance, as Europeans have done with the GDPR. The Article 29 Working Party was an advisory body charged with issuing guidelines for the interpretation of the GDPR, and their writings have provided much clarity when it came to ambiguous provisions. *See* WORKING PARTY GUIDELINES, EUR. COMM'N, NEWSROOM, https://ec.europa.eu/newsroom/article29/items [https://perma.cc/AL97-R8M9] (last visited Oct. 30, 2023).

172 *See e.g.*, *Hearing on the General Data Protection Regulation and California Consumer Privacy Act: Opt-Ins, Consumer Control, and the Impact on Competition and Innovation Before S. Comm. On the*

comply with the GDPR, a company will need to spend $1 million on the necessary technology.[173] However, while the GDPR does not contain exceptions for small businesses,[174] ADPPA does.[175] Moreover, experts have shown that GDPR-compliant businesses save money in the long run, because, when breaches do occur, the precautions put in place, like data security measures and data minimization, limit damage.[176]

Heiman argues that the GDPR threatens the internet's business model (referring to the practice of offering free services) and poses risks to emerging technologies like blockchain and the development of artificial intelligence (AI).[177] His arguments could be applied to ADPPA: if the majority of consumers withhold consent to tracking, companies will have to charge for services that were once offered for free, meaning platforms like Facebook, LinkedIn, and even some news sources could begin to charge fees.[178] And if consumers exercise their right to deletion, blockchain—which depends on the permanent retainment of information—will be unable to function.[179] Such a bleak picture, if applied to the United States, misses the bottom line: things cannot stay as they are in this country. As American law currently stands, the most helpful aspects of the law kick in after a breach has already occurred. There is a massive gap in the law that does not protect against the "sloppy mass data mining" that proves so disastrous when breaches inevitably occur.[180] A federal law modeled in the GDPR's image would be proactive, targeting data collection and use, rather than reactive. If that means free services and blockchain must change how they operate, that may be the necessary price to pay. "People lend their information to businesses, and those businesses have a responsibility to look after that information with care."[181]

Lastly, Heiman emphasizes that, in some circumstances, databases of information linkable to people can be very helpful to law enforcement, and is so

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Judiciary, 116th Cong. (2019) (statement of Roslyn Layton, American Enterprise Institute); *see also* Oliver Smith, *The GDPR Racket: Who's Making Money from This $9 Billion Business Shakedown*, FORBES (May 2, 2018), https://www.forbes.com/sites/oliversmith/2018/05/02/the-gdpr-racket-whos-making-money-from-this-9bn-business-shakedown/ [https://perma.cc/2NNP-XN7M].

173 Heiman, *supra* note 167 at 950 (citing George P. Slefo, *Got $1 Million? You're That Much Closer to Being GDPR Compliant*, ADAGE (Dec. 11, 2017), https://adage.com/article/digital/gdrp-privacy-costing-media-companies/311582) [https://perma.cc/V9GM-A67P].

174 *See GDPR for Small Businesses Under 250 Employees*, CLARIP, https://www.clarip.com/blog/gdpr-under-250-employees/ [https://perma.cc/G8NV-U3X9] (last visited Oct. 17, 2023).

175 American Data Privacy Protection Act (ADPPA), H.R. 8152, 117th Cong. § 209 (2022).

176 *See* Polanco, *supra* note 9, at 634 (citing Dan Swinhoe, *Does GDPR Compliance Reduce Breach Risk?*, CSO ONLINE (Mar. 29, 2019), https://www.csoonline.com/article/3369461/does-gdpr-compliance-reduce-breach-risk.html [https://perma.cc/TKR4-SASW]).

177 Heiman, *supra* note 167 at 950–51 (citing Anisha Mirchandani, *The GDPR-Blockchain Paradox: Exempting Permissioned Blockchains from the GDPR*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1201, 1224 (2019)); A blockchain is a "distributed database or ledger that is shared among the nodes of a computer network" and collects information in groups known as blocks. Adam Hayes, *Blockchain Facts: What Is It, How It Works, and How It Can Be Used*, INVESTOPEDIA (Sept. 27, 2022), https://www.investopedia.com/terms/b/blockchain.asp [https://perma.cc/84FV-586Y].

178 Heiman, *supra* note 167, at 950–52.

179 *Id.*

180 Polanco, *supra* note 9, at 620.

181 *Id.* at 630.

crucial in some cases that enforcement would be significantly hindered without such information.[182] Privacy expert Michael Lamb agrees with Heiman, discussing how ADPPA in particular contains "unlimited rights for any person to opt out of data held by any firm that acquired the data indirectly" (such as anti-crime services that do not get their data directly from consumers) but "contains no exceptions for data used to prevent or investigate fraud or other crimes."[183] In other words, as Lamb points out, efforts to identify sexual predators or potential terrorists could be frustrated if such persons are able to request that third party data brokers not use their information.[184]

The best answer to Heiman and Lamb's arguments at this point may be that while enforcing the law may become more difficult, ensuring ADPPA's passage is more important than ironing out every kink, especially if alternative routes are available to law enforcement. Heiman discusses how the GDPR reduced access to WHOIS, a popular third-party database that was used by law enforcement, owners of intellectual property, security experts, domain name owners, and many others to identify infringers of intellectual property rights.[185] Practitioners have commented on the situation as it stands now that the GDPR is in place, saying the situation is not as dire as some predicted, and there are still strategies firms and government officials can use to enforce the law.[186] The situation may be the same for ADPPA if it passes; law enforcement will need to find other sources of the same information, or concerned groups could lobby for an amendment. Moreover, Lamb's complaint that even potential sexual predators or potential terrorists could opt out of data processing contains a hidden assumption that such people should not be eligible for privacy rights despite not yet having committed any crime. If this understanding of Lamb's argument is correct, his is a disturbing assertion that goes against the values of constitutional and criminal law.[187] Perhaps some carve-out for convicted criminals could be contemplated, in which criminals forfeit data privacy rights for a period of time. The fact remains that the need for a comprehensive federal law to protect individ-

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182 Heiman, *supra* note 167, at 952.

183 Michael Lamb, *What's Needed to Improve the ADPPA*, INT'L ASS'N OF PRIV. PROS. (Oct. 20, 2022), https://iapp.org/news/a/whats-needed-to-improve-the-adppa/ [https://perma.cc/YXT5-NAF2].

184 *Id.*

185 Heiman, *supra* note 167, at 952 (discussing the WHOIS database, a registry of website ownership that was formerly open to the public); David E. Weslow et al., *Preparing for Drastic Changes to Availability of "WHOIS" Information About Domain Names*, WILEY LAW (Apr. 18, 2018), https://www.wiley.law/alert-IPAlert-PreparingforDrasticChangestoAvailabilityofWHOISInformationAboutDomainNames [https://perma.cc/WE9G-GPJD] (listing the various parties who have relied upon WHOIS for information).

186 David Cooper et al., *Enforcement in an Era of Data Privacy and Redacted WHOIS*, WORLD TRADEMARK REV. 2–3 (Oct. 1, 2019), https://www.worldtrademarkreview.com/article/enforcement-in-era-of-data-privacy-and-redacted-whois [https://perma.cc/2ZSD-8Q7R] (noting that "archived WHOIS information is still widely available" and that "monitoring tools can still be used to detect potential and actual infringements" as well as "online relay system[s]" that allow enforcers to "contain domain name registrants without having access to their personal data.").

187 *See Presumption of Innocence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/presumption_of_innocence [https://perma.cc/N68C-PS4Q] (last visited Oct. 17, 2023).

ual privacy rights is greater than the inconvenience to law enforcement's search for suspects.

Roslyn Layton, visiting scholar at the American Enterprise Institute, and former law student Julian Mclendon raise other noteworthy arguments against the GDPR, contending that a similar model should not be used in the United States and implying that the patchwork functions smoothly.[188] First, Layton and Mclendon claim in a questionable twist that the GDPR does not protect data privacy, it is instead oriented only toward data protection.[189] They differentiate privacy from protection, first citing the International Association of Privacy Professionals' definition of information privacy as the "claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others."[190] They then explain that "data protection . . . is the safeguarding of information from corruption, compromise, or loss."[191] They are not the only people to make such a distinction: an article by IPSwitch states that "data protection is essentially a technical issue, whereas data privacy is a legal one."[192] But Layton and Mclendon's claim that the GDPR does not protect data privacy is simply incorrect. The one real measure of support they give their claim is that the word "privacy" does not appear in the final text of the GDPR other than in a footnote and that the "P" of "GDPR" stands for processing rather than privacy.[193] In fact, the GDPR was created precisely to protect an individual's right to determine "when, how and to what extent" their information is communicated to others, a goal which perfectly corresponds with data privacy.[194] ADPPA is constructed to do the same. Like the GDPR, ADPPA "allows individuals to access, correct, delete, and export covered data and opt out of data transfers and targeted advertising."[195] It is understandable why Layton and Mclendon interpreted these rights to be consistent with data protection, but that does not mean data privacy is not also protected. Both statutes empower individuals to determine how their information is collected and used.

Layton and Mclendon make it seem as though it would be a gross exaggeration to characterize the US data privacy landscape as the "wild west." They argue that there are "hundreds of laws relating to privacy and data protection in the

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188 *See* Roslyn Layton & Julian Mclendon, *The GDPR: What it Really Does and How the U.S. Can Chart a Better Course*, 19 FEDERALIST SOC'Y REV. 234 (2018).

189 *Id.*

190 *Id.* at 235 (citing *Glossary of Privacy Terms*, IAPP, https://iapp.org/resources/glossary/#information-privacy [https://perma.cc/4HTM-FCUR] (last visited Nov. 14, 2023)).

191 *Id.*

192 Rick Robinson, *Data Privacy vs. Data Protection*, IPSWITCH (Jan. 30, 2020), https://blog.ipswitch.com/data-privacy-vs-data-protection [https://perma.cc/2SMW-DLWL].

193 Layton & Mclendon, *supra* note 188, at 235 (citing GDPR, *supra* note 14, n.18).

194 *Id.* (quoting *Information Privacy*, INT'L ASS'N OF PRIV. PROS: GLOSSARY, https://iapp.org/resources/glossary/#information-privacy [https://perma.cc/ZA75-6B2B] (last visited Oct. 17, 2023)); *What is GDPR, the EU's New Data Protection Law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr/ [https://perma.cc/JU8W-HTEL] (last visited Oct. 17, 2023).

195 Qiuyang Zhao, *American Data Privacy and Protection Act: Latest, Closest, Yet Still Fragile Attempt Toward Comprehensive Federal Privacy Legislation*, HARV. J. L. & TECH.: JOLT DIGEST (Oct. 19, 2022), https://jolt.law.harvard.edu/digest/american-data-privacy-and-protection-act-latest-closest-yet-still-fragile-attempt-toward-comprehensive-federal-privacy-legislation [https://perma.cc/7J8C-52NZ].

US—including common law torts, criminal laws, evidentiary privileges, federal statutes, and state laws."[196] Their argument proves too much. There may be hundreds of laws that relate in some way to privacy and data, but that does not fix the undeniable problems that those very laws present: American companies and individuals have been left vulnerable to cyberattacks due to complex and transient patchworks; all parties are confused about their rights and duties; and ultimately, the nation is left generally disadvantaged in a rapidly evolving digital world. Layton and Mclendon point to the Federal Trade Commission Act as the shining example of American privacy law; they point out that the FTC enforces privacy promises made only upon being broken and, presumably in contrast to the GDPR, "does not assume that every entity wants to harm online users."[197] The FTC presides over deceptive and unfair practices.[198] While the FTC has determined that claims of inadequate data security can legitimately fuel a deceptive practices claim, the lack of comprehensive regulations have resulted in lengthy, costly proceedings for those making data security claims.[199] Ambiguity in the FTC's current policies leads to gaps that can be filled by a comprehensive law. Even if Layton and Mclendon's characterization of the GDPR is correct, that simply means any similarities in ADPPA exist to further protection of data subjects. Even if ADPPA does err on the side of assuming the worst of entities, data subjects need the protection and the power ADPPA can provide.

Layton and Mclendon's final significant argument is the problematic assertion that the United States would not benefit from a GDPR-like privacy model because Americans simply care less about giving out their private data. They cite one study as proof of their argument and conclude that "this could explain why Americans are more comfortable with sharing information."[200] While their supporting claim that a GDPR-like model may not perfectly fit every country is sound, their generalization about American attitudes toward privacy has been undermined by numerous surveys and studies.

The reality of the American attitude toward data privacy sharply contradicts Layton and Mclendon's claims, signifying a real, abiding need for clarity and regulation. The Pew Research Center has a treasure trove of data, all pointing to a deep sense of confusion among average citizens and an increasing lack of trust toward data collectors. The Center identifies the 2013 leak by former National Security Agency contractor Edward Snowden as the beginning of America's suspicions about data collection and processing.[201] At the close of 2019, a clear majority of Americans expressed concern over the amount of data collected

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196 Layton & Mclendon, *supra* note 188, at 236.

197 *Id.*

198 15 U.S.C. §§ 41-58 (2018).

199 *See* Polanco, *supra* note 9, at 623–26 (referencing F.T.C. v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602 (D.N.J. 2014), *aff'd*, 799 F.3d 236 (3d Cir. 2015)).

200 *Id. at* 237; *see also Frequently Asked Questions*, HOFSTEDE INSIGHTS, https://hi.hofstede-insights.com/faq [https://perma.cc/M6S4-78NU] (last visited Oct. 17, 2023).

201 Brooke Auxier et al., *10 Tech-Related Trends That Shaped the Decade*, PEW RSCH. CTR. (Dec. 20, 2019), https://www.pewresearch.org/fact-tank/2019/12/20/10-tech-related-trends-that-shaped-the-decade/ [https://perma.cc/4FF3-M7AQ].

about them by companies and the government.[202] Most Americans "do not think it is possible to go about daily life without corporate and government entities collecting data about them."[203] Crucially, most Americans believe the risks of data collection outweigh the benefits.[204] It is true that about half of American adults are comfortable with the government collecting mass data to assess potential terrorist threats.[205] But most citizens who say they understand little to nothing about data protection laws are in favor of more governmental regulation.[206] In fact, half of American citizens are so concerned about privacy, they have been dissuaded from using a product or service.[207] In short, Americans emphatically *do* care about whether their information is collected and how it is used, regardless of the fact that their attitudes have changed dramatically over a short period of time. Americans deserve a regulatory scheme that they feel protects them adequately, and ADPPA shows great promise.

C. The American Data Privacy Protection Act's Consistence with the First Amendment

While the primary object of this Note is to argue that a federal law regulating data privacy is needed and that ADPPA appears to be a solid solution, it is important to briefly address ADPPA's fitness for withstanding First Amendment challenges; for no law can be a solution without passing constitutional muster. As mentioned above in section I.D, legislators wishing to pass ADPPA will need to be able to demonstrate why the harm to American citizens without ADPPA is greater than the interest of potential collectors and processers in unfettered data mining. Given that ADPPA does not apply to government entities,[208] leaving only private entities and nonprofits within ADPPA's restrictions, convincing a court that ADPPA is worth passing may prove to be straightforward. The government arguably has the most interest in collecting and processing data for the sake of national security and other important goals and will be exempt. Without ADPPA, the situation for citizens (who lack protection) and potential covered entities (which lack direction) is dire.

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202 *See* Brooke Auxier & Lee Rainie, *Key Takeaways on Americans' Views About Privacy, Surveillance and Data-Sharing*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/fact-tank/2019/11/15/key-takeaways-on-americans-views-about-privacy-surveillance-and-data-sharing/ [https://perma.cc/VFP6-JGT2].

203 *Id.* *See* Brooke Auxier, *How Americans See Digital Privacy Issues Amid the COVID-19 Outbreak*, PEW RSCH. CTR. (May 4, 2020), https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/ [https://perma.cc/9GWK-AAU2]; *see also* Brooke Auxier, *How Americans See US Tech Companies as Government Scrutiny Increases*, PEW RSCH. CTR. (Oct. 27, 2020), https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/ [https://perma.cc/QJ6C-VKS8].

204 Auxier & Rainie, *supra* note 202.

205 *Id.*

206 *Id.*

207 *See* Andrew Perrin, *Half of Americans Have Decided Not to Use a Product or Service Because of Privacy Concerns*, PEW RSCH. CTR. (Apr. 14, 2020), https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/ [https://perma.cc/PGK2-9LB4].

208 *See* McKenna, *supra* note 111.

Leading privacy scholar Eugene Volokh once expressed doubt that sharing individuals' data between companies can be regulated as speech.[209] He acknowledges that the commercial speech doctrine has been held out as a promising category for data sharing but argues that data sharing does not meet the criteria for commercial speech.[210] "Under the 'speech that proposes a commercial transaction' analysis, communication of information about customers by one business to another is not commercial speech. It doesn't advertise anything, or ask the receiving business to buy anything from the communicating business."[211] Today, though, "collecting and selling data about people is estimated to be a $200 billion business, and all signs point to continued growth of the data-brokerage business."[212] Marketers, whether social media companies, grocery stores, or clothing retailers, can pay to license databases compiled by data brokers, who have gathered information about consumers through many different sources: "through loyalty cards, public records, social media posts, and most often by tracking their browsing behavior across different websites."[213] Marketers then target certain audiences using this data.[214] If this highly popular practice of data sharing for money is not commercial speech, hardly any other transactional speech would fit the bill; categorizing it as commercial would not stretch the definition.[215] Thus, legislators hoping to pass ADPPA can at least argue that this kind of speech passes First Amendment tests, and they can likely extend the definition to free data sharing without fear of putting many other kinds of speech at risk.[216]

Michael Lamb points out another First Amendment challenge ADPPA might face; ADPPA, as well as all five state comprehensive data privacy laws, exempts publicly available information about individuals from legal regulation.[217] It does so because "the Supreme Court has never upheld restricting speech when the content of the speech consists of true, publicly available information that was

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209 *See* Volokh, *supra* note 154.

210 *See id.*, at 1075–76.

211 Volokh, *supra* note 154, at 1082.

212 Catherine Tucker & Nico Neumann, *Buying Consumer Data? Tread Carefully.*, HARV. BUS. REV. (May 1, 2020), https://hbr.org/2020/05/buying-consumer-data-tread-carefully [https://perma.cc/B7HM-LW36]. *See* Kalev Leetaru, *What Does It Mean for Social Media Platforms to "Sell" Our Data?*, FORBES (Dec. 15, 2018, 3:56 PM), https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data/?sh=51a4cd022d6c [https://perma.cc/6XXE-QUMW]; Kalev Leetaru, *The Data Brokers So Powerful Even Facebook Bought Their Data—But They Got Me Wildly Wrong*, FORBES (Apr. 5, 2018), https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data/?sh=51a4cd022d6c [https://perma.cc/WK5S-5KPF].

213 Tucker & Neumann, *supra* note 212.

214 *See id.*

215 Volokh, *supra* note 154, at 1084 (articulating a concern about stretching the definition of "commercial speech"). For another defense of data sharing as commercial speech, see Kathryn Peyton, *The First Amendment and Data Privacy: Securing Data Privacy Laws That Withstand Constitutional Muster*, 2019 PEPP. L. REV. 51, 75–76 (2020).

216 Volokh, *supra* note 154, at 1122 ("All the proposals for such expansion—whether based on an intellectual property theory, a commercial speech theory . . . would, if accepted, become strong precedent for other speech restrictions . . . [and] may shift courts and the public to an attitude that is more accepting of government policing of speech generally.").

217 Lamb, *supra* note 183.

lawfully made public."[218] Lamb predicts that ADPPA will face scrutiny because it allows for restriction of publicly available information if combined with covered data.[219] According to Lamb, databases used by law enforcement and identity authentication services routinely combine public data with covered data. While a deep dive into First Amendment precedent is outside the scope of this Note's analysis, it is conceivable that, if given the opportunity, the Court, taking all circumstances of the current data privacy landscape into account, would decide that data covered under ADPPA must take precedence over public data so that any combinations must give priority to covered data. The lack of protection for data addressed by ADPPA is so stark that it is time for federal regulation to be given serious consideration. Of course, any downsides of this relatively expansive approach should be thoughtfully considered as well, and Lamb even suggests adding a provision to ADPPA exempting public interest data uses (although one would imagine the exemption for government entities could be sufficient).[220] Ultimately, avenues around Volokh's and Lamb's objections are possible, leaving room for hope about ADPPA's viability.

CONCLUSION

The nature of privacy is difficult to pin down and challenging to regulate,[221] but the problems created by a lack of regulation in the United States far outweigh the costs of passing legislative solutions. The patchwork of laws currently comprising the United States' approach toward data privacy is confusing, outdated, and poses risks to individuals and companies alike. The federal government should take seriously the possibilities ADPPA poses for national (and international) harmony. Congress can iron out defects as needed but ought to keep passage of a federal law the main goal, as partisan arguing has too often killed efforts at regulating data collection.[222]

A comprehensive privacy law would change data subjects' daily lives for the better. People would be able to buy products and explore websites without concerns over how much of their data could be compromised from a single click.[223] Privacy policies would be easy to understand, and a baseline level of privacy would allow consumers to feel more comfortable clicking "I accept" in response to a boilerplate list of terms and conditions.[224] Consumers who know that companies will be held accountable for protecting against and responding to breaches will have higher levels of trust in their choices. On the other side, companies that have previously spent resources keeping breach notification laws and data privacy laws

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218 *Id.*

219 *Id.*; *see* American Data Privacy Protection Act (ADPPA), H.R. 8152, 117th Cong. § 2(27) (2022).

220 Lamb, *supra* note 183.

221 *See generally* Solove, *supra* note 74 (laying out a framework to help scholars organize leading theories of privacy as a concept, but acknowledging that privacy is nebulous).

222 *See* Editorial Board, Opinion, *Enough Failures. We Need a Federal Privacy Law.*, WASH. POST (Mar. 30, 2022, 3:53 PM), https://www.washingtonpost.com/opinions/2022/03/30/congress-must-pass-federal-privacy-law/ [https://perma.cc/TRD8-8AM2].

223 Klosowski, *supra* note 3.

224 *Id.*

straight will enjoy the benefits of clarity about the exact limits of data collection, processing, and sharing.

Laying down rules and regulations is crucial when there is a lack of legal clarity, as there so clearly is with the United States' data privacy regime. A legal vacuum such as this cries out for what jurisprudence scholar Larry Alexander calls "authoritative settlement," or a set of rules to which all actors can point as the final authority.[225] A federal law would solve the problems of coordination among organizations and states; enable efficiency when it comes to everyday user experience; prevent greater injury when breaches occur; and allow for greater expertise in the privacy community, reducing burnout and leading to greater trust among consumers.

Naturally, a federal privacy law subject to legislative compromise will never fix every issue, but at least it could encourage the development of a technological world less hostile to people's privacy and provide protection against careless data mining.[226] After all, "'[p]rivacy isn't about not using tech, it's about being able to participate in society and knowing your data isn't going to be abused. . . .'"[227] Given the level of bipartisan agreement about the state of American data privacy, the time is right for a federal law to protect Americans' personal information from misuse.

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[225] For a broad discussion of legal clarity for better efficiency, see Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 533–36 (1999).

[226] *See* Klosowski, *supra* note 3.

[227] *Id.* (quoting Amie Stephanovich, executive director at the Silicon Flatirons Center at Colorado Law).

HAVE SOME HEART FOR THE HEARTLAND: A CALL FOR A FEDERAL RIGHT TO REPAIR LAW

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CONTENTS

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INTRODUCTION

A farmer in the heartland is granted access to an online, invite only, paid discussion forum where they acquire "cracked" firmware that was created somewhere in Eastern Europe, which they will use to hack their farming equipment.[1] In Nebraska, another farmer intentionally seeks out a twenty-five year-old John Deere tractor, not out of economic necessity, but rather because it was the only model the farmer was assured a local repair shop would be able to fix.[2] These are not isolated incidents; they are spurred by farmers attempting to circumvent a repair monopoly artificially manufactured by companies themselves. This monopoly was brought about by the advent of high–tech farming which all agriculture companies are involved in, but the focus of this Note is on John Deere. In this era of high-tech farming, one can understand the modern tractor as a supercomputer.[3] Everything a farmer does with these machines generates a message that is sent to the cloud for John Deere to analyze.[4] With this digitized farming, the computers in the equipment enable the transmission of farming data such as, "moisture and nitrogen levels in soil; the exact placement of seeds, fertilizer, and pesticides; and, ultimately, the size of the harvest."[5] The issue for farmers comes when their machine needs a repair, as it often requires software from John Deere which the company refuses to distribute to farmers or independent repair shops.[6]

For example, tractor engines build up soot during their operation which is generally self–cleaned by the machine in passive regeneration where the soot is oxidized before being burnt off.[7] If the tractor is unable to regenerate, it will go into "limp mode," reducing power to a point that "will allow a farmer to 'limp' their equipment out of the field, but not much else" as this is an emissions issue.[8] In instances such as these, small or independent repair shops and farmers are unable to access the software necessary to restart and repair equipment them-

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[1] Jason Koebler, *Why American Farmers Are Hacking Their Tractors with Ukrainian Firmware*, VICE (Mar. 21, 2017, 4:17 PM), https://www.vice.com/en/article/xykkkd/why-american-farmers-are-hacking-their-tractors-with-ukrainian-firmware [https://perma.cc/4AQM-6CBW].

[2] Louise Matsakis & Olivia Solon, *Senate Introduces Bill to Allow Farmers to Fix Their Own Equipment*, NBC NEWS (Feb. 1, 2022, 7:30 AM), https://www.nbcnews.com/tech/new-senate-bill-farm-equipment-right-to-repair-rcna13961 [https://perma.cc/AP3R-6WLD].

[3] Peter Waldman & Lydia Mulvany, *Farmers Fight John Deere Over Who Gets to Fix an $800,000 Tractor*, BLOOMBERG (Mar. 5, 2020, 5:00 AM), https://www.bloomberg.com/news/features/2020-03-05/farmers-fight-john-deere-over-who-gets-to-fix-an-800-000-tractor [https://perma.cc/ETD6-9K9G].

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Highlighting the Importance of Engine Regeneration*, MACH. FINDER BLOG, https://blog.machinefinder.com/31770/importance-of-engine-regeneration [https://perma.cc/RHG4-TBB5] (last visited Jan. 14, 2023).

[8] KEVIN O'REILLY, WHY FARMERS NEED RIGHT TO REPAIR 5 (U.S. PIRG Educ. Fund 2022), https://pirg.org/edfund/resources/why-farmers-need-right-to-repair-2/ [https://perma.cc/Y8W6-PKAT] [hereinafter WHY FARMERS NEED RIGHT TO REPAIR].

selves.[9] To have their equipment repaired, farmers must either bring the machine to a licensed John Deere repair shop or pay for a mechanic from the company to do a house call.[10] Yet, getting these machines operational again is not a quick process and the time lost can be costly.[11] A corn farmer in Nebraska faced a similar emissions error with a windstorm looming and lost five-hours waiting for a half-hour repair.[12] In that time, the farmer lost at least fifteen percent of their crop.[13]

Numerous farmers and their unions as a whole, along with members of Congress, have called for legislation prohibiting these situations from occurring, and these proposals have been coined the "right to repair."[14] Succinctly stated, the aim of repair legislation is to expand choices by "giving farmers and independent mechanics access to necessary repair materials at a fair and reasonable price."[15] Part I of this Note examines the history of both the increase in the type of software used within farming equipment and the rise of the right to repair movement. Part II describes the legislation surrounding the proposed right to repair along with an analysis of that which has been passed recently at both the state and federal levels. Part III discusses the most recent events with right to repair; an FTC complaint filed by a farmer's union, a call for the EPA to launch an investigation surrounding emission controls, a consolidated lawsuit against John Deere, as well as a memorandum of understanding. Part IV focuses on why right to repair is truly vital at this moment. In Part V, the arguments made by John Deere are considered. Finally, Part VI is the call for federal legislation granting the right to repair. This legislation will aim to support farmers specifically by ensuring that they and independent repair shops have access to the software necessary to repair their equipment if they so choose. Advocating for this at the federal level will prevent states from creating varying laws that could lead to disparity across the heartland and will prevent an unworkable standard being set by case law.

