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ARTICLES

NOTES

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Today, America faces a health paradox: the nation's largest jails are the nation's largest psychiatric institutions. In a criminal justice system designed for punishment, solutions like mental health units or mental health courts try to address this contradiction. Yet, if mental illness is a health issue, and not a criminal issue, then increased investments in the criminal justice system seem misplaced. Instead, a more promising approach is to stop the mentally ill from entering the criminal justice system at all.

This article presents just that: a new approach to decriminalize mental illness. Viewed under an overarching "health justice" lens, the approach shows how deficiencies in systemic components outside an individual's control—called social determinants of health—lead to negative mental health outcomes. The approach encourages a more balanced and nuanced understanding of why the mentally ill end up incarcerated, thereby shifting any disproportionate moral blame on the individual to a broader responsibility found in inequitable systems.

Then, using two unique forms of thinking—systems thinking and upstream thinking—the approach breaks down the systemic components contributing to criminalization of mental illness, which lead to such inequitable results. Under these thinking frameworks, the approach shows how the criminal justice system is an inadequate system for the mentally ill.
Finally, the new approach proposes focusing on six leverage points of investment before an individual even enters the criminal justice system, which, working all together, address the systemic deficiencies by intertwining the social determinants of health. In this way, the paradox is alleviated, the mentally ill do not end up in the criminal justice system, and health justice is achieved.

On January 15, 2025, a unanimous Supreme Court announced a decision about the nature and scope of supplemental jurisdiction that some commentators claim ran contrary to decades of precent from the Supreme Court itself, as well as from every federal appellate circuit to have considered the issue presented in the case, declaring how a federal district court can be forfeited of subject matter jurisdiction by a voluntary amendment to a plaintiff's pleadings in a properly-removed complaint.

Royal Canin U.S.A., Inc. v. Wullschleger had been through the district court twice, though the Eighth Circuit Court of Appeals on the same number of occasions, each time with widely different results, before finally reaching the Supreme Court for resolution of what the Court termed as a "split" among the federal circuit courts.

It is proposed by the author that a "split" is hardly an accurate description of the state of the circuit court decisions, since prior to Royal Canin every federal appellate circuit that had

considered the question of the effect of post-removal changes to the plaintiff's pleadings, be it for the amount in controversy, the domicile of adverse parties, or an abandonment of the federal claims that had supported the case's removal, had no impact on the federal courts' retention of valid subject matter jurisdiction.

This paper begins by reviewing the foundations of ancillary, pendant and supplemental jurisdiction, the incorporation of those concepts in revisions to Title 28 of the United States Code and continues with a review of the decisions of the various federal appellate circuits that preceded *Royal Canin*, reaching opposite conclusions from that case on the effect of post-removal activity upon the federal courts' jurisdiction. In doing so, the author will opine that Royal Canin represents a sea change in the concept of subject matter jurisdiction, the full impact of which is yet to be seen.

This Article describes and evaluates a kinesthetic, simulation-based approach to teaching Evidence at Southern Illinois University Simmons Law School. Departing from the traditional Langdellian, case-method model, one section of Evidence requires students to memorize and apply the Federal Rules of Evidence through a series of five scaffolded mini-trials built around fractured fairy tales and nursery rhymes. Drawing on the MacCrate Report, Bloom's taxonomy, and Vygotsky's theory of scaffolding, we situate this pedagogy within the broader movement toward experiential legal education and argue that Evidence—because of its centrality to litigation practice—is an ideal doctrinal course in which to integrate trial advocacy and skills training.

The Article explains how the course is structured, including the formation of "law firms," rotating student judges, and progressively more complex trial problems that require students to move from simple recall of rules to higher-order skills such as application, analysis, evaluation, and creation. We present both quantitative and qualitative data from student evaluations and surveys, as well as the teaching assistant's observations and personal testimony, to demonstrate that this kinesthetic model increases engagement, deepens understanding of evidentiary doctrine, and improves students' confidence and performance in courtroom settings, externships, and mock trial competitions.

Ultimately, we contend that embedding episodic, low-stakes trials in a required Evidence course offers a powerful way to help students internalize the Federal Rules of Evidence, develop professional identity, and practice lawyering skills in a supportive, scaffolded environment. We conclude by suggesting how this method can be adapted to other doctrinal courses, challenging law schools to reconsider the sharp divide between "doctrinal" and "skills" instruction in favor of a more integrated, practice-ready curriculum.

Externship faculty agree that goal setting is a key part of the externship learning experience, for example, helping students to become self-directed learners by deciding what they want to get out of a learning experience and then taking an active role in working toward that end. But while the literature advocating goal setting is based on years of experience and anecdotal evidence, one thing it is lacking is empirical support. In this paper, I report on my study of the pedagogical tool of student goal setting. This study included the review and coding of hundreds of student reflective journals in order to discover, based on the types of goals students select, where externship programs might turn more of their focus. I also examined hundreds more

NOTES

structure limits financial fallout and creates both the incentives and information needed to govern advanced AI in a serious, adaptive, and forward-looking way.

ENDING THE CYCLE: A NEW APPROACH TO DECRIMINALIZE MENTAL ILLNESS

Paige E. Kohn*

INTRODUCTION

For about two centuries, America has struggled to solve the criminalization of mental illness.[1] Indeed, we have come full circle from the flawed institutions of the past.[2] We are back to the same situation in the early 1800s, where prisons and jails were the primary institutions for the mentally ill.[3] For years now, jails in Chicago, New York City, and Los Angeles have been the largest psychiatric facilities in America.[4] The failure to adequately address the problem has detrimental and even fatal consequences: the mentally ill cycle through the criminal justice system for petty crimes and are more likely to be shot by police.[5]

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1 *See generally* Eric Andrew Nelson, *Dorothea Dix's Liberation Movement and Why It Matters Today*, 17 AM. J. PSYCHIATRY RES. J. 8, 8–9 (2021); ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS 73–94 (2020); Howard H. Goldman & Joseph P. Morrissey, *The Alchemy of Mental Health Policy: Homelessness and the Fourth Cycle of Reform*, 75 AM. J. PUB. HEALTH 727, 727 (1985); Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative And Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 147 (2012).

2 *See* ROTH, *supra* note 1, at 94.

3 *See* Yekeen A. Aderibigbe, *Deinstitutionalization and Criminalization: Tinkering in the Interstices*, 85 Forensic Sci. J. 127, 127 (1997).

4 *See* ROTH, *supra* note 1, at 2 (noting that, as of 2020, all three jail systems are the largest mental institutions in America); Mark J. Heyrman, *Mental Illness in Prisons and Jails*, 7 U. CHI. L. SCH. ROUNDTABLE 113, 113 (2000) (explaining that, as of 2000, Chicago's Cook County jail was the largest mental institution in Illinois, and New York City's Riker's Island jail was largest mental institution in New York); Steve Scauzillo, *LA County to Treat Severely Mentally Ill Inmates in the Twin Towers Jail*, L.A. DAILY NEWS (May 17, 2023), https://www.dailynews.com/2023/05/16/la-county-to-treat-severely-mentally-ill-inmates-in-the-twin-towers-jail/ (explaining that since opening in 1997, the Los Angeles Twin Towers jail "has become the largest *de facto* mental health institution in the United States").

5 *See* ROTH, *supra* note 1, at 3 ("[M]any people with mental illness cycle back and forth between jail or prison and living in the community . . . One in four of the nearly one thousand fatal police shootings in 2016 involved a person with a mental illness"); Liz Szabo, *People with Mental Illness 16 Times More Likely to be Killed by Police*, USA TODAY (Dec. 10, 2015), https://www.usatoday.com/story/news/2015/12/10/people-mental-illness-16-times-more-likely-killed-police/77059710/; Deena Zuru, *The National Issue of Criminalizing Our Mentally Ill*, ABC NEWS (Jan. 15, 2024), https://abcnews.go.com/US/national-issue-criminalizing-mentally-ill/story?id=106324105 (reporting that "local jails incarcerate offenders for petty crimes that mental health patients tend to commit, like loitering or disturbing the peace.").

As one Los Angeles deputy aptly stated when looking at a mentally ill man in a suicide gown on a jail floor, "This is wrong."[6] With good intentions, many criminal justice actors attempt to alleviate this problem, such as judges, lawyers, and social workers involved in mental health courts.[7] Regardless of good intentions, however, investments in approaches like mental health courts do not solve the ultimate underlying problem.[8] Instead, the mentally ill still cycle within or enter the criminal justice system when they should not be there in the first place.[9]

These cases often involve low-level crimes. For example, over a 20-year period beginning in the 1980s, a Florida man with mental illness named John Beraglia ("Beraglia") was arrested at least 130 times, usually for minor charges like trespass or disorderly conduct.[10] He spent over 1,000 days in jail and was committed to mental hospitals numerous times.[11] Tragically, in 2001, Beraglia died while on suicide watch in a Florida jail.[12] In a grand jury investigation, the cause of his death was disputed: the sheriff's office reported Beraglia died after beating his head against the wall, but fellow inmates stated guards beat him to death.[13] Regardless of the truth, a Florida editorial argued "[i]t might have been more accurate, though, if the grand jurors had said that although no individual was guilty of Beraglia's death, the system certainly was."[14]

While Beraglia's crimes were minor, sometimes cases involve heinous crimes. As another example, in 2019, a 26-year-old Ohio man diagnosed with reactive detachment disorder ("RAD") and bipolar disorder named Kristofer Garrett ("Garrett") was convicted of murdering his ex-girlfriend and 4-year-old daughter.[15] The Ohio Supreme Court acknowledged his mental-health

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6 ROTH, *supra* note 1, at 11, 46 (explaining the conditions of the Los Angeles jail; the deputy also noted: "If you are mentally ill, this is a horrible place.").

7 *See*, *e.g.*, LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF STATE GOV'TS JUST. CTR., MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 14 (2009).

8 *See*, *e.g.*, Amy Carter, *Fixing Florida's Mental Health Courts: Addressing the Needs of the Mentally Ill by Moving Away from Criminalization to Investing in Community Health*, 10 J.L. & SOC'Y 1 (2009).

9 *Id.* at 32.

10 *Dream of Dignity Collides with Reality*, SUN SENTINEL (Jan. 30, 2019), https://www.sun-sentinel.com/2004/02/15/dream-of-dignity-collides-with-reality/ [https://perma.cc/S7H7-GZWW] [hereinafter *Dream of Dignity*]; *see also* Carter, *supra* note 8, at 32.

11 *Dream of Dignity, supra* note 10.

12 *Id.*

13 *Id.*

14 *Id.*

15 Sheridan Hendrix, *Jury Recommends Death Sentence in Killings of 4-year-old Daughter, Ex-girlfriend*, COLUMBUS DISPATCH (Aug. 14, 2019), https://www.dispatch.com/story/news/crime/2019/08/14/jury-recommends-death-sentence-in/4462175007/; State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 23–27.

issues "undoubtedly" played some role in his daughter's murder.[16] Even so, while being diagnosed with RAD twelve years earlier, Garrett never received mental health treatment.[17] Despite having never entered the criminal justice system until his early twenties, Garrett is now on death row.[18]

Whether involving hundreds of low-level offenses or a single major crime, many individuals with mental illness, like Beraglia and Garrett, enter the criminal justice system because other societal systems failed them.[19] To keep the mentally ill out of the criminal justice system, one of the most promising solutions is to address the inequities within those other systems, particularly in health care.[20] While "the roots of health inequities are deep and complex," a solution is possible.[21]

In four parts, this Article shows how the solution is possible. First, the Article describes health justice, systems thinking, and upstream thinking, which, combined, provide a new analytical framework for analyzing this old problem in a new way. The framework offers a fresh way of thinking, which shifts the focus from a narrow criminality angle for individuals like Beraglia and Garrett, and more towards a broad systematic angle addressing the inequitable factors largely outside individual control called social determinants of health ("SDOH"), which may contribute more than one's character.[22] This viewpoint urges updating the connection between childhood adversity and adult mental illness, [23] which creates a shaky foundation for individuals, thereby increasing the likelihood of their later involvement in the criminal justice system.[24] For example, in 2022, the Ohio Supreme Court upheld Garrett's death sentence, stating it "seldom ascribed much weight in

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16 *Garrett* at ¶ 1–5 (speaking as a former staff attorney at Franklin County Common Pleas Court, I watched segments of this death penalty trial live, which inspired me, in part, to write this Article).