I. THE ADVENT OF THE RIGHT TO REPAIR MOVEMENT

In considering the merits of both sides of right to repair, the purpose of such software within farming equipment must be analyzed first. The proliferation of this software can broadly be attributed to two big factors, the first is regulation via government agencies and the second is basic productivity. The Environmental Protection Agency (EPA) is in charge of regulating and enforcing the right to repair through the Clean Air Act.[16] The method of achieving this directive is rather complex; the EPA regulates the pollutants that the engines within farming

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9 Waldman & Mulvany, *supra* note 3.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 Matsakis & Solon, *supra* note 2.

15 WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 5.

16 Nilay Patel, *John Deere Turned Tractors into Computers—What's Next?*, VERGE (June 15, 2021, 8:20 AM), https://www.theverge.com/22533735/john-deere-cto-hindman-decoder-interview-right-to-repair-tractors [https://perma.cc/U7GH-N23Y]; Clean Air Act, 42 U.S.C. §§ 7401–7671 (2018).

equipment create, while companies such as John Deere are tasked with ensuring that their engines meet those regulation standards.[17] As applied to engines, the basic science is that when fuel is burned with enough air, it produces carbon dioxide, but when engines burn fuel without enough air they produce soot or carbon monoxide—toxic fumes—which is called incomplete combustion.[18] To prevent this, farming equipment "regenerate[s]," a process which burns off the excess emissions within the engine as opposed to releasing them into the environment.[19] If the equipment is unable to regenerate it will enter limp mode and be unusable until repair.[20]

The second purpose is far less complex. It is simply an emphasis on increased productivity. Farming equipment from companies such as John Deere is riddled with complex computer sensors that gather a variety of information.[21] These sensors can detect the number of crops collected, adjust the distribution of seeds based on soil fertility data from years past, and even spray pesticides on weeds using a scanning algorithm.[22] This efficiency is known as precision agriculture and holds the potential for "better crop yields with less work and lower cost."[23] Indisputably, there is great merit to this aim; it will be no simple task to feed a growing population while combating climate change.[24] In fact, John Deere, renowned for its farming equipment, is leaning very heavily into this future model, now employing more software development engineers than mechanical engineers.[25] Whether it be related to emissions or productivity, this growing emphasis on the utilization of software within farming equipment has not come without scrutiny because it often requires an equipment specialist to repair. This is what inspired the right to repair movement.[26]

The history of the right to repair is a convoluted one, a movement that came from varying fronts but that can be surmised to a single viewpoint: "[i]f you own something, you should be able to repair it yourself or take it to a technician

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17 40 C.F.R. § 1039.125 (2023); 42 U.S.C. § 7547(a) (2023); Matthew Gault, *Repair Advocacy Organizations Accuse John Deere of Violating EPA Regulations*, VICE (July 28, 2022, 9:00 AM), https://www.vice.com/en/article/k7bbex/repair-advocacy-organizations-accuse-john-deere-of-violating-epa-regulations [https://perma.cc/E6PX-VS8M].

18 *Engine Combustion Process Explained*, X-ENGINEER, https://x-engineer.org/engine-combustion-process/ [https://perma.cc/Y7TY-SHJ2] (last visited Oct. 23, 2023).

19 WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 5.

20 *Id.*

21 Scott Carpenter, *Access to Big Data Turns Farm Machine Makers into Tech Firms*, FORBES (Dec. 31, 2020, 10:56 PM), https://www.forbes.com/sites/scottcarpenter/2021/12/31/access-to-big-data-turns-farm-machine-makers-into-tech-firms/?sh=182bb0d7e473 [https://perma.cc/M7MB-HKTR].

22 *Id.*

23 Patel, *supra* note 16.

24 Norman Mayersohn, *How High Tech Is Transforming One of the Oldest Jobs: Farming*, N.Y. TIMES, https://www.nytimes.com/2019/09/06/business/farming-technology-agriculture.html [https://perma.cc/PES6-3AMQ] (June 13, 2020).

25 *See* Patel, *supra* note 16.

26 *See* Waldman & Mulvany, *supra* note 3.

of your choice."[27] For many issues with farming equipment this is the norm. The controversy arises from problems with the software that handles emissions and productivity.[28] When this software has a problem farmers face two issues: not only do they need a John Deere dealer to diagnose the issue, they also need an authorized dealership to repair the issue.[29] This can be not only costly, but it can also start a race against time for farmers as they wait with an idle machine for an authorized repair provider to arrive as their crops are threatened by two natural opponents: weather and time.[30]

From the perspective of farmers, the movement really boils down to two key components: productivity and cost.[31] Incidents of delayed harvests and lost time due to software malfunctions that require authorized dealerships are abundant in the farming community and can bring a "loss in farm income . . . and [even] a less resilient food supply chain."[32] Even when repairs come, they can be costly. One Nebraska farmer detailed purchasing a new tractor in 2014 for $300,000 only to spend over $8,000 the next few years clearing fault codes.[33] Farmers fueled by fears of such experiences have begun to purchase vintage equipment to avoid potential software issues.[34] One poll found that ninety–two percent of farmers believed they could save money with access to independent repairs including making the repairs themselves.[35] An indication of the expense is in John Deere repair service profits, which are three to six times higher than equipment sales.[36] Turning to vital data, the Public Interest Research Group found that a group of fifty-three farmers lost an average of $3,348 per year due to repair restrictions. Assuming that translates to all farmers, these restrictions could be costing farmers more than $3 billion each year.[37]

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[27] Thorin Klosowski, *What You Should Know About Right to Repair*, N.Y. TIMES: WIRECUTTER (July 15, 2021), https://www.nytimes.com/wirecutter/blog/what-is-right-to-repair/ [https://perma.cc/ANV4-JLXD].

[28] *See* Patel, *supra* note 16.

[29] *See* Uri Berliner, *Standoff Between Farmers and Tractor Makers Intensifies Over Repair Issues*, NPR (May 26, 2021, 7:19 AM), https://www.npr.org/2021/05/26/1000400896/standoff-between-farmers-and-tractor-makers-intensifies-over-repair-issues [https://perma.cc/V85U-V9NL]; *see also* Waldman & Mulvany, *supra* note 3.

[30] Kari Paul, *Why Right to Repair Matters—According to a Farmer, a Medical Worker, a Computer Store Owner*, GUARDIAN (Aug. 2, 2021, 6:00 AM), https://www.theguardian.com/technology/2021/aug/02/why-right-to-repair-matters-according-to-a-farmer-a-medical-worker-a-computer-store-owner [https://perma.cc/VP4V-WUBN].

[31] *See Supporting Farmers in Right-to-Repair and Holding Corporations Accountable*, FOOD INTEGRITY CAMPAIGN: FOOD INTEGRITY BLOG (June 15, 2022), https://foodwhistleblower.org/supporting-right-to-repair/ [https://perma.cc/ZS6M-YR3F].

[32] *Id.*

[33] Waldman & Mulvany, *supra* note 3.

[34] *Id.*

[35] WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 5.

[36] Waldman & Mulvany, *supra* note 3.

[37] *See* KEVIN O'REILLY, OUT TO PASTURE 5 (U.S. PIRG Educ. Fund 2023), https://pirg.org/resources/out-to-pasture/ [https://perma.cc/R5FR-URQU] [hereinafter OUT TO PASTURE].

John Deere's response to this movement begins from the premise that the company is not opposed to repairs.[38] They oppose modifications.[39] From this perspective, the so–called right to repair is truly aimed at modifying software that has undergone rigorous testing, and letting modifications be done could risk violations of the Clean Air Act and consumer expectations regarding safety.[40] Furthermore, John Deere does not seem to think that farmers have a right to access this copyrighted software in the first place. In a 2015 filing to the FTC, Darin Bartholomew, Senior Intellectual Property Counsel at John Deere, claimed that absent "an express written license in conjunction with the purchase of the vehicle, the vehicle owner receives an implied license for the life of the vehicle to operate the vehicle" which does not extend to the software.[41] Another opposition to the right to repair is the potential security risks that could come from this software being available to the public.[42] John Deere also claims that it has made diagnostic tools available to farmers for sale, but investigations show that getting these tools is not as easy as John Deere makes it out to be.[43] For example, Kevin O'Reilly with the US Public Interest Research Group found that across six states, eleven out of twelve John Deere dealerships said that they were not selling this equipment.[44] The twelfth dealership passed along an email address to reach out to, that failed to respond to the inquiry requesting this equipment.[45] Having analyzed the introduction of software into equipment and the arguments from both sides on the right to repair, one must next analyze proposed legislation and legal challenges that have surrounded this.

II. PROPOSED LEGISLATION

In 2021, a total of twenty-seven states considered right to repair legislation, twelve of which were aimed specifically at agriculture equipment.[46] In 2023, that number rose to thirty-three.[47] A right to repair bill was also introduced in

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38 Patel, *supra* note 16.

39 *Id.*

40 *Id.*

41 Darin Bartholomew, Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201 (Mar. 27, 2015), https://cdn.loc.gov/copyright/1201/2015/comments-032715/class%2022/John_Deere_Class22_1201_2014.pdf [https://perma.cc/5QRB-6VEZ].

42 *See* Klosowski, *supra* note 27.

43 Patel, *supra* note 16; *see also* Berliner, *supra* note 29.

44 Berliner, *supra* note 29.

45 *Id.*

46 Nathan Proctor, *Half of U.S. States Looking to Give Americans the Right to Repair*, PIRG, https://pirg.org/articles/half-of-u-s-states-looking-to-give-americans-the-right-to-repair/ [https://perma.cc/7LAS-V6LT] (Apr. 22, 2022); Press Release, Sen. Jon Tester (D-MT), "Right to Repair" Farm Equipment and Empowering Family Farmers is Aim of Tester's New, Groundbreaking Legislation (Feb. 1, 2022), https://www.tester.senate.gov/newsroom/press-releases/pr-8866/ [https://perma.cc/B6K2-D7ZY].

47 *Right to Repair 2023 Legislation*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/technology-and-communication/right-to-repair-2023-legislation#:~:text=Creates%20Agricultural%20Equipment%20Repair%20Act.&text=Pending-,Requires%20original%20equipment%2

the US Senate in 2022.[48] In 2023, a right to repair act was introduced in the House.[49] State-wise, four states actually managed to pass right to repair legislation, however three of the four specifically excluded repair rights for farming and agricultural equipment.[50] The general language of most of these bills is similar. For example, H.B. 2309 proposed in Kansas provides common language seen within right to repair proposals.

> Requiring manufacturers of electronics-enabled equipment used in agriculture, animal husbandry and ranching to make available to farmers, ranchers, and independent repair providers, on fair and reasonable terms, the documentation, parts and tools used to diagnose and maintain and repair such equipment.[51]

While most states afforded some variation of this in their proposed acts, it is important to analyze the details seen in the explanations of the proposals. The language used in right to repair legislation that has passed at the state level has historically become the controlling standard. For example, when Massachusetts passed a bill in 2012 granting independent auto mechanics the same access to repair data as dealerships, the industry acquiesced and made that the norm across the nation.[52]

Within these bills there are essentially four key things to differentiate: who the right applies to, the components and software permitted for repair and how they are made available, what the right to repair is, and the enforcement mechanisms. In looking at who this right would apply to, there was a wide consensus across the board. Generally, the right would extend to any product defined as farm or construction machinery that was purchased or used within the state.[53] Some states did propose more specific language such as specifying that this would apply to "independent repair providers" which would be individuals that did not have arrangements with the original equipment manufacturer.[54] Thus, in this regard, it seems that state legislatures were very clear as to whom this right was going to apply.

0manufacturers%20of%20electronics%2Denabled%20agricultural%20equipment%20to,owners%20and%20independent%20repair%20providers. [https://perma.cc/3KL2-479A] (Nov. 1, 2023).

[48] Proctor, *supra* note 46.

[49] Press Release, Abigail Spanberger, U.S. Representative, Spanberger Helps Introduce Bipartisan Bill to Establish Right to Repair Ag Equip. for Virginia Farmers & Producers (Sept. 21, 2023), https://spanberger.house.gov/posts/spanberger-helps-introduce-bipartisan-bill-to-establish-right-to-repair-ag-equipment-for-virginia-farmers-producers [https://perma.cc/KF97-NA3Z].

[50] H.R. 23-1101, 2023 Leg. Sess. (Colo. 2023); S.B. 244, 2023 Reg. Sess. (Cal. 2023) (excluding equipment related to agricultural products); S.F. 2744, 93d Leg. Sess. (Minn. 2023) (excluding "farm implements" and "farm machinery" and other related products); S.B. S4104A, 2022 Leg. Sess. (N.Y. 2022) (as passed by Senate, December 28, 2022) (excluding "farm and utility", "forestry", and "mining" equipment).

[51] H.R. 2309, 2021 Leg. Sess. (Kan. 2021) (as introduced by Rep. Xu, Feb. 10, 2021). Note, this bill has since died in House.

[52] Waldman & Mulvany, *supra* note 3.

[53] *See* H.R. 975, 101st Gen. Assemb., Reg. Sess. §§ A(9)–A(10) (Mo. 2021).

[54] *See* H.R. 543, 107th Leg. § 2(7) (Neb. 2021).

The second important aspect of these proposals was what explicitly listed equipment the right to repair would extend to and how legislatures were defining that right. All of these bills made clear that they would apply to electronics–enabled agricultural equipment.[55] This was defined as products sold for use in farming or ranching or other forms of agriculture "that depends for its functioning, in whole or in part, on digital electronics embedded in . . . it."[56] One state proposal that went beyond this was Arkansas, which required this same treatment for legacy equipment.[57] This meant for equipment older than ten years manufacturers still had to make available parts even if they no longer made them or provide "a procedure to reverse engineer the part for legacy equipment."[58] In Missouri, the proposed legislation also dictated that owners be given the right to acquire these "in the same manner and time as [those parts are given] to authorized repair providers."[59] In other words, once manufacturers had the information, owners should have it as well. Yet, Missouri also carved out a very large exclusion to this right, dictating that manufacturers need not provide this right if the product was currently covered by a repair or replacement warranty.[60] Thus, this bill had a glaring loophole for manufacturers. Another interesting carve out came in Nebraska's proposal, almost certainly a result of lobbying efforts by companies such as John Deere. In that proposal, the legislature differentiated the terms repair and modify, stating repair meant "maintain, diagnose, and repair machinery; but, does not include modify."[61] Thus, this right did not grant the ability to "[r]eset an immobilizer system or security–related electronic module . . . [,] [r]eprogram any electronic processing units or engine control units . . . [,] [c]hange any equipment or engine settings negatively affecting emissions or safety compliance[,] and [d]ownload or access the source code of any proprietary embedded software or code."[62] This proposal is a clear response to the criticisms from manufacturers and thus was one of the most clear as to what could and could not be done.

In looking at how the right was defined, the language generally found in these proposals was something along the lines of "to require an original manufacturer to provide essential information to farmers to repair farm equipment."[63] Essential information usually meant two things: documentation and embedded software. Documentation commonly meant, "any manual, diagram, reporting output, service code description, schematic, or other guidance or information . . . affecting . . . diagnosis, maintenance, or repair."[64] Embedded

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[55] L.B. 543, 107th Sess. § 3 (Neb. 2021); H.R. 975, 101st Gen. Assemb., Reg. Sess. § A(4) (Mo. 2021); H.R. 2309, 2021 Leg. Sess. § 3 (Kan. 2021) (as introduced by Rep. Xu, Feb. 10, 2021); H.R. 4063, 87th Sess. (Tex. 2021).

[56] H.R. 2309, 2021 Leg. Sess. § 2(c) (Kan. 2021) (as introduced by Rep. Xu, Feb. 10, 2021).

[57] S.B. 461, 93rd Gen. Assemb., Reg. Sess. § 1.4-88-1103(a)(2) (Ark. 2021).

[58] *Id.*

[59] H.R. 975, 101st Gen. Assemb., Reg. Sess. § A(407.653.1)(1) (Mo. 2021).

[60] *Id.* § A(407.653.12).

[61] L.B. 543, 107th Sess. § 2(12) (Neb. 2021).

[62] *Id.* §§ 2(12)(a)–2(12)(d).

[63] S.B. 461, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

[64] S. 67, 2021 Gen. Assemb. § 2.4151(3) (Vt. 2021).

software on the other hand is "programmable instructions provided on firmware" within farming equipment which also necessitated making available "all relevant patches and fixes" to said firmware.[65] Thus, the states that proposed the right to repair for farmers were on the same page in terms of who the right would apply to and what the right was. Where critical differences arose was what the right extended to and the methods of enforcement.

Another aspect of these proposals was the methods by which manufacturers were to make this information available. The standard across all was the terms fair and reasonable.[66] These proposed bills often defined fair and reasonable as equivalent to the most favorable costs and terms extended to the authorized repair providers.[67] The proposal in Florida went beyond this rather vague standard by offering a non–exhaustive list of relevant factors.[68] In this regime, the fair and reasonable standard considered the usual amount authorized providers were paying as well as distribution costs and the price other manufacturers were charging.[69] Interestingly, this list also contained the price before the launch of original equipment manufacturer websites and also the ability of independent repair providers to afford the information.[70] Perhaps the most favorable definition of fair and reasonable for farmers was proposed in Arkansas, which carried the same terms as most but added something extra.[71] In the event that documentation was needed for updates, this proposal required that electronic documentation be delivered at no cost or for a reasonable cost if physical documentation is requested by an independent provider.[72]

The final distinguisher amongst these proposals was the enforcement mechanisms. Some states simply listed out liability for a violation which ranged from as low as $500 to $5,000 and all the way up to $10,000.[73] Other states' right to repair laws would have made a violation of their proposal a violation of Deceptive Trade or Unfair Competition Acts.[74] Truthfully, this would appear to be the preferable method of enforcement as these statutes would generally expressly permit injunctions as well as attorney's fees.[75]

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65 *Id.* § 2.4151(4).

66 *See* H.B. 975, 101st Gen. Assemb., Reg. Sess. § A(407.652)(5) (Mo. 2021); L.B. 543, 107th Leg. Sess. § 3(1) (Neb. 2021).

67 H.B. 2309, 2021 Leg. Sess. § 2(f)(1) (Kan. 2021).

68 H.B. 511, 2021 Leg. Sess. § 2(686.35)(1)(d) (Fla. 2021).

69 *Id.* §§ 2(686.35)(1)(d)(1)–2(686.35)(1)(d)(3).

70 *Id.* §§ 2(686.35)(1)(d)(4)–2(686.35)(1)(d)(5).

71 S.B. 461, 93rd Gen. Assemb., Reg. Sess. § 1(4-88-1102)(5) (Ark. 2021).

72 *Id.* § 1(4-88-1102)(5)(B).

73 H.B. 511, 2021 Leg. Sess. § 2(686.35)(6) (Fla. 2021) ("Any original equipment manufacturer found in violation of this section is liable to a civil penalty of not more than $500 for each violation."); H.B. 2309, 2021 Leg. Sess. § 5 (Kan. 2021) ("A violation of this act shall be an unclassified nonperson misdemeanor punishable by a fine of $5,000."); H.B. 975, 101st Gen. Assemb., Reg. Sess. § A(407.653)(13) (Mo. 2021) (""Each violation of this section shall be punishable by a ten-thousand-dollar fine.").

74 NEB. REV. STAT. ANN. § 87-303 (West 2022); H.B 4063, 87th Leg. Sess. § 1(113.004) (Tex. 2021); H.B. 3061, 102d Gen. Assemb., Reg. Sess. § 15 (Ill. 2021); Federal Trade Commission Act, 15 U.S.C.A. § 45(d) (West 2018).

75 NEB. REV. STAT. ANN. § 87-303(b) (West 2022).

As mentioned, the right to repair was also proposed at the federal level by Montana Senator Jon Tester.[76] This proposal was very similar in most regards to the others but had key differences. In terms of the fair and reasonable standard, costs were dictated to be the "lowest actual cost for which the [Original Equipment Manufacturer]" offered the component.[77] Further, the methods and timeliness of delivery were to be equivalent to the most favorable terms given to authorized repair providers. Original manufacturers also were not to impose substantial obligations pertaining to the part, tool, or documentation.[78] Like the Nebraska proposal, the federal bill also prohibited modifications that took the equipment out of compliance with emission laws and those that would permanently deactivate a safety notification system.[79] At the federal level, a violation of the right to repair would be enforced via the Federal Trade Commission Act as an unfair or deceptive act or practice.[80] This proposal would have carried the perks of the similar state proposals plus an added benefit. Once the Federal Trade Commission made an order that someone had violated this act, they could request injunctions and fines as well.[81]

With all the proposals on the table, one can next turn to the landmark right to repair legislation coming out of Colorado, which is set to become effective on January 1, 2024.[82] Most of the terms in this legislation are defined pretty similar as detailed above; it delineates between authorized and unauthorized repair providers, defines the software and repair tools, and dictates they be made available at fair and reasonable terms.[83] It does have some interesting nuance to it; it defines agricultural equipment as equipment "primarily designed for use in a farm or ranch operation" yet explicitly excludes irrigation equipment.[84] The bill also defines data as requiring the consent of the owner during transmission.[85] Furthermore this bill carries the typical carveouts. Manufacturers do not need to divulge trade secrets nor does it authorize impacts to safety or anything that would take equipment out of compliance with emissions laws.[86] Colorado did add a unique twist to the trade secret exception in the form of a pretext clause of sorts, which essentially states that such information can be withheld if it is trade secret and "the usability of the part, embedded software, embedded software for agricultural equipment, firmware, or tool for the purpose of providing services is not diminished."[87] Nonetheless, as advocates for the right to repair mostly faced failure in terms of legislation, they began to take matters into their own hands.

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76 S. 3549, 117th Cong. (2022).

77 *Id.* § 2(7)(A)(i).

78 *Id.* § 2(7)(A)(ii).

79 *Id.* §§ 6(5)(A)–(B).

80 *Id.* § 4(a).

81 Federal Trade Commission Act, 15 U.S.C. § 45(l) (2018).

82 H.B. 23-1011, 2023 Leg. Sess. (Colo. 2023).

83 *Id.* §§§ 2(6-1-1502)(1.3), 2(6-1-1502)(3.2), 2(6-1-1502)(5)(d).

84 *Id.* § 2(6-1-1502)(1).

85 *Id.* § 2(6-1-1502)(1.5).

86 *Id.* §§ 3(6-1-1503)(2)(a)(II), 4(6-1-1504)(1)(a.5)(II).

87 *Id.* § 3(6-1-1503)(2)(b)(II).

III. LAWSUITS, COMPLAINTS, AND ORDERS

With a large absence of meaningful right to repair legislation, other entities such as farmers and the executive have filed lawsuits and administrative complaints. With regard to lawsuits, the biggest challenge thus far has been a class action filed in federal court by a farming corporation located in North Dakota.[88] This lawsuit was then consolidated with others to an MDL in the District Court of Northern Illinois.[89] The North Dakota company alleged that in "shutting out farmers and independent repair shops from accessing the necessary resources for repairs," John Deere had violated the Sherman Antitrust Act.[90] The allegation continued that John Deere exploits customers by forcing them to pay for "expensive and inconvenient" services from the company because they "did not want their revenue stream from service and repair . . . to end when equipment is purchased."[91] Many of the factual allegations in this complaint surround what has been aforementioned in this work: the wait times farmers endure for authorized repairs, that farmers must pay travel expenses for the repair providers, that this practice "cut[s] into [] already razor-thin profit margin[s]," and the high number of sensors in this equipment, any of which malfunctioning can cause the tractor to enter limp mode.[92] However, this complaint also carries some new information surrounding John Deere's activities. Specifically, over the past twenty years, the company began a strategy of pressuring dealerships to consolidate such that the number of dealerships has been cut in half and "[o]nly 144 are not owned by big dealers."[93] Furthermore, the complaint notes that an FTC report found that if independent shops were given the resources to make the same repairs as authorized providers, there was no evidence they would be inferior.[94]

This lawsuit carries eight relevant claims for relief, each of which alleges a violation of the Sherman Antitrust Act. The first two concern John Deere's actions with its dealerships, alleging a conspiracy to restrain trade and a group boycott of entities that "would have introduced price–reducing sales of Deere Repair Services."[95] The third claim alleges that by selling Deere Repair Services separate from equipment, John Deere has engaged in illegal tying, which occurs when a seller forces a buyer to accept a second product upon purchase of the first.[96] The fourth claim is the most important for this work, as it alleges that by restricting the availability of repair software, John Deere has created a monopo-

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88 Matthew Gault & Jason Koebler, *John Deere Hit With Class Action Lawsuit for Alleged Tractor Repair Monopoly*, VICE (Jan. 13, 2022, 6:01 PM), https://www.vice.com/en/article/xgdazj/john-deere-hit-with-class-action-lawsuit-for-alleged-tractor-repair-monopoly [https://perma.cc/WG2D-FFKC].

89 *In re* Deere & Co. Repair Servs. Antitrust Litig., 607 F. Supp. 3d 1350 (J.P.M.L. 2022).

90 Complaint at 1, Forest River Farms v. Deere & Co., No. 1:22-cv-00188 (N.D. Ill. Jan. 12, 2022).

91 *Id.* at 4.

92 *Id.* at 10, 12, 13.

93 *Id.* at 15.

94 *Id.* at 27.

95 Complaint, *supra* note 90, at 36.

96 *Id.* at 37.

ly.[97] Building on this, the next claim is that John Deere has used its monopoly on their software to leverage a monopoly in the repair market.[98] The next two claims assert that John Deere has attempted monopolization in the alternative and that their actions have met the burden of becoming a conspiracy to monopolize.[99] As of 2023, this case is still working its way through court. It is pertinent to note that recently the Judge overseeing this case denied John Deere's Motion for Judgment on the Pleadings.[100] In the Order, Judge Johnston made clear that the plaintiffs had "sufficiently and plausibly alleged claims . . . based on the Sherman Act."[101]

On another front, a group of farmers unions from varying states filed a complaint directly with the Federal Trade Commission (FTC) requesting it to enjoin Deere from this behavior.[102] The complaint is like other allegations but also contains some interesting arguments. For example, the group responds to John Deere's contention that access to software is only necessary for around two percent of repairs.[103] To this claim the farmers unions reply that the "supposed two percent of repairs that require software reprogramming are vitally important, including common, necessary repairs involving the engine."[104] This complaint also goes into more specifics of John Deere's practices, listing certain machines and the diagnostic error codes that correspond with them, finding that in repair manuals, more than eighty-nine percent state that to solve the issue, the farmer should "[h]ave your John Deere dealer repair [the issue] as soon as possible."[105] The FTC complaint concludes that John Deere's practices are violations of the FTC Act as well as the Sherman Antitrust Act.[106] As of 2023, there have been no updates with regard to this complaint. However, an indication of which side executive agencies are taking in this matter came when the Department of Justice got involved in the aforementioned lawsuit. The DOJ filed a statement of interest in favor of the farmers, arguing that John Deere was asking for a new standard in their Sherman Act analysis.[107]

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97 *Id.* at 39.

98 *Id.* at 40.

99 The eighth claim was a request for declaratory and injunctive relief. *Id.* at 41–42.

100 *In re* Deere & Co. Repair Servs. Antitrust Litig., No. 3:22-cv-50188, slip op. at 89 (N.D. Ill. Nov. 27, 2023).

101 *Id.*

102 Complaint for Action to Stop Unfair Methods of Competition & Unfair & Deceptive Trade Practices to Federal Trade Commission, Nat'l Farmers Union v. Deere & Co., (Mar. 3, 2022), https://farmaction.us/wp-content/uploads/2022/03/Deere-Right-To-Repair-FTC-Complaint.pdf [https://perma.cc/A3TV-5AEE] [hereinafter Complaint to Stop Unfair Methods].

103 *Id.* at 10.

104 *Id.* (quoting Letter from Todd E. Davies, Associate General Counsel & Corporate Secretary at John Deere, to Securities and Exchange Commission, Shareholder Proposal to Deere & Company by the Green Century Funds 10 (Oct. 15, 2021)).

105 *Id.* at 12.

106 *Id.* at 25.

107 Statement of Interest of the United States, *In re* Deere & Co. Repair Servs. Antitrust Litig., No. 3:22-cv-50188 (N.D. Ill. Feb. 13, 2023).

On the executive front, President Joe Biden signed an executive order on July 9, 2021, promoting competition in the American economy.[108] In this order, President Biden noted that concentrated markets are making it hard for farms to survive and decreasing farmers share of the value of their products.[109] As a result, President Biden dictated that the FTC address "unfair anticompetitive restrictions on third–party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment."[110] President Biden also convened a roundtable with officials from both the federal and state level where the importance of the right to repair was discussed.[111] Made clear from all of the above is that multiple entities, states, Congress, courts, administrative agencies, and the executive are all looking at the right to repair. It is thus pertinent that action be taken by Congress to ensure a standard that is well thought out, with input from states and farmers across the nation to create a right that gives farmers their autonomy while protecting the public and ensuring accordance with the Clean Air Act.

Finally, during this work, John Deere reached an agreement with the American Farm Bureau Federation.[112] The purpose of this Memorandum of Understanding—not a legally binding contract—was to grant "electronic access on Fair and Reasonable terms to Manufacturer's Tools, Specialty Tools, Software and Documentation."[113] Yet a closer look at this raises some concern. First, the intended purpose of this is to avoid legislative or regulatory action.[114] This is concerning because it alludes to a common practice of John Deere. If there is going to be any semblance of right to repair, it is going to be defined by them, which has meant it never came or that it came so watered down or at such a high cost it was worthless.[115]

Second, it is made clear that this memorandum of understanding will not force John Deere to "divulge trade secrets, proprietary or confidential information" or "allow owners or Independent Repair Facilities to override safety features or emissions controls or to adjust Agricultural Equipment power levels."[116] In fact, some are very skeptical of this action. Part of this agreement requires the AFBF (American Farm Bureau Federation) to encourage its organizations to "refrain from introducing, promoting, or supporting federal or state 'Right to

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108 Exec. Order No. 14,036, 3 C.F.R. § 1003 (2021).

109 *Id.* § 1.

110 *Id.* § 5(h)(ii).

111 *See infra* note 167 and accompanying text.

112 It should be noted that this is not the sole union relating to farmers. Emma Roth, *John Deere Commits to Letting Farmers Repair Their Own Tractors (Kind of)*, VERGE (Jan. 9, 2023, 11:19 AM), https://www.theverge.com/2023/1/9/23546323/john-deere-right-to-repair-tractors-agreement [https://perma.cc/ENZ7-ZCVE].

113 Memorandum of Understanding from American Farm Bureau Federation and John Deere 2 (Jan. 8, 2023) (on file with author) [hereinafter Memorandum of Understanding].

114 *Id.* at 1.

115 Jason Koebler & Matthew Gault, *John Deere Promised Farmers It Would Make Tractors Easy to Repair. It Lied.*, VICE (Feb. 18, 2021, 1:17 PM), https://www.vice.com/en/article/v7m8mx/john-deere-promised-farmers-it-would-make-tractors-easy-to-repair-it-lied [https://perma.cc/3ZMB-C4JD].

116 Memorandum of Understanding, *supra* note 113, at 3.

Repair' legislation."[117] Thus, what appears a step in the right direction could in fact be a serious hindrance to meaningful legislation down the line. Considering that Colorado has right to repair legislation set to become effective in 2024, this agreement could be in jeopardy.

IV. RIGHT TO REPAIR IN THE HEARTLAND

While there is a great deal of nuance within the right to repair movement, I see this movement as being comprised of three key ideas: protecting the rights and expectations of consumers, preventing corporate monopolies, and most fundamentally—the protection of the American Spirit. What is meant by this is the idea of self–reliance, or rugged individualism that built the nation.[118] In a campaign speech, President Hoover spoke of this spirit. He stated, "[t]he very essence of equality of opportunity and of American individualism is that there shall be no domination by any group or combination in this Republic, whether it be business or political."[119] As applied to this work, it represents the right to repair movement as a whole. Farmers and independent repair shops are more than capable of fixing things on their own. These are individuals who do not need to wait around for a company representative to fix their machine while their harvest is damaged.[120] This is what the protection of the American Spirit means in this regard.

The notion of right to repair from a consumer rights lens is a rather simple premise, stemming from the Federal Trade Commission Bureau of Consumer Protection. The "About" statement on their website features the following claim: the aim of the Bureau is to "stop[] unfair, deceptive and fraudulent business practices."[121] Considering the practices of John Deere, I do think that some of its actions fall neatly into these categories of fraudulent, deceptive, or unfair.

From a pragmatic lens, one can understand some of this company's actions. For example, it is not surprising that John Deere has followed general corporate practice in holding information close and pursuing an exceptional profit margin. In researching this company, though, one action really leapt out as toeing the line of fraudulent.[122] In their complaint to the FTC, the Farmers Union detailed that in 2018, a trade group who spoke on behalf of agricultural manufacturers, including John Deere, promised that manufacturers would make available "maint-

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117 *Id.* at 4.

118 Herbert Hoover, Republican Candidate for President, Principles and Ideals of the United States Government (Oct. 22, 1928) (transcript available online with the University of Virginia Miller Center).

119 *Id.*

120 WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 5 ("92% of farmers surveyed believe they could save money if they had better access to independent repair or could make repairs themselves.").

121 *Bureau of Consumer Protection*, BUREAU CONSUMER PROT., https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection [https://perma.cc/7VG5-FCXM] (last visited Oct. 24, 2023).

122 *Fraudulent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fraudulent [https://perma.cc/MJG4-Y6DX] (last visited Oct. 24, 2023) ("[C]haracterized by, based on, or done by fraud: deceitful.").

enance, diagnostic, and repair information . . . 'at fair and reasonable terms.'"[123] This promise was broken, and this agreement likely served to prevent the passage of right to repair legislation as it would have been unnecessary if these manufacturers had lived up to their promise.[124] John Deere did, however, capitalize on this as a chance to make more revenue. They created "Customer Service ADVISOR" which does provide some diagnostic information but also requires both a $5,000 fee upfront for the equipment and an annual subscription cost of more than $2,500 .[125]

In terms of deceptive practices, one can glance at the repair page on John Deere's website which gives the perception that the company is highly committed to autonomy.[126] In fact, the website was something that the Farmers Union specifically cited in their recent complaint to the FTC.[127] Emblematic of this deceptive practice is a quote from John Deere's website in the FTC complaint: "[w]e also know you want to repair your own equipment in your own shop, and on your own time. That's why repairability is designed into every tractor we build."[128] As a matter of fairness, it seems the equation should be rather simple: a consumer purchases an item and therefore gains the rights to that item. If an issue arises, the consumer should be able to repair their product if they so desire. Generally, this has been the practice, as most of time, if you own something, you can repair it.[129]

In fact, this is the law for most products. The FTC has made clear the Magnuson Moss Warranty Act explicitly dictates that tying arrangements are illegal.[130] Pursuant to this law, consumers cannot face warranty conditions on the use of "an article or service identified by brand, trade, or corporate name unless that article or service is provided without charge to the consumer."[131] The FTC has had to keep a very watchful eye on this practice as multiple companies have toed the line and even just outright violated it. For example, in 2018, Hyundai, Nintendo, and Sony were all reprimanded by the FTC for such actions.[132] While

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[123] Complaint to Stop Unfair Methods, *supra* note 102, at 24 (quoting *Right to Repair Statement of Principles*, FAR WEST EQUIP. DEALERS ASS'N, https://www.fweda.com/wp-content/uploads/2018/09/FWEDA-Right-to-Repair-Statement-Signed_090718.pdf [https://perma.cc/H3M5-U6M7] (last visited Nov. 29, 2023)).

[124] *See* Gault & Koebler, *supra* note 115.

[125] Complaint to Stop Unfair Methods, *supra* note 102, at 24.

[126] *Customer Service Advisor*, JOHN DEERE, https://www.deere.com/en/parts-and-service/manuals-and-training/customer-service-advisor/ [https://perma.cc/THT3-XD94] (last visited Oct. 24, 2023).

[127] Complaint to Stop Unfair Methods, *supra* note 102, at 40.

[128] *Id.* (quoting *Repair: Self–Repair Made Easy*, JOHN DEERE, https://www.deere.com/en/our-company/repair/ [https://perma.cc/AG6Z-MBVW] (last visited Oct. 25, 2023)).

[129] Editorial Board, *It's Your iPhone. Why Can't You Fix It Yourself?*, N.Y. TIMES (Apr. 6, 2019), https://www.nytimes.com/2019/04/06/opinion/sunday/right-to-repair-elizabeth-warren-antitrust.html [https://perma.cc/9HR7-F7WC].

[130] 16 C.F.R. § 700.10(a) (2023).

[131] *Id.*

[132] Colin Dwyer, *'Warranty Void If Removed'? As It Turns Out, Feds Say Those Warnings Are Illegal*, NPR: THE TWO-WAY (Apr. 11, 2018, 5:06 PM), https://www.npr.org/sections/thetwo-way/2018/04/11/601582169/warranty-void-if-removed-as-it-turns-out-feds-say-those-warnings-are-illegal [https://perma.cc/NRM6-UK6M].

this law only applies to warranties and also excludes agricultural equipment from its coverage, it nonetheless goes to show that this idea of the right to repair is not a novel idea; it is one that has been enforced at some level for years. It further shows that companies beyond John Deere have long pushed back against third party and independent repair, which has required the FTC to keep an ever–watchful eye.

Not only does a prevention of the right to repair impose a challenge to consumer rights, but it also further imposes a challenge on consumer expectations. Although this work has been aimed at addressing the right to repair as it relates to farmers, consumer expectations as to the broad idea of right to repair are nonetheless important. It provides a pulse on what consumers generally expect and demonstrates that this is not just an issue for farmers. A broadly representative survey conducted by a law professor provided this very pulse.[133] The survey posited a simple agree or disagree to begin, inquiring the following: "If I purchase a [device], I have the right to repair it myself or to take it to the repair shop of my choice."[134] This sentiment was largely agreed with, and "[sixty percent of respondents] strongly agreed."[135] Studies such as this demonstrate that even beyond the farmers spearheading the right to repair campaign, the average consumer also has the basic idea that they should be able to repair things they buy.

An important aspect of the right to repair is the prevention of corporate monopolies. When it comes to this vital software, John Deere has a stranglehold on repairs, one that they refuse to surrender. The only place farmers can repair these software issues is those authorized repair locations, and sometimes those locations can be miles away.[136] The issue of corporations acquiring monopoly power is addressed by vast amounts of literature but in summation: it fails consumers, kills innovation, and makes for a fragile economy.[137] When it comes to failing consumers, corporate monopolies leave them paying higher costs but receiving less in terms of service.[138] This is not just an academic explanation of how monopolies work; it is an experience farmers in the heartland have had. One Missouri farmer detailed hours of lost time, in the midst of planting season, waiting for an authorized John Deere technician with access to necessary tools to conduct a repair.[139] The technician replaced one part but failed to utilize the Dealership Technical Assistance Center to test the machine.[140] This would have shown that a product installed post-production as a cure to a manufacturing defect was the root of the problem.[141] Fed up with lost time and John Deere authorized

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133 Aaron Perzanowski, *Consumer Perceptions of the Right to Repair*, 96 IND. L.J. 361 (2021).

134 *Id.* at 381.

135 *Id.*

136 Koebler, *supra* note 1.

137 Stacy Mitchell & Susan R. Holmberg, *America's Monopoly Problem: Why it Matters and What We Can Do About It*, INST. LOCAL SELF RELIANCE (July 2020), https://ilsr.org/fighting-monopoly-power/americas-monopoly-problem-and-why-it-matters/ [https://perma.cc/29XF-6LF6].

138 *Id.*

139 WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 5.

140 *Id.* at 7.

141 *Id.*

dealers, this farmer ended up jiggling the part every ten hours to force the system to regenerate himself.[142]

The monopoly on repairs has led to subpar service which in most cases would spur consumers to seek other options. In this case, however, those options are unavailable because John Deere has the exclusive access to the necessary software, which is often most compatible with larger farming operations.[143] An Oklahoma farmer detailed a similar monopoly situation created by John Deere. His family had a tractor that was about twenty years old, and by the time a John Deere representative made it out to diagnose the issue, they were informed it would be nine months before it could be repaired.[144] Luckily, the technician in that instance went beyond the typical practice and told the farmer what the error code meant so that it could be repaired by an independent provider.[145] Unfortunately, the repairs then needed to be calibrated. John Deere refused to assist until the farmer's father went in and threw such a fit that a corporate officer relented and provided the information. All in all, this fiasco resulted in a farmer losing use of his tractor for four weeks in the middle of the summer.[146]

This behavior described above is what is referred to as "illegal tying." In the farming context, one of the harms of tying is the idea of extracting surplus from consumers.[147] This work has detailed the length farmers will go through to avoid John Deere's repair costs, but not everyone is capable of that. Some farmers will opt to purchase old equipment at a heightened price instead. The reality is that farmers are not going to eat these costs by themselves. John Deere's antics will be passed along to consumers who have already faced heightened costs from a variety of sources.[148]

Another response to this lack of alternative repair options is that farmers download cracked software from various foreign countries on the internet to circumvent this monopoly, which was detailed in the introduction of this work.[149] While their innovation and ability to overcome obstacles is laudable, these situations are far from ideal. It could mean that our nation's farming equipment and thus our access to agricultural goods would hinge on illegal software acquired from dark corners of the web. It exposes the breadbasket of America to a serious risk from bad actors. Security agencies are acutely aware of this risk. In fact, the FBI detailed the increased risk when farmers are in a time crunch during the harvest season and could be extorted for a ransom to get back to work.[150]

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142 *Id.*

143 OUT TO PASTURE, *supra* note 37, at 10.

144 *Id.* at 9.

145 *Id.* at 9–10.

146 *Id.* at 10.

147 *See* Daniel A. Crane, *Tying and Consumer Harm*, 8 COMPETITION POL'Y INT'L 27, 28 (2012).

148 Kelly Anne Smith, *Why are Food Prices Still Rising?*, FORBES: ADVISOR (Sept. 21, 2022, 11:57 AM), https://www.forbes.com/advisor/personal-finance/why-are-food-prices-still-rising/ [https://perma.cc/4GT2-2Q9Y].

149 Koebler, *supra* note 1.

150 Elizabeth Rembert, *The Feds Warn that Hackers Could Hold Midwestern Harvests Hostage with Ransomware*, KCUR 89.3 (Nov. 17, 2022, 3:00 AM), https://www.kcur.org/news/2022-11-17/ag-hackers [https://perma.cc/3HLN-CWD7].

The final issue with a lack of right to repair is a normative one based on the very foundation of the United States and the ideals of the heartland. While there is a vast swath of ideas of what the American Spirit is and whether it remains today, it seems safe to say that a cornerstone of this spirit relates to the right to repair. That cornerstone is the "freedom to define your own destiny."[151] This ideal is undoubtedly evident within the right to repair movement, with an advocate of the movement in Nebraska characterizing it as "the birthright we all share as a hot-rodding nation."[152] All of this traces back to a common lens of innovation: consumers being able to repair their own equipment can bring not only utility to them but benefits to society at large.[153] Furthermore, the ability to repair their own equipment could lead to a gain that both sides are interested in, productivity.[154] Farmers could find shortcuts or better methods of repair which would enhance their software and aid John Deere in cost cutting so they could devote more resources to improving the software that farmers need to work more efficiently. In summing up this idea of the American Spirit as it relates to farmers, one can turn to a remark by President Biden, "American farmers always find a way. They always feel something extra, a spark of patriotism. And . . . that's not hyperbole. A spark of patriotism. A sense of never giving up, of always finding a solution."[155]

V. JOHN DEERE'S ARGUMENTS

Earlier, a brief mention of John Deere's main responses to this movement were detailed, and they will now be revisited considering the argument for the right to repair. John Deere has three main points in response to this; it does not support right to repair because of "safety risks, emission compliance, and engine performance."[156] Of course, there is a level of merit to these claims. Yet, one of the most easily dispensed with arguments is this idea of safety. There are two underlying practical responses to this. First, think of all the vehicles in the United States on the road today that are not repaired at a certified dealership. They could be repaired by independent shops or even by owners themselves. If this is not a concern for vehicles that are much more likely to interact with a larger amount of people, why should it be one for farm equipment? The second issue with this argument is that it is disingenuous. The reality is that farmers unions and independent repair shops are not requesting the right to repair because they want to hot-rod their tractors. Farmers want this right so that they can see what the issue is

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151 Edwin J. Feulner, *The American Spirit*, HERITAGE FOUND. (June 12, 2012), https://www.heritage.org/commentary/the-american-spirit [https://perma.cc/TF5X-UWTE].

152 Waldman & Mulvany, *supra* note 3.

153 Leah Chan Grinvald & Ofer Tur Sinai, *Intellectual Property Law and the Right to Repair*, 88 FORDHAM L. REV. 63, 90 (2019) (detailing that innovation in repair led the Wright Brothers to the open sky).

154 Mayerson, *supra* note 24.

155 Remarks on American Farmers in Kankakee, Illinois, 2022 DAILY COMP. PRES. DOC. 382 (May 11, 2022).

156 Alex Gray, *The Debate Over Right to Repair in 2022*, SUCCESSFUL FARMING (Mar. 9, 2022), https://www.agriculture.com/machinery/repair-maintenance/the-debate-for-right-to-repair-in-2022-joe-biden-jon-tester-john-deere [https://perma.cc/2ZTG-7Z4X].

themselves and if capable of doing so, repair it. As the FTC has detailed, there is no evidence independent repairs would be inferior to what a licensed John Deere mechanic would do.[157]

The next argument that John Deere makes concerns farmers or independent repair shops tampering with emissions controls.[158] In light of the evidence that farmers have had issues with their tractors' soot filters during the regeneration process, this is a valid concern. With multiple farmers detailing how cumbersome this process can be, one could see the temptation to bypass this altogether. Yet most instances of farmer complaints come not from the emission controls themselves but rather either being unable to diagnose the problem or John Deere representatives repairing it incorrectly.[159] Thus, what farmers are asking for is the ability to see the problem, not bypass emission controls altogether. In fact, this very scenario is addressed in their complaint to the FTC. This complaint notes that model legislation would provide farmers with "documentation, tools, and parts needed to reset [an electronic security lock] or function when disabled in the course of diagnosis . . . ."[160] The gist of this is that with right to repair, a farmer could figure out the issue, complete the repair, and shut the code off that locked the tractor.[161] If the farmers' intentions were what John Deere suggests, it would actually require much more: the erasure of the current operating system on the equipment and the upload of modified software with no emission controls or the ability to ignore them.[162] This is a clear violation of EPA regulations and would open the farmer or independent repair shop to liability.[163] Anyone interested in taking such a risk would likely do it with or without the right to repair. Furthermore, the EPA has actually addressed this argument, noting that the right to repair is compatible with the Clean Air Act.[164]

In fact, this situation seems to fall neatly into this notion of what modifications truly are. It is not a situation in which farmers or independent repair shops are able to assess the issue and then make a repair with parts and information from John Deere. It is a situation where the software the manufacturer has put onto the machine is entirely dispensed with and replaced by new software. This is related to another concern from John Deere that the right to repair would impact engine performance. The issue with this argument is that it goes against the very interest of all parties involved. Farmers and independent repair shops want the right to repair so they can diagnose the issue and then repair

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157 FEDERAL TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 38 (2021).

158 OUT TO PASTURE, *supra* note 37, at 11.

159 WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 7.

160 Complaint to Stop Unfair Methods, *supra* note 102, at 35.

161 *Id.*

162 *Id.*

163 *National Enforcement and Compliance Initiative: Stopping Aftermarket Defeat Devices for Vehicles and Engines*, U.S. ENV'T PROTECTION AGENCY (Dec. 22, 2022), https://www.epa.gov/enforcement/national-enforcement-and-compliance-initiative-stopping-aftermarket-defeat-devices [https://perma.cc/LY6V-FZCE].

164 Letter from Michael S. Regan, Adm'r, Env't Prot. Agency (EPA), to Rob Larew, President, Nat'l Farmers Union (Aug. 4, 2023), https://files.constantcontact.com/63400020701/bfa78700-0f65-4f17-bfc8-1a9c05916b6f.pdf?rdr=true [https://perma.cc/VZ3M-ZPJ7].

it.[165] Of course, the nature of this issue being repairs does mean that at some points engine performance may not be as optimal as a model straight off the show floor. Yet, John Deere's concerns lack common sense. Farmers by simple economics would want their tractors running optimally, so why would they choose to tamper with engines unless there was already an issue? Furthermore, the FTC has addressed this argument. They noted that engines on automobiles are permitted to be repaired by anyone and that with the proper information independent repair shops and individuals could do the same with other products.[166]

VI. THE CALL FOR RIGHT TO REPAIR: THE IDEAL LEGISLATION AND WHY NEGOTIATIONS ARE DONE

Having addressed the issue of right to repair, its history and arguments from both opponents and supporters, the goal of this work can finally be addressed: the call for federal legislation.[167]

First, the gravity of this situation must be addressed. As this work has outlined, across the United States, farmers are engaging in very risky behavior to circumvent the current situation put in place by companies such as John Deere. Downloading software from all corners of the internet to repair their tractors.[168] As has been addressed, this is a big security risk.[169] Bad actors could catch on, and in already trying times, valuable crops could be lost.[170] Even if such risk never matriculates, an important question nevertheless remains. Would the U.S. agricultural economy rather rely on actors within its borders such as John Deere and other similarly situated companies or some software downloaded from the Internet? Yet this is just one method by which the repair monopoly has been circumvented. Another mentioned method was farmers purchasing very dated equipment which lacks the current software for precision farming so that they can be sure they will not face issues.[171] In the complaint to the FTC, this situation was explained further. "[I]n November 2021, a Deere tractor built in 1998 sold for $170,000—more than $32,000 more than that model had ever been recorded

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165 WHY FARMERS NEED RIGHT TO REPAIR, *supra* note 8, at 8.

166 FEDERAL TRADE COMM'N, *supra* note 157, at 29.

167 Press Release, Readout of the White House Convening on the Right to Repair (Oct. 25, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/25/readout-of-the-white-house-convening-on-right-to-repair/ [https://perma.cc/K8VD-N4XP]. Recently, President Biden met with representatives from the EPA and FTC as well as the four state legislators who helped pass right to repair bills in order to discuss the benefits of right to repair law for executive endorsement.

168 Koebler, *supra* note 1.

169 Elizabeth Rembert, *The Feds Warn that Hackers Could Hold Midwestern Harvests Hostage with Ransomware*, KCUR (Nov. 17, 2022, 3:00 AM), https://www.kcur.org/news/2022-11-17/ag-hackers [https://perma.cc/3HLN-CWD7].

170 *Id.*

171 Matthew Gault, *Farmers are Buying 40–Year–Old Tractors Because They're Actually Repairable*, VICE (Jan. 7, 2020, 10:57 AM), https://www.vice.com/en/article/bvgx9w/farmers-are-buying-40-year-old-tractors-because-theyre-actually-repairable [https://perma.cc/MNR5-CACN].

selling for."[172] Situations such as these make it clear that farmers and independent repair shops are simply not going to back down to the repair monopoly put in place. Perhaps it is that spirit of a hot-rodding nation that spurs these individuals to work for the right to repair. Either way, this is one party that refuses to acquiesce.[173]

On the other side of this issue are companies who have made it clear that they are not going to budge. John Deere speaks out against modification, referring to the right to diagnose and then repair as modification.[174] John Deere has also worked to effectively prevent the right to repair from gaining traction, ending a lot of its momentum by promising to a deal they did not hold up.[175] What is also concerning regarding their practices is the consolidation of repair facilities and money drained into repairs.[176] At this time in history, climate is a real concern for the future of agriculture, and equipment manufactures should be aiming the majority of their focus at putting out the most capable equipment.[177] In other words, precision farming, which John Deere has already become so talented at, should be the biggest focus as opposed to building a repair monopoly.

The situation today then is two warring factions: John Deere and other manufacturers versus farmers, their unions, and independent repair shops. As this work has detailed, this has brought about a vast number of attempts to attack the law as it is today. This makes federal legislation all the more important. Currently, with the method at which right to repair is being handled, there exists a variety of possible outcomes, each of which will be addressed.

One possible scenario is that a state legislature passes a right to repair law for agriculture equipment, which has been realized by the state of Colorado. Nonetheless, I think this could be proven to be an outlier as many other state legislatures could see the Memorandum of Understanding between John Deere and the American Farm Bureau Federation as meaning they need not be involved in this. Further, it was no easy task to pass in Colorado. This legislation forced Republicans in Colorado to choose between their farming constituents and manufacturers, which meant it was spurred mostly by Democrats.[178] Thus, other states in the heartland with Republican majorities and even supermajorities may not be so successful.

With the Memorandum of Understanding, most legislatures will see the issue as not requiring their work anymore. Even the newer rights granted, such as Colorado's, may not necessarily be seen as a victory. First, it could always go to a referendum if John Deere decides to gather the troops to propose a constitutional amendment, although this is realistically unlikely as it would not be great for

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172 Complaint to Stop Unfair Methods, *supra* note 102, at 16.

173 Waldman & Mulvany, *supra* note 3.

174 Roth, *supra* note 112.

175 Gault & Koebler, *supra* note 115.

176 Complaint to Stop Unfair Methods, *supra* note 102, at 16–18.

177 *Climate Change and Agriculture: A Perfect Storm in Farm Country*, UNION CONCERNED SCIENTISTS (Mar. 20, 2019), https://www.ucsusa.org/resources/climate-change-and-agriculture [https://perma.cc/JU6P-RKST].

178 Jesse Bedayn, *Colorado Becomes 1st to Pass 'Right to Repair' for Farmers*, ASSOCIATED PRESS (Apr. 25, 2023, 8:23 PM), https://apnews.com/article/colorado-right-to-repair-farming-equipment-1da00ea957fd1057bf522cb4725e62d4 [https://perma.cc/RFM8-QH6J].

optics.[179] Second, the Colorado law could reveal some deficiencies in its language once it takes effect. One concern here is the idea of data transmission requiring consent. One could imagine John Deere making it quite tedious to consent to this and approval taking a significant amount of time. There also remains the trade secret out, which could lead to litigation regarding the definition of a trade secret and the standard for diminished usability. It also holds a carveout that would allow a nationwide memorandum of understanding to govern the right to repair, except that it could not deny anything the bill protects.[180] Thus, there could be a risk that this law is made obsolete by an agreement that utilizes the trade secrets and safety limitations liberally to give the appearance the right to repair is granted when in fact it is prohibited. Another potential issue is one that only time will reveal. Perhaps John Deere decides this state legislation is the perfect level of commitment by finding wiggle room and simply acquiesces to it across the nation, making federal legislation more unlikely. Such a situation would leave farmers with an unsatisfactory law and manufacturers in the perfect position to say they had done their part.