17 *Id.*

18 *Id.* at ¶ 227–32, ¶ 266–73 (stating Garrett "had no prior criminal history, either as a juvenile or an adult" and upholding death penalty for Garrett); *see Franklin County Jury Hands Down First Death Sentence Since 2003*, WOSU (Sep. 11, 2019), https://www.wosu.org/news/2019-09-11/franklin-county-jury-hands-down-first-death-sentence-since-2003.

19 *See* ROTH, *supra* note 1, at 268 (suggesting maybe society is to blame for the mentally ill ending up in the criminal justice system, not the individuals themselves); *Dream of Dignity*, *supra* note 10.

20 *See generally* J. Rad, *Health Inequities: A Persistent Global Challenge from Past to Future*, 24 INT'L J. EQUITY HEALTH 1 (2025) (documenting that health systems worldwide exhibit persistent inequities, with marginalized populations disproportionately burdened by poor outcomes and limited access to care).

21 NAT'L ACAD. SCIS., ENG'G & MED., THE FUTURE OF NURSING 2020-2030: CHARTING A PATH TO ACHIEVE HEALTH EQUITY 31 (Mary K. Wakefield et al. eds., 2023).

22 *See generally infra* Section II(a)(ii).

23 *See* James B. Kirkbride et al., *The Social Determinants of Mental Health and Disorder: Evidence, Prevention and Recommendations*, 23 WORLD PSYCHIATRY 58, 62 (2024) ("Clear and consistent evidence has demonstrated associations between childhood adversity . . .and several poor mental health outcomes in childhood, adolescence and adulthood, including general psychopathology, depression, anxiety, self-harm, psychosis and suicide.").

24 *Id.* at 78.

mitigation to a defendant's unstable or troubled childhood."[25] But health justice and this Article encourage otherwise.

Second, relying on this new analytical framework, the Article details a big picture view of the systems affecting the criminalization of the mentally ill. The immediate, or most obvious, systems are the criminal justice system and health systems (mental health system and physical health system). The less immediate, or less obvious, systems include economic systems (housing system, income system, and food system) as well as psychological and social systems (interpersonal system and education system).

Third, from a smaller picture view, the Article demonstrates how the criminal justice system alone fails to serve the mentally ill under health justice by applying both systems thinking and upstream thinking.

Fourth, using the analytical framework, the Article explains a solution aimed at preventing the mentally ill from entering the criminal justice system altogether by integrating other systems based on leverage points.

Ultimately, the Article demonstrates a new approach to solving the old problem of criminalization of mental illness, focusing more on aspects outside the penal system than within.[26] The goal is to prevent future individuals like Beraglia and Garrett from entering the criminal justice system at all. If the framework had existed in the past, Beraglia might still be alive, Garrett might not be on death row, and Garrett's ex-girlfriend and daughter might not have been murdered. While it is too late for all of them now, it is not too late for those in the future.

I. HEALTH JUSTICE AND THE THINKING FRAMEWORKS

A. Health Justice

1. Generally

Health justice is a relatively new field of legal scholarship that provides a framework to use law and policy to reduce health inequities.[27] More specifically, the field "combines knowledge of the social determinants of health with a commitment to legal principles of equal justice."[28] Given the

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[25] State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 333–40 (quoting State v. Kirkland, 2020-Ohio-4079, 157 N.E.3d 716, ¶ 174).

[26] Importantly, the article's scope is limited. It does not attempt to detail the financial allocations needed to implement the approach but rather focuses on the foundational conceptual blueprint.

[27] Yael Cannon, *Injustice is an Underlying Condition*, 6 U. PA. J.L. & PUB. AFF. 201, 205 (2020); *see also* Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47, 83 n.187 (2014).

[28] Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 807 (2020).

complexity of health inequities and social justice, the health justice field is interdisciplinary, melding various disciplines such as law, medicine, public health, education, urban planning, and business.[29]

At its core, health justice supports the "civil rights of health."[30] While individual choices certainly affect health, health justice acknowledges that many negative health outcomes are not an individual's fault.[31] Instead, the reasons why someone experiences poverty, resides in a violent neighborhood, and lacks access to healthy food are often based on factors outside an individual's control.[32] Health justice encourages analyzing the structural, systemic, legal, and policy indicators contributing to such negative health outcomes, which show a need for equalizing the health playing field, not penalizing and shaming individuals for disadvantage.[33] Accordingly, "[h]ealth equity is achieved by addressing the *underlying issues* that prevent people from being healthy."[34]

2. Social Determinants of Health

Fundamentally, health justice incorporates the social determinants of health ("SDOH"), which is a term of art in public health.[35] SDOH "are the conditions in the environments where people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks."[36]

Internationally, in the early 2000s, SDOH entered the lexicon from the World Health Organization ("WHO").[37] Nationally, in 2010, the U.S. Department of Health and Human Services ("HHS") incorporated SDOH

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29 Emily A. Benfer, *Health Justice: A Framework (And Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U.L. REV. 275, 338 (2015).

30 Harris & Pamukcu, *supra* note 28, at 766.

31 *Id.* at 768.

32 *Id.* at 768–69.

33 *See generally id.* at 795.

34 NAT'L ACAD. SCIS., ENG'G & MED., *supra* note 21, at 34 (emphasis added).

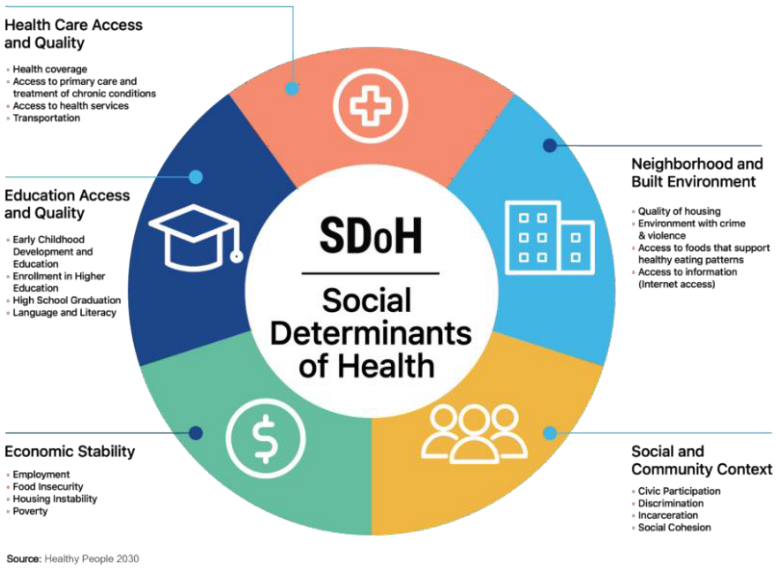
35 *See*, *e.g.*, Robert A. Hahn, *What is a Social Determinant of Health? Back to Basics*, 10 J. PUB. HEALTH RES. 633 (2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8672311/pdf/jphr-10-4-2324.pdf [https://doi.org/10.4081/jphr.2021.2324].

36 *Social Determinants of Health*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. DISEASE PREVENTION & HEALTH PROMOTION, https://health.gov/healthypeople/priority-areas/social-determinants-health (last visited Sep. 12, 2025); *see also* Samantha Bent Weber & Dawn Pepin, *Why Law is a Social Determinant of Health*, 50 STETSON L. REV. 401, 410 (2021).

37 Mary Jane Osmick & Marcella Wilson, *Social Determinants of Health—Relevant History, A Call to Action, An Organization's Transformational Story, and What Can Employers Do?*, 34 AM. J. HEALTH PROMOTION 219, 220 (2020). Epidemiologists Michael Marmot and Richard Wilkinson published a book on SDOH in 1999. *Id.*

into its own health initiatives, most particularly Healthy People, which collects data and develops goals to improve American public health.[38] SDOH is slowly becoming more widely used throughout the world.[39] As SDOH has grown in use and the number of factors to consider have grown, the HHS has organized the SDOH factors into five domains: 1) health care access and quality; 2) education access and quality; 3) economic stability; 4) neighborhood and built environment; and 5) social and community context.[40] The domains and specific examples within each are shown below.

Diagram 1: Social Determinants of Health [41]



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38 *Social Determinants of Health Workgroup*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. DISEASE PREVENTION & HEALTH PROMOTION, https://health.gov/healthypeople/about/workgroups/social-determinants-health-workgroup (last visited Sep. 12, 2025); *Social Determinants of Health*, *supra* note 36.

39 Sanne Magnan, *Social Determinants of Health 101 for Health Care*, NAT'L. ACAD. MED. 1 (2017), https://nam.edu/wp-content/uploads/2017/10/Social-Determinants-of-Health-101.pdf; *see also* DAN HEATH, UPSTREAM: THE QUEST TO SOLVE PROBLEMS BEFORE THEY HAPPEN 128 (2020).

40 *Social Determinants of Health*, *supra* note 36.

41 Coral Frederique Guzman & Joaquín Rodríguez Kierce, *Social Determinants of Health: Understanding the Drivers of Health Disparities*, V2A CONSULTING (Oct. 18, 2022), https://v2aconsulting.com/social-determinants-of-health-understanding-the-drivers-of-health-disparities/.

The importance of SDOH on overall health is massive.[42] These "non-biological [SDOH], such as housing instability, food insecurity, and unequal access to healthcare and education, can contribute to more than 80% of a person's health."[43] SDOH research demonstrates that an individual's health often depends on external factors that may be outside their immediate control rather than on personal choice.[44] In turn, these external factors are intertwined with governmental laws and policies shaping the individual's environment.[45]

Strong evidence shows that deficiencies in SDOH, either alone or combined, can lead to mental health problems in both children and adults.[46] For example, deficiency in the economic SDOH, such as low income, food insecurity, and housing instability, can lead to mental health issues such as depression, attention deficit hyperactivity disorder ("ADHD"), and anxiety.[47] Further, deficiencies in the social and community contexts, such as a lack of social cohesion stemming from low family support, can lead to mental health problems such as depression and anxiety too.[48]

Ultimately, health justice encourages "structural understanding of health disparities and the ways that [SDOH] drive those inequities."[49] "The framework recognizes that laws and policies have created systems that have enabled, perpetuated, and exacerbated disparities – and that laws and policies must be used to undo them."[50] In this way, health justice encourages examining social ills such as homelessness, addiction, incarceration, and violence with a systemic causation and interconnected lens, not as individual moral failures.[51]

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42 *See Social Determinants of Health (SDOH)*, CTR. DISEASE CONTROL (Jan. 17, 2024), https://www.cdc.gov/about/priorities/why-is-addressing-sdoh-important.html ("SDOH have been shown to have a greater influence on health than either genetic factors or access to healthcare services.").

43 Cannon, *supra* note 27, at 203 (relying on Magnan, *supra* note 39, at 1 (citing Carolyn Hood et al., *County Health Rankings: Relationships Between Determinant Factors and Health Outcomes*, 50 AM. J. PREV. MED. 129, 129–135 (2016))).

44 Weber & Pepin, *supra* note 36, at 411.

45 *See id.*

46 NAT'L ACAD. SCIS., ENG'G & MED., *supra* note 21, at 36–49.

47 Margarita Alegria et al., *Social Determinants of Mental Health: Where We Are and Where We Need to Go*, 20 CURRENT PSYCHIATRY REPS. 1 (2019); Kirkbride, et al., *supra* note 23, at 60–61.

48 *Id.* at 1; NAT'L ACAD. SCIS., ENG'G & MED., *supra* note 21, at 36–49.

49 Cannon, *supra* note 27, at 205; *see also* Lindsay F. Wiley et al., *Introduction: What is Health Justice?*, 50 J. L., MED. & ETHICS 636, 638 (2022) ("Realizing health justice requires addressing the structural determinants of health that are the root cause of health inequities, such as the social and economic policies that create unequal conditions in health care, employment, housing, and education.").

50 Cannon, *supra* note 27, at 216.

51 *See generally,* Harris & Pamakcu, *supra* note 28, at 807; *see also* NAT'L ACAD. SCIS., ENG'G & MED., *supra* note 21, at 31, 38 ("[i]ntersectionality recognizes the complex factors contributing to

B. Systems Thinking

Health justice provides the global framework for this Article, yet two forms of thinking are further embedded: systems thinking and upstream thinking.