The next possible scenario, aside from a federal law, is a ruling in any one of the pending lawsuits regarding the right to repair. For purposes of this work, the consolidated MDL will be revisited. In that lawsuit, there are eight relevant claims. In terms of remedies, the class is seeking damages and, importantly, that John Deere be enjoined or restrained from continuing their actions.[181] The potential issue with this outcome is that the relevant claims for right to repair regard violations of the monopoly component of the Sherman Act. That is count four and five dictate that Deere has built a monopoly on their repairs and leveraged their monopoly over their software to create a monopoly in the repair market.[182] Thus, even if the court were to find for the farmers and award more than damages in the form of an order that Deere stop this behavior, they may still have wiggle room. For example, they could maybe split their dealerships a little and make the software more available but not as widely available as legislation could and would. This could also open the door for Deere to explicitly state what they view as modification, which they would likely define to encompass a lot of things that were more like repairs. If they do so, the court order would likely only refer to repair information, thus creating a new issue in that some repairs could be left out. The other issue is simply a matter of time. Class action lawsuits like this can take years to play out, and time is critical in this matter.[183]

Of course, another potential outcome would be a ruling from the FTC. The outcome is similar to the lawsuit in that the allegations are violations of the Sherman Act, but in this context, they would also be a violation of the FTC Act. The potential issue here is similar: without the force of clear-cut legislation, John Deere would only be ordered to cease its current practices. This could create ambiguity and permit the company to find new methods to restrict the right to

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179 H.R. 23-1011, 2023 Leg. Sess. (Colo. 2023).

180 *Id.*

181 Complaint, *supra* note 90, at 46–47.

182 *Id.* at 39–41.

183 *How Long Does a Class Action Take?*, CLASSACTION.ORG, https://www.classaction.org/learn/how-long-it-takes [https://perma.cc/3ZCK-2ARX] (last visited Oct. 25, 2023).

repair while still complying with an FTC ruling. Furthermore, in the wake of the current Supreme Court's rulings regarding agency action, some suspect federal regulators may be hesitant to take such bold action.[184] For example, commentators have noted the "Supreme Court's major questions doctrine will make it harder for the FTC to defend new rules that opponents can characterize as unprecedented."[185]

As a matter of pragmatics, there are two big wrinkles in either a court ruling or FTC order. The first is simply that in either event, the agricultural monolith would be told that its practices as they are currently violate the law. Such a ruling would be negative legislation in a sense. What either of these would serve to do, then, is mark a clear line in the sand that John Deere would know not to cross. The benefit of positive legislation is that it would give John Deere guidelines it must follow. "Must" is a pivotal part of right to repair law. As the battle for this right has shown, John Deere has been incredibly competent when it comes to toeing the line of liability.[186] They have also shown an affinity for avoiding legislation. Thus, one of the most vital things here is a clear command in legislation that dictates exactly what John Deere is required to provide to farmers.

Second, and more important, is what the failure to provide legislation would signal. While certainly a court order or ruling from the FTC would be a win, in a sense, it would be a disappointing win. In the research done on this topic, an underlying idea appears to have been something along the lines of an "us versus them"—"us" being farmers, consumers, and all the pieces that make up the US economy—"them" being the large corporate monopolies who have taken great lengths to make more money. The underpinnings of this movement then are that we, the people, via Congress, should support farmers in this battle. If the final ruling from the voice of the people was a mere finger wag to a corporate monolith, it would be a poor message to those who provide so much to this nation. It would demonstrate an unwillingness to go the extra mile and ensure they are adequately protected via legislation.

Now, as previously mentioned, John Deere did reach a memorandum of understanding with the American Farm Bureau Federation on January 8, 2023. Yet, there are some issues with this. This action is reminiscent of another John Deere move: the 2018 agreement to make certain information available at fair and reasonable terms—which they never lived up to.[187] Their explicit admission to avoiding legislation should be seen as a red flag.[188] It is thus a possibility that this is simply a method to circumvent any form of legislation passing; in fact, John Deere is permitted to end the deal if it does.[189] What is also interesting is the

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184 Alison Frankel, *U.S. Supreme Court Just Gave Federal Agencies a Big Reason to Worry*, REUTERS (June 30, 2022, 5:44 PM), https://www.reuters.com/legal/government/us-supreme-court-just-gave-federal-agencies-big-reason-worry-2022-06-30/ [https://perma.cc/B6HY-KREN].

185 *Id.* at 2.

186 Gault & Koebler, *supra* note 115.

187 *Id.*

188 Roth, *supra* note 112.

189 *Id.*

notion of trade secrets—a company's protected proprietary or confidential information. There is no definition for those terms attached in the agreement.[190] In thinking about trade secrets, John Deere has continuously raised that concern regarding the right to repair, yet many have pointed out that it is virtually impossible to get trade secrets from embedded software which is what is needed for repairs.[191] Further, when dealing with embedded software and the distribution of the tools and documentation necessary to access that, one wonders just how much will be considered confidential. The final red flag here is that the terms fair and reasonable are defined differently than they are in model legislation. Instead of comparing the price that authorized repair dealers get, this agreement defines the term as, "equitable terms for access to or receipt of any item pertaining to Agricultural Equipment . . . in light of relevant factors . . . ."[192] In fact, many have already raised this issue with many farmers concerned that no change will actually occur.[193] Specifically, the vague language has led to speculation that this will be another attempt to pass off the Service Advisor instead of the actual right to repair.[194]

Another interesting aspect concerning this idea of self-regulation comes from the FTC report on right to repair. The report noted that the only time a memorandum of understanding had worked was in the automobile industry after a Massachusetts law had passed which created the right to repair for that sector.[195] In that case, the industry essentially acquiesced to legislation on the table on the condition that no more was passed.[196] The benefit there, however, was that if they broke their promise, there was a state law to fall back on. Here, there is the Colorado law to fall back on once it takes effect, but it remains to be seen whether or not this will be sufficient. Perhaps there should be some level of concern regarding this as John Deere did not respond to a request for a comment after the Colorado bill was signed.[197] Yet another reason for nationwide legislation.

Any form of legislation needs a certain number of variables to succeed, and in the case of right to repair, the most vital is a problem being perceived as urgent by the public and powerful political actors.[198] The next most important is that political motivation to solve it is high and that there is a viable policy solution.[199] With all of these present, a sufficient policy window could be created to pass this legislation at the federal level.[200] The situation at hand with the Colorado law and

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190 Memorandum of Understanding, *supra* note 113, at 3.

191 Complaint to Stop Unfair Methods, *supra* note 102, at 13.

192 Memorandum of Understanding, *supra* note 108, at 5.

193 Lela Nargi, *Not Everyone is Celebrating This Week's Right-to-Repair News*, AMBROOK RSCH. (Jan. 13, 2023), https://ambrook.com/research/right-to-repair-john-deere-MOU-afbf [https://perma.cc/MBZ9-E9ZY].

194 *Id.*

195 FEDERAL TRADE COMM'N, *supra* note 157, at 45–46.

196 *Id.*

197 Bedayn, *supra* note 178.

198 ROGER KARAPIN, POLITICAL OPPORTUNITIES FOR CLIMATE POLICY: CALIFORNIA, NEW YORK AND THE FEDERAL GOVERNMENT 62 (2016).

199 *Id.*

200 *Id.*

the Memorandum of Understanding seem risky in that they could be a negative focusing factor and harm public support. From a legislator's perspective, this issue has likely become less important.[201] A federal legislator considering the right to repair may take note of the Memorandum of Understanding and successful state legislation and decide that this issue has been addressed and does not warrant legislation. Thus, if John Deere breaches the Memorandum or finds wiggle room in the legislation that has currently passed, it could be an uphill battle to get support for federal legislation again, which exposes the massive risk of relying on what would essentially be an unenforceable promise. Such heavy reliance discounts the fact that not all farmers were on board. The language of this Memorandum of Understanding notes that if legislation is passed, John Deere can pull out of the Memorandum.[202] If farmers continue to push for legislation in states because they oppose this agreement, there is the distinct possibility that John Deere leaves the deal and starts back its crusade against the right to repair. Similar risks are present for the Colorado bill; it could be weak enough that John Deere acquiesces. Alternatively, if John Deere does not like it, they could accept a bad deal from Colorado and push very hard on the memorandum to avoid further state and federal legislation.

Furthermore, the FTC noted that sometimes these agreements are not flexible enough to change with the times.[203] This is a clear area of concern in this realm. The entire issue was spurred in the first place by the advent of technology in farming equipment, which makes the lasting stability of this agreement a potential concern. This equipment is increasingly complex, and there is the possibility that soon enough, the understanding of what the right to repair looked like would be obsolete in terms of how the machines operate. This is a clear method to stall legislation that lacks any teeth and should not be used as a reason to avoid the passage of true right to repair laws.

With an understanding of the possible outcomes absent federal legislation and the reason why this agreement should not be used to avoid it, one can turn to the ideal legislation. To begin, one should focus on who owes the right and to whom it extends. In this regard, Senator Jon Tester drafted perfect language. First, he clearly mentions that the duty to provide information stems from an original equipment manufacturer.[204] This is great because it defines who owes this right narrowly enough that there is no confusion but also broadly enough that manufacturers could not wiggle out of it. Next, the proposal listed that this would apply to not only owners but also independent repair providers and those who owned or leased the equipment.[205] Here, two aspects are of pure necessity. First, when defining owners, legislation should include those who lease the equipment. Farming equipment can be immensely expensive and thus if this class was not broad enough, the right to repair might only apply to a select few. Further, if the definition of owners does not include those who lease the equipment, several issues may occur. For example, farmers may have to forego purchas-

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201 *Id.* at 64.

202 Memorandum of Understanding, *supra* note 113, at 4.

203 FEDERAL TRADE COMM'N, *supra* note 157, at 46.

204 S. 3549, 117th Cong., 2d Sess. § 3(a) (2022).

205 *Id.* § 2.

ing equipment until they can afford to buy it outright, or even worse, farmers may have to continue relying on the current loopholes, such as illegal software, that have been utilized. Second, the right to repair should extend to independent repair shops. This ensures that the right is still present even when a farmer would be incapable of repairing the equipment themselves. In such a situation, they would not need to wait for John Deere but could take it to their local repair shop.

The next thing to consider with ideal legislation would be what equipment is applicable with the right. In this regard, the ideal legislation would truly be a combination of multiple proposals. The first thing to consider here is the term "electronics-enabled agriculture equipment" which has been defined to exclude and include various things in different bills. Most agree that this means equipment dependent on digital electronics.[206] There is some divergence on the usage of the equipment; some proposals limit it to equipment solely used for farming by the owner while others just focused on the intent when sold.[207] In this, the ideal language would revolve around the intended usage of the product by the manufacturer when sold. Farming equipment may be explicitly sold with one purpose in mind, but savvy individuals should not be punished for extracting the maximum value out of such expensive equipment.

Following this notion of extracting the maximum value, another very important clause in valuable legislation comes from the Arkansas proposal. This proposal ensured that the right would also apply to "legacy equipment."[208] This clause raises some competing interests. On the one hand, it serves the clear goal of the right to repair law in that it prevents the exploitation of a loophole by John Deere. Deere could potentially say the right to repair has been granted but is only applicable to new equipment. Thus, farmers would be faced with the choice of paying for brand new equipment to have their rights or keeping their old equipment at the mercy of John Deere. This invokes two concerns. First, it could be seen as unfair that John Deere must provide information on how to keep their equipment running because it does not clarify how long they are obligated to do so. Nonetheless, a cost–benefit analysis seems to dictate that some lost profits for John Deere on the basis of not selling brand new equipment yearly is vastly outweighed by farmers saving money and investing it into greater crop yields. Second, it could raise some potential environmental concerns. Studies on emissions show that older vehicles produce more emissions than newer vehicles.[209] Alternate arguments have been raised that the emissions created in manufacturing newer vehicles demand older vehicles be used to the fullest extent possible.[210]

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[206] S. 3549, 117th Cong., 2d Sess. § 2(3) (2022); H.B. 2309, 2021 Leg. Sess. § 2(c) (Kan. 2021); H.B. 511, 2021 Leg. Sess. § 2(3) 2(686.35)(1)(c) (Fla. 2021); Legis. B. 543, 107th Sess. § 2(2) (Neb. 2021).

[207] S. 3549, 117th Cong., 2d Sess. § 2(5) (2022); H.B. 2309, 2021 Leg. Sess. § 2(c) (Kan. 2021).

[208] S.B. 461, 93rd Gen. Assemb., Reg. Sess. § 1(4-88-1102)(9) (Ark. 2021).

[209] *Ageing Cars are Bogging Down the Battle Against Climate Change*, U.N. ENV'T PROGRAMME (Oct. 8, 2021), https://www.unep.org/news-and-stories/story/ageing-cars-are-bogging-down-battle-against-climate-change [https://perma.cc/FQ83-568W].

[210] Chris Melore, *Keeping Old Cars Longer Can Help the Environment MORE Than Buying New Electric Cars*, STUDY FINDS (Sept. 30, 2021), https://studyfinds.org/keeping-old-cars-help-environment-more-than-new-electric-cars/#:~:text=Specifically%2C%20researchers%20find%20keeping%20older,the%20more%20CO2%20it%20emits [https://perma.cc/BS9X-AZTA].

Nonetheless, it is reasonable to assert that continued use of older equipment could have some impact on the emissions released into the environment. Perhaps one potential solution would be a sliding scale in which the right to repair is not extended to equipment older than a certain number of years. This would dictate that older equipment with emissions issues need to be replaced in the interest of the environment. Perhaps another solution is a tax incentive that would give John Deere benefits related to the amount of functional equipment it has in use over ten years old. This could serve to incentivize smarter manufacturing.

In looking at the exact definition of the right to repair, the legislation proposed at the federal level once again proves the best. Generally, the right is defined as a requirement to make available certain things.[211] At the federal level there is some great language that ensures nearly full disclosure.[212] At the state level, the right usually explicitly includes "documentation" and "embedded software."[213] What makes the federal proposal ideal is that it also would have to apply to tools as well as software tools.[214] Tools in this context meant software, hardware, or any other apparatus necessary to bring equipment back to "fully functional condition."[215] There is a clear benefit to the language dictating any apparatus that is going to get the equipment back to fully functional. It prohibits a situation in which some tools that could kind of fix the equipment but would not get it to pique performance were released, thus still requiring a licensed technician to step in. Another benefit of this legislation is how it defines software tools, dictating they be given "without requiring authorization or internet access."[216] Not requiring internet access is beneficial because it ensures that farmers do not need to be worrying about getting great internet out in the fields to use their tractors. This is crucial because of how clear it has become that getting broadband into rural areas is no easy task.[217] A right to repair that could not be exercised upon would clearly not be of much value. The further benefit of the federal proposal is revealed when really thinking about how the repair process has gone. Part of the battle in right to repair has been over farmers not being able to diagnose the error codes in their equipment.[218] The federal legislation would then ensure farmers had the documentation and embedded software necessary to see how the equipment worked and how the software within it operated. Yet, it would also ensure that the tools necessary to act on this knowledge were made available. Otherwise, there could be some half repair scheme where only enough information to diagnose the problem was provided. To act on it, one would need to go get a specific tool that only John Deere had access to.

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211 S. 3549, 117th Cong., 2d Sess. § 3(d) (2022).

212 *See id.* § 3(d)(1).

213 *See supra* notes 63–64.

214 S. 3549, 117th Cong., 2d Sess. § 2(14) (2022).

215 *Id.*

216 *Id.* § 2(7)(C).

217 *See generally* Alejandra Marquez Janse et al., *Life Without Reliable Internet Remains a Daily Struggle for Millions of Americans*, NPR (Nov. 22, 2021, 6:00 AM), https://www.npr.org/2021/11/22/1037941547/life-without-reliable-broadband-internet-remains-a-daily-struggle-in-nevada [https://perma.cc/VXY9-U4HN].

218 Complaint to Stop Unfair Methods, *supra* note 102, at 12.

Now, almost certainly one of the most vital aspects of the model right to repair legislation is the means by which information is to be made available. In this context, the standard across the board has been "fair and reasonable terms," but the definition for that has varied. Model legislation would certainly define both costs and terms. In looking at costs, there is a focus on what authorized repair providers pay. In this scenario, the federal legislation does a bit too much as it dictates fair and reasonable is the lowest actual price an authorized repair provider pays to the original equipment manufacturer.[219] In fact, this could serve to harm those authorized repair providers who have incentive programs or the like set up. Here, Florida provides a great addition which takes into account "discounts, rebates, or other incentive programs."[220] This is important because it acknowledges the reality that a lot of independent repair shops have been consumed by bigger ones in the past two decades.[221] These repair shops are not inherently wrong; they simply played a role in this operation. Thus, the deals they accepted should be honored. It also could serve to incentivize John Deere to set up similar economic deals with independent repair shops which could pump some life into some small-town economies.

Another benefit of this definition of "fair and reasonable terms" is that it considers the costs the manufacturers of original equipment face for distributing information.[222] The positive here is that it provides original equipment manufacturers with some level of incentive to ensure that they are looking into pertinent software repairs. Otherwise, there would exist the risk of the situation described above. Manufacturers would have to choose between devoting time to new equipment or to software updates which they would then have to pay to distribute. Of course, there would remain the basic business incentive of ensuring customer satisfaction. Yet if the costs were significant enough, one could imagine manufacturers deciding to devote less time to research. This is why it is important that some consideration for manufacturers goes into the legislation.

Figuring out what fair and reasonable terms looks like is one of the most difficult aspects of the right to repair. This is because it is where the rubber meets the road. Once the right has been granted, how can one ensure the right is given on "fair and reasonable terms"? Should John Deere truly be required to provide all of its software for no cost? Or should farmers be expected to pay the same amount a repair shop does for this information? Certainly, a repair shop would have no issue paying, as they could utilize that information for further repairs to make profit. Farmers, on the other hand, may only need it once. A consideration for "fair and reasonable" should thus be the purchaser's intent when exercising the right. If one farmer purchases the software and only intends to use the information for a singular repair, it should be more affordable. A solution could be offering group discounts so that farmers unions acquire the information in a package and share it amongst themselves as necessary. This is one component of the legislation that has no clear answer and thus leaves open a lot of discretion.

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219 S. 3549, 117th Cong., 2d. Sess. § 2(7)(A) (2022).

220 H.B. 511, 2021 Leg. Sess. § 2(686.35)(1)(d)(1) (Fla. 2021).

221 Complaint at 15, Forest River Farms v. Deere & Co., 1:22-cv-00188 (D. Ill. Jan. 12, 2022).

222 S. 3549, 117th Cong., 2d. Sess. § 2(7)(A)(i) (2022).

Concerning the enforcement mechanism, the proposed federal legislation is also ideal. This is because the mechanism of enforcement was the FTC Act, which makes this practice a violation of that act as an unfair or deceptive practice.[223] The clear-cut benefit of this method is that the FTC is a large agency that specializes in this area, so it could suitably handle and monitor this legislation. This is vital to the right to repair. There needs to be a watchdog in any form of legislation that monitors practices and takes complaints to ensure that corporations are not shirking their responsibilities. The added benefit here, as opposed to an FTC ruling alone, is they would be acting with positive legislation aimed at the situation, not just administrative action based on a broad non-compete law.

CONCLUSION

Right to repair is not just a farmer's crusade. It is fundamental to farmers to ensure they can optimize the food they grow. Furthermore, it is what consumers expect. The battle to win federal legislation for farmers or for any right to repair will not be easy. As farmers have learned, companies such as John Deere will work to stall legislation at every turn, even going so far as to strike a deal with no teeth in the eleventh hour of this battle, a deal that demanded no legislation. For these companies if there is going to be a right to repair, they want it at their terms not the consumers. For this very reason, right to repair should be pursued just as ardently, if not even more, as it was prior to the signing of this deal. Only then will farmers finally have the security they need and the peace of mind they deserve.

To reiterate just how important it is that farmers are supported in this crusade, it seems pertinent to close this work with remarks made by President Biden, thanking American farmers and considering their role in feeding not only the nation but the world:

> But the real reason I'm here is to thank the American farmers—thank farmers. You feed America. You get us through—you got us through a pandemic. And you're literally the backbone of our country. It's not hyperbole. But you also feed the world. And we're seeing [this] with Putin's war in Ukraine, you're like the backbone of freedom.[224]

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[223] *Id.* § 4(a).

[224] Remarks on American Farmers in Kankakee, Illinois, 2022 DAILY COMP. PRES. DOC. 382 (May 11, 2022).

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A MODEL STATE COMPENSATION LAW FOR THE WRONGFULLY CONVICTED[†]

Jacqueline Kamel[*]

† This Note is dedicated to my friend, Iris Seabolt. Iris's friendship has inspired the changes proposed in this law. It is my hope that her twenty years spent wrongfully incarcerated will not have been in vain. In my heart, this law is known as "Iris's Law." Love you, girl. I would like to thank Natalie Huffman of the CJI for her polite, professional, and passionate dedication to not only her job, but to helping me with this note—which would not exist without her. The state of Indiana needs more people like Natalie Huffman. Thank you to Kristine Bunch for taking my last-minute call to open up her wounds—not just for this Note—but so to help others. Kristine, you are a wonderful mother to *both* Trent and Tony.

* J.D. Notre Dame Law, 2024. It is my hope with this degree I can help people like my friends; Marvin Cotton Jr., Krissy Bunch, Roosevelt Glenn, Obie Anthony, & Ken Nixon on their quests for proper exoneree legislation in the United States.

CONTENTS

INTRODUCTION

I could spend the majority of this Note explaining to you how radically unjust wrongful convictions are. I could express to you how permanent the suffering and how perpetual the frustration is for those among us who have been the ultimate victims of our flawed justice system. There are people more fitted to do this. What I do hope to discuss, is that aside from the utter cruelty, wrongful convictions are *expensive*. And further, without appropriate compensation to those who are lucky enough to be exonerated, not only is the injustice continued, but it spreads, infecting us all, socially and economically. And the very people in government who use fiscal reasons to prevent a proper remedy are either unaware of the true injury it requires, or do not realize this is a situation where to save, one must spend. Regardless of which ignorance plagues your state government, this Note hopes to be enlightening.

Each year, well over half a million Americans are released from state and federal prisons. At any given time, nearly seven million people are either incarcerated, on probation, or on parole.[1] Two-thirds of the people released will end up back in prison within three years.[2] Is this their failure or the system's inability to accurately focus on the needs reentry requires? The social and economic cost of these failures is widespread; one in twenty-eight children grow up with an incarcerated parent.[3] The intersection between health issues, poverty, and reentry is more or less a roundabout.

Broadly, there are two types of people released from prison: those who are truly guilty, and those who are truly innocent. This Note is meant to focus on the latter.[4] While both groups experience similar struggles, exonerees need a different level of assistance for an equitable outcome. That outcome can only be achieved by *both* expungement and compensation.

Expungement, the wiping of a criminal record—which is needed for housing and most jobs—is too long of a process considering its importance.[5] Because exonerees cannot enjoy the freedoms of non-criminals until their records are expunged, their lives become frozen in time.[6] Since exonerees are not technically

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[1] Office of the Assistant Secretary for Planning & Evaluation, *Incarceration & Reentry*, ASPE, https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0 [https://perma.cc/TRG2-4ZYK] (last visited Oct. 26, 2022).

[2] *Id.*

[3] *Id.*

[4] For clarification, a "parolee" is someone who is released from prison but is still serving the remainder of a court-ordered sentence. The term "exoneree" can refer to two groups: it can be someone whose sentence has been officially pardoned by a governor, or overturned by a court because of actual innocence, vacated, meaning it could have been retried, but the prosecutor declined to do so, both of which release them from the status of a prisoner or parolee, or it can be someone who further—because of their adjudicated innocence—had their record expunged, releasing them from the status of a criminal or ex-felon. This Note focuses on the struggles faced by both exoneree groups.

[5] *Expungement FAQs*, PAPILLON FOUND., https://www.papillonfoundation.org/information/expungement-faqs [https://perma.cc/L4LE-2ANP] (last visited Aug. 9, 2023).

[6] Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403 (2015); CARDOZO SCHOOL OF LAW, AN INNOCENCE PROJECT REPORT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR

parolees, they are not entitled to reentry services at all. Exonerees have insufficient notice of release, no reentry benefits, and lack guidance for accessing assistance.[7] In attempting to vindicate a person by voiding parolee status, the unintended effect is punishing them further with more complications.

Compensation, which includes money and an apology,[8] is not prioritized. There is a common assumption that exonerees get their money back ten-fold. They can either profit from selling their stories as the subject of a documentary or podcast or become rich from multi-million-dollar civil verdicts. But those instances are rare and paint a false narrative.[9] Many times, exonerees are not compensated appropriately or even at all to tell their stories, which can become sensationalized by documentaries that reap the proceeds.[10] What endures is the exoneree's distrust not only in their entire government, but in their social circle that comes to celebrate those fifteen minutes of fame. Successful civil lawsuits are rare, retraumatizing, and risky. Exonerees dedicate more of their lives to the worst thing that's ever happened to them just to be made whole again.

Compensation and expungement are the two necessary actions for the reentry exonerees need to avoid these collateral issues. These must be brought by uniform legislation, which this Note hopes to propose for enactment across the United States.

Part I of this Note describes the collateral consequences and financial burdens that a poorly functioning reentry for exonerees and lack of proper compensation has on not only them, but on society. These are the issues the proposed legislation aims to fix. Part II compares the varying state laws in existence and explains why they are ineffective. Because of its recent adoption into law, and because of its commonality with many other state statutes, I closely examine the current Indiana statute to show how compensation law actually works from both the state's perspective and an exoneree's experience. Part III describes the government's economic and constitutional burdens to exonerees and to society which underlies the importance of new legislation. Part IV presents in its full form a proposed model compensation law tailored to fulfill the burden and satisfy

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COMPENSATION 10 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf [https://perma.cc/KP5A-2TBM].

[7] Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 109 (2008).

[8] Tyler G. Okimoto, *Outcomes as Affirmation of Membership Value: Material Compensation as an Administrative Response to Procedural Injustice*, 44 J. EXPERIMENTAL SOC. PSYCH. 1270, 1271 (2008) (discussing the psychological impact compensation has on reaffirming a victim's identity and value in society and how it's only effective when given as an apologetic gesture). Hoffner v. State, 142 N.Y.S.2d 630, 631 (Ct. Cl. 1955) ("The state . . . suggests that more compensatory than money is the apologetic gesture of a penitent society. It seems to the Court that such an apology accompanied by a token payment would add a highhanded insult to an almost inconceivable injury.").

[9] Tony Kennedy, *Wrongfully Convicted Man Wins $1.9 Million Judgment, But Normal Life May Elude Him*, L.A. TIMES (Nov. 5, 1989, 12:00 AM), https://www.latimes.com/archives/la-xpm-1989-11-05-mn-1352-story.html [https://perma.cc/R5M3-GAA9] ("'People think I'm winning the lottery or something,'. . .'[w]ell, they owe me. If they had given me a choice, I wouldn't have gone through all this for $50 million.'").

[10] Telephone interview with Kristine Bunch, Indiana exoneree, released in 2012 after seventeen years of wrongful incarceration (Jan. 20, 2023) [hereinafter Bunch interview].

the presented needs in a practical and practicable way. In crafting this legislation, I have studied all thirty-eight state compensation statutes to assemble a single statute to fix the problems identified. This Frankensteinian proposal is inspired not only by research, but by my relationships working with exonerees, seeing and listening to their needs.

There is no way to right such a massive wrong.[11] There is, however, a beneficial way to be held accountable. And if anyone deserves greater accountability from others, it's the wrongfully convicted.

I. COLLATERAL CONSEQUENCES & THE COST TO SOCIETY

Collateral consequences are the consequences that a conviction has on an individual's ability to live as a citizen upon reentry.[12] Anyone susceptible to collateral consequences will likely be unable to escape the criminal justice system by design. The damage caused by these consequences thus becomes a cycle—never-ending for the exoneree and perpetuating through our society.[13] Reentry programs are often either misguided or underfunded, and if reentry is not done correctly, the effects could be worse than not having reentry at all.

Parole became increasingly popular in the mid-twentieth century as a utilitarian measure for those who showed rehabilitative growth.[14] During the "war on drugs" years of the 1980s, there were several legislative strongholds enacted to get "tough on crime" by punishing not only the incarcerated, but anyone who had ever been incarcerated.[15] Inconsistent and untimely expungem-

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[11] *Hoffner*, 142 N.Y.S.2d at 631–32 ("[A]ll the wealth in the State of New York could not compensate the claimant for the mental anguish suffered through . . . false imprisonment, under the impression that he would be there the rest of his life.").

[12] *See generally* Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (1986) (analyzing the consequences restrictions of civil rights have among released offenders).

[13] Amy Sholsberg et al., *The Expungement Myth*, 75 ALB. L. REV. 1229, 1237 (2011); *Criminal Justice Involvement and Homelessness*, CONN. COAL. END HOMELESSNESS, https://cceh.org/criminal-justice-involvement-and-homelessness/ [https://perma.cc/6DD4-ABCR] (last visited Jan. 20, 2022).

[14] Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116 (2000) ("Utilitarian penology treats punishment as . . . permissible only when its benefits in reducing future crime outweigh the pain, fear, and public expense it imposes.").

[15] *Id.* at 118 ("[P]unishment became a medium for expressing hatred of criminals. . . . [I]t was unnecessary . . . to ask whether punishment would reduce crime or enhance social welfare. It sufficed that an offender deserved it."); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.); Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 11–12 (2011) (demonstrating that since the war on drugs, the rate of crime is at an all-time low, while the amount of incarcerated individuals has gone from 300,000 to over two million); Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment [https://perma.cc/3C8G-8CSG] ("In the 1970s, roughly 1,950 separate laws limited job opportunities for people with a criminal record. Today, more than 27,000 rules bar formerly justice-involved people from holding professional licenses. (This includes a New York State law that bars anyone with a criminal conviction from obtaining a bingo operator's license!)."); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.). Truth–In–Sentencing Laws were created to make sure that

ent of public criminal records rendered even minor crimes to carry, effectively, a life sentence.[16] Naturally, parole was naturally attacked and diminished during the "tough on crime" years by abolitionists who preferred the caging of purported undesirables over the rehabilitation of people.[17] The result was a 700% increase in prison inmates in America; costs of prison maintenance ballooned from $6 billion to $67 billion.[18]

A parolee's first year outside prison is considered their "high-risk period" for reoffending.[19] Parole has an immediate system in place upon release to help parolees during this period by providing job assistance, counseling, and addiction services.[20] Yet, exonerees are not considered to be parolees, therefore, they are not given access to any of these resources.[21] Regardless, the collateral consequences of reentry affect exonerees just the same, and in other ways, more so.[22] They are receiving all of the cost, and none of the benefit, and they *never even committed the crime.*

Without a full understanding of these consequences, it is impossible to accurately calculate the most equitable solution to criminal justice funding, be it reentry programs, wrongful conviction compensation, or prison spending. Some examples of these consequences are, homelessness, healthcare issues, welfare dependency, crime, unemployment, an imbalance in the workforce, and a breakdown of the family unit.[23]

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prisons no longer allowed incarcerated prisoners parole based on a case-by-case basis of rehabilitation, but to imprison them for as much time as possible as punishment. Paula M. Ditton et al., *Truth in Sentencing in State Prisons Special Report*, U.S. DEP'T OF JUST., (Jan. 1999), https://bjs.ojp.gov/content/pub/pdf/tssp.pdf [https://perma.cc/F5H6-WJ5K].

16 Mandatory minimums force judges to give sentences to those convicted of crimes regardless of mitigating circumstances. *The History Behind Mandatory Minimums*, REHAB. ENABLES DREAMS, https://stoprecidivism.org/blog/the-history-behind-mandatory-minimums/ [https://perma.cc/AE9G-WKSD] (last visited Oct. 31, 2022); CAL. PENAL CODE § 667 (West 2023) (known as the infamous Three Strikes law that imposes a life sentence on those who commit their third felony). For how that worked out, see Rummel v. Estelle, 445 U.S. 263 (1980) (giving a life sentence to a man convicted of cashing three forged checks all under $130); Ewing v. California, 538 U.S. 11 (2003) (giving a life sentence to a man who stole three golf because he had prior burglaries on his record).

17 Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 490–95 (1999) (describing that parole used to be a rehabilitative period, but then became seen as useless, an idea perpetuated by retributivist scholars). *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME (Vintage Books rev. ed. 1985) (arguing that more incarceration, not rehabilitation should be the chief aim to combat crime).

18 Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/XB38-GA86].

19 Petersilia, *supra* note 17, at 483 ("A study by the Bureau of Justice Statistics found that twenty-five percent of released prisoners are rearrested in the first six months [of release] and forty percent within the first year.").

20 *Id.*

21 Kelly Shea Delvac, *Liberty and Just [Compensation] for All: Wrongful Conviction as a Fifth Amendment Taking*, 53 CONN. L. REV. 981, 989 (2022).

22 Chunias & Aufgang, *supra* note 7, at 109.

23 For an extensive description and examples of collateral consequences, see Kessler, *supra* note 6.

A. The Causes and the Cures of Collateral Consequences

The two causes of collateral consequences are laws and stigma towards people in reentry.[24] The two cures to these consequences are expungement and compensation. Letting an exoneree out of prison without an expunged record is akin to throwing someone off the deep end with cement shoes and a snorkel. Laws meant to imprison offenders forever still apply to exonerees because expungement is not automatic. Statutes that create "civil disabilities"—or barriers—between those with criminal records and those without take away freedoms such as voting, government employment, parental rights, jury duty, or the right to own a firearm.[25] Exonerees are barred from employment, housing, welfare benefits, and retaining their identity as both an individual and a citizen, especially if the crime they were convicted of is particularly perverse in nature.

Stigma is just as, if not more, powerful than restrictive laws.[26] The information age coupled with "right to know" laws allow the public to access and exploit people with criminal records. In fact, an entire market exists to disseminate those records.[27] The privacy of one's criminal record is not regulated, nor is it protected by the Constitution.[28] After expungement occurs, many states "seal" instead of "destroy" these records, allowing them to still be used by law enforcement.[29] The legitimate public interest in accessing the records of former offenders is sensible—but not for those who are innocent. Until the exoneree's record is expunged, they suffer the same collateral consequences as former offenders, and are subjected to the same outcomes of ostracism, poverty, and post-offending.[30] Expungement is not immediate for exonerees, but recidivism is. It is worth clarifying that even if an exoneree has never committed a crime in their life, they are still equally subject to recidivism—or reoffending—due to the design of collat-

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[24] Kessler, *supra* note 6, at 405–06.

[25] Petersilia, *supra* note 17, at 509–11.

[26] Douglas N. Evans et al., *Education in Prison and the Self-Stigma: Empowerment Continuum*, 64 CRIME & DELINQ. 255 (2018).

[27] Kessler, *supra* note 6, at 411–12; *Expungement FAQs*, *supra* note 5.

[28] Kessler, *supra* note 6, at 410; *see also* Dickerson v. New Banner Inst. Inc., 460 U.S. 103, 115 (1983) ("[E]xpunction under state law does not alter the historical fact of the conviction.").

[29] Kessler, *supra* note 6, at 409. *See, e.g.*, KAN. STAT. ANN. § 60-5004(i) (West 2022) ("Upon entry of a certificate of innocence, the court shall order the expungement and destruction of the associated biological samples authorized by and given to the Kansas bureau of investigation . . . .").

[30] Kenny Lo, *Expunging and Sealing Criminal Records*, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/article/expunging-clearing-criminal-records/ [https://perma.cc/P4F3-9WM5] (Apr. 23, 2020).

eral consequences.[31] The first year being outside prison is when exonerees (and parolees) are at their most vulnerable, and most susceptible to arrest.[32]

Factors that are known to decrease recidivism include access to social services, health insurance, a familial support system, housing, and full-time job opportunities.[33] Most affordable housing and minimum wage jobs require background checks, shying away from those with a felony record. If these needs are not addressed adequately and immediately it often leads to recidivism which perpetuates deep social, moral, and monetary harms onto all members of society.[34]

B. The Consequential Costs

The effects and expenses on exonerees and society from a few of these consequences are discussed here. Important to remember, is that whenever crime is a secondary effect, it also comes with an implied cost.

1. Employment

Exonerees claim that their most dire, initial need is a job.[35] This makes sense considering that employment is most effective when recidivism is most likely.[36] Even if they have been pardoned, until their records are formally expunged, exonerees must disclose any previous conviction to potential emplo-

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[31] In some cases where the exoneree had a perfect record beforehand, the issues of reentry, such as homelessness, end up causing them to live a lifestyle that may cause them to go back to prison. This does not imply that every exoneree had lived as criminals beforehand. *See also* Chunias & Aufgang, *supra* note 7, at 115 ("According to exoneree Lawyer Johnson . . . living outside of prison was at times so difficult that he would commit minor offenses, like shoplifting, in order to spend the night in prison when he was feeling particularly overwhelmed with life on the outside.").

[32] *See, e.g.*, Megan C. Kurleychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 CRIMINOLOGY & PUB. POL'Y 483,498 (2006); Office of the Assistant Secretary for Planning & Evaluation, *Predictors of Reentry Success*, ASPE RSCH. BRIEF (Dec. 2016), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//173586/reentrysuccessbrief.pdf [https://perma.cc/J22H-2VXH].

[33] *Predictors of Reentry Success*, *supra* note 32.

[34] *See generally* All Things Considered, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/transcripts/312158516 [https://perma.cc/M44H-K24D] ("From the defense view, the sentence is meant to be the punishment for the crime. And to then say that we're going to charge you for the privilege of being prosecuted and sentenced for the crime is somewhat a double penalty. . . . [S]tate legislators don't want to raise taxes. So they fund popular programs by charging more and more fees to an unpopular group: defendants and the convicted.").

[35] Leslie Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 CRIM. L. BRIEF 10, 10 (2009). Scott's interviews with several exonerees are illuminating first accounts of the exact effects collateral consequences have on exonerees both mentally, socially, and physically.

[36] Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOCIO. REV. 529 (2000).

yers.[37] This cuts their access to employment nearly in half.[38] At least sixty percent of the post-release population is, at any given time, jobless.[39] Because of this, exonerees are often desperate for any job in order to stay out of prison. And as a consequence, the post-prison population loses its bargaining power with employers. In effect, industries that want to save money end up employing exonerees over those who have never been to prison.[40] This is just one example of how poor reentry negatively affects society as a whole.[41] Additionally, the economic burden imposed due to the aforementioned collateral consequences is felt by all. The unemployment rate for formerly incarcerated people is five times higher than the unemployment rate for the entire United States population.[42]

Though there are laws in place that discourage employment discrimination based on a criminal record, those laws are ineffective in practice; employers have a right to avoid the liabilities that may come from those who have a criminal past. And while in recent years, new anti-discrimination legislation for background checks has been effectuated throughout the United States, eighty percent of employers continue to perform background checks of potential employees, and the mere existence of a criminal record continues to substantially reduce the likelihood of a hiring callback.[43] Criminal records also prevent people from obtaining occupational licenses.[44] Even without a criminal record, the exoneree must explain any gaps in employment, a lack of recent references, and a lack of technical skills.[45] Economists estimate that about $80 billion in lost gross domestic product is a result of barring criminals from the workforce.[46]

Many exonerees have been imprisoned for so long that they have missed the opportunity to finish high school, get a degree, or even develop skills that would allow them to hold their own in a competitive job market. Therefore, exonerees are often forced to take low-level employment opportunities. Prison inmates are prevented from choosing their own calling, contracting, bargaining, or acquiring skills to monetize their labor.[47] Those who entered prison with jobs

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[37] Sholsberg et al., *supra* note 13, at 1235.

[38] *Prison & Jail Reentry & Health Policy Brief*, HEALTH AFFAIRS POL'Y BRIEF (Oct. 28, 2021), https://www.healthaffairs.org/do/10.1377/hpb20210928.343531/full/health-affairs-brief-appendix-prison-community-reentry-russ.pdf [https://perma.cc/42HV-D8H6].

[39] Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), https://www.prisonpolicy.org/blog/2022/02/08/employment/ [https://perma.cc/9DTT-GNE9].

[40] *Id.*

[41] *Id.* ("Without leveling the playing field for formerly incarcerated people, not only will their jobless rates remain high, but self-serving employers will continue to benefit from a disposable labor pool, with detrimental impacts on everyone.").

[42] Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html [https://perma.cc/EA4M-85NA].

[43] Kimble & Grawert, *supra* note 15.

[44] For examples, see Kessler, *supra* note 6, at 404–08.

[45] Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 129 (2010).

[46] Lo, *supra* note 30.

[47] Delvac, *supra* note 21, at 1011; *see also* Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOCIO. REV.

and education find that the stigma upon release is insurmountable, in part due to public opinion of those who have been imprisoned.[48] Nearly half of the wrongfully convicted end up earning less after prison than they did before entering.[49] Moreover, many have incurred debt due to lawyer fees, criminal fines, and unpaid child support. Most never recover financially.[50] As a result, a third of exonerees are financially dependent on family and friends.[51]

Compensation can ease the desperation of needing employment to survive. But without a mechanism for expungement in the statute, there is no specific nor guaranteed recourse for exonerees looking to expunge their records. Those without expunged records cannot begin to rebuild their lives and are likely to wind up homeless or back in prison.

2. Homelessness

Formally incarcerated individuals are ten times more likely than others to end up homeless, thanks to poverty caused from unemployment, legal restrictions on public housing, discrimination due to their criminal record, and an inflated market.[52] The law does little to help. The Fair Housing Act of 1968 does not protect people with criminal records.[53] They can be denied housing, as can anyone who lives with them.[54] This makes family unity difficult. Additionally, because wrongful convictions tend to occur more often in lower-income neighborhoods, the very neighborhoods that tend to have higher recidivism rates, it is unsurprising that exonerees are set up to fail.[55] Since these same neighborhoods are met with several reentries a year, the members of those communities deal with those same challenges as well.[56] Generally, former prisoners will have access to rehoming programs through the state, but no such programs exist for the wrongfully incarcerated who are unceremoniously released with nothing.[57] These individuals, who often do not have enduring, close familial relations can easily end up in a homeless shelter. It is common for those who have served longer sentences

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539 (2000) (describing how workplace and age, both factors determined by reentry, can affect recidivism).

48 Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), https://www.nytimes.com/2007/11/25/us/25dna.html [https://perma.cc/3MKF-6CY7].

49 *Frontline: Burden of Innocence: Frequently Asked Questions*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html#4 [https://perma.cc/6GNA-4JFD] (last visited Nov. 29, 2022).

50 *Id.*

51 Scott, *supra* note 35, at 16.

52 *Prison & Jail Reentry & Health Policy Brief*, *supra* note 38.

53 42 U.S.C. §§ 3601–3631 (2018).

54 Romina Ruiz-Goiriena, *Exclusive: HUD Unveils Plan to Help People with A Criminal Record Find A Place to Live*, USA TODAY (Apr. 12, 2022, 11:41 AM), https://www.usatoday.com/story/news/nation/2022/04/12/can-get-housing-felony-hud-says-yes/9510564002/ [https://perma.cc/GC6L-XU4K].

55 *See* Chariles E. Kubrin & Eric A. Stewart, *Predicting Who Reoffends: The Neglected Role of Neighborhood Context in Recidivism Studies*, 44 CRIMINOLOGY 165, 185 (2006).

56 *Id.* at 166.

57 Chunias & Aufgang, *supra* note 7, at 119–20.

to no longer have these connections, and without immediate means, will end up homeless.

To make matters worse, homelessness is a crime in almost every state in the United States.[58] Thus, the vicious cycle of post-offending begins.[59] Supportive services for a homeless person costs anywhere between $30,000 to $50,000 per year.[60] Twenty-five percent of homeless people report that they have been arrested simply for *being* without a home.[61] Homeless people make up the largest population of emergency room visits, and also cost the taxpayers the expenses of frequent arrests, jail stays, ambulance rides, and other medical costs.[62] Some cities have made strides to alleviate both the personal and societal consequences of homelessness through the adoption of novel initiatives. The evidence suggests they work. In San Diego, a two-year program that housed just thirty-six homeless people saved the taxpayers a total of $3.5 million.[63] In Denver, offering supportive housing to the homeless resulted in a savings of $15,733 per person in public costs.[64]

Until their records are expunged, homeless exonerees will fail the requisite background checks for many housing opportunities. This only increases their shame and lack of independence.[65] Under Indiana law, it is permissible for apartment complexes to deny renters with criminal records a place to live.[66] People with records are advised to seek out housing opportunities from individual renters, often found on housing websites and in local advertisements, as opposed to complexes owned by management companies.[67] Nearly sixty percent of rental opportu-

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[58] Cynthia Griffith, *Where in the United States is it Illegal to Be Homeless?*, INVISIBLE PEOPLE (Dec. 16, 2022), https://invisiblepeople.tv/where-in-the-united-states-is-it-illegal-to-be-homeless [https://perma.cc/DV77-J2C2].

[59] *Criminal Justice Involvement and Homelessness*, *supra* note 13.

[60] Belle Ren, *Ending Homelessness Would Cost Far Less Than Treating It*, STREET SENSE MEDIA (Aug. 10, 2022), https://www.streetsensemedia.org/article/ending-homelessness-would-cost-far-less-than-treating-it [https://perma.cc/AZD4-YCYD].

[61] Griffith, *supra* note 58; *see also Homelessness–What We Know*, REENTRY AND HOUSING COALITION, http://www.reentryandhousing.org/public-housing [https://perma.cc/9R8Y-HX3X] (last visited Jan. 18, 2022).

[62] *United Way's Homeless Initiative, Father Joe's Project 25, Saves Lives, $3.5 Million*, FATHER JOE'S VILLAGES, https://my.neighbor.org/homeless-initiative-project-25-saves-lives-3-5-million [https://perma.cc/D2TD-HXEJ] (Mar. 12, 2020).

[63] *Id.*

[64] *What is the Cost of Homelessness?*, FATHER JOE'S VILLAGES, https://my.neighbor.org/what-is-the-cost-of-homelessness/homeless-initiative-project-25-saves-lives-3-5-million/ [https://perma.cc/ZL3G-Y272] (Mar. 9, 2022).

[65] Alexander, *supra* note 15, at 23 ("It is not just the denial of public housing, but the shame of being a grown man having to ask your grandma to sleep in her basement at night.").

[66] Bente Bouthier, *Rising Rent, Pandemic Making it Hard For People with Criminal Records to Find Housing*, WFYI INDIANAPOLIS (Feb. 15, 2022), https://www.wfyi.org/news/articles/rising-rent-pandemic-making-it-hard-for-people-with-criminal-records-to-find-housing [https://perma.cc/RJZ2-AH9D] ("[T]he surge in rental prices makes landlords more selective . . . Criminal Records make it the hardest, criminal records and evictions. That's what makes it take the longest to find housing.").

[67] *Housing*, FELONY REC. HUB, https://www.felonyrecordhub.com/housing-for-felons/ [https://perma.cc/98JJ-G8FQ] (last visited Jan. 20, 2022).

nities in Indiana, however, are acquired through rental companies.[68] Regardless, even if an exoneree can pass a background check, landlords can still ask for security deposits, first and last month's rent upfront, and proof of income—all of which are insurmountable hurdles for most people fresh out of prison.

3. Health Issues

Because exonerees have been isolated, interrogated, manipulated, wrongfully convicted, and incarcerated they thus, from a mental health standpoint, suffer from the symptoms of having been tortured.[69] While in prison, their mental health severely deteriorates. Studies show a causal link between procedural justice afforded and the mental health of the convict once behind bars.[70] The wrongfully convicted have received the ultimate miscarriage of justice and they know that. Beyond that, their false reputation as a criminal may precede them behind bars.[71] It is common knowledge that child sex offenders are often tortured, if not killed, in prison. Eleven percent of wrongfully incarcerated people are convicted of child molestation.[72] Those accused of other offenses are also at risk. For example, a New York man's erroneous conviction for killing a gang kingpin led incarcerated members of that gang to attack him inside prison.[73]

Paddy Hill, one of the Birmingham Six exonerees[74] explains that "every day a rightfully convicted person spends in prison is one day closer to release. But every day a wrongfully convicted person is in prison is one more day he shouldn't

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[68] *Comprehensive Housing Market Analysis For Indianapolis–Carmel–Anderson, Indiana*, U.S. DEP'T OF HOUS. & URB. DEV. (May 2016), https://www.huduser.gov/portal/publications/pdf/Indianapolis-comp-16.pdf [https://perma.cc/X8D7-NADR].

[69] Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 430 (2009). In several cases out of Chicago, many had *literally* been tortured by disgraced former "detective," Jon Burge. *E.g.*, Dave Byrnes, *Brothers Sue Chicago After Enduring Police Torture and Decades of False Imprisonment*, COURTHOUSE SERV. NEWS (July 25, 2023), https://www.courthousenews.com/brothers-sue-chicago-after-enduring-police-torture-and-decades-of-false-imprisonment/ [https://perma.cc/QG5J-QLPZ]; John Garcia, *Two Ex-Prosecutors on Trial After Man Wrongfully Convicted of Killing Two Chicago Police Officers*, ABC7 (Oct. 17, 2023), https://abc7chicago.com/jackie-wilson-wrongful-conviction-nick-trutenko-andrew-horvat/13930102/ [https://perma.cc/P8AZ-LMJ4].

[70] *See* Karin A. Beijersbergen et al., *Procedural Justice and Prisoners' Mental Health Problems: A Longitudinal Study*, 24 CRIM. BEHAV. & MENTAL HEALTH 100, 109 (2014).

[71] *See, e.g.*, Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 139, 151 (2004) (describing exonerees' experiences of being labeled as sex-offenders behind bars; they would be strip- searched, beaten, harassed, and singled out because of the stigma).

[72] *Basic Patterns*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx [https://perma.cc/S6YE-2VCP] (Nov. 2016); *see, e.g.*, Baba-Ali v. State, 878 N.Y.S.2d 555, 589–90 (N.Y. Ct. Cl. 2009), *aff'd in part, rev'd in part*, 907 N.Y.S.2d 432 (App. Div. 2010).

[73] Jones v. State, No. 2009-014-051 (N.Y. Ct. Cl. Aug. 19, 2009).

[74] The Birmingham Six refers to six men in Ireland who were tortured into confessing for a bombing they did not commit and served fifteen years while the real culprits were known by journalists. Rowan Moore, *Why The Birmingham Six's Story Must Not Be Forgotten*, THE GUARDIAN, https://www.theguardian.com/uk-news/2022/mar/26/why-the-birmingham-six-story-must-not-be-forgotten [https://perma.cc/GQH5-GMM8], (last visited Jan. 19, 2022).

have been there"; the psycho–emotional difference in that realization is dramatic.[75] Post–traumatic stress disorder (PTSD) is a common consequence of spending years in prison and a result of incarcerated individuals' segregation and fear for their lives. Depression and anxiety are the other common disorders suffered by exonerees.[76] Prisonization materializes from necessary adaptation. Survival methods include becoming emotionally vacant and aggressive, conforming to cruelty, staying alert at night, and distrusting surroundings due to the constant threat of harm or even death.[77] This often leaves permanent psychological damage and irreversible personality defects. Submitting to physical intimidation by inmates and guards and crumbling under the emotional confusion and disillusionment can showcase weakness, and, thus, the exoneree becomes more punished.[78] Not having a release date in sight, separation from loved ones, a lack of control over their reputation, and the loss of all of their assets are often the only things the wrongfully convicted can think about. If they are lucky enough to be released, their biggest hurdle is recovery, and they live in constant fear that wrongful conviction will somehow happen again.

Once the wrongfully convicted fight their way out, they are not met with immediate and constructive apologies from the government, but even worse, a society that still considers them ex-convicts.[79] Under these conditions, exonerees often feel paranoid, isolated, and revictimized.[80] After years of living in a restricted survival mode and collecting uncontrollable debt, they enter a world where they may not recognize: a world with advanced technology, cultural changes, and an unrecognizable family[81] Moreover, they are robbed of an education, destined to a life they never wanted, shortened by prolonged exposure to prison conditions.

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[75] Jennifer Wildeman et al., *Experiencing Wrongful and Unlawful Conviction*, 50 J. OF OFFENDER REHAB. 411, 412–13 (2011).

[76] Lauren Legner, *The Psychological Consequences of a Wrongful Conviction and How Compensation Statutes Can Mitigate the Harms*, MICH. ST. L. REV. F. (Apr. 26, 2022), https://www.michiganstatelawreview.org/vol-2021-2022/2022/4/25/the-psychological-consequences-of-a-wrongful-conviction-and-how-compensation-statutes-can-mitigate-the-harms [https://perma.cc/Q45N-KTSF]("Many studies have found that wrongfully convicted people suffer from additional psychological symptoms in addition to specific disorders. Some individuals have reported feeling 'worn down' after being wrongfully accused and often worry that others do not believe in their innocence. Wrongfully convicted people also often experience feelings of 'bitterness, feelings of loss, hopelessness, emptiness, anger and aggression, helplessness, [and] chronic feelings of threat and fear when out in public.'").

[77] Chunias & Aufgang, *supra* note 7, at 113–19.

[78] MARVIN COTTON JR., BETTER, NOT BROKEN: AN OPTIMISTIC GUIDE TO OVERCOMING PAIN AND LEVERAGING LIFE'S OPPORTUNITIES 91–96 (2022). Michigan exoneree, Marvin Cotton Jr. describes a Christmas Eve he spent in prison wrongfully incarcerated. The guards left the doors open until every inmate was so cold, they would scream for heat, only to turn the heat on so hot they felt trapped inside a furnace unable to breathe. This continued back and forth all night as the guards laughed. Marvin was not only tortured by guards on the inside, but he was inside for something he did not do. Now a free man, he no longer wears a jacket because he refuses to be cold.

[79] Evans et al., *supra* note 26.

[80] Weigand, *supra* note 69, at 429–30.

[81] Legner, *supra* note 76 (explaining studies of exonerees upon reentry where every participant felt "psychologically the age they had been upon entering prison, as if time stopped in their head at that point").

They are left with mental trauma, addiction, broken relationships, lack of closure from deaths they missed, children they never saw grow up, and continuous anxiety–inducing interactions with the state.[82]

The severe difficulty finding unemployment and rebuilding or starting new family relationships have the most profound impact on exonerees' mental health once exonerated.[83] Many exonerees lost touch with their families due to their incarceration.[84] Additionally, trying to build relationships with those they meet after release can be difficult, because exonerees are different people than they were before these traumatic events unfolded.[85] It is difficult to readjust to normalcy, because in prison, their wrongful conviction consumed their thoughts and lives. After adapting to strict day-to-day living, exonerees find it both difficult and embarrassing to reenter a society that has moved on culturally or that contains simple mundane tasks people take for granted daily.[86] Worse, this whole experience turns historically "normal" people with no mental issues or addictions into completely different people now dependent on mental and physical assistance to survive.[87]

4. Social Welfare[88]

Crime costs money. This is not an unfamiliar concept. And those with criminal records must pay. Forever. Take child support for example—"rising imprisonment contribut[es] to rising child support debt and rising child support debt contribut[es] to rising imprisonment."[89] With heavy wage garnishes, if an exoneree can get a job, sixty percent of their income can go to child support they were unable to pay while in prison. These debts also come with fees and interest.[90]

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[82] AN INNOCENCE PROJECT REP., *supra* note 6, at 7–11; *see, e.g.*, Aaron Montes, *"You'll Never be the Same," Daniel Villegas Opens Up on Life After 2018 Trial*, KTSM, https://www.ktsm.com/local/youll-never-be-the-same-daniel-villegas-opens-up-on-life-after-2018-trial/ [https://perma.cc/C5UM-BYUN] (Dec. 3, 2021, 10:09 PM).

[83] Scott, *supra* note 35, at 11.

[84] *Id.*

[85] *Id.*

[86] Legner, *supra* note 76 ("[S]everal exonerees reported feeling 'embarrassed by the practical difficulties of mundane tasks like crossing the street, using a microwave, or handling money.' They categorized this experience as humiliating and shameful. In addition, many reported feeling 'unsettled'—that they 'could not find a sense of direction' and that they 'struggled to reintegrate back into their families.'").