1. Generally

Because health justice requires interdisciplinary analysis across different sectors, it naturally fits within a non-legal concept called "systems thinking."[52] Systems thinking is "[1] an approach to seeing the world in a way that makes connections and relationships more visible and improves our decision-making abilities, and [2] a set of methods and tools."[53] This Article is focused on the first part, which is a "mental framework . . . to understanding diverse, interconnected phenomena."[54] Systems thinking does not originate from law or medicine; instead, it is an analytical lens stemming from scientific disciplines as varied as biology to computer science.[55]

Addressing the first part only, systems thinking is "a discipline for seeing wholes and a framework for seeing interrelationships rather than things, for seeing patterns of change rather than static snapshots."[56] Those employing such thinking "position themselves such that they can see both the forest and the trees; one eye on each."[57] Further, "[s]ystems thinking emphasizes consideration of the big picture over individual parts when trying to understand the cause of identified outcomes."[58]

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health inequities by stressing the importance of the intersection of multiple interdependent social determinants that shape the health and well-being of individuals and communities.").

52 *See*, *e.g.*, Ross D. Arnold & John. P. Wade, *A Definition of Systems Thinking: A Systems Approach*, 44 PROCEDIA COMPUT. SCI. 669, 670 (2015).

53 Erin Betley et al*., Introduction to Systems and Systems Thinking*, 11 LESSONS IN CONSERV. 9, 12 (2021).

54 Tomar Pierson-Brown, (*Systems) Thinking Like a Lawyer*, 26 CLINICAL L. REV. 515, 519 (2020). Full application of the methods and tools is beyond the scope of this Article.

55 David H. Peters, *The Application of Systems Thinking in Health: Why Use Systems Thinking?*, 12 HEALTH RES. POL'Y & SYS. 1, 2 (2014); *see also* DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER ix (2008). Formal study of systems thinking developed a base at the Massachusetts Institute of Technology ("MIT"), largely through engineer and computer scientist Jay Forrester, who founded the MIT Systems Dynamics group in the 1950s. *Id.; see also Systems Thinking Courses*, MIT MGMT EXEC. EDUC., https://exec.mit.edu/s/topic/systemsthinking [https://perma.cc/74W3-HTEV] (last visited Sep. 12, 2025).

56 Peter G. Gulick, *A Systems Thinking Approach to Health Care Reform in the United States*, 21 DEPAUL J. HEALTH CARE L. 1, 44 (2019).

57 *Id.*

58 Pierson-Brown, *supra* note 54, at 522.

2. Systems Thinking and Complex Problem Solving

Even though legal scholars only recently began applying systems thinking to legal issues,[59] the approach is well-suited for complex problem solving, like the decriminalization of mental illness, which involves multiple systems. If systems thinking had a motto, it might be that everything is connected.[60]

In this way, systems thinking is not interested in confining itself to one discipline; specialty silos are abandoned.[61] For a problem like the decriminalization of mental illness, systems thinking welcomes individuals from fields as diverse as sociology, criminology, psychology, and law. The expansive approach encourages a problem solver to go beyond their field of expertise and draw on other areas that might support a solution.[62] This approach works well for highly complex and nebulous problems that defy pigeonholing, like global poverty.[63]

Systems thinking is also different than linear thinking, which focuses on separating fields like sociology, criminology, psychology, and law based on the idea that the whole can be better tackled by addressing the parts.[64] Linear thinking is therefore reductionist.[65] Yet, linear thinking is not well-suited to address complex and chronic social problems like the decriminalization of mental illness.[66] Homelessness is another example; the solution is not merely to provide shelter.[67] Instead, an effective long-term response requires consistent staples like affordable housing, economic opportunities, and psychological support.[68] Further, a response requires connections between these various silos to ensure an individual does not fall

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59 *See e.g., id.* (applying systems thinking to law school curriculum reform in 2020); Robert C. Bird & Julie M. Magid, *Toward a Systems Architecture in Corporate Governance*, 24 U. PA. J. BUS. L. 84, 125 (2021) (applying systems thinking to corporate governance).

60 *See* Pierson-Brown, *supra* note 54, at 518.

61 *See id.*

62 *Id.*

63 *See id.*

64 DAVID PETER STROH, SYSTEMS THINKING FOR SOCIAL CHANGE: A PRACTICAL GUIDE TO SOLVING COMPLEX PROBLEMS, AVOIDING UNINTENDED CONSEQUENCES, AND ACHIEVING LASTING RESULTS 14–15 (2015).

65 *See* Gulick, *supra* note 56, at 12 ("[a] linear system is one in which the whole of the system is the sum of its parts. Put another way, a linear system can be understood by understanding each component part individually, then putting them together. This type of analysis, reducing a system to its components to facilitate understanding, is referred to as reductionism.")

66 STROH, *supra* note 64, at 15.

67 *Id.*

68 *See id.*

through the cracks.[69] This is because "[t]he root causes of a chronic, complex problem [like homelessness] can be found in its underlying *systems structure* the many circular, interdependent, and sometimes time-delayed relationships among its parts."[70]

Instead of focusing just on the criminal justice and mental health systems, a systems thinking approach permits expansion into other systems to solve the decriminalization of mental illness. There are other systems at play, such as those involving housing, food, employment, and social aspects. With the shift in thinking, new possibilities emerge that do not involve the criminal justice system at all, which just happens to be the endpoint where the mentally ill often reach when all other systems fail.

3. Systems Thinking Parts: Elements, Interconnections, and Purpose

As a framework, systems thinking is helpful in theory, but somewhat abstract. Scientist Donella Meadows, whose work was published posthumously in *Thinking in Systems*, helped put the theory into practice.[71] Meadows defined a system as "an interconnected set of elements that is coherently organized in a way that achieves something."[72] Within each system are three aspects: 1) elements; 2) interconnections; and 3) a function or purpose.[73] Elements are the tangible or intangible characteristics providing a foundation for the system.[74] Interconnections are the "relationships that hold the elements together" or how the elements "relate to and/or feed back into each other."[75] The function or purpose is "deduced from behavior, not from rhetoric or stated goals."[76] Practical examples of Meadows' system breakdowns are illustrated below as applied to the digestive system, football, and a tree.

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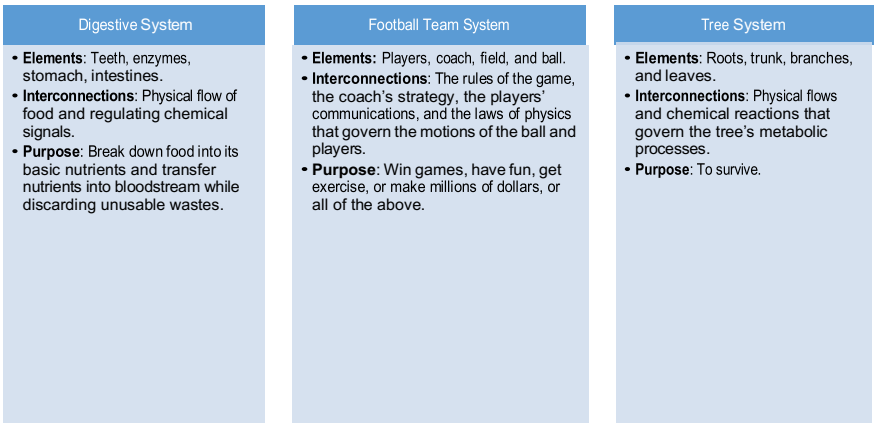
69 *See id.* at 15–16.
70 *Id.* at 38.
71 MEADOWS, *supra* note 55, at ix.
72 *Id.* at 11.
73 *Id.*
74 *Id.* at 11–13.
75 *Id.* at 13.
76 *Id.* at 14.

Diagram 2: Meadows' System Examples[77]



Building on Meadows, another definition considers "systems thinking as the ability to understand these interconnections in such a way as to achieve a *desired* purpose."[78] This definition will be helpful when applying systems thinking to the decriminalization of the mental illness problem later in this Article.

C. Upstream Thinking

1. Generally

Because systems thinking embraces the big picture, interconnections, and complexity, it melds well with another mental framework called "upstream" thinking.[79] Indeed, "[a] telltale sign of upstream work is that it involves systems thinking."[80] "Upstream" thinking is a metaphor for preventive thinking popularized by business author Dan Heath in his 2020 book *Upstream*.[81] The term "upstream" is not new, however, and has been used in health circles long before Heath's book.[82] Upstream terminology, along with "midstream" and "downstream," is used explicitly in SDOH

77 *Id.* at 11–13. Graph created by the author utilizing Meadows' examples.
78 STROH, *supra* note 64, at 16.
79 *See generally* HEATH, *supra* note 39.
80 *Id.* at 7.
81 *Id.*
82 *See*, *e.g.*, David R. Williams et al., *Moving Upstream: How Interventions that Address the Social Determinants of Health can Improve Health and Reduce Disparities*, 14 J. PUB. HEALTH & MGMT. PRAC. 88 (2008).

literature.[83] That said, Heath provides much more depth about the concept from an interdisciplinary viewpoint.[84]

Heath prefers the word "upstream" because it "prods us to expand our thinking about solutions."[85] He defines "upstream efforts as those intended to prevent problems before they happen or, alternatively, to systematically reduce the harm caused by those problems."[86]

2. Challenges of Upstream Thinking

Upstream thinking is challenging for several reasons, however, particularly due to the complexity, lack of tangibility, and interconnectivity. As will be seen in this Article, these challenges frequently thwart effective solutions to decriminalize mental illness. By clearly identifying them, they can be adequately addressed.

a. Complexity

First, upstream problems can be complex, which require patience and time to determine an adequate upstream solution.[87] Furthermore, when multiple problems are juggling at once, people often give up and adopt "tunnel vision," which involves "no long-term planning" or "strategic prioritization of issues."[88]

Yet, "with this approach, we never get around to fixing the *systems* that caused the problems."[89] Often, tunneling just leads to knee-jerk reactions, thus eliminating the opportunity for systems thinking.[90] To escape tunneling, time is needed for problem-solving.[91] Without dedicated time, the problem never resolves because of a reactive mindset.[92]

For example, Heath considers the American health care system as "designed almost exclusively for reaction."[93] When comparing America to other countries, America spends more money on reacting to immediate problems and less time on preventive and consistent care.[94] In effect,

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83 Alegria et al., *supra* note 47, at 94; NAT'L ACAD. SCIS., ENG'G & MED., *supra* note 21, at 31.

84 *See generally* HEATH, *supra* note 39; *see*, *e.g.*, Williams et al., *supra* note 82, at 88.

85 HEATH, *supra* note 39, at 7.

86 *Id.* at 6.

87 *See id.* at 9.

88 *Id.* at 59.

89 *Id.* at 5 (emphasis added).

90 *Id.* at 60.

91 *See id.*at 63.

92 *See id.* at 62–63.

93 *Id.* at 10.

94 *See id.* at 12; *see also* BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, And BODY IN THE HEALING OF TRAUMA 170 (2015) (suggesting Norwegian and Dutch preventive

America goes downstream while other countries go upstream.[95] As one American government health care administrator said, "[w]e'll pay $40,000 a year for the price of insulin, but we won't pay $1,000 to prevent someone from ever getting diabetes."[96]

America's approach to the decriminalization of mental illness is also an example of systemic tunneling. Instead of meaningfully addressing the core reasons the mentally ill end up in jail or prison, our criminal justice system is largely designed for police officers to arrest individuals committing crimes, even if they are committed by low-level mentally ill offenders who might be better served by receiving stable housing, medication, and consistent meals.[97] While some diversion programs exist, the purpose of the criminal justice system, as well as its elements and interconnections, does not overall favor upstream thinking.[98]

b. Tangibility

Second, upstream thinking is not tangible.[99] It requires a leap of faith into the abstract. If properly implemented, the result of upstream thinking is the absence of something. Absence is hard to imagine. Thus, we often "favor reaction [b]ecause it's more tangible."[100] When an immediate problem is fixed, it is "easier to see."[101]

Absence can feel more tangible, however, when put into context. For example, in 1975, the leading cause of children's death, besides newborns, was the automobile.[102] More deaths were caused inside the vehicle rather than outside.[103] While children's car seats existed in the 1970s, they were not

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investment in universal health care, a guaranteed minimum wage, paid parental leave, and childcare for working mothers may contribute to the lower crime rates and medical costs in those countries compared to the American approach).

95 HEATH, *supra* note 39, at 12; *see also* VAN DER KOLK, *supra* note 94, at 170.

96 HEATH, *supra* note 39, at 192.

97 *See Research Weekly: Our Mental Health System, Hidden Behind Bars*, TREATMENT ADVOC. CTR. (Feb. 6, 2018), https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf [hereinafter *Research Weekly*]; *Criminalization of People with Mental Illness*, NAT'L ALL. MENTAL ILLNESS (2023), https://www.nami.org/advocacy/policy-priorities/stopping-harmful-practices/criminalization-of-people-with-mental-illness [hereinafter *Criminalization*].

98 *See Research Weekly, supra* note 97; *Criminalization*, *supra* note 97.

99 *See* HEATH, *supra* note 39, at 6.

100 *Id.*

101 *Id.*

102 *Id.* at 44.

103 *Id.*

mandated. It was not until 1981 that effective lobbying created the first state law mandating children's car seats in Tennessee.[104] Yet by 1985, all states had passed laws regarding child restraints.[105] The National Highway Traffic Safety Administration estimated that between 1975 and 2016, approximately 11,000 children under age four were saved by car seats.[106] Absence of something *is* something.

Likewise, truly fixing the decriminalization of mental illness requires a series of abstract links, interconnected in a logical order. Some of the solutions presented in this Article start before a child is even born.[107] While studies can be done, and have been done on certain components, this Article's approach compels a conceptual leap of faith based on understanding the interconnections among systems.

c. Interconnectivity

Third, it is difficult to connect gaps between more than one system.[108] For example, Heath describes a Massachusetts case where a domestic violence volunteer, Kelly Dunne ("Dunne"), helped a female victim, Dorothy Giunta-Cotter ("Giunta-Cotter"), for at least five years, but Giunta-Cotter still ended up murdered by her husband.[109] This tragic result was preventable: as Dunne stated, "Her case showed us where all the gaps in the system were."[110] "[T]he system was splintered into specialized functions: police officers to respond to 911 calls; health care providers to mend wounds; advocates to help victims; district attorneys to prosecute cases; and parole officers to monitor abuses."[111]

None of these roles had the explicit purpose to "prevent homicide," however.[112] A researcher named Jacqueline Campbell ("Campbell") noticed this same discrepancy and employed upstream thinking, which enabled her to envision foreseeable risk factors that often led to homicide in domestic violence cases.[113] These include aspects of the abuser, such as alcoholism, access to guns, and unemployment, but also actions of the abuse victim, which include visits to the health care system.[114] Campbell developed a

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104 *Id.* at 46–47.
105 *Id.* at 47.
106 *Id.*
107 *See infra* Section V(b)(i).
108 *See infra* Section V.
109 HEATH, *supra* note 39, at 82–83.
110 *Id.* at 82.
111 *Id.*
112 *Id.*
113 *See id.* at 84.
114 *Id.* at 84–85.

"Danger Assessment" tool, which is often used to predict domestic homicide.[115] When Gunne completed the questionnaire for Giunta-Cotter, she scored 18/20, which is extreme danger.[116]

In 2005, Dunne went further and developed the Domestic Violence High Risk Team, which connected all the people with abuse cases, such as police officers, parole officers, probation officers, hospital workers, victim advocates, and attorneys.[117] They developed a practical plan for the women in their care and began to identify the systematic flaws.[118] They learned to engage, give notice, and align efforts with the right people to prevent homicide.[119]

Just like the homicide of the domestic violence victim could be prevented by connecting the systems leading to that tragic result, so can the decriminalization of mental illness. This specific problem is difficult because there are so many different institutions, systems, and people involved, yet it merely requires breaking the interconnected systems down like Campbell and Dunne did for domestic violence victims.

3. Leverage Points

Regarding ways to solve a complex problem, both Meadows and Heath discuss the concept of "leverage points" in their work on systems thinking and upstream thinking, respectively.[120]

For Meadows, leverage points are "places *in* the system where a small change could lead to a large shift in behavior."[121] Yet, sometimes these points are not intuitive.[122] Meadows describes at least twelve different leverage points, from addressing the purpose of a system to a carrots-and-sticks approach (e.g., creating subsidies, taxes, etc.).[123]

For Heath, he does not define leverage points, but requires a "point of leverage" to prevent problems in complex systems.[124] He describes points of leverage through examples. In 2008, in Chicago, the problem to be solved

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115 *Id.* at 85.
116 *Id.*
117 *Id.* at 86.
118 *Id.* at 87.
119 *Id.* at 88.
120 *Id.* at 115–33; MEADOWS, *supra* note 55, at 145–65.
121 MEADOWS, *supra* note 55, at 145 (emphasis added).
122 *Id.* at 146.
123 *Id.* at 145–65.
124 HEATH, *supra* note 39, at 115–16.

was the prevention of youth violence. [125] City leaders tended to focus on gang activity as the cause, but when researchers analyzed the actual evidence, they found a pattern not based on gang activity—though that did occur—but rather ordinary quarrels amongst young boys who just happened to have guns.[126] Possible leverage points included "moderating impulsivity or reducing alcohol consumption or restricting access to guns."[127] As it happened, there was a program called Becoming a Man ("BAM") that helped Chicago boys manage anger and emotion.[128] The researchers wondered if a program like BAM could slow down a young man's anger, so a minor dispute would not end in murder.[129]

The researchers decided to test a hypothesis: BAM will reduce arrests, especially for violent acts.[130] After choosing 18 schools to participate in BAM, a year's worth of data was collected.[131] The results proved the hypothesis correct: arrests decreased by 28% and violent-crime arrests decreased by 45%.[132] BAM was a good point of leverage.

Further, for Heath, leverage points can be found in analyzing "the risk and protective factors for the problem you are trying to prevent."[133] For example, to prevent teenage alcohol abuse, a protective factor can be engaging teenagers in a formal sports program because it involves a large positive time commitment, which means they have less time to spend on negative influences.[134] In the same situation, a risk factor is parental inattention, which may cause the same teenager to act out.[135] Thus, by enrolling a teenager in basketball with parents showing encouragement through attending games, the teenager's attention becomes redirected.

For the purposes of this Article, which connects both systems thinking and upstream thinking, a refined definition of "leverage point" is needed. Meadows' focus is a leverage point *within one* system, but that is not expansive enough because sometimes multiple systems are interconnected with overlapping points of leverage. For this Article, a leverage point requires connecting to points from other systems; sometimes it cannot stand alone. As a result, when "leverage point" is used here, it can refer to both Meadows' narrow definition, but also an expansive version, which identifies an area

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125 *Id.* at 116.
126 *Id.* at 116–17.
127 *Id.* at 117.
128 *Id.* at 117–21.
129 *Id.* at 121.
130 *Id.*
131 *Id.*
132 *Id.* at 123.
133 *Id.* at 125.
134 *Id.*
135 *Id.*

where connecting points in various systems change can create the overall "leverage point," which incorporates Heath's more extensive viewpoint.

4. Putting Health Justice, Systems Thinking and Upstream Thinking All Together

Health justice, systems thinking, and upstream thinking are all interconnected. Health justice encourages broader solutions to health inequities, which do not all come from within the health care or legal system, thereby encouraging consultation with other systems. The importance of looking outside the mental health care system for the solution to decriminalization of mental illness is shown through the overwhelming importance of SDOH in affecting an individual's health.[136] In turn, emphasizing SDOH is the epitome of upstream thinking that can prevent a mentally ill individual from landing in jail or prison.[137] "[G]iven considerable evidence of the links between social determinants and mental health outcomes, multilevel interventions aimed at eliminating systemic social inequalities—such as access to educational and employment opportunities, healthy food, secure housing, and safe neighborhoods—are crucial."[138]

If society relies on only the mental health care system or the criminal justice system to solve the decriminalization of mental illness, then it is unlikely to be solved. This is our current situation, but this Article attempts a different approach. When facing a complex social problem, such as the decriminalization of mental illness, which implicates several different systems and requires preventative measures, or leverage points, the combination of health justice, systems thinking, and upstream thinking is necessary to create a solution. This Article shows how.

II. THE BIG PICTURE: THE SYSTEMS AFFECTING THE CRIMINALIZATION OF THE MENTALLY ILL

When systems thinking is applied to the decriminalization of the mental illness problem, several systems appear. No one system is responsible for causing this problem; however, this is the main reason why fixing it is challenging. In America, as far back as the 1800s, notable reformers like Dorothea Dix were appalled when seeing the mentally ill housed in prisons

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136 *See* Cannon, *supra* note 27, at 203.

137 *See, e.g.*, Harris & Pamukcu, *supra* note 28, at 770.

138 Alegria et al., *supra* note 47, at 100.

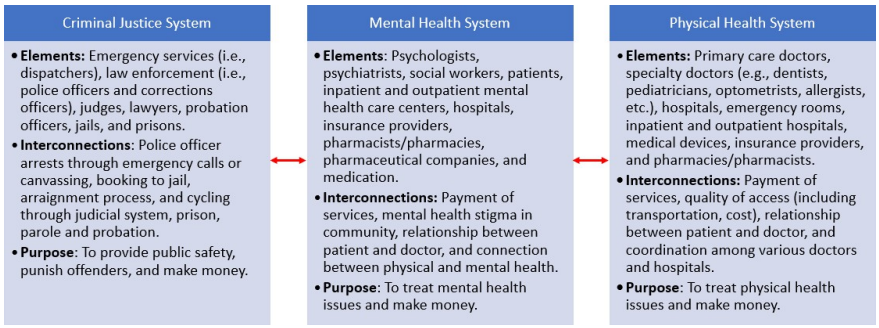
and jails, and tried to solve this exact problem.[139] After reforms were implemented in the 1800s, many mentally ill people were sent to mental health public hospitals instead of prisons and jails until the 1960s.[140] Yet, those hospitals suffered from problems too, resulting in many of those hospitals closing during a period called "deinstitutionalization," and now we have come "full circle" back to prisons and jails.[141] Once again, jails and prisons have become the largest psychiatric facilities in America.[142]

Extensive literature provides several reasons offered for why the problem has come full circle, such as deinstitutionalization or the failure of community-based care.[143] Even so, this Article argues that a leading cause is the failure to pursue an interconnected systemic and upstream solution to the problem with a health justice mindset. However, by breaking the systems down, and then establishing the interconnections between the systems through leverage points, a solution becomes more feasible and understandable.

A. Immediate Systems

The most immediate systems affecting the criminalization of the mentally ill are the criminal justice system, mental health system, and physical health system.[144] Applying Meadows' three aspects of a system to these systems provides the following breakdowns.

Diagram 3: Immediate Systems[145]



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139 *See generally* Nelson, *supra* note 1, at 9.

140 *See generally id.*

141 *See generally id.;* ROTH, *supra* note 1, at 88 (in 1947, a psychiatrist noted the state of the public hospital is "merely a symptom of an outdated system that is crying for a complete remodeling. . . . [W]e need . . . an entirely new *concept* of public psychiatry.").

142 ROTH, *supra* note 1, at 2.

143 *Id.* at 88, 93.

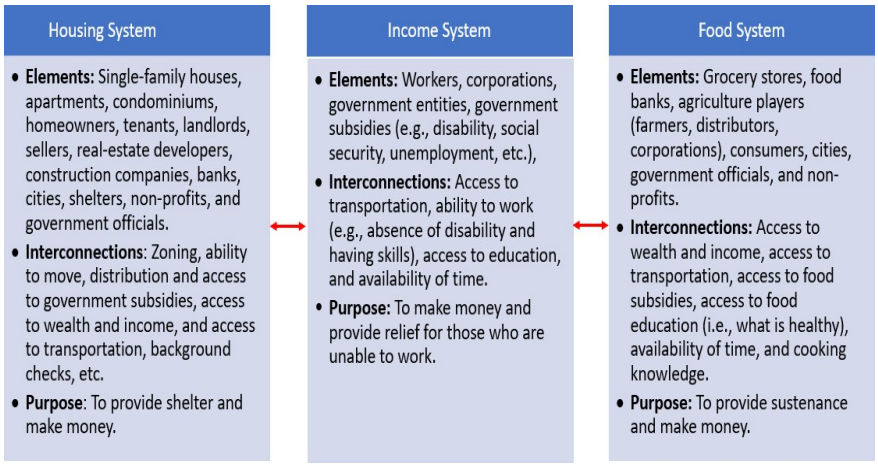
144 The mental health care system and physical health system can be combined into a larger system—the health care system—but are broken out here for ease of analysis.

145 These graphs are based on the author's overall familiarity with the criminal justice, physical health care, and mental health areas and not any particular source. They are artificial systems created based on systems thinking.