[87] *Id.*

[88] "When evidence is not excluded, indictments are not quashed, and convictions are not overturned, we eviscerate the deterrent effect of these and other similar measures, and, consequently, infect the entire criminal process with an ambivalence toward our most fundamental liberties." Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1195 (1995).

[89] Lynne Haney & Marie Mercier, *Child Support and Reentry: Executive Summary*, NAT'L INST. JUST. (Sept. 20, 2021), https://nij.ojp.gov/topics/articles/child-support-and-reentry [https://perma.cc/M6GE-9BSZ]; *see also* Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, MARSHALL PROJECT (Oct. 18, 2015, 5:00PM), https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt [https://perma.cc/2F6C-RB37];

[90] Alexander, *supra* note 15, at 22.

Not paying can also send them back. Further, this has negative effects on the family of that parent. In fact, most exonerees are imprisoned around twenty-six—the prime of their working lives.[91] Leaving behind families and children typically ensures poverty among the household.[92] It also hinders the concept of a family unit which strengthens community and welfare.

In 1996, a federal welfare reform banned drug felons from collecting food stamps.[93] Indiana banned Supplemental Nutrition Assistance Program (SNAP) benefits for people with criminal records until 2020.[94] It was one of the last states to recognize that it costs more money and social harm to do so.[95] In Florida, the state modified SNAP ban reform to include those committing financially motivated crimes. Most people leaving prison need access to food stamps within the first two months.[96] Florida's modified SNAP ban caused recidivism rates to go up because those who were precluded from accessing bare necessities were left to make money the only other way they knew how: crime.[97] In trying to save money, Florida spent over $70 million.[98]

In fact, Florida's compensation statute forbids those with a prior felony from collecting compensation. Further, compensation is capped at $50,000 annually.[99] Compare that with New York, where there is no prior felony restriction nor a cap on compensation.[100] In Florida, there is an almost sixty percent reoffending rate amongst exonerees, and in New York, eight percent.[101]

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91 *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/E37T-CTEG] (last visited Jan. 20, 2022).

92 Rebecca Silbert et al., *Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System*, CHIEF JUST. EARL WARREN INST. L. & SOC. POL'Y, 16 (2015).

93 Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J.: ECON. POL'Y 301, 302 (2019).

94 Mark Peterson, *Indiana Food Stamp Ban For Drug Felons Nears Its End*, WNDU (Dec. 17, 2019, 4:14 PM), https://www.wndu.com/content/news/Indiana-food-stamp-ban-for-drug-felons-nears-its-end-566284431.html [https://perma.cc/YD9D-AS9Z] ("When they suddenly started finding out that their constituents in the rural areas who were now being convicted of meth, who had opiate issues, they were finding out what it was like for when those people came out of prison or when those people came out of rehab.").

95 Elizabeth Wolkomir, *How SNAP Can Better Serve the Formerly Incarcerated*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/food-assistance/how-snap-can-better-serve-the-formerly-incarcerated [https://perma.cc/XZG5-QLTX] (Mar. 18, 2018); *No More Double Punishments: Lifting the Ban On SNAP and TANF for People with Prior Felony Drug Convictions*, CLASP, https://www.clasp.org/publications/report/brief/no-more-double-punishments [https://perma.cc/9QES-57QL] (Apr. 2022).

96 Tuttle, *supra* note 93, at 315–16.

97 *Id.* at 324 ("For every offender who recidivates because of the SNAP ban, Florida pays the cost to incarcerate that offender and the citizens of Florida suffer costs of victimization.").

98 *Id.*

99 FLA. STAT. ANN. § 961-06(1)(a) (West 2023); FLA. STAT. ANN. § 961-06(2) (West 2023).

100 N.Y. JUD. CT. ACTS LAW § 8-b(6) (McKinney 2023).

101 *See* Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553 (2013).

Noted factors in determining recidivism rates include the offender's age, race, neighborhood into which they return, gender,[102] prison experience,[103] and poverty level.[104] This is why, because they are experiencing all of these collateral consequences, exonerees with no criminal past are still subject to returning to prison. This constant fear can lead to a severe distrust of the criminal justice system. Not only stemming from the exoneree, but from those they know, and those who hear their stories.

Additionally, when compensation laws are not satisfactory—or non-existent—the exoneree may file a civil rights lawsuit. As of 2022, a total of $2.65 billion has been paid to exonerees nationally through civil rights suits.[105] The average payout is $318,000 per year spent incarcerated.[106] This, of course, is only after years of waiting for a payout.

The reason civil suits are so attractive is because they often award far more than the state's compensation package. Still, civil suits are not as glamourous as they appear; there is an extremely heavy burden on the exoneree to spend several years relitigating either extreme police corruption or malicious prosecution—both are uphill battles.[107] The solution, thus far, has been to accept offers from predatory loan companies that make themselves immediately available to exonerees who appear to have promising claims and reliable representation. These companies come calling with six-figure offers, skirting interest caps by claiming the "all–or–nothing risk."[108] If the exoneree loses in court, their loan is forgiven, but if they win, a hefty chunk of that settlement goes back to the company. This is why exonerees backed by reputable civil rights attorneys are the ones eligible to borrow these loans, which on average have a thirty-three percent interest rate.[109] Why would anyone borrow money with this kind of rate? As one exoneree put it, "I needed a service and they provided it…[m]ost people aren't willing to take a chance on any of us."[110]

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[102] Kubrin & Stewart, *supra* note 55, at 187–89.

[103] *Id.* at 168.

[104] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/89G7-N8QG].

[105] Specifically, claims made under 42 U.S.C. § 1983; Corey Kilgannon, *They Were Unjustly Imprisoned. Now, They're Profit Centers*, N.Y. TIMES (Nov. 27, 2022), https://www.nytimes.com/2022/11/27/nyregion/high-interest-loans-exonerated-prisoners.html [https://perma.cc/PTY9-SHAD].

[106] *Id.*

[107] Alberto B. Lopez, *$10 and a Denim Jacket–A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 690–98 (2002) (explaining the elements the exoneree must prove and the immunities of each defendant).

[108] Roy Strom, *Out of Prison and Broke, Wrongfully Convicted Sell Their Case*, BLOOMBERG L., https://news.bloomberglaw.com/business-and-practice/out-of-prison-and-broke-wrongly-convicted-turn-lawsuits-to-cash, [https://perma.cc/RY8R-JYB2] (Feb. 2, 2022, 12:38 PM).

[109] Kilgannon, *supra* note 105.

[110] *Id.* "I had no choice. I just wanted . . . normalcy, but that normalcy comes at a high price." A New York exoneree, Fernando Bermudez "acknowledges the lawsuit loans were his 'best option' but wasn't happy about the terms: 'I felt taken advantage of. I just felt exploited." Strom, *supra* note 108.

Civil rights suits are not always a practical choice for exonerees. Many cannot prove misconduct either because of immunity defenses, loss of original evidence, or a statutory bar. Many also do not have the resources to wait that long. Therefore, much of the money is going to only a small amount of those wrongfully convicted. And who pays for these verdicts? The taxpaying public.

If the exoneree sues an individual officer, the city typically indemnifies that officer, that is, it pays on their behalf.[111] In fact, a 2014 study concluded that officers personally paid .02% of the dollars recovered by plaintiffs in civil rights lawsuits against them.[112] Many times, the exoneree will sue the city itself. Cities usually have varying forms of liability insurance for this reason, as a way to protect themselves from the actions of its police officers.[113] The cities pay with their insurance usually through general funds or pools depending on the jurisdiction. The data varies, but ultimately, it is still the taxpayer who funds at least a portion of the insurance.[114] Some cities, however, do not have insurance, and therefore the money comes directly from municipal taxes.[115] Either way, the people pay.

Even after awards are given, issues continue to manifest. The exoneree may have to experience additional legal battles with insurance companies that try to avoid liability.[116] The city may appeal the award because it cannot afford to

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[111] *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (conducting a study of civil rights lawsuits and who pays on the officer's individual behalf).

[112] *Id.* at 913.

[113] *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 U.C.L.A. L. REV. 1144, 1161–63 (2016) (discussing the different methods of municipal insurance, and how civil rights lawsuits affect each kind); *see also* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1579–81 (2017) (describing different ways private insurance companies audit and regulate police departments to prevent them from incurring excessive liability, particularly, by interpreting constitutional rights).

[114] Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 781–82 (2004) ("Civil judgments come out of the city or county funds, or perhaps from insurance policies that the local government purchases–i.e., from taxpayers.").

[115] *See* Schwartz, *supra* note 113, at 1161.

[116] For example, Missouri exoneree, Ryan Ferguson was exonerated in 2013 after ten years of wrongful imprisonment. In 2017, he was awarded $5.3 million against the City of Columbia. The city paid $500,000, but its insurer refused to indemnify because it wasn't the insurer at the time of the conviction, so Ferguson had to relitigate to get his damages award. In 2019, a court affirmed his award against the insurers. Ferguson v. St. Paul Fire & Marine Ins. Co., 597 S.W.3d. 249 (Mo. Ct. App. 2019); Marcelle Peters, *Former City Insurer Ordered to Pay $5.35 Million for Ferguson Wrongful Conviction*, COLUMBIA MISSOURIAN (Aug. 14, 2018), https://www.columbiamissourian.com/news/local/former-city-insurer-ordered-to-pay-5-35-million-for-ferguson-wrongful-conviction/article_18bc6de2-a000-11e8-830b-07831aaa482d.html [https://perma.cc/BAR9-7RML].

pay.[117] The general public suffers from raised taxes,[118] or cutbacks in social services.[119] Some jurisdictions do not allow for insurance to financially impact their law enforcement budgets.[120] This fact, along with constant indemnification, gives no deterrence for city officials to take steps to prevent misconduct.[121] This means that the cause of these suits will continue in perpetuity and thus the consequences never cease. The more lawsuits a city experiences, the higher the premiums, and the taxpayers continue to pay more.

Aside from judgment awards are litigation fees. From 2004 to 2018, Chicago spent $213 million on private lawyers to represent officers in civil rights suits.[122] Civil rights attorneys say the city wants to "appease cops who want to see their conduct justified in court."[123] Advocates of that approach argue good defense lessens the plaintiff's expectations. This would be persuasive if the City did not spend so much to lose even more.[124]

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[117] *See, e.g.*, Hill v. City of Hammond, No. 2:10-CV-393-TLS, 2023 WL 4683311 (N.D. Ind. July 21, 2023) (granting the parties' Motion to vacate the $25 million a jury awarded exoneree James Hill against the City of Hammond in favor of a $9 million dollar settlement). The City claimed "the settlement will better allow" it "to meet the demands it owes its citizens" and that the "risks implicat[ing] the financial costs of continued provision of police and fire services, proper roads, sidewalks, bridges, and other vital community services" was a "burden" to ask its "present-day citizens to bear" considering the conviction happened forty years prior. *Id.* at *5. Hill agreed to sacrifice $14 million because he had waited long enough to see his money, needed it because he could not rebuild his life without it, and the City could not pay him. If he accepted $9 million, he would be paid right away. *Id.* at *6. How? Because the city sold its debt. For this, Hammond homeowners will pay an additional $3.44 in taxes per year over ten years. Molly DeVore, *Hammond Moves Forward with $155M Budget*, TIMES OF NW. IND. (Oct. 12, 2023), https://www.nwitimes.com/news/local/lake/hammond/hammond-city-budget/article_a01581e8-6904-11ee-b3bb-bbe68e1f6a05.html [https://perma.cc/NW4W-E6HF]. This is not the first time Hammond has done this to the wrongfully convicted for the same reason. *See* Mayes v. City of Hammond, 631 F. Supp. 2d 1082, 1096–98 (N.D. Ind. 2008). One wonders what Hammond will do at the conclusion of another pending lawsuit by two exonerees. Note, all of these claims stem from the *same officer*, Mike Solan. Glenn v. City of Hammond, No. 2:18-CV-150-TLS-JEM, 2021 WL 4078063 (N.D. Ind. June 22, 2023).

[118] Inkster, MI is self-insured for claims above $2 million. A $1.4 million settlement due to police misconduct caused the entire city to raise its property taxes $178 per household. Schwartz, *supra* note 113, at 1174–75, n.96.

[119] "When you had to budget for [police] tort liability you had less to do lead poisoning screening for the poor children of Chicago. We had a terrible lead poisoning problem and there was a direct relationship between the two. Those kids were paying the tort judgments, not the police officers." *Id.* at 1178 (quoting former Chicago attorney Lawrence Rosenthal).

[120] Schwartz, *supra* note 113, at 1166, 1188.

[121] For arguments both supporting and weakening this argument, see *id.* at 1155–56. For a fuller analysis, see Rappaport, *supra* note 113 at 1595–1607.

[122] Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: $213 Million to Private Lawyers Since 2004*, CHICAGO TRIB. (Sept. 12, 2019 5:00 AM), https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpnki-story.html [https://perma.cc/FR3R-27T5].

[123] *Id.*

[124] *Id.* For example, exoneree Jacques Rivera was awarded $17 million despite Chicago spending nearly $6 million on attorneys. *Id.* The "Englewood Four" (four men falsely accused of rape and murder) settled for $31 million after Chicago spent $4.4 million on attorneys. *Id.* After twenty-five years wrongfully convicted of arson, James Kuppleberg spent five years awaiting his

These funds should not be sacrificed by innocent taxpayers. If there were more consistent and equitable compensation laws in place, civil suits may not be as necessary for exonerees. Ultimately, all of the social and literal cost that society endures from lackluster, or nonexistent expungement and compensation laws specifically tailored to the needs of exonerees are costing more money than lawmakers think they are saving by not enacting them correctly. Worse, what does it say about a society that prioritizes laws for punishment over remedies?

II. CURRENT COMPENSATION LEGISLATION

Currently, only thirty-eight states plus D.C. have mandatory exoneration compensation laws.[125] All vary in their eligibility requirements, obstacles, compensation amounts, and contributory provisions.[126] In reality, exonerees often must relitigate their own case, to get compensation and expungement. During this process, they often must depend on their family to seek shelter and the luck of their jurisdiction to determine if relief is even possible because eligibility requirements and processes vary between states.

A. Nation-Wide[127]

Wrongful convictions are inconsistent nationally because they tend to happen in state courts where judicial practices vary.[128] Nationally, seventy-two percent of exonerees who file state claims are given compensation, but it varies by

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civil trial when the City's private lawyers offered to settle for $9.3 million after billing over $6 million. "We would have taken that number more or less earlier." *Id.*

[125] Alejandra Marquez Janse & Ari Shapiro, *For the Exonerated, Compensation is a Battle for Stability and Dignity*, NPR (Jan. 11, 2023, 5:00 AM), https://www.npr.org/2023/01/11/1147443227/for-the-exonerated-compensation-is-a-battle-for-stability-and-dignity#:~:text=Currently%2C%2038%20states%20plus%20the,the%20states%20have%20been%20paid [https://perma.cc/K9HV-ED3N].

[126] *Id.*

[127] For the most informative state comparison charts up to 2019, see *Compensation Statutes: A National Overview*, NAT'L REGISTRY OF EXONERATIONS (May 21, 2018), https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf [https://perma.cc/44LK-S7VJ]; *Key Provisions in Wrongful Conviction Compensation Laws*, INNOCENCE PROJECT, https://www.law.umich.edu/special/exoneration/Documents/Key-Provisions-in-Wrongful-Conviction-Compensation-Laws.pdf [https://perma.cc/5PBR-NC84] (last visited Oct. 27, 2022); and *National Landscape of Compensation*, MONT. DISTRICTING & APPORTIONMENT COMM'N, https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Meetings/June-2019/LJIC-June28-2019-Ex19.pdf [https://perma.cc/8YSH-YBXN] (last visited Oct. 27, 2022).

[128] On a federal level, the 2004 Justice For All Act urged states to "provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death." Eleven years later, it made compensation tax-exempt. That is the only consistency that exists. Justice For All Act of 2004, Pub. L. No. 108–405, 118 Stat. 2260 (codified as amended at 42 U.S.C. § 3797j); Keith. A. Findley, *The Federal Role in the Innocence Movement in America*, 33 J. CONTEMP. CRIM. JUST. 61, 64, 75 (2017).

state.[129] Some states pay the exoneree by the day.[130] Most pay them by the year. Some pay them based on an arbitrary calculation guided by a cap.[131] Some states' maximums are lower than other states' minimums.[132] Some states compensate time in pre-trial custody,[133] others do not. Some base the amount off of how many years were served,[134] some add more if a death sentence was given.[135] Some states will allow the exoneree to collect a lump sum or specific installments on a case-by-case basis,[136] while others are stringent on how much is given per year.[137] Some states do not explain how much they will award, nor how it is calculated.[138]

The likelihood of getting compensation is also inconsistent because the burdens of proof vary, as does the deciding authority. For example, in fifteen states, the burden of proof is clear and convincing.[139] In eleven states, the burden is preponderance of evidence.[140] Other states are silent on the matter. Some states

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[129] Celina Tebor, *What's the Value of Decades Lost in Prison? Adnan Syed Could Get Millions, But Exonerated People Often Face a Legal Maze in US*, USA TODAY (Oct. 23, 2022, 5:00 AM), https://www.usatoday.com/story/news/nation/2022/10/23/adnan-syed-exoneration-compensation/10528473002/ [https://perma.cc/F5XT-KJCU].

[130] *See, e.g.*, California–$140 per day, CAL. PENAL CODE § 4904(a) (West 2023); Iowa–$50 per day, IOWA CODE ANN. § 663A-1(6)(b) (West 2023); Maryland–unknown amount, MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (West 2022); Missouri–$100 per day, MO. ANN. STAT. § 650.058(1) (West 2023).

[131] In Massachusetts, it's $1 million, MASS. GEN. LAWS ANN. ch. 258D § 5 (West 2023); in New Hampshire, it's $20,000, N.H. REV. STAT. ANN. § 541-B:14(II) (2022); in Mississippi, it's anywhere from 50k to 500k a year, MISS. CODE ANN. §11-44-7(2)(a) (2022). Some states give a few determination factors, others do not.

[132] *See* Wisconsin (caps at $25,000 per year), WIS. STAT. ANN. § 775.05(4) (West 2022) compared to Louisiana (minimum per year starts at $40k), LA. STAT. ANN. § 572:8(H)(2)(b) (2023).

[133] *See, e.g.*, ALA. CODE § 29-2-160(d) (2022), CAL. PENAL CODE § 4902 (West 2023); COLO. REV. STAT. ANN. § 13-65-103-3(b)(I) (2022); HAW. REV. STAT. ANN. § 661B-3(a)(3) (West 2022); IDAHO CODE § 6-3503(1)(a)(ii) (2022); WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2023).

[134] *See, e.g.*, 705 ILL. COMP. STAT. ANN. 505/8 (West 2023); NEV. REV. STAT. ANN. § 41.950 (West 2022).

[135] *See, e.g.*, COLO. REV. STAT. ANN. § 13-65-103-(3)(a)(I) (2022); IDAHO CODE § 6-3503-1(a)(ii) (2022); WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2023).

[136] *See, e.g.*, ALA. CODE § 29-2-160 (2022); KAN. STAT. ANN. § 60-5004(e)(3)(B) (West 2022); LA. STAT. ANN. § 572:8(H)(2)(c) (2023); MONT. CODE ANN. § 53-1-214 (West 2022); TENN. CODE ANN. § 9-8-108(a)(7)(D) (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2022); UTAH CODE ANN. § 78B-9-405(4)(c) (West 2022); WASH. REV. CODE ANN. § 4.100.060(12) (West 2023).

[137] *See, e.g.*, while Missouri pays $100 per day, they cap yearly disbursements to $36,500. MO. ANN. STAT. § 650.058 (West 2023); Indiana distributes its installments evenly over five years with no exceptions. IND. CODE ANN. § 5-2-23-3(c) (West 2022).

[138] *See, e.g.*, MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2022); N.Y. CT. CL. ACT LAW § 8-b (McKinney 2023); W. VA. CODE ANN. § 14-2-13a(d) (West 2022) ("If the court finds that the claimant is entitled to a judgment, the court shall award damages in a sum of money as the court determines will fairly and reasonably compensate the claimant based upon the sufficiency of the claimant's proof at trial. The damages shall depend upon the unique facts and circumstances of each claim. The claimant shall bear the ultimate burden of proving all damages associated with the claimant's claim.").

[139] *National Landscape of Compensation*, *supra* note 127.

[140] *Id.*; IDAHO CODE § 6-3502 (2022); S.B. 1584 § 1(9)(a), 81st Leg. Assemb., Reg. Sess. (Or. 2022).

form committees to decide,[141] others delegate the matter to various courts.[142] Some states require re-litigation for the exoneree,[143] others, simply a certificate of innocence given by a judge or committee.[144] Montana leaves it up to its department of corrections.[145]

State statutes create barriers for their citizens and remain tone-deaf in the severity and case-by-case variations of wrongful conviction. For example, in New Jersey, an innocent person cannot get compensated if they took a plea deal even though over eleven percent of exonerees are coerced into pleading guilty.[146] Relatedly, states bar recovery for those who have perjured,[147] but false confessions are one of the leading causes of wrongful convictions.[148] Rhode Island will not allow a claim for compensation if the exoneration was based off of ineffective assistance of counsel.[149] In Missouri and Montana, compensation is only eligible for those exonerated through DNA, but just under eighteen percent of exonerations are through DNA.[150] A large problem is that many crimes either did not involve the collection of viable DNA samples, or the samples were either lost or destroyed.[151]

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141 ALA. CODE § 29-2-151 (2022); LA. STAT. ANN. § 572:1 (2023); N.C. GEN. STAT. § 15A-1462 (2022).

142 *National Landscape of Compensation*, *supra* note 127.

143 MASS. GEN. LAWS ANN. ch. 258D, § 4 (West 2023); VT. STAT. ANN. tit. 13, § 5569 (2022); WASH. REV. CODE ANN. § 4.100.040 (West 2023).

144 IDAHO CODE § 6-3504 (2022); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2023); KAN. STAT. ANN. § 60-5004(g) (West 2022); NEV. REV. STAT. ANN. § 41.910 (West 2022).

145 Montana doesn't even give monetary compensation, just tuition at a Montana school. Montana is the worst—unequivocally so. MONT. CODE ANN. § 53–1–214 (West 2022).

146 *See* N.J. STAT. ANN. § 52:4C-3(d) (West 2023); *see also*, *e.g.*, IOWA CODE ANN. § 663.A.1(1)(b) (West 2023); MASS. GEN. LAWS ANN. ch. 258D, § 1(C)(iii) (West 2023); OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2023); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(b) (West 2023); Christina Carrega, *More Than 2,800 Have Been Wrongly Convicted in the US. Lawmakers and Advocates Want to Make Sure They're Paid Their Dues*, CNN POL. (July 7, 2021, 4:28 PM), https://www.cnn.com/2021/07/07/politics/wrongful-conviction-compensation-bill/index.html [https://perma.cc/XC3H-M2EQ].

147 *See*, *e.g.*, HAW. REV. STAT. ANN. § 661B-3(b)(2-(3) (West 2022); VT. STAT. ANN. tit. 13, § 5574(4) (2022).

148 *Facts and Figures*, FALSECONFESSIONS.ORG, https://falseconfessions.org/fact-sheet/ [https://perma.cc/DBC9-YESV] (last visited Jan. 2, 2022).

149 12 R.I. GEN. LAWS § 12-33-2 (2022). *But see* EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 225 DNA EXONERATION CASES (2010) (detailing cases where exonerees' judgments were solely vacated due to ineffective assistance of counsel claims).

150 MO. ANN. STAT. § 650.058 (West 2023); MONT. CODE ANN. § 53-1-214 (West 2022); *see Exonerations by Year: DNA vs. Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [https://perma.cc/D54T-5BEZ] (current as of Sept. 25, 2023). Note: in 2023, both states admitted they needed to improve their wrongful conviction laws. Missouri proposed increasing its daily amount and annual cap and removing the DNA-only requirement. Montana proposed actual compensation. Both bills passed house and senate, but both governors, Gianforte (R-MT) and Parson (R-MO) vetoed them.

151 Clare Gilbert, *When the State Loses or Destroys Key Evidence…*, GA INNOCENCE PROJECT (Aug. 22, 2010), https://www.georgiainnocenceproject.org/general/when-the-state-loses-or-destroys-key-evidence-2/#:~:text=The%20loss%20or%20destruction%20of,incentivized%20witnesses%2C%20and%20circumstantial%20evidence [https://perma.cc/3QFU-J39F].

Some states put pressure on officials to make a speedy decision.[152] Some give input on expungement.[153] Most do not seem to acknowledge speed or expungement at all. Some states give social benefits, acknowledging the due hardships faced by exonerees.[154] Many states provide nothing. Most states allow civil suits. Only a few do not.[155] Many allow for the family to benefit, even fewer allowing for the estate to make a claim of innocence after death.[156]

Of course, there are also 275 exonerees so far who could not receive compensation at all because they were convicted in: Alaska, Arkansas, Arizona, Delaware,[157] Georgia,[158] Kentucky,[159] New Mexico, North Dakota, Pennsylvania,[160] South Carolina,[161] South Dakota, and Wyoming—all states that do not have compensation laws.[162]

B. Indiana's Law Specifically

This section illustrates the reality of a compensation law from both the perspective of the state and the exoneree. Indiana became the thirty-fifth state to enact a compensation law in 2019.[163] Indiana, being a recent law, is written simply

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[152] *See, e.g.*, ALA. CODE §§ 29-2-158 to 29-2-159 (2022); CAL. PENAL CODE § 4902 (West 2023); CONN. GEN. STAT. ANN. § 54-102uu(d) (West 2022); D.C. CODE § 2-423.02 (2022); FLA. STAT. ANN. § 961-06(3) (West 2023); HAW. REV. STAT. ANN. § 661B-2(b) (West 2022); LA. STAT. ANN. § 572:8(e) (2023); MASS. GEN. LAWS ANN. ch. 258D §§ 2–3 (West 2023); UTAH CODE ANN. § 78B-9-405(3) (West 2022).

[153] COLO. REV. STAT. ANN. § 13–65–103(7) (2022); KAN. STAT. ANN. § 60–5004(h) (West 2022); 20 ILL. COMP. STAT. ANN. 2630/5.2(b)(8) (West 2023); MICH. COMP. LAWS ANN. § 691.1755(14) (West 2023); MO. ANN. STAT. § 650.058(4) (West 2023); TENN. CODE ANN. § 40-27-109(b) (2022); VT. STAT. ANN. tit. 13, § 5569(d) (2022) (but only for DNA exonerations); WASH. REV. CODE ANN. § 4.100.060(9)(b) (West 2023).

[154] California has bridge housing funding, job training, and provides a license, CAL. PENAL CODE § 3007.05 (West 2023); Colorado gives tuition, finance course, health care, COLO. REV. STAT. ANN. § 13-65-103 (2022); Idaho gives reentry services, IDAHO CODE § 6-3503 (2022); Nevada provides health care, restitution, and housing subsidies; NEV. REV. STAT. ANN. § 41.950 (West 2022).

[155] *See, e.g.*, CONN. GEN. STAT. ANN. § 54-102uu(g) (West 2022); FLA. STAT. ANN. § 961.06(01) (West 2023); HAW. REV. STAT. ANN. § 661B-6 (West 2022); IND. CODE ANN. § 5-2-23-4 (West 2022).

[156] ALA. CODE §§ 29-2-160 (2022); IDAHO CODE §6-3502 (2022); MD. CODE ANN., STATE FIN. & PROC. § 10-501(c)(4) (West 2022); MISS. CODE ANN. § 11-44-13 (2022); MO. ANN. STAT. § 650.058 (West 2023); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(c) (West 2022); VT. STAT. ANN. tit. 13, § 5574 (2022); WASH. REV. CODE ANN. § 4.20.046 (West 2023).

[157] *But see* S.B. 169, 152d Gen. Assemb., Reg. Sess. (Del. 2023) (introduced in June 2023).

[158] S.B. 35, 158th Gen. Assemb., Reg. Sess. (Ga. 2023) (rejected by the Ga. Senate).