1. The Less Immediate Systems

The less immediate systems affecting the criminalization of the mentally ill, which are further upstream, include housing, income, food, interpersonal systems, and education systems. These are not all the systems that could be implicated, but rather the ones that appear to be the most prominent in addressing the decriminalization of mental illness problem for the purposes of this Article. Using Meadows' systems thinking, the breakdowns of these systems are as follows: the first groupings are economic, and the second groupings are psychological and social.[146]

Diagram 4: Less Immediate Systems – Economic [147]



146 MEADOWS, *supra* note 55, at 11–13 (graphs created by this Article's author using Meadows' examples and applying those examples to common knowledge of the systems).

147 *Id.* These graphs are based on the author's overall familiarity with housing, income, food, interpersonal, and education areas and not any particular source.

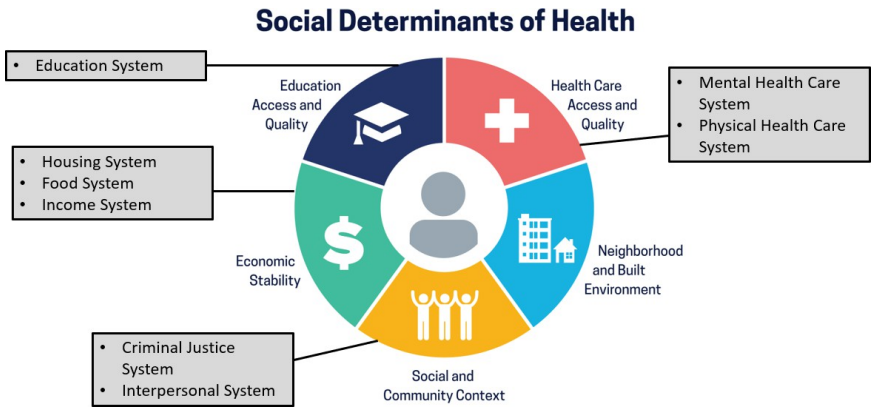
Diagram 5: Less Immediate Systems – Psychological and Social[148]

Interpersonal System	Education System
• **Elements:** Nuclear family members (parents, siblings, stepparents, etc.), extended family members (e.g., cousins, aunts, uncles, etc.), work colleagues, coaches, teachers, mentors, and any important non-medical person in an individual's life. • **Interconnections**: Quality of relationships between individual and various people in their life, love, support, security, mentoring, safety, and encouragement. • **Purpose**: To provide social, emotional, educational, and safety needs for an individual.	• **Elements:** Teachers, school administrators, counselors, coaches, general education-related personnel, schools, and athletic teams. • **Interconnections**: The relationships between students and education personnel, classes, athletic games, studying, support, learning, and expectations. • **Purpose**: To provide knowledge enabling individuals to lead productive lives through mastery of physical, intellectual, and social skills.

2. How the Systems Fit Together

Coincidentally, all eight of these systems can fit, or closely fit, into one of the HHS's five SDOH domains.[149] Because non-biological social determinants contribute such a large percentage to an individual's overall health outcome, this is not surprising.[150] From a big-picture viewpoint, where the systems might reside in the HHS's SDOH five domains can be seen below. Later, this Article shows how they interconnect.

Diagram 6: Social Determinants of Health and System Overlap[151]



148 *Id.*

149 *Social Determinants of Health*, *supra* note 36.

150 *See* Magnan, *supra* note 39.

151 For basic graph, *see Social Determinants of Health*, *supra* note 36. The eight systems are the author's own creation.

III. THE SMALLER PICTURE: WHY THE CRIMINAL JUSTICE SYSTEM IS THE WRONG SYSTEM TO TREAT THE MENTALLY ILL

Now that the systems are mapped out, it is easier to explain why the criminal justice system is mismatched to treat the mentally ill from both a systems thinking and upstream thinking rationale under the health justice mindset. Even though our understanding of mental illness and psychology is still rapidly evolving, from a systems viewpoint, this Article hypothesizes that the problem leading to the criminalization of the mentally ill is system failure, not individual moral failures. When applying systems thinking to the criminal justice system, there is noticeable misalignment regarding both the purpose and elements applied to the mentally ill. Applying upstream thinking, the criminal justice system is inherently reactive, not proactive. Under a health justice mindset, the criminal justice system does not adequately acknowledge the structural inequities leading to many mentally ill individuals landing in jail or prison.

A. The Mismatched Purpose: The Main Purpose of the Criminal Justice System is Punitive, Not Rehabilitative

Under systems thinking, at a fundamental level, the purpose of the American criminal justice system is punitive, not rehabilitative.[152] Traditional purposes for criminal imprisonment include retribution, deterrence, and incapacitation.[153] While some modern approaches evolved around a rehabilitation approach, such as therapeutic or restorative justice, the traditional rationales still pervade the basic operation of criminal justice in America today.[154]

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[152] *See*, *e.g.*, ROTH, *supra* note 1, at 15, 29 ("[U]ltimately, [a prison's] mission is punishment, not medical care. The criminal justice system is built around a punitive, authority-based approach."); *see, e.g.*, *id.* at 264 (quoting a Virginia district attorney, "[t]he challenge for us is the criminal justice system isn't set up to deal with mental illness. It's set up to punish or not.")

[153] *See*, *e.g.*, Hafemeister, Garner & Bath, *supra* note 1, at 160–61 (describing various approaches to punishment in America's criminal justice system); Almquist & Dodd, *supra* note 7, at 5 ("The criminal justice system was not designed to provide mental health treatment; its main purposes are to ensure public safety, promote justice, and punish and prevent criminal behavior"); ROTH, *supra* note 1, at 9, 93 ("Over the course of our history, punishment by incarceration has been out standard response to crime [W]e [have] largely given up on the idea that incarceration should be rehabilitative. .....[W]e have been left with an almost single-minded focused on punishment and retribution.").

[154] *See*, *e.g.*, Hafemeister, Garner & Bath, *supra* note 1, at 157, 164, 183.

Because the purpose of the criminal justice system is not to treat those with mental illness, systems thinking demonstrates that efforts to do so *within* this system are not likely to work well.[155] As an example of the perverse purpose mismatch, in states like New York, solitary confinement is often used as punishment for suicide attempts.[156] Yet, it is illogical to punish someone attempting to commit suicide because there is something psychologically amiss internally, not something the individual externally inflicts on someone else. In a further perverse twist, over half of prison suicides occur in solitary confinement.[157] With his kind of illogic applied, it is no surprise that treating the mentally ill in prisons and jails turns out so poorly.[158]

Punishing people with mental illness, a condition which often stems from other system failures like housing and interpersonal systems, and not moral wrongdoing, does not mesh with the purpose of the criminal justice system.[159] Unsurprisingly, then, medical and public health experts have questioned the propriety, efficacy, and safety of combining therapy with punishment."[160] For non-violent and low-level offenses, arresting many mentally ill individuals does not make sense. As one author wrote, "[n]o rational purpose is served by the current system [which criminalizes mental illness].[161] Public safety is not protected when people who have mental illnesses are needlessly arrested for nuisance crimes or when the mental illness at the root of a criminal act is exacerbated by a system designed for punishment, not treatment."[162]

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155 *See*, *e.g.*, ROTH, *supra* note 1, at 30 ("There is an inherent tension between the security mission of prisons and mental health considerations"); *id.* at 106 (noting Yale psychiatrist, "The chief problem is that mental health care and criminal justice start with different philosophies so the ethos itself of the criminal justice approach is incompatible with therapeutic means and methods.").

156 *Id.* at 146.

157 *Id.* at 139.

158 *See*, *e.g.*, *id.* at 58 (explaining in places like the Los Angeles County Jail there are "thousands of desperately sick people receiving minimal treatment for their mental health problems, being cared for by people with little training for that aspect of the job").

159 *See*, *e.g.*, *id.* at 80 (explaining some early 1800s reformers believed that "people who committed crimes weren't bad, but rather had been failed by various social institutions in the past: family church, school, and the like. This is a concept that we have begun to come back around to—understanding, for example, the role that childhood abuse or other early trauma can play in the development of mental illness and the likelihood that a person will commit a crime.").

162 Erin Collins, *Beyond Problem-Solving Courts*, 25 CARDOZO J. CONFLICT RESOL. 229, 234–235 (2023).

161 Tammy Seltzer, *Mental Health Court: A Misguided Attempt to Address the Criminal Justice. System Unfair Treatment of People with Mental Illnesses*, 11 PSYCH. PUB. POL. & L. 570, 582 (2005).

162 *Id.*

B. The Mismatched Elements: The Criminal Justice System Institutions and Actors are Not Appropriate for the Mentally Ill

In addition to a mismatched purpose, the criminal justice system contains mismatched elements under systems thinking to treat the mentally ill.[163]

The main institutions are jails, prisons, and courts. These institutions meld with the criminal justice system's punitive and public safety purposes, as the courts decide when to remove people from society and then when to house them in jails and prisons. Yet, "jails and prisons were never meant to be therapeutic environments."[164] The criminal justice system is "deeply fragmented and bureaucratic," which contains a "patchwork of institutions and entities–cops, courts, and correctional facilities . . . ."[165] Rather than providing meaningful care, jails and prisons often fail to address mental illness and may even worsen the condition.[166]

As applied to the mentally ill, one commentator aptly explained the insufficiency of the criminal justice system, which often leads to an adverse cycle:

> The traditional court model is ineffective because the consequences of a fine and probation do not work as a deterrent or punishment because most of the fines remain unpaid, and when given time served, the mentally ill are released to the street where they continue the cycle of arrest and incarceration for low level offenses. Moreover, those that suffer from severe and chronic mental illness usually do not have the capacity to successfully complete probation, which leads to a violation of the probation and further judicial intervention. [167]

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163 *See*, *e.g.*, ROTH, *supra* note 1, at 99 (questioning the efficacy of trying to "turn an institution designed to punish into one that is meant to cure.").

164 *Id.* at 107 (noting in 1972, a criminal justice professor stated that a "study of cases indicates that adequate medical care cannot be systematically provided in large prisons.").

165 *Id.* at 8.

166 *See*, *e.g.*, *id.* at 30, 45 (stating the mentally ill "receive far too little appropriate treatment" in the criminal justice system and practices like solitary confinement are "known to exacerbate mental illness and even cause it."); *id.* at 114 (finding that mental illness is "worsened by a jail or prison environment."); Sabah Muhammad, *Race, Mental Illness, and Restorative Justice: An Intersectional Approach to More Inclusive Practices*, 20 SEATTLE J. SOC. JUST. 159, 179–180 (2021) ("Although jails and prisons provide the most mental healthcare, they are among the worst places to receive those services.").

167 Carter, *supra* note 8, at 10.

The primary individuals involved in the current system are law enforcement, judges, lawyers, and probation officers. While all these individuals help fulfill the criminal justice system's purpose, they are less equipped to handle complex mental illnesses.[168] "For police, there is a disconnect between their training and the job they are asked to do."[169] Instead, most police training is focused on how to manage genuinely dangerous people, not solve mental health crises.[170] This is not a new revelation; this training discrepancy was noted as early as the 1800s.[171] Understandably, many of these actors in these criminal justice institutions see how the mentally ill are underserved and compassionately try to solve the problem within the criminal justice system by incorporating new elements. One of the most prominent, more recent elements is a problem-solving court called mental health courts ("MHC").[172] In MHCs, while still within the criminal justice system, individuals are diverted from regular processing and given special attention focused on their mental illness needs.[173] Inspired by the drug court model that began in 1989 in Florida, which addressed the proliferation of drug offenders within the system, the first mental health court also launched in Florida in 1997 to address the proliferation of the mentally ill in the system.[174] As of 2023, over two decades later, there were 655 mental health courts across the United States.[175]

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168 *See*, *e.g.*, ROTH, *supra* note 1, at 51 (noting the ideological discrepancy of how law enforcement officers making recommendations to psychologists about which patients are doing well and need more treatment); *see also id.* at 63 (quoting a deputy at the Los Angeles Twin Towers, "We're not the Department of Mental Health; we're not psychiatrists . . . . We as deputies . . . know how to arrest people. We know how to put people in jail. We don't know how to take care of people with mental illness.").

169 *Id.* at 236.

170 *Id.*

171 *Id.* at 84.

172 *See generally* Seltzer, *supra* note 161.

173 *See*, *e.g.*, KRISTEN DEVALL, CHRISTINA LANIER & LINDSAY J. BAKER, NAT'L. DRUG CT. RSCH. CTR., *PAINTING THE CURRENT PICTURE, A NATIONAL REPORT ON TREATMENT COURTS IN THE UNITED STATES* 33 (2022), https://ntcrc.org/wp-content/uploads/2022/08/PCP_2022_HighlightsInsights_DigitalRelease.pdf (noting MHC's "were developed to divert individuals with severe or persistent mental illness from traditional criminal justice processing")

174 Helen Zhou & Elizabeth B. Ford, *Analyzing the Relationship between Mental Health Courts & the Prison Industrial Complex*, 49 J. AM. ACAD. PSYCHIATRY L. 590, 594 (2021) ("MHCs were founded on important concepts that remain critical today [such as] the decriminalization of serious mental illness"); Carter, *supra* note 8, at 9–10 (describing the creation of the Florida specialized courts).

175 *Treatment Court Maps*, NAT'L TREATMENT CT. RES. CTR., https://ntcrc.org/maps/interactive-maps/ (last visited Aug. 27, 2025).

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While these courts have created positive change in individual lives, judges are lawyers by training, not mental health professionals.[176] For criminal cases, while a respect for mental health issues can play a part, especially in sentencing, judges are not expected to make decisions primarily on mental health grounds.[177] A judge is not likely to be a medical expert on mental health, which often intertwines complicated issues such as trauma, addiction, and abuse.[178] Yet, by creating mental health courts, we put judges in that role.

Thus, while "goals of these problem-solving courts are laudable, they have flourished because of systemic failures in public mental health and the criminal justice system."[179] Further, while "there is evidence that MHCs are effective in reducing recidivism, by allocating the majority of resources to the criminal justice system as a means of treatment, the state is cheating the mentally ill out of what they are entitled to: access to humane, adequate, and quality healthcare while retaining their dignity." [180] Even more, "[i]f it is true that the crimes of the mentally ill are manifestations of an underlying mental illness, a courtroom is not the appropriate environment to provide a long-term solution to this problem."[181]

With that in mind, it seems logical that mental health professionals should be in this role, not a judge. Mental health courts require a judge to make medical decisions, not legal ones. Long-term, this is a mismatched system.[182] "By placing the majority of our resources in the criminal justice system, we are placing the responsibility on those who are least equipped to provide treatment."[183]

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176 Sam Whitehead, *Well-Intentioned Mental Health Courts Can Struggle to Live Up to Their Goals*, NPR (Dec. 27, 2023), https://www.npr.org/sections/health-shots/2023/12/21/1219628362/well-intentioned-mental-health-courts-can-struggle-to-live-up-to-their-goals [https://perma.cc/USZ3-AYBG] (after being arrested for drug possession and enrolled in the mental health court, Florida man got sober, started taking medication for anxiety and depression, and built a stable life).

177 *See*, *e.g.*, *id.* ("'[J]udges often aren't trained to make decisions about participants' care, said Raji Edayathumangalam, senior policy social worker with New York County Defender Services. 'It's inappropriate,' she said. 'We're all licensed to practice in our different professions for a reason. I can't show up to do a hernia operation just because I read about it or sat next to a hernia surgeon.'").

178 *See*, *e.g.*, *id.*

179 Seltzer, *supra* note 161, at 570.

180 Carter, *supra* note 8, at 21.

181 *Id.*

182 Zhou & Ford, *supra* note 174, at 593 ("MHCs also give judges the power to mandate interventions related to mental illness, albeit aided by assessments from mental health professionals, for which they are not the most appropriate or qualified arbiters.").

183 Carter, *supra* note 8, at 21.

Instead, individuals with mental illness often need medical and social work professionals like psychiatrists and counselors.[184] As a result, going through a judge or attorney first is not the most logical approach.[185]

Even more, "[o]n a more systemic level, the deep judicial investment in this institutional response helps perpetuate the notion that the criminal legal system - and particularly the courts - are the best and most appropriate mechanism for responding to complicated social and structural issues."[186] As this Article shows, they are not.

Because the institutions and people in the criminal justice system cannot truly address the root causes of the mentally ill, it is no wonder that the results have been so poor. "[H]aving the police responding to a medical emergency sounds bizarre, especially if you replace *mental* illness with a physical one: who would even think of calling the police to help deal with diabetes or an asthma attack?"[187] As a Cook County, Illinois sheriff stated, "It's a system that makes absolutely no sense."[188]

C. A Lack of Upstream Thinking: The Criminal Justice System is Reactionary, Not Preventive

Moving to an upstream thinking focus, the criminal justice system is largely reactionary, not preventative.[189] Police officers continually pick up the same individuals who cycle through the system repeatedly without ever managing their mental illness.[190]

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184 *See id.*

185 *See id.*

186 Erin Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1625 (2021); *see also* Zhou & Ford, *supra* note 174, at 591 ("Some reforms may be framed as promoting justice but actually serve to expand and entrench the power and reach of the PIC [prison industrial complex]. For example . . . recent campaigns to make jails more therapeutic and humane may affirm the role of jails as major providers of health care.").

187 ROTH, *supra* note 1, at 234.

188 Matt Ford, *America's Largest Mental Hospital is a Jail*, ATLANTIC (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/.

189 *See*, *e.g.*, ROTH, *supra* note 1, at 201 (quoting the Oklahoma mental health commissioner, "[w]hen we have a [mental health] system that's underfunded and those people who are most ill are who receive services, the bulk of our money is tried up in community and inpatient care, which leaves very little money for prevention.").

190 *See*, *e.g.*, *id.* at 59 (commenting on what she saw at Twin Towers in Los Angeles, the author observed that "circumstances have conspired to leave [the mentally ill] in a vicious cycle of poor treatment, addiction, and incarceration."); *see also id.* at 210 (explaining that one who cycles in and out of jail is called a hot-spotter or superutilizer; a disproportionate amount of these individuals have mental illness, a substance use disorder, or both).

"This cycle is referred to as the 'revolving door' and describes the process whereby a mentally ill person commits a low-level, non-violent crime, is arrested, spends time in jail, is released, and is again arrested for committing another non-violent crime."[191] The numbers are staggering: "*[h]alf* of all arrests of people with mental illnesses are for nonviolent crimes such as trespassing or disorderly conduct."[192] "As a result of this 'revolving door,' correctional institutions [across the United States] became *de facto* mental health hospitals."[193]

There are many extreme, but not uncommon, examples of the revolving door. A New Yorker named Kyle Muhammad was picked up by police at least 18 times in the thirty-five years since his first diagnosis.[194] The police took him to the hospital sometimes, but other times he was arrested for low-level misdemeanors like petit larceny, jumping the turnstile, and criminal trespass.[195] Further, as mentioned previously, Floridian John Beragalia was arrested over 130 times and spent over 1,000 days in jail for minor charges such as petty theft and trespass. [196]

Managing mental illness effectively requires thinking ahead, stable treatment, and addressing root causes. The pervasiveness of the revolving door shows America has failed to employ upstream thinking for the mentally ill, so it is no wonder that the problem continues its endless cycle. Further, a clinician states that the most important aspect in effectively treating mental illness is stability.[197] Yet, where mental health care is available outside prison and jails, it's often focused on "crisis response," which is the opposite of stability.[198] By staying within the criminal justice system, the mentally ill are never stable. Instead, the instability of prison or jail takes time away from "crucial social anchors of job, home, family, and . . . treatment."" [199]

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191 Carter, *supra* note 8, at 9.

192 Seltzer, *supra* note 161, at 577; *see also* ROTH, *supra* note 1, at 210–11 (explaining that most of the charges for superutilizers are minor such as petit larceny and small possessions of controlled substances, and then the rest are usually low level misdemeanors like criminal trespass and turnstile jumping).

193 Carter, *supra* note 8, at 9 (emphasis added).

194 ROTH, *supra* note 1, at 217.

195 *Id.*

196 *Dream of Dignity*, supra note 10; *see also* Carter, *supra* note 8, at 32.

197 ROTH, *supra* note 1, at 211.

198 *Id.* at 280.

199 *Id.* at 211.

One of the main reasons why jails and prisons are the largest mental health repositories in America is failure to pay enough attention to—or attempt to resolve—why so many mentally ill individuals end up in jail or prison.[200] Accordingly, "[a]t times, building new and improved facilities for prisoners with mental illness seems to be almost a knee-jerk response to crisis."[201] Whether within or outside the criminal justice system, the theme is a lack of cohesive upstream thinking to assist the mentally ill.

Because many jurisdictions have no consistent or viable intervening process, mentally ill individuals often get arrested by the police for "nuisance crimes."[202] Even so, "[t]hese arrests fail to protect public safety when 'mental illness at the root of a criminal act is exacerbated by a system designed for punishment, not treatment.'"[203] Often, the first reaction is arrest, not diversion to a "treatment-oriented alternative."[204]

This is a significant problem. As seen before, many police officers are not trained to deal with mental health crises.[205] Instead, they are left to their own instincts, which is a poor way—and reactive way—to approach a tense situation.[206] As a result, "[a]t least one study has found that people with psychiatric disabilities are four times more likely than members of the general population to die in encounters with the police."[207]

Thus, to eliminate this often tragic result, the root causes of the problem must be addressed, not just the symptoms.[208] Examples of some root causes include community service gaps[209] and poverty.[210] Even more, "because the

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200 *See*, *e.g.*, Michael L. Perlin & Alison J. Lynch, *"Had to Be Held Down by Big Police": A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities*, 43 FORDHAM URB. L.J. 685, 687 (2016).

201 ROTH, *supra* note 1, at 107.

202 Perlin & Lynch, *supra* note 202, at 687.

203 *Id.* at 687–88.

204 *Id.* at 687.

205 *Id.*

206 *Id.*

207 *Id.* at 709–10*; see also* Sonya M. Shadravan et al., *Dying at the Intersections: Police-Involved Killings of Black People With Mental Illness*, 72 PSYCHIATRIC SERVS. 623, 623 (2021) ("25% of fatal police encounters involve persons with mental illness, and 76% of individuals killed in police encounters have had previous mental health treatment.").

208 *See* Seltzer, *supra* note 161, at 583.

209 *Id.*; *see also* Robert Bernstein & Tammy Seltzer, *Criminalization Of People With Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. REV. 143, 148 (2003) ("The best approach to the problem of criminalization is to create a comprehensive system of prevention and intervention. Mental health courts may provide immediate relief to criminal justice institutions, but alone they cannot solve the underlying systemic problems that cause people with mental illnesses to be arrested and incarcerated in disproportionate numbers.").

210 Collins, *supra* note 186, at 1617.

relationship between mental illness and criminal behavior is not causal, simply treating mental illness is unlikely to prevent future criminal behavior."[211] This is much like the homelessness problem described earlier: just giving a homeless individual immediate shelter will not solve their homelessness.[212] While immediate housing certainly helps, other issues at play can contribute to the individual's homelessness long-term, such as the ability to work, regulate addiction, and manage mental health.

This is where an unintended side effect of MHCs comes into play: they impede upstream thinking.[213] As one scholar aptly notes, "[b]y attempting to reduce criminal recidivism through psychiatric treatment, MHCs may perpetuate the disproven notion that serious mental illness is a primary cause of criminal behavior." [214] In turn, "[t]his has the potential to obscure the socioeconomic sources of that behavior, rooted in systemically racist and ableist policies in law enforcement and therefore limit momentum for reform related to race, wealth, health care, housing, employment, and education equity."[215] The detrimental effects of these sources negatively influence individual decision-making.[216]

Even more, incarceration of the mentally ill leads to further problems in the other systems: "[b]eyond the trauma of arrest and incarceration are the unintended collateral consequences, such as social stigmatization based on a criminal record; the resulting denial of housing, employment, and/or treatment services; and possibly deportation, even if charges are dropped."[217]

IV. A NEW PICTURE: MOVING THE MENTALLY ILL OUT OF THE CRIMINAL JUSTICE SYSTEM PERMANENTLY: INTERCONNECTING THE OTHER SYSTEMS

Now that the drawbacks of working within the criminal justice system to address decriminalization of mental illness are shown, this Article demonstrates how no one system is prepared to solve the problem but instead

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211 *Id.*

212 *See* STROH, *supra* note 64, at 15.

213 *See e.g.*, Zhou & Ford, *supra* note 174, at 592–93 ("MHCs have the appearance of progressive reform that confers benefits upon ambitious judges, but do nothing to address the root causes of inequality, structural racism, and ableism that leave individuals with serious mental illness marginalized in the first place.").

214 *Id.* at 592.

215 *Id.*

216 *See id.* at 593.

217 Seltzer, *supra* note 161, at 582.

requires interconnecting several systems through leverage points.[218] As a psychiatrist at New York's Rikers prison stated, "You've heard that the criminal justice system is the new mental health system. We need to accept that fact and then, obviously, try to change it."[219] This Article accepts this proposition and now attempts to modify it.

This Article's hypothesis argues that with more investment in the targeted systemic leverage points, then fewer mentally ill adults will end up in prison. This Article focuses on six leverage points.[220]

Leverage point 1 resides *between* the housing system, food system, and income system, which is the economic stability portion of SDOH. Leverage points 2, 3, 4, 5, and 6 reside *between* the mental health care system, physical health care system, interpersonal system, and criminal justice system, which are in the health care access, social community, and context SDOH, along with the education access SDOH.

All leverage points work together, however, which is why a sole focus on any one of the leverage points is unlikely to solve the decriminalization of mental illness problem. That is because "if we truly want to solve the problem, we must also address the social and economic risk factors . . . that so often come with it."[221]

As will be seen, some of the leverage points are time-sensitive and far upstream: if a leverage point is missed, the likelihood of criminalization of the mentally ill increases years later. If those time-sensitive leverage points are missed, however, some of the other later leverage points can alleviate the problem, but not as well as if the further upstream efforts had been implemented. This leverage point approach attempts to fix the shortcomings of the traditional mental health care system, which one scholar calls "a patchwork relic-the result of disjointed reforms and policies." [222]A basic visual of the leverage points and big-picture view is below.

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218 *See*, *e.g.*, ROTH, *supra* note 1, at 9, 35 (asserting that "practitioners of both law and medicine and others who are involved in mental illness and criminal justice . . . see that any true reform will require coordination and engagement on many levels and . . . many places. In an effort to manage the crisis of mental illness in the criminal justice system, jurisdictions have begun examining different inflection points, places where the trajectory of a person's engagement with the system could have gone differently.").

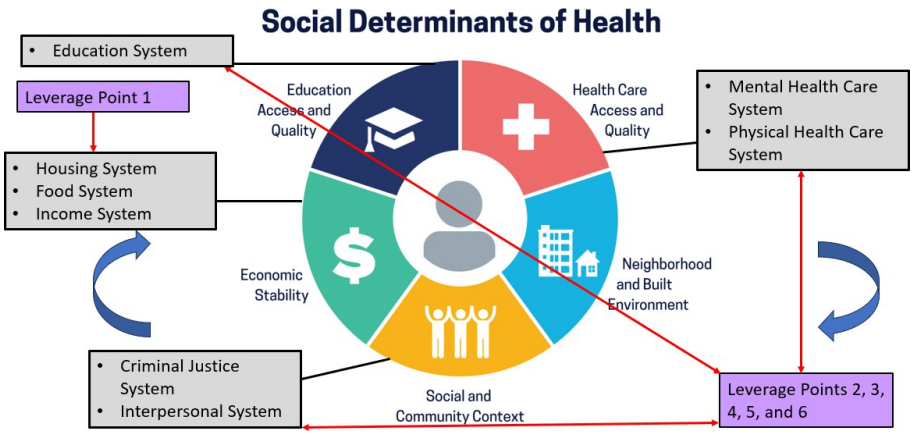
219 *Id.* at 100.

220 There are many possible leverage points, but this Article's concentration is purposely narrow, focusing on the points that provide the most promising and practical solutions for decriminalization of mental illness. Scholars have already identified practical ways to improve SDOH generally, but this Article assumes not every idea can be practically implemented. *See*, *e.g.*, Kirkbride et. al, *supra* note 23.

221 ROTH, *supra* note 1, at 227.

222 Carter, *supra* note 8, at 27–28.

Diagram 7: Social Determinants of Health, System Overlap, and Leverage Points[223]



All six leverage points will be described and applied to the Ohioan, Kristopher Garrett ("Garrett") as an example, and combined to show how the leverage points interconnect. While other scholars developed similar frameworks and interconnected leverage points for showing how SDOH can be addressed, they do not specifically focus on the decriminalization of mental illness goal or intertwine systems thinking and upstream thinking under a health justice lens.[224] As a result, this Article tailors its focus to those aspects.

A. Basic Needs: Housing, Food, and Income Needs: Leverage Point 1

The most basic and stabilizing leverage point is satisfaction of an individual's housing, food, and income needs. This first leverage point is directly in the economic SDOH, which is subdivided into the housing, food, and income systems under systems thinking. They are all interconnected, however, and must all be satisfied to achieve the best results.

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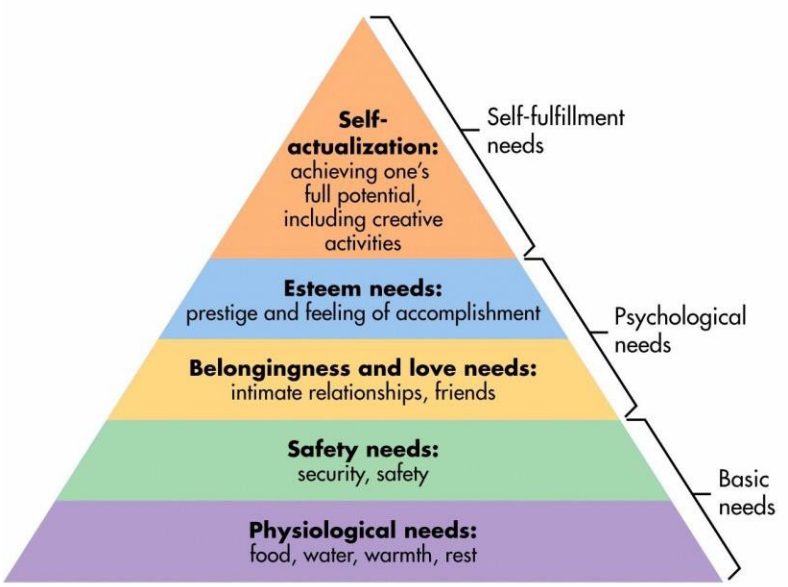
223 For basic graph, *see Social Determinants of Health*, *supra* note 36. The eight systems and leverage points are the author's own creation.

224 *See, e.g.*, RUTH BELL, ANGELA DONKIN & MICHAEL MARMOT, TACKLING STRUCTURAL AND SOCIAL ISSUES TO REDUCE INEQUITIES IN CHILDREN'S OUTCOMES IN LOW TO MIDDLE-INCOME COUNTRIES 6 (2013); Marco Thimm-Kaiser, Adam Benzekri & Vincent Guilamo-Ramos, *Conceptualizing the Mechanisms of Social Determinants of Health: A Heuristic Framework to Inform Future Directions for Mitigation*, 101 MILBANK Q. 486, 489–490 (2023).

Indeed, leverage point 1 satisfies the "basic needs" of Abraham Maslow's ("Maslow") well-known hierarchy of human needs.[225] Without this part of the pyramid fulfilled, criminalization of the mentally ill becomes extremely likely because it is the foundational piece for every individual. If an individual is constantly worried about where to sleep, what to eat, and how to obtain income, the individual does not have sufficient energy to spend on mental health, which leads to tunneling and reactivity under upstream thinking. Indeed, "living conditions may be as important as or more important than the disease in shaping behavior."[226] It is no wonder then that the mentally ill are frequently arrested for "crimes of survival" such as retail theft (to find food or supplies) or breaking and entering (to find a place to sleep)."[227]

Diagram 8: Maslow's Hierarchy of Needs[228]



If, however, those basic needs are fulfilled, an individual's "psychological needs" can better be addressed, which are next in the

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225 Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLYPSYCHOLOGY (Jan. 24, 2024), https://www.simplypsychology.org/maslow.html [https://web.archive.org/web/20250905064104/https://www.simplypsychology.org/maslow.html].

226 ROTH, *supra* note 1, at 227 (a social worker stated mental illness "causes [people who have it] to be poor").

227 Ford, *supra* note 190.

228 *See* McLeod, *supra* note 227.

pyramid.[229] Interestingly, "[f]or those with mental illness, charges of drug possession can often indicate attempts at self-medication," which indicates a failure to meet psychological needs.[230] "Even the drugs of choice [can] connect to what the mental illness is.[231] People with severe depression might use cocaine "to lift their mood."[232] Those who hear voices and have schizophrenia or bipolar disorder often turn to heroin to regulate their sleep.[233] Marijuana use "is just constant for kids with ADD and depression."[234]

As the SDOH analysis showed earlier, there is a proven connection between economic issues such as food insecurity, housing issues, and lack of income, causing negative mental and physical health outcomes.[235] The National Alliance on Mental Illness ("NAMI") has long stated that a better mental health care treatment system would contain not only medical treatment, but also supported housing and employment.[236] Everything is connected; the situation can deteriorate like cascading dominoes: "[f]or people with bipolar disorder, schizophrenia, or other serious mental illnesses, losing access to treatment can lead to a loss of employment [and] housing."[237]

Starting with the importance of food, "[f]ood insecurity is closely connected to poor health, including an array of concerning conditions, such as obesity, low birthrate, iron deficiency, and developmental problems including aggression, anxiety, depression, and attention deficit disorder."[238] In general, children in poverty are not only food insecure but are also more likely to suffer from behavior disorders.[239]

As for the importance of housing, lack of stable and quality housing causes stress, which can lead to poor mental health outcomes.[240] For children,

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229 *See id.*

230 Ford, *supra* note 190.

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *See*, *e.g.*, NAT'L ACADS. SCIS., ENG'G & MED., FEDERAL POLICY TO ADVANCE RACIAL, ETHNIC, AND TRIBAL HEALTH EQUITY 133–34 (Sheila P. Burke, Daniel E. Polsky & Amy B. Geller eds., Nat'l Acads. Press 2023); *see also* Thimm-Kaiser, Benzekri & Guilamo-Ramos, *supra* note 226, at 489–490.

236 ROTH, *supra* note 1, at 203 (relying on NAT'L ALL. MENTAL ILLNESS, GRADING THE STATES 2009: A REPORT ON AMERICA'S HEALTH CARE SYSTEM FOR ADULTS WITH SERIOUS MENTAL ILLNESS (2009), https://www.nami.org/wp-content/uploads/NAMI_GTS2009_FullReport.pdf).

237 Ford, *supra* note 190.

238 Cannon, *supra* note 27, at 220.

239 *See id.* at 221.

240 *See id.* at 245.

this lack can cause "developmental delays, anxiety, depression, and even death. Even more, research suggests that mothers are more likely to be depressed even years after enduring an eviction."[241] As a result, addressing housing is an important stabilizing factor.[242]

Income is also crucial. Having repeated incarcerations and hospitalizations can make it hard to keep a stable job.[243] About "80 percent of people who qualify for disability payments because of a mental illness are unemployed."[244] Further, housing and income issues can become intertwined. For example, homelessness is a higher risk for mentally ill individuals because they do not have regular employment, which impedes a stable income stream, but affordable housing is also often unattainable because the common voucher program—Section 8—is underfunded, thereby decreasing availability.[245] Everything is connected in a systemic catch-22 that is hard to escape.

With this in mind, "people with mental illness [often] 'engage in offending and other forms of deviant behavior not because they have a mental disorder but because they are poor.'"[246] The homeless population is one with high incidences of both mental illness and substance abuse, which is a perfect storm leading to small crimes like loitering, criminal trespass, public indecency, and petty theft, which then brings them into the revolving door of the criminal justice system.[247] If their housing, food, and income components are satisfied, then they can become economically stable, which allows for movement upward in Maslow's pyramid.

As an example, considering food, housing, and income, Garrett suffered challenges with all three at various times in his life. As a baby, Garrett's maternal grandmother called Children Services on her daughter because Garrett was hungry.[248] His grandmother often visited because Garrett was not being fed.[249] Based on his mother's neglect, Garrett was removed from her care at 3 months old, and then cycled through 5 or 6 foster care placements before the age of 2, which shows intense housing instability at a formative age in Garrett's psychological development.[250] Later in his childhood, from

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241 *Id.* at 242.

242 ROTH, *supra* note 1, at 211.

243 *Id.* at 216.

244 *Id.* at 227.