[159] *But see* H.B. 571, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023) (introduced in Feb. 2023).

[160] *But see* H.B. 1470, 2023-2024 Gen. Assemb., Reg. Sess. (Pa. 2023) (introduced in June 2023).

[161] *But see* H.B. 3546, 125th Gen. Assemb., Reg. Sess. (S.C. 2023) (introduced in Jan. 2023).

[162] That number was calculated referencing NAT'L. REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=ST&SortDir=Asc [https://perma.cc/N2W4-ZASW] (last visited Dec. 27, 2023) [hereinafter THE REGISTRY].

[163] Act of July 1, 2019, P.L. 165-2019, 2019 Ind. Acts 1941 (codified as amended at IND. CODE ANN. §§ 5-2-23-1 to 5-2-23-10 (West 2022) (IND. CODE ANN. § 5-2-23-7 has been repealed));

and reads quite basic. It offers no benefits other than the $50,000 per year incarcerated, which is the national average.[164] Originally, its statute was narrower. In 2017, the debate was between $25,000 versus $35,000 a year, and it relied solely on DNA exoneration.[165] Fortunately, Indiana's law became less narrow, but compared to the two statutes passed within the same year,[166] Indiana's offers much less, while the state itself has more exonerees.[167]

The law describes itself as follows: if a judge vacates a conviction, that person has two years to apply for compensation.[168] They must be deemed "actually innocent" to get approval.[169] This determination is made by the Criminal Justice Institute (CJI).[170] If approved, they are allotted $50,000 per year of compensation.[171] If compensation is sought, the right to a civil action must be waived.[172] No one can collect it on their behalf or that of their estate.[173] If the applicant is in prison for another crime, they are ineligible to collect.[174] They are not precluded from receiving services, but services are not offered whatsoever.[175]

1. The State's Perspective

There have been thirty-three applications for compensation as of the time of this Note, and only ten have been approved for compensation.[176] The average

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Indiana is Now One of 35 States to Pay Exonerees For Wrongful Incarceration, INNOCENCE PROJECT (June 24, 2019), https://innocenceproject.org/new-law-to-provide-wrongfully-convicted-hoosiers-with-compensation/ [https://perma.cc/E5PT-NPUM].

164 Jamiles Lartey, *"It's Crushing": The Lasting Trauma of the Exonerated*, THE MARSHALL PROJECT (July 30, 2022 12:00 PM), https://www.themarshallproject.org/2022/07/30/it-s-crushing-the-lasting-trauma-of-the-exonerated [https://perma.cc/6KX2-XAKC].

165 Scott Rodd, *What Do States Owe People Who Are Wrongfully Convicted?*, STATELINE (Mar. 14, 2017, 12:00 AM), https://stateline.org/2017/03/14/what-do-states-owe-people-who-are-wrongfully-convicted/ [https://perma.cc/JN7L-FVW6].

166 KAN. STAT. ANN. § 60-5004(e) (West 2022) (offering $65,000 per incarcerated year plus $25,000 a year on parole); NEV. REV. STAT. ANN. § 41.950(2)(a) (West 2022) (offering $50,000 per year for 1–10 years in prison, $75,000 per year for 11–20 years in prison, and $100,000 per year for over 20 years in prison, plus $25,000 for every year on parole).

167 As of this Note's publication, Indiana has forty-seven exonerees, whereas Kansas has twenty, and Nevada has twenty-two. Numbers calculated using THE REGISTRY, *supra* note 162.

168 IND. CODE ANN. §§ 5-2-23-8(a)(2) (West 2022).

169 *Id.*

170 *Id.* § 5-2-23-8(b).

171 *Id.* § 5-2-23-3.

172 *Id.* § 5-2-23-4.

173 *Id.* § 5-23-2-8(f)(1)–(4).

174 *Id.* § 5-2-23-8(e)(4).

175 *Id.* § 5-2-23-6.

176 Leslie Bonilla Muñiz, *Indiana Has Paid Out $1 Million in Restitution to Eight Wrongfully Incarcerated People*, IN. CAP. CHRON. (Aug. 16, 2023, 6:31 AM), https://indianacapitalchronicle.com/2023/08/16/indiana-has-paid-out-1-million-in-restitution-to-eight-wrongfully-incarcerated-people/ [https://perma.cc/5RTR-AGKA]. The highest payout was given to Kristine Bunch. *Id. See also infra* section II.B.2.

amount of time an exoneree must wait to get a decision is anywhere from six to eighteen months. It can sometimes be longer. There are a few reasons for this.[177]

First, "actual innocence" according to the statute, is not the only reason a court may render a "vacated judgment." Judgments can be vacated for several reasons that are not necessarily because the accused is actually innocent. For this assessment of "actual innocence," the applicant must go through a review process akin to that of applying to be represented by an exoneration clinic. This is done through a first-come-first-serve basis. A group of three people, with several other unrelated tasks, must sift through court transcripts, exhibits, motions for post-conviction relief, appellate briefs, judgments, sentencing records, police reports, and any other document related to the entire case. If they leave this process believing the person is innocent by a preponderance of the evidence and the case meets all statutory requirements, they submit a memorandum to a subcommittee of CJI board members for review.[178]

The subcommittee consists of five board members: three state judges, the representative of public defenders, and the representative of prosecutors. If they agree with the finding of innocence, it then goes to the entire board.[179]

The CJI board consists of sixteen members. Eight are statutorily appointed by the positions they hold, the other eight are specially appointed by the governor.[180] These positions are that of either law enforcement or the legal profession. The board meets quarterly, and the applications are reviewed by a first-come-first-serve basis out of fairness. There must be a majority vote for the applicant to become approved, at which point it can take up to six weeks for the first installment to go into their bank account.[181] This means, assuming everything goes at its fastest pace, an exoneree will be out in the world for almost eight months before they see a dime of compensation. Once that occurs, the check comes every year in exactly twenty-percent increments for five years. The largest delay is that people have a hard time getting every single document the committee asks for.[182] These documents include court dockets, evidence, letters from witnesses or lawyers, certificates, and paperwork showing sentencing and time served. Pro se applicants take the most amount of time.[183] They often do not appreciate exactly what the committee needs.

2. The Exoneree's Perspective[184]

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177 Zoom interview with Natalie Huffman, General Counsel, Indiana Criminal Justice Institute (Oct. 28, 2022) [hereinafter Huffman interview].

178 *Id.*

179 *Id.*

180 At the time of this Note, the governor is Eric Holcomb. The board of trustees is assigned via IND. CODE ANN. § 5-2-6-4 (West 2022); for a list of board members, see also *Board of Trustees*, IND. CRIM. JUST. INST., https://secure.in.gov/cji/about-icji/ [https://perma.cc/GJ4S-9PY5] (last visited Dec. 27, 2023).

181 Huffman interview, *supra* note 177.

182 *Id.*

183 *Id.*

184 Bunch interview, *supra* note 10 (describing her experience applying for compensation).

Though she was not asked to appear, Kristine Bunch, an Indiana exoneree who had been wrongfully incarcerated for seventeen years for allegations that she started the fire that led to the death of her three-year-old son, was not going to allow another body of strangers make decisions about her life without her present. She scrambled to figure out the hearing date, as the board did not communicate it to her. Bunch is lucky. Unlike many other exonerees, she had the strength and energy to fight fiercely, the resources for an effective lawyer, her younger brother to give her housing and shelter, a gas station that employed her without checking her background, and the knowledge of computer technology. Without those things, which most exonerees do not have, she would not have been able to apply as immediately and effectively. Regardless, she applied in November of 2020, and did not get a hearing until October of 2021.

"They say the petitioner does not have to pay for the application process, but what they don't say is you have to send those documents in as certified copies. That requires time and money to go to the county clerk's office and request those dockets."[185] Another aspect Bunch was unprepared for was relitigating her case.

The original prosecutor's office was sent notice that Bunch had applied for compensation; they wanted his opinion. He was given ninety days to submit a letter. Eventually, Bunch was given thirty days to submit her materials. She scrambled for everyone who could testify on her behalf. "I felt like I was gathering up my own witnesses. I was preparing, yet again, for a trial."[186]

At the hearing, three dissenters, whose identities and qualifications unknown to Bunch, tirelessly expressed that she was probably guilty despite the evidence establishing—for almost a decade—that the ATF chemist at her trial falsified her report. She was not allowed to speak, nor could her lawyer. Bunch and her lawyer held hands as she wept–it reminded Bunch of the day a jury stole seventeen years of her life. Chris Naylor, of the Indiana Prosecuting Attorney's Counsel, and chief dissenter, had mainly this to say: "The evidence of guilt, *albeit circumstantial*, was strong."[187]

The majority, led by a superior court judge, agreed with the previous panels, and the dozens of attorneys who had worked on Bunch's case for a decade—there was no evidence of guilt.

Bunch was exonerated in 2012, seven years before Indiana's statute came into effect. Winning compensation was a relief to her. She felt seen as an innocent person for the first time. Clearly, compensation statutes can do so much good, not just for the economy, but for morale as well. She attempted to file a civil suit and was first offered one thousand dollars in mediation. She did not progress with the suit because she would have had the burden of proving that the man who purposely imprisoned her had acted with malice. A tough thing considering he had already died. She decided to give up on the advice of her attorneys. Had she

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185 *Id.*

186 *Id.*

187 Sandra Chapman, *Legal Panel Approves Payouts for Wrongfully Convicted*, WTHR, https://www.wthr.com/article/news/local/legal-panel-approves-payouts-for-wrongfully-convicted/531-7887849e-b852-48c8-ad4e-dea715521ea8 [https://perma.cc/9GF2-VNXN] (Oct. 19, 2020 2:43 AM) (emphasis added).

gone forward and failed, she would have been liable to the state for $200,000. This will never sit right with her.[188]

This shows two things: civil suits and compensation statutes serve different purposes, each with varying levels of restitution, and vindication. Both are needed to help make the exoneree feel whole. The choice of which to pursue should be theirs; the government has dictated enough.[189]

Bunch used her first check to repay debts incurred in prison and to get check–ups she desperately needed, as she was not given any medical attention while incarcerated. The next three checks, she says, will go towards her retirement, as she had never been able to save. This means that she must keep working to maintain her life at present, which she is fortunate enough to be able to do. Because her case is well known, and she is a fighter by nature, Bunch has been able to find work. At the time of this Note, she is unaware if her record has ever been expunged.[190]

When I asked Bunch what her dreams were before prison, she said that at the time, she was close to getting her welder's certificate so she could make good money and take care of her sons. She loves being a mother. She missed out on raising her children. Not only was one son stolen from her in a fire that she did not start, but upon reentry, she realized her fertile years were also stolen from her.[191]

The three dissenters, who sat in the same room as Bunch—acting as if she was not there—elected not to compensate her for that.

III. THE GOVERNMENT'S BURDEN

Though it seems reasonable to assume, regardless of religious or political belief, that anyone would support reparations for the wrongfully convicted, the (in)actions of many state governments are telling. When seeking compensation, the burden is on the exoneree to show they were wronged. The burden is on the exoneree to show employers they are not criminals. The burden is on the exoneree to live their lives making up for a mistake made by the very authority chosen to protect them. The burden is on the exoneree to overcome the obstacles of stigma, sovereign immunity, qualified immunity, mental and physical ailments, poverty, and all else. Burden shifting seems to be both the cause *and* the effect of wrongful conviction.

The two primary arguments against compensation statutes are: cost to the state and potentially letting criminals free. The latter is taken care of by the "actual innocence" standard adopted by states through statute. The former has

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188 Bunch interview, *supra* note 10.

189 *See generally* Megan Fernandez, *When Will Kristine Bunch Be Free?*, INDIANAPOLIS MONTHLY (Dec. 23, 2015), https://www.indianapolismonthly.com/longform/when-will-kristine-bunch-be-free [https://perma.cc/3ZYX-LR9M] (for more information on Bunch's story).

190 Bunch interview, *supra* note 10.

191 *Id.*

been proven to be a baseless argument.[192] The majority argument is based in costs, which tends to be the motivation for change.[193]

Considering the deference shown to the lower courts, and the questionable use of the harmless error doctrine, legislation may only be able to control the consequences of frivolous aspects of jurisprudence. The state has an interest in finality.[194] But until justice is served, finality is simply an illusion.

A. Civic & Constitutional Duties

> *The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earnings. For this he must be paid . . . How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously passed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows.*[195]

The government not only *should* pay because justice requires, but because it is beneficial. Though an argument could be made that the government did not viciously prosecute an innocent person on purpose, when both parties are innocent, the party that suffers the greater harm should benefit from the party that has the ability to prevent that harm.[196] The least-cost-avoider theory is not unknown to the law. It dates back to Judge Learned Hand's approach in *United States v. Carroll Towing*.[197] Liability must be assigned to the party best able to minimize costs.[198] A regular citizen is not in the situation to best prevent their wrongful conviction; however, the government is. The government has the ability to decide when and whom to prosecute. The government is in the best position to put preventative investigative measures into place.[199] The government has the authority to immediately expunge a record, admit when a mistake has been made, and pay for unconstitutional injustices.[200] When they do not, the only reason the public can ascertain is that the government simply does not want to. If that were perceived as the case, it could also follow that the government is being frivolous with taxpayer money. The underlying goal of the theory is the application of future loss prevention.[201]

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192 Lauren C. Boucher, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1098 (2007).

193 Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 713–16 (2004).

194 Edwards, *supra* note 88, at 1179.

195 Hoffner v. State, 142 N.Y.S.2d 630, 631–32 (N.Y. Ct. Cl. 1955).

196 Boucher, *supra* note 192, at 1087–88.

197 159 F.2d 169 (2d Cir. 1947).

198 David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 365 (1994).

199 Boucher, *supra* note 192, at 1102–03 (explaining that since the government has control over lineup procedures, crime lab standards, and public defender reforms, it thus is in the best position to prevent erroneous convictions).

200 *Id.* at 1088 (illustrating least cost avoider theory in relation to wrongful convictions).

201 *Id.* at 1089.

Americans have paid well over $4 billion in keeping the wrongfully convicted behind bars.[202] With the average length of incarceration lasting around nine years, the lost salaries of those who have been incarcerated have been calculated to be over $700 million.[203] That's almost a billion dollars that could have been spent paying taxes, investing in stocks, contributing to social security, supporting families, and paying into consumer markets. America is hindering its own economic energy. Not only are people who end up in prison disproportionately poor, the median felony bail bond is the equivalent of eight months' rent for a typical defendant.[204] What results is lengthy pretrial detention, for which exonerees are often not compensated.[205] District attorney's offices may use county funds for prosecuting crimes, but they worry not about the resulting incarceration, as the taxpayer will pick up the tab.[206] Social Security is affected, and those who did not get to pay into it will be working until they die, which ultimately means one way or another, the state is going to take care of them once they are unable to work.

Data has shown that anything less than $500,000 in compensation has a much higher likelihood of leading to post-conviction offending because of the aforementioned reentry barriers and research supporting the premise that criminal conduct is affected by perceptions of systematic procedural fairness.[207]

Upon institutionalization, the incarcerated person is literally and figuratively stripped of their identity and forced to maintain the identity of the institution.[208] Thinking in terms of consumerism, customer retention is more likely to occur in situations where the customer feels failed by a service they paid for when an apology and some sort of compensation is given. Likewise, when an exoneree's self-identity has been violated by the justice system, compensation can restore both their self-value and their community value.[209]

Even if those would cede that the government *should* pay, the premise would rely on if they *could* pay. A simple "yes" is easily inferable considering the federal revenues deposited into the Crime Victims Fund is over $1.8 billion as of December 2022.[210] Exonerees are also typically paid in installments, and the rush

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202 Kristin Myers, *US Taxpayers Spent Almost $1 Billion Incarcerating Innocent Black People*, YAHOO! FIN. (Nov. 20, 2019), https://finance.yahoo.com/news/us-taxpayers-spent-over-4-billion-incarcerating-innocent-people-184439282.html [https://perma.cc/CX6T-B9Z3].

203 *Id.*

204 Sawyer & Wagner, *supra* note 104 ("Poverty is not only a predictor of incarceration; it is also frequently the outcome, as a criminal record and time spent in prison destroys wealth, creates debt, and decimates job opportunities.").

205 *See, e.g.*, IND. CODE ANN. § 5-2-23-3(b) (West 2022).

206 Daniel S. Medwed, *The Real Zeal Deal: Prosecutorial Resistance to Post–Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 154 (2004).

207 Mandery et al., *supra* note 101, at 576.

208 Campbell & Denov, *supra* note 71; *see also* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 46–48 (Anchor Books & Doubleday & Co. eds., 1961) (discussing this concept known as the "mortification process[es].").

209 Okimoto, *supra* note 8, at 1271.

210 Exonerees are victims too. *See also* Office for Victims of Crime, *Crime Victims Fund*, (2020), https://ovc.ojp.gov/about/crime-victims-fund [https://perma.cc/MP9S-MEDE] (last visited Jan. 20, 2022); *see, e.g.*, CAL. PENAL CODE § 4904(a) (West 2023); UTAH CODE ANN. § 78B-9-405(3) (West 2022) (states that utilize this fund for compensation).

to collect would likely not change if the barriers are not lowered. It has also been shown that the better the compensation, the less likely a civil suit would be filed.[211]

Because life expectancy decreases inside prison, the cost of providing state health care to a younger exoneree upon release, may be cheaper than paying for their incarceration down the line.[212]

Immediate bridge funding would also save money because the amount given upon release is nominal in comparison to the collateral effects caused by an exoneree without instant resources. A recent study of people on the brink of homelessness in the Midwest showed that by immediately giving them one month's worth of living expenses ($1000 in this case), the vast majority of them prevented the pitfalls of homelessness for at least two years.[213]

Because of the uptick of incarcerated people in America over the last forty years, states have found ways to help pay incarceration expenses: by forcing them on those charged with crimes.[214] These debts need to be accounted for by legislation for true compensation to be effective.[215]

Additionally, compensation statutes are still legislation. State legislation is a product of its voters. Compensation laws are popular, as is the notion that the wrongfully convicted have suffered a grave injustice.[216] In the last few decades, exposure to wrongful conviction has become popular in the media. The media as a whole has had a progressive effect on legislation.[217] This is unlikely to go away any time soon. Considering the state is in a better position to prevent erroneous convictions, it is their responsibility to do so. If the state accepts that responsibility, it saves money for the state and its people which, therefore, invites less scrutiny of its government actors.[218]

States owe constitutional duties to their citizens. Forcing state governments to pay compensation prevents them from overusing their takings authority.[219] Depriving an individual of their right to income is a government taking, not only

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[211] *See, e.g.*, Strom, *supra* note 108 (describing that Texas's law is satisfactory enough that exonerees have not chosen a civil suit in lieu of compensation).

[212] Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated–How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 502, 544 (2011).

[213] David Shultz, *A Bit of Cash Can Keep Someone Off the Streets For 2 Years or* More, SCIENCE (Aug. 11, 2016), https://www.science.org/content/article/bit-cash-can-keep-someone-streets-2-years-or-more [https://perma.cc/7B52-M4UW].

[214] *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNON CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate [https://perma.cc/2L2R-MQTB].

[215] *See, e.g.*, COLO. REV. STAT. ANN. § 13-65-103 (2022); D.C. CODE § 2-423.02 (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2022); WASH. REV. CODE ANN. § 4.100.060(5)(c) (West 2023) (releasing exonerees from debt). *But see also* MICH. COMP. LAWS ANN. § 691.1755(11) (West 2023), *and* OHIO REV. CODE ANN. § 2743.48(F)(3) (West 2023) (deducting from an exoneree's compensation outstanding debts).

[216] Bernhard, *supra* note 193, at 711. *But see also* Delvac, *supra* note 21, at 984.

[217] Bernhard, *supra* note 193, at 711–12.

[218] Boucher, *supra* note 192, at 1104.

[219] Daryl J. Levinson, *Making the Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 349 (2000) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (Little, Brown & Co. 4th ed. 1992)).

because of the lack of the individual's free choice in doing so, but because of the government's use of their imprisonment for a benefit.[220] In support of the original 1939 federal bill acknowledging wrongful conviction compensation, one proponent analogized the duty of compensation to one of government necessity, for the same reasons offered for compensating in cases of eminent domain.[221] Even if one does not categorize labor as property, the vast majority of the wrongfully convicted lose their assets when they are imprisoned.[222]

The Thirteenth Amendment allows for servitude when incarcerated.[223] If incarceration is not limited to those who actually commit a crime, does a constitutional ban on slavery truly have effect? "Slavery" may sound like hyperbole, but it was not so for Clyde Charles: a Black man, wrongfully convicted of rape, who picked who picked cotton in the fields of Angola, Louisiana for eighteen years.[224]

"Involuntary confinement is the most serious deprivation of liberty that a society" can impose on an individual.[225] The psychological and physical effects of incarceration are, at face value, akin to a human experiment. A common coping mechanism, especially among those who have never committed a crime or been to prison, is withdrawal.[226] The shock and horror of the prison environment causes them to segregate themselves. Often, by withdrawing or consistently maintaining their innocence, prison guards classify them as unrepentant, unwilling to adapt, and therefore hostile. This leads them to maintain maximum-security status, and denies them reentry eligibility, family visitation, or freedoms other prisoners may enjoy.[227] This isolation can often lead to suicidal ideation.[228] This could surely be classified as a violation of the Eighth Amendment.[229]

Any argument that the harm of sending the occasional innocent person to prison is an acceptable tradeoff for getting it right more often directly contradicts our constitutional scheme—one designed to put the burden and the error of risk on the government.[230] There are several rights within that serve as safety nets

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220 Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully* Convicted, 60 N.Y.U. ANN. SURV. AM. L. 97, 141–44 (2004).

221 Act of May 24, 1938, ch. 266, 52 Stat. 438; Jeffery S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 CLEV. ST. L. REV. 219, 229 (2021) (quoting Dean John H. Wigmore, "To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living, perhaps also to exact a money fine–these are sacrifices which the state imposes on him for the public purpose of punishing crime.").

222 *Frontline: Burden of Innocence: Frequently Asked Questions*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html [https://perma.cc/2LAW-N5XN] (last visited Nov. 29, 2022).

223 U.S. CONST. amend. XIII; *see also* United States v. Reynolds, 235 U.S. 133 (1914); Marchese v. United States, 453 F.2d 1268 (Ct. Cl. 1972).

224 Master, *supra* note 220, at 103.

225 Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

226 Campbell & Denov, *supra* note 71, at 148–50.

227 *Id.* at 152–53.

228 *Id.* at 148–49.

229 U.S. CONST. amend. VIII.

230 Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Mergers Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 135 (2008); Alexander Volokh,

for criminal defendants: the right to counsel; the right not to testify or respond to questioning; speedy trials; confronting witnesses; and protections against interrogations, intrusions, and adversarial coercion all make it clear that the Framers found it imperative that the innocent not be convicted.[231] For these reasons, it is a greater violation of the Constitution to convict the innocent than fail to imprison the guilty.[232]

B. Moral Duties

> *By imposing financial liability upon the State, recognition is given to a proposition that would seem to be self-evident, namely that it is the State's obligation, and no one else's, to do what justice and morality demand when an innocent person is convicted of a crime he did not commit.*[233]

The financial cost of compensation comes second to the political cost of having taxpayers bail out their representatives in these cases. And votes are more important to government actors than money.[234] Almost everyone involved in a wrongful conviction is elected, and they are all protected by some form of immunity.[235] Though as of 2020, prosecutorial misconduct has been the cause of fifty-four percent of wrongful convictions to date, only *two* prosecutors have ever received jail time for purposely rendering wrongful convictions; one spent four days in jail, the other spent one. Additionally, two prosecutors have been fired, five have been demoted, and three have been disbarred.[236] In fact, the only actors to lose their jobs in malicious prosecution suits have been police officers—who were guilty of misconduct in thirty-four percent of cases.[237] And even then, that's rare. We as a society, cannot turn a blind eye.

Guilty Men, 146 U. PA. L. REV. 173, 198 (1997) (describing the history of the constitutional scheme valuing presumption of innocence); *see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."). Even the common law upon which the Constitution is based imprisoned those guilty of wrongful prosecution. F. POLLOCK & F.W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 564 (2d ed. 1968).

231 U.S. CONST. amends. IV–VI.

232 Findley, *supra* note 230, at 135–36.

233 Baba-Ali v. State, 878 N.Y.S.2d 555, 567 (N.Y. Ct. Cl. 2009), *aff'd in part, rev'd in part*, 907 N.Y.S.2d 432 (App. Div. 2010).

234 Levinson, *supra* note 219, at 420.

235 Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 704 (1987) ("In 1976 . . . the Supreme Court extended to prosecutors similar immunity from suits brought against them under [42 U.S.C. § 1983] . . . . This decision has eliminated potential civil liability as a deterrent.").

236 Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent*, NAT'L REGISTRY OF EXONERATIONS 120 (Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/QE9G-QP8G].

237 *Government Misconduct Cause of Most Wrongful* Convictions, UCI SCH. OF SOC. ECOLOGY (Sept. 30, 2020), https://socialecology.uci.edu/news/government-misconduct-cause-most-wrongful-convictions [https://perma.cc/VPK9-W7QS].

Official misconduct has occurred at every level and stage of a criminal investigation.[238] Though the exclusionary rule acts as a deterrent for police officers to not act in bad faith, there is nothing to deter prosecutors from engaging in *Brady* violations; they are rarely punished for their actions.[239] The Supreme Court has ruled that prosecutors get the same "good-faith deference" as policemen, yet punishing them—even for acts of misconduct—is still worse for our system.[240] Prosecutors enjoy absolute immunity, are seldom sanctioned, and typically refuse to prosecute their colleagues.[241] If we continue to pretend that sanctions and model rules are actual deterrence (they are not), we must make up for a willing deprivation of citizens' lives and liberties.

Regardless, even in situations where it was an innocent mistake on behalf of the government, there should be a justifiable remedy.[242] Since a civil suit would not be applicable, there has to be a legislative alternative that would promise comparable relief. Though a government purposely putting away an innocent life seems more egregious than doing so by accident, the injustice is not so polarizing as to fairly make the rewards all that different.

In my work with exonerees, it often seems as if they are the ones doing most of the work to effect change. In the case of California exoneree, Obie Anthony, he used his civil rights award to start a campaign enacting laws for reentry benefits in California.[243] It should not be on exonerees alone. Family

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[238] Mandery et al., *supra* note 101, at 581 n.113 ("Common forms of misconduct by law enforcement officials include: employing suggestion when conducting identification procedures, coercing false confessions, lying or intentionally misleading jurors about their observations, failing to turn over exculpatory evidence to prosecutors, and providing incentives to secure unreliable evidence from informants. Common forms of misconduct by prosecutors include: withholding exculpatory evidence from the defense; deliberately mishandling, mistreating or destroying evidence; allowing witnesses they know or should know are not truthful to testify; pressuring defense witnesses not to testify; relying on fraudulent forensic experts; and making misleading arguments that overstate the probative value of testimony.").

[239] Rosen, *supra* note 235, at 731–32 ("Effectively insulated from disciplinary punishment and immune from civil suit, a prosecutor contemplating *Brady*–type misconduct knows that the only possible legal consequence of presenting false evidence or suppressing exculpatory evidence is that the defendant may be fortunate enough to discover [it] and file for post–conviction relief. Even if this does occur, the defendant's only hope, as this prosecutor knows, is for a court retrospectively to decide that the evidence is material enough to warrant a new trial. The prosecutor can take added comfort in the development of strict materiality standards and from the general trend towards restricting post–conviction relief in criminal cases.").

[240] Imbler v. Pachtman, 424 U.S. 409, 427 (1976) ("The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to §1983 liability. . . . [T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. *But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest.*") (emphasis added). *But see* Mostaghel, *supra* note 212, at 531–33 (explaining that moral hazards are created specifically by overlooking wrongdoing because it incentivizes corruption and thus hurts the community it's supposed to serve).