245 Carter, *supra* note 8, at 10, 26.

246 Perlin & Lynch, *supra* note 202, at 693.

247 *See* Kevin Y. Xu et. al., *Mental Illness and Violence Among People Experiencing Homelessness: An Evidence-Based Review*, 121 MO. MED. 14, 16 (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC10887459/pdf/ms121_p0014.pdf.

248 State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 283–90.

249 *Id.*

250 *See id.* at ¶ 28–31.

age 13 to 15, Garrett was again removed from his mother's care and cycled through 4 or 5 more foster care placements.[251] Further, at one point, both Garrett and his mother were homeless for about a year.[252]

Regarding income, as an adult, one of Garrett's stressors with his ex-girlfriend was his struggle to pay child support, which was $600 a month.[253] Garrett wanted to start a food truck business, but on top of child support, $485 for rent and other expenses, he struggled.[254] Ultimately, in both childhood and adulthood, Garrett's economic stability SDOH was strained. If these economic challenges were adequately addressed through leverage point 1, this may have helped ease his mental stress.

B. Psychological Needs: Maternal Support, ACE Test, and Mentorship: Leverage Points 2, 3, and 4

The next leverage points focus on the psychological needs of the Maslow pyramid. The second leverage point is providing early maternal support, the third leverage point is the usage of a diagnostic test called Adverse Childhood Experiences ("ACE"), and the fourth leverage point is ensuring every child has a stable adult mentor. These leverage points interconnect various systems within the SDOH domains and will be described under each leverage point.

These leverage points were chosen because they lay the foundation for the healthy psychological development of an individual. By the time the mentally ill arrive at jail or prison, like Garrett, it is often too late. These leverage points prevent mental health problems for the future from the beginning of a child's life, which is leverage point 2, but also envision addressing emerging psychological problems in later childhood before it is too late, which are leverage points 3 and 4. While leverage point 1 can be implemented at any time—though ideally first—these latter leverage points are incredibly time-sensitive. To work best, they should all be done before a child reaches 17.

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251 *Id.* at ¶ 23–27.
252 *Id.*
253 *Id.* at ¶ 6–14.
254 *Id.* at ¶ 15–22.

1. Maternal Support: Leverage Point 2

The second leverage point is dedicated early maternal support, which resides outside of, and interconnects, the interpersonal system, physical health care system, mental health care system, and education system. It also overlaps with the health care access and quality, education access and quality, and social and community context SDOH domains.

The importance of a mother's well-being is crucial so she can positively affect her own child's physical and mental health.[255] Without it, negative health outcomes for her child are high.[256] In particular, if the mother is stressed during the prenatal phase, such as financial or relationship challenges, the risk of her child experiencing mental health problems after birth, such as anxiety, depression, and borderline personality disorder, increases.[257]

There are promising initiatives that show addressing maternal health helps, however. For example, the Nurse-Family Partnership (NFP), which is a non-profit founded in the 1970s, focuses on having nurses visit first-time moms from the beginning of pregnancy to the child's second birthday.[258] The nurse acts as a mentor, helping the mother with parenting, the basics of caring for a child, and providing support for the mother on how to take care of herself.[259]

Research shows how the program prevents mental illness, psychological issues, and incarceration of both mother and child.[260] For the mother, statistics show up to a 64% decrease in maternal depression or mental health problems, and for the child, a 42% decrease in child aggressive and defiant behaviors.[261] Other statistics show a 59% reduction in arrests among children and 72% fewer convictions of mothers.[262]

For Garrett's mother, a program like NFP could have been extremely helpful. When Garrett was born, his mother was 16 years old.[263] His mother started running away from home at age 14.[264] While his mother stayed at

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255 This Article does not intend to undermine the importance of fathers. Instead, this Article acknowledges the reality that mothers biologically carry a child, which has different effects on a child, and she often becomes a crucial influence in a child's life generally as a result. Nevertheless, subtracting the biological components, this leverage point can also apply to fathers if they are present in a child's life.

256 *See* Kirkbride et al., *supra* note 23, at 63.

257 *See id.* at 61.

258 *See* NURSE-FAM. P'SHIP, NURSE-FAMILY PARTNERSHIP OVERVIEW (2023), https://changent.org/wp-content/uploads/2024/09/Nurse-Family-Partnership-Program-Overview.pdf; HEATH, *supra* note 39, at 194–98.

259 HEATH, *supra* note 39, at 195.

260 *See* NURSE-FAMILY P'SHIP, *supra* note 260.

261 *See id.*

262 *See id.*; NURSE-FAMILY P'SHIP, NURSE-FAMILY PARTNERSHIP BENEFITS AND COSTS (2020), https://www.santacruzhealth.org/Portals/7/Pdfs/NFP/NFP-Benefits-and-Costs.pdf.

263 State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 283–90.

264 *Id.*

home with Garrett's grandmother during the pregnancy, his mother continued to run away after Garrett was born.[265] Garrett's grandmother told her daughter that Garrett "was a baby and needed a stable environment."[266] Yet, as mentioned earlier, Garrett's grandmother contacted child services due to her concerns that her daughter could not sufficiently care for Garrett.[267] At the trial level, the judge wrote the evidence showed Garrett's mother "was an absentee parent, at best [she] gave priority to her needs and the needs of her significant others at the expense of her children."[268] Garrett described her as "not a fit mom."[269]

Thus, on top of facing stress in the economic SDOH, Garrett faced stress in the social and community context SDOH because he lacked a healthy maternal figure. Even more, Garrett's biological father was in prison for his entire childhood, thereby leaving a severe parental gap that detrimentally affected his psychological development.[270] If Garrett had a healthier mother, he may have fared better psychologically and not have suffered from reactive detachment disorder ("RAD").

2. ACE Test: Leverage Point 3

A third leverage point takes the form of a diagnostic test called Adverse Childhood Experiences ("ACE"), which resides outside of, and interconnects, the physical health care system, mental health care system, interpersonal system, and education system.[271] Because it incorporates similar concepts, the ACE test can serve as a quantitative assessment of what SDOH are deficient in a child's life, thereby allowing early intervention.[272]

ACEs "are preventable, potentially traumatic events that occur in childhood (age 0–17 years)."[273] "The reality that traumatic childhood experiences are directly linked to negative health [mental or physical] outcomes has been known and widely recognized in public health and clinical

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265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.* at ¶ 306–13.

270 *Id.* at ¶ 283–90, ¶ 306–13 ("Garrett's father was in prison the entire time Garrett was growing up.").

271 *See, e.g.*, *Take the ACE Quiz–And Learn What It Does and Doesn't Mean*, HARV. UNIV., CTR. ON DEV. CHILD, https://developingchild.harvard.edu/media-coverage/take-the-ace-quiz-and-learn-what-it-does-and-doesnt-mean/ (last visited Sep. 12, 2024).

272 *See*, *e.g.*, Jason A. Yaun et. al, *Whole Child Well-Child Visits: Implementing ACEs and SDOH Screenings in Primary Care*, 61 CLINICAL PEDIATRICS 542 (2022).

273 Derrick W. Gervin et. al, *Centers for Disease Control and Prevention Investments in Adverse Childhood Experience Prevention Efforts*, 62 AM. J. PREVENTIVE MED. 1, 1 (2022).

literature for more than two decades." [274] According to Dr. Robert Block, former President of the American Academy of Pediatrics, ACEs represent the "single greatest unaddressed public health threat facing our nation today." [275] While around 61 percent of the general population has at least one ACE, 97 percent of people in prison have at least one ACE.[276] As connected to SDOH, "[c]hildhood adversity is an especially well-characterized social determinant of mentally ill health."[277]

a. ACE Test Background

The scientific connections leading to the ACE test were developed over the course of the mid-1980s and throughout the 1990s.[278] From 1995 to 1997, Dr. Vincent Felitti ("Felitti") of Kaiser Permanente, and others, conducted the first formal ACE study.[279] The first study examined how childhood trauma may cause negative effects in adulthood.[280] The original ACE questionnaire had ten questions, which can be grouped into areas addressing abuse (emotional, sexual, and physical), neglect (emotional and physical), and household dysfunction (mental illness, incarcerated relative, interpersonal violence, substance abuse, and divorce).[281] These were the "conventional" ACEs.[282] Ultimately, "[t]he [original] ACE study found a *direct* link between childhood trauma and adult onset of chronic disease, *incarceration*, and employment challenges."[283]

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274 *See* Todd J. Clark et. al, *Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience*, 90 U. CIN. L. REV. 857, 857 (2022).

275 *Id.*

276 Susan Nembhar & Natalie Lima, *To Improve Safety, Understanding and Addressing Link between Childhood Trauma and Crime Is Key*, URB. INST. (Aug. 9, 2022), https://www.urban.org/urban-wire/improve-safety-understanding-and-addressing-link-between-childhood-trauma-and-crime-key.

277 *See* Kirkbride et al., *supra* note 23, at 62.

278 *See generally* Vincent J. Felitti, *The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead*, 6 PERMANENTE J. 1 (2002); VAN DER KOLK, *supra* note 94, at 145–49.

279 Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 245–58 (1998).

280 *See The Original ACE Study,* NHTTAC, H.H.S., https://nhttac-stage.acf.hhs.gov/soar/eguide/stop/adverse_childhood_experiences [https://web.archive.org/web/20250707145118/https://nhttac-stage.acf.hhs.gov/soar/eguide/stop/adverse_childhood_experiences] (last visited Sep. 15, 2025).

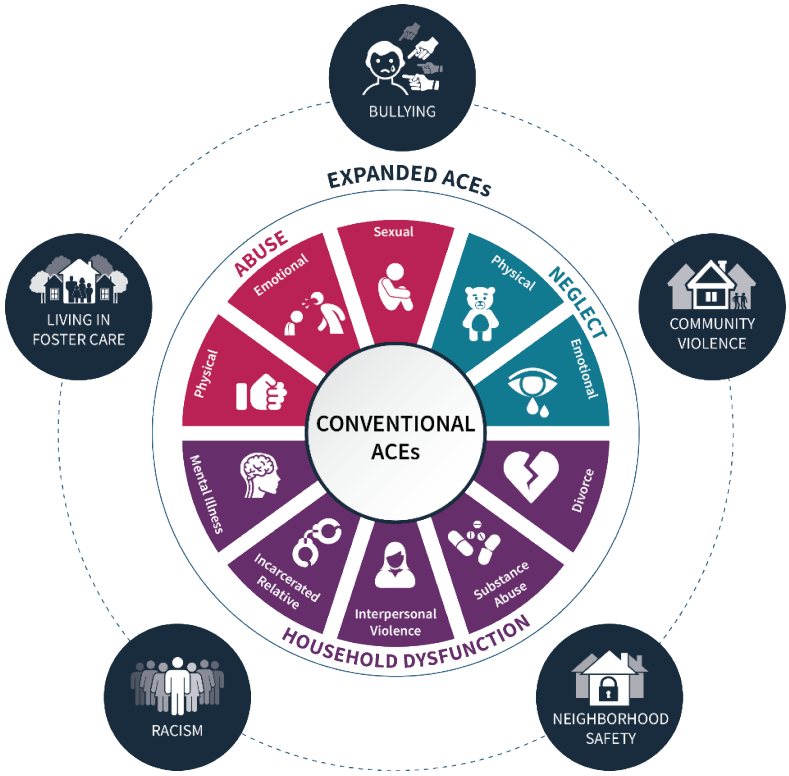
281 *See generally* Felitti et al., *supra* note 281.

282 *See The Original ACE Study, supra* note 282.

283 *See id.* (emphasis added).

By 2015, the original ACE test expanded its diagnostic criteria. [284] The additions were bullying, community violence, neighborhood safety, racism, and living in foster care.[285] The diagram below shows the "conventional" ACEs and then the "expanded" ACEs.

Diagram 9: Conventional and Expanded ACE Chart[286]



Garrett's ACE indicators are extremely troubling and, unfortunately, predictable. Based on the evidence from the trial court and the appellate court opinion, calculating his score resulted in a 7 out of 10 "conventional" ACEs, but these could be higher if more evidence were available. For example, Garrett experienced ACEs such as an incarcerated father, a drug-addicted

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284 Peter F. Cronholm et al., *Adverse Childhood Experiences: Expanding the Concept of Adversity*, 49 AM. J. PREVENTIVE MED. 354, 354–61 (2015).

285 *Id.*

286 *The Original ACE Study, supra* note 282.

mother, emotional and physical abuse by his mother or stepfather, regular abandonment by his mother, and food insecurity.[287] Out of the "expanded