[241] Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, it is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W.L. REV. 283 (2001).

[242] Lopez, *supra* note 107, at 704–05.

[243] Douglas Oakley, *Healing the Trauma of Wrongful Conviction and Imprisonment*, KAISER PERMANENTE (Oct. 5, 2022), https://lookinside.kaiserpermanente.org/healing-the-trauma-of-

members of both victims and exonerees, state officials that have done their jobs correctly, and other citizens who live in paranoia that this could one day happen to them, all deserve the comfort of a competent, just government. There is something terribly wrong with our justice system. Until those perpetrating a large portion of this issue are held liable, change will not truly exist. A law that helps squash the negative effects of collateral consequences, restores the injustices felt by all, and deters bad actors from repeating their malfeasance is a law worth having. A law that mends the best pieces from existing legislation to form a remedy that gives both expungement and compensation. A law that puts the exoneree first. A law that gives justice to all.

IV. A MODEL COMPENSATION LAW: RESTITUTION FOR WRONGFULLY INCARCERATED PERSONS[244]

A. Who Can Apply, To Whom They Apply, & The Process

To start, the *tone* of the statute should change. First, it should be remorseful. Acknowledging legislative intent and speediness is important. Acknowledging how and why the state must prioritize these cases shows that the state cares about righting a wrong and improving itself.[245] The statute should also clearly describe the process. It must make sense to the exoneree, and it must be thorough. That way, they understand what they must do from when they petition

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wrongful-conviction-and-imprisonment/ [https://perma.cc/57QC-R7K9] (describing some of the enacted benefits: a bridge fund, four years of housing costs, job training, mental health services, food program access, and free tuition); *Obie Anthony*, EXONERATED NATION, https://exoneratednation.org/obie-anthony/#:~:text=Obie%20was%20instrumental%20in%20the,training%2C%20and%20mental%20health%20services [https://perma.cc/CD77-S5RM] (last visited Aug. 15, 2023); AB 672, 2015-2016 Gen. Sess. (Ca. 2015) (codified as amended at CAL. PENAL CODE § 3007.05(i)(2) (West 2023)).

[244] Before the statute begins, there should be a notice of legislative intent. This is done in Mississippi, Nebraska, New Jersey, New York, Rhode Island, Virginia, Washington, and West Virginia. Though seemingly insignificant, it adds to the statute a level of acknowledgment and concern that makes it appear as if the state *wants* to right a wrong, as opposed to simply legislating out of obligation; *see, e.g.*, MISS. CODE ANN. § 11-44-1 (2022); NEB. REV. STAT. ANN. § 29-4602 (West 2022); N.J. STAT. ANN. § 52:4C-1 (West 2023); N.Y. CT. CL. ACT LAW § 8-b (McKinney 2023); 12 R.I. GEN. LAWS § 12-33-1 (2022); VA. CODE ANN. § 8.01-195.10.20 (2022); WASH. REV. CODE ANN. § 4.100.010 (West 2023); and W. VA. CODE ANN. § 14-2-13a (West 2022).

[245] *See, e.g.*, WASH. REV. CODE ANN. § 4.100.010 (West 2023) ("The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration."); MISS. CODE ANN. § 11-44-1 (2022) ("The Legislature finds that innocent persons who have been wrongly convicted of felony crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and should be compensated. In light of the particular and substantial horror of being imprisoned for a crime one did not commit, the Legislature intends by enactment of the provisions of this chapter that innocent people who are wrongfully convicted be able to receive monetary compensation.").

in prison to when they get their money. It should also clarify how long it will take. The exoneree should be able to read the statute, understand their rights, and feel as if the state is going to take care of them.

Additionally, the process an exoneree goes through to get compensation *must change.* Typically, the process includes a multi-level evaluation stage that can last years. The very people who put the exoneree in prison get a say in the process. This can be anxiety-inducing, triggering, and humiliating for the exoneree as they must relive their pain just to get compensation.[246] Instead of government officials serving as the final arbiters, experts in the field of fair trials and wrongful convictions should be vested with the decision-making power. There should also be an immediacy in how often they meet, as opposed to simply quarterly, as it currently dictates. This immediacy will help the exoneree better integrate and save the state the social costs of failed reentry. Delay can occur when the statute does not force deadlines on the process.[247] We need to make immediacy and mandatory provisions written into the statute.[248]

It also acknowledges the rights of co-defendants and victims. In many states, notifying the victim is a part of the process, however, in this case it would not be for permission, but for their safety as well as that of the exoneree. Additionally, recording the proceedings is important to preserve what occurs for a civil trial and for an appeal. An inquiry within thirty days and a decision in forty-five days sets for everyone an expectation that serves as a clear guideline so that immediacy is not only required but specified. I propose that instead of relitigating, upon the vacation of the sentence, they be issued a certificate of innocence. This certificate acts as an all-in-one ticket. Once this ticket is issued, it is considered binding on subsequent damage claims;[249] it triggers the bridge fund, the compensation, the benefits, the expungement, the ending of a nightmare, and the beginning of a new life. It can be sent directly to those in charge of expungement, and those in charge of the money without any more litigation.[250] Once a claim is filed, there should be assistance from either legal aid, an innocence clinic, or a department of justice to assist the petitioner in their case so the process can move along faster.[251]

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246 Bunch interview, *supra* note 10.

247 Jeffery S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongfully Convicted*, 82 MO. L. REV. 369, 411 (2017).

248 ALA. CODE §§ 29-2-158(b) (2022) ("The committee shall within 90 days of such notification meet to certify the award."); CAL. PENAL CODE § 4902 (West 2023) ("[T]he Board shall, within 30 days of the presentation of the claim, calculate the compensation . . ."); D.C. CODE § 2-423.02(a) (2022) ("Within 60 days after a petition for compensation is approved, the Director shall compensate . . .").

249 Gutman, *supra* note 247, at 411 n.232 (explaining the benefits of this binding certificate in helping expedite the process without relitigating and why without it, there are several tricky pitfalls resulting in delay).

250 *See, e.g., id.* at 424 (discussing Illinois process in the automatic transfer of the certificate to their court of claims).

251 *Id.* (discussing how Texas does this).

Section 1——The Innocence Commission

(a) There is established the Innocence Inquiry Commission which shall be an independent commission under the Administrative Office of the Courts for administrative purposes.[252] The Commission shall consist of nine voting members as follows:
    (1) One shall be a superior court judge.
    (2) One shall be a prosecuting attorney.
    (3) One shall be a victim advocate
    (4) One shall be engaged in the practice of criminal defense law.
    (5) Two shall be public members not in the legal profession.
    (6) One shall be a legal ethics trial expert.
    (7) Two shall be the most senior lawyers of the two closest established exoneration clinics.

    (1)–(5) may not be from the same county as the original trial.[253] The superior court judge who is appointed shall serve as Chair of the Commission. The Commission shall meet a minimum of once every 6 months and shall also meet whenever necessary to carry out this chapter.[254] A majority of the members shall constitute a quorum. All Commission votes shall be by majority vote.
(b) Members may only serve as long as they hold their respective offices.[255]
(c) The state shall apologize.

Section 2——To Whom This Applies

(a) This chapter applies to a person:
    (1) sentenced to prison and/or jail as the result of a criminal conviction;
    (2) who is pardoned by the governor; or
    (3) who receives a certificate of innocence.
(b) As used in this chapter, "actually innocent" means, with respect to a particular offense, that a person did not:
    (1) commit the offense;
    (2) take part in the offense; or
    (3) plan, prepare for, or participate in the planning or preparation of; any other criminal act in connection with that offense.
(c) The state shall apologize.

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252 N.C. GEN. STAT. § 15A-1462(a) (2022).

253 N.C. GEN. STAT. § 15A-1463(a) (2022); (6) and (7) are not a part of the N.C. statute. They are an equitable and unbiased addition based on their specific occupations.

254 *See* ALA. CODE § 29-2-152(c) (2022). This helps with immediacy.

255 N.C. GEN. STAT. § 15A-1464 (2022); *id.* at § 15A-1466.

Section 3——The Process

(a) The petitioner shall bring to the Commission a petition for an evidentiary hearing. There will be a formal inquiry within 30 days of the petition. If there is new evidence, the Commission shall hold an evidentiary hearing. Otherwise, an evidentiary hearing is at the discretion of the Commission. A denial of an evidentiary hearing can be appealed.
(b) At the granting of an evidentiary hearing, the petitioner has the right to counsel. If they are indigent, they shall be appointed counsel.
(c) Any possible co-defendants shall be notified and have 30 days to decide if they want to join the claim.
(d) All proceedings of the Commission shall be recorded and transcribed as part of the record. All Commission member votes shall be recorded in the record. Commission records for conclusions of insufficient evidence of actual innocence to merit judicial review shall remain confidential.[256]
(e) If a majority, by vote, agrees that the petitioner has shown by preponderance of the evidence they are actually innocent, they shall issue a certificate of innocence.
(f) The Commission shall use all due diligence to notify immediately the victim of the Commission's conclusion in a case.[257]
(g) There will be an automatic no contact order issued for both parties.
(h) The decision of actual innocence shall be final.[258]
(i) Decisions shall be made within 45 days of the submission of the petition.[259]
(j) The state shall apologize.

B. The Relief

First, the statute needs to *ensure* an immediate and effective release for each exoneree, and that is done through an immediate bridge fund. Because the incarceration experience is so jarring—and the potential for negative social impact so great—legal advice, social services, expungement, and funds should be made accessible *immediately* so the exoneree can try to avoid the pitfalls of post-conviction offending and exploitation. In the model statute's proposed section 4, the issues of reentry are offset by offering a few immediate services. Virginia's

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256 N.C. GEN. STAT. § 15A-1468(e) (2022).

257 N.C. GEN. STAT. § 15A-1468(c) (West 2022). Note: in 2023, Massachusetts proposed this as well as an immediate check for $5,000 upon release. H.1752, 193d Gen. Ct. (Ma. 2023).

258 Though I believe the prosecution should get absolutely no say in the compensation decision, a tolerable compromise would be the California approach: if the Attorney General dissents to compensation, *they* have the burden to prove clearly and convincingly that the exoneree is not deserving. CAL. PENAL CODE ANN. § 4904(a) (West 2023).

259 D.C. CODE § 2-423.01 (2022).

compensation laws provide good inspiration here.[260] If compensation is received, it will be taken from the final payment, and, if not, it is still a worthy investment on behalf of the state. Within five days, the exoneree is met with legal assistance and reentry guidance from an institution that is not law enforcement or the state government. This will help them separate themselves from the wrongdoer for a period of time, allowing them to begin the healing process. It will be given in writing and make things as easy as possible for the exoneree. They will also have access to receiving a birth certificate, a driver's license or state ID, and a housing stipend per Obie's law.[261]

Next, the statute must also *guarantee* more than it currently does in terms of funding and services. The average annual compensation for an exoneree is $50,000 per year of imprisonment after conviction. Very few statutes provide benefits, reimbursements, compensation for pretrial custody, parole, probation, or time spent as a sex offender—all of which are an inhibition on the freedoms of the individual brought by the conviction. Exonerees were also forced to spend money on their trial, including their exoneration proceedings, and were also likely ordered to give restitution to the victim. Because of the sheer multitude of incarcerated individuals in America, states have taken to charging offenders—regardless of crime severity—several fines and expenses both before and during imprisonment.[262] This contributes to the debt the exoneree is faced with upon release.[263] These losses should be accounted for. The largest expense an exoneree typically has upon release is unpaid child support, along with its interest, which has defaulted because of their imprisonment.[264] The exoneree has also not paid into Social Security, which means they have no retirement. They also likely do not have retirement savings, nor good credit. What little compensation is given by the state is used to pay off debts they would never have had and save for a future they did not ask for. A fixed amount can provide consistency, but the ability to get case-by-case related benefits dispenses justice.[265] What of those who will

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260 VA. CODE ANN. § 8.01-195.11(D) (2022) ("Any person who is . . . wrongfully incarcerated . . . shall receive a transition assistance grant of $15,000 to be paid from the Criminal Fund, which amount shall be deducted from any award received . . . within 30 days of receipt of the written request for . . . disbursement.").

261 AB 672, 2015-2016 Gen. Sess. (Ca. 2015) (codified as amended at CAL. PENAL CODE § 3007.05(i)(2) (West 2023)); *see supra* note 243 and accompanying text.

262 *Explainer: Do Prisoners Really Pay $249 Per Day?*, HOW TO JUST., https://howtojustice.org/i-am-getting-released-from-prison/explainer-do-prisoners-really-pay-249-per-day/ [https://perma.cc/HD2S-AZGD] (last visited Aug. 8, 2023).

263 *See Out of Prison and Deep in Debt*, N.Y. TIMES (Oct. 6, 2007), https://www.nytimes.com/2007/10/06/opinion/06sat1.html [https://perma.cc/NZ2G-V2JT].

264 Hager, *supra* note 89 ("It is . . . up to the father to prove that he is incarcerated, and then to file for the reduction [which] involves navigating a maze of paperwork from prison, usually with no lawyer, irregular access to phones and, in many cases, an eighth–or ninth–grade education . . . . [T]he incarcerated dad has no idea his child support is piling up because he isn't getting the notices. The debt keeps compounding–and federal law prohibits the reduction of child support bills retroactively.").

265 Gutman, *supra* note 247, at 417 (quoting an observer of Kenneth Feinberg's determination of 9/11 Compensation damages: "[T]he resultant mix of presumptive scheduling tempered by personal empathy and pecuniary adjustments at the margin was the touchstone to the success of the program.").

not live for five years? What about those with multiple dependents? I propose lump sum as an option to be determined based on those needs with access to financial literacy courses.[266]

The statute must also help *reeducate* the exoneree, so they can regain some of their life back. Exonerees have also lost their standing in the working world. If they do not have a degree, they should have access to tuition. Significant time in prison is scientifically proven to lessen one's life expectancy and being wrongfully imprisoned takes a permanent and severe toll on mental health.[267] The statute must compensate for this, and the state should provide tuition and permanent physical and mental health care to the exoneree not only because it is most just, but because it helps mitigate the social costs. Some statutes call these "loss of life" funds because, in essence, these detriments hinder the quality of the exoneree's life forever.[268] It would be for the betterment of society, more economically sound over time, a more effective deterrence of judicial misconduct, and quite frankly, a nod to the retributivism that fuels the very need to punish someone in the first place.[269]

Section 4——Preliminary Relief

(a) A claimant shall be entitled to preliminary relief under this section upon an initial showing that there is a substantial likelihood of success on the merits of the case.[270]

(b) Within 5 business days after the release of a person from incarceration, the Superior Court shall provide information to the claimant, in writing, that includes guidance on how to obtain compensation and a list of nonprofit advocacy groups that assist individuals who have been wrongfully convicted and imprisoned.[271] It will also include information regarding social, health, financial, and legal services; transition programs; and substance abuse treatment.[272] The claimant shall receive a transition assistance grant of $15,000 which amount shall be deducted from any award received within 30 days of receipt of the application for compensation.[273]

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266 Scott, *supra* note 35, at 18 ("Exonerees often have very little experience managing money, and thus they are likely to misspend what they do receive."); *see, e.g.*, Conversation with Marvin Cotton Jr., Michigan exoneree, who was released in 2020 after twenty years of wrongful incarceration. (Oct. 30, 2022) ("I worry about the lump sum because I didn't know what money really was after so long in prison that I would spend it frivolously because I didn't understand its value or meaning.").

267 Chunias & Aufgang, *supra* note 7, at 113.

268 *See, e.g.*, LA. STAT. ANN. § 572:8(H)(2)(c)(3) (2023).

269 Binder & Smith, *supra* 14, at 118; Livermore et al., *supra* 225, at 75–76.

270 MASS. GEN. LAWS ANN. ch. 258D, § 1(G) (West 2023).

271 D.C. CODE § 2-423.03 (2022). This helps with all aforementioned collateral consequences and serves as a recognition of them. A nonprofit group is also helpful because it keeps state and law enforcement interaction and control at a minimum.

272 WASH. REV. CODE ANN. § 4.100.060(10) (West 2023).

273 VA. CODE ANN. § 8.01-195.11(D) (2022). This incentivizes immediate action on the state.

(c) In addition to any other payment to which the person is entitled to by law, a person who is exonerated shall be paid the sum of $5,000 upon release, to be used for housing, including, but not limited to, hotel costs, mortgage expenses, a down payment, security deposit, or any payment necessary to secure and maintain rental housing or other housing accommodations. The exonerated person shall also be entitled to receive direct payment or reimbursement for reasonable housing costs for a period of not more than 4 years following release from custody.[274]
(d) The Department of Corrections shall facilitate the process required to obtain an identification card, a birth certificate, social security number, notary services, assistance with obtaining necessary forms, and correspondence.[275]
(e) The state shall apologize.

Section 5——Compensation

(a) An exonerated person shall receive prorated monetary compensation in an amount of $85,000 for each year that they were wrongfully incarcerated both before and after trial.
Additionally:
    (1) $30,000 for each year spent on death row; and
    (2) $25,000 for each year served on parole, on probation, or as a registered sex offender after a period of incarceration as a result of the felony of which they have been exonerated and not for any other criminal offense.[276]
(b) The court may approve the agreement only if the judge finds that the agreement is in the best interest of the claimant and actuarially equivalent to the lump sum compensation award before taxation. When determining whether the agreement is in the best interest of the claimant, the court must consider the following factors:
    (1) The age and life expectancy of the claimant;
    (2) The marital or domestic partnership status of the claimant; and
    (3) The number and age of the claimant's dependents.[277]
(c) If a lump sum is given, the exonerated person is required to complete a personal financial management course.[278]

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[274] CAL. PENAL CODE § 3007.05(i)(2) (West 2023).

[275] *Id.* at § 3007.05(a)2.

[276] COLO. REV. STAT. ANN. § 13-65-103(3)(a) (2022) (amount adjusted).

[277] WASH. REV. CODE ANN. § 4.100.060(12) (West 2023). This is important for those who do not have ten years to wait for all of their money.

[278] COLO. REV. STAT. ANN. § 13-65-103(f) (2022). In my conversation with exoneree, Marvin Cotton Jr., he said his concern with a lump sum was that being in prison for so long made having a large amount of money dangerous.

(d) Immediate payment of 20% and thereinafter not to exceed 10 years.
(e) Payments shall be reduced to the extent that the period of incarceration for which the petitioner seeks payment was attributable to a separate and lawful conviction.[279]
(f) A person entitled to compensation under this chapter is entitled to standard annuity payments.[280] This shall be applied retroactively to any current state exonerees who have received compensation.
(g) The state shall apologize.

Section 6——Benefits

In addition, the court may award:
(a) Reasonable attorney's fees, not to exceed $25,000.[281]
(b) Medicare in perpetuity unless the claimant opts out. They are entitled to opt back in at any time.[282]
(c) Programs for reentry into the community, counseling services and
    (1) They may select a relative to receive counseling with the person.
    (2) Housing assistance in an amount not greater than $15,000 per year.[283]
    (3) Programs for assistance for financial literacy.[284]
    (4) Tuition waivers at state institutions of higher education for the exonerated person and for any children and custodial children of theirs.[285]
(d) A court shall not award payment:
    (1) In an amount greater than $100,000 in a calendar year.
    (2) For a length of time that exceeds the period the person was imprisoned or on parole.[286]

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279 UTAH CODE ANN. § 78B-9-405(6)(a) (West 2022).

280 TEX. CIV. PRAC. & REM. CODE ANN. § 103.053 (West 2022). This is to help recuperate from lack of retirement savings while incarcerated. This should be made retroactive to other compensated exonerees.

281 NEV. REV. STAT. ANN. § 41.950(2)(a) (West 2022); this is in reference to attorney's fees for the postconviction relief process. This is the only money that can be taxed.

282 I recommend Texas's health care provision giving exonerees the same healthcare as their state employees. TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(d) (West 2022).

283 This whole section to this point comes from Nevada. An alternative would be California's Obie's Law, CAL. PENAL CODE § 3007.05(i)(2) (West 2023); *see supra* note 243.

284 NEV. REV. STAT. ANN. § 41-950(2)(b)(2)–(6) (West 2022).

285 COLO. REV. STAT. ANN. § 13-65-103(2)(e)(ii)(A)–(B) (2022).

286 NEV. REV. STAT. ANN. § 41.950(6) (West 2022).

(e) Reimbursement for the amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication.[287]
(f) Compensation for child support payments owed by the exonerated person.[288]
(g) Subsections (b)–(f) of this section shall be applied retroactively to any current state exonerees who have received compensation.
(h) The state shall apologize.

C. Funding

Section 7——Funding

(a) The exoneration fund is established for the purpose of carrying out this statute.
    (1) The fund consists of appropriations from the general assembly with money from [the state's allotted funds].[289]
    (2) The aid will be disbursed within 15 calendar days.[290]
(b) If the person dies without leaving a surviving spouse or surviving minor children, the payments shall cease. Upon the death of the claimant, any monthly installments left remaining shall be paid to the claimant's surviving spouse and surviving minor children in equal portions.[291]
(c) The state shall apologize.

D. Expungement

The statute needs to address the exoneree's release and specify the expungement process. Many statutes use the term "sealing," but that is inadequate; sealed records can always be accessed by law enforcement.[292] Further, it is unjust to maintain record of biological samples of an innocent person. The term "destroy" needs to apply to both records and samples. A truly free exoneree should have the option to be restored to the position they were in before wrongful conviction. As already discussed, this needs to happen quickly. Immediate starter

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[287] COLO. REV. STAT. ANN. § 13-65-103(2)(e)(V) (2022) ("This . . . shall not be interpreted to require the reimbursement of restitution payments by any party to whom the exonerated person made restitution payments as a result of his or her wrongful conviction or adjudication.").

[288] *Id.* § 13-65-103(2)(e)(iii) (2022).

[289] I could not dictate the source of the funds nor that they be the same throughout the states. For suggestions and discussions on possible sources, see Mostaghel, *supra* note 212, at 537–44; Schwartz, *supra* note 113.

[290] FLA. STAT. ANN. § 961-06(3) (West 2023).

[291] TENN. CODE ANN. § 9-8-108(a)(7)(C) (West 2022). While it is not as progressive as some states that allow for suing on behalf of the estate, this is a great clause to help with the effects of collateral consequences.

[292] *Expungement FAQs*, *supra* note 5.

cash and swift, thorough, *clear* expungement is the only way society can prevent the social costs of reentry failure.

Section 8——Expungement

(a) Upon entry of a certificate of innocence, the court shall order the associated convictions and arrest records be expunged and purged from all applicable state and federal systems pursuant to this subsection. The court shall enter the expungement order regardless of whether the claimant has prior criminal convictions.
(b) The order of expungement shall state the:
    (1) claimant's full name, or name at the time of arrest and conviction;
    (2) claimant's sex, race, and date of birth;
    (3) crime for which the claimant was arrested and convicted;
    (4) date of the claimant's arrest and date of the claimant's conviction;
    (5) identity of the arresting law enforcement authority and identity of the convicting court.
(c) The order of expungement shall also direct the State Bureau of Investigation to purge the conviction and arrest information from all applicable state and federal databases. The clerk of the court shall send a certified copy of the order to the State Department of Corrections, Laboratory, and Bureau of Investigations and any other agency that may have a record all of whom should carry out the order after which, each agency shall send confirmation to the court.
(d) If a certificate of innocence and an order of expungement are entered pursuant to this section, the claimant shall be treated as not having been arrested or convicted of the crime.[293]
(e) Upon entry of a certificate of innocence, the court shall order the expungement and <u>destruction</u> of any associated biological samples submitted to authorities pursuant to this conviction. It shall <u>destroy</u> any profile record, or any lab notes taken in relation to the relevant investigation.
(f) The expungement process shall take no more than 15 business days from the submission of the certificate of innocence.
(g) The claimant may move to copy these records before destruction for use as evidence in a civil suit.
(h) The state shall apologize.

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[293] KAN. STAT. ANN. § 60-5004(h) (West 2022); *see also* MINN. STAT. ANN. § 609A.03 subd. 6 (West 2023) (explaining that, in effect, the person is restored to the status they had before the crime occurred).

E. Civil Suit

Furthermore, I strongly propose we *omit* any and all clauses that force exonerees to waive their rights to civil trial. It should not be an either/or situation. This is especially so because civil suits occur in cases where the incarceration is a result of government malfeasance. Though statutes do not *forbid* a civil suit to apply, they do forbid a suit for compensation to be *received*. This means that the exoneree may apply for compensation while the civil suit is pending, but they will not be awarded compensation unless the suit is lost or dismissed. Because results of civil suits often take years, this forces the exoneree to wait even longer for compensation than they would have if they waived their rights, effectively stalling the process. Though the state may see this as a choice, in practice, it is not. I propose that exonerees are given compensation, *and* the right to sue through an offset provision that deducts awards from compensation. This prevents the exoneree from "eating from both sides of the apple," a common argument from opponents of compensation statutes.[294]

Section 10——Suing the State

(a) At the time of the decision of innocence, the Committee must orally inform the claimant and their attorney that, if the grounds exist to do so, they have the right to commence a civil action against the state should they choose.[295] This shall not be construed as legal advice.
(b) If at the time of the judgment the claimant has won a monetary award against the state, the amount of the award in the action or the amount received in the settlement agreement, less any sums paid to attorneys or for costs in litigating the other civil action or obtaining the settlement agreement, shall be deducted from the sum of money to which the claimant is entitled under this section.[296]
(c) Though this affects and ceases compensation, it shall not bar the petitioner from their right to collect reimbursements and benefits described in this law.
(d) Only the certificate of innocence, not the award of compensation can be brought into evidence in the civil suit.[297]
(e) The state shall apologize.

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[294] In response to being told this, Kristine Bunch said she "deserves the whole fucking orchard." Bunch interview, *supra* note 10.

[295] IOWA CODE ANN. § 663A.1(3)(b) (West 2023). Iowa has taken the step in helping the exoneree make an informed choice, which is *exactly* what should be done.

[296] KAN. STAT. ANN. § 60-5004(f)(1)–(2) (West 2022). Oregon does this as well. S.B. 1584 §1(9)(a), 81st Leg. Assemb., Reg. Sess. (Or. 2022).

[297] The exoneree's compensation reward should not be factored in when determining § 1983 damages; *see also* COLO. REV. STAT. ANN. §13-65-103(9)(b) (2022) ("A court's finding that a person is actually innocent and eligible for compensation pursuant to this article shall not be interpreted to limit the person's ability to pursue an action for damages against an entity that is not an employee, agent, or agency of the state government.").

CONCLUSION

The variation across our country is unsettling. No fair compensatory system would have such inequality.[298] It is my hope that every state adopts this model. It is more so my hope that these injustices stop altogether.

These changes are not only far fairer, but completely possible and realistic as exampled by other states' legislatures. It could not only inspire states with inadequate or obsolete statutes to improve, but it would promote consistency among the states. Improvement would ultimately lead to less dependency on social welfare, less poverty, less crime, more accountability, increased liberty, a better relationship between the people and their government, and thus a better society in general. It would also be a cost benefit to the state. It could lessen the need for civil suits. It would eventually lead to taking affirmative steps to prosecute with more precision and less misconduct which improves democracy and the judicial system as a whole.

> It is as if a man's life has been terminated at one point and then resurrected later; yet with all the intervening traumas, dangers and injuries that will endure, linger and become a permanent part of his life. It is within this set of circumstances that this Court must award damages; stating again that the liberty one so cherishes is absolute and the loss of it a tragedy of incalculable value.[299]
>
> –Judge Adolph C. Orlando

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[298] Gutman, *supra* note 247, at 432.

[299] Baba-Ali v. State, 878 N.Y.S.2d 555, 589–90 (N.Y. Ct. Cl. 2009), *aff'd in part, rev'd in part*, 907 N.Y.S.2d 432 (App. Div. 2010) (quoting Ferrer v. State of New York, No. 74308, (N.Y. Ct. Cl. June 13, 1990)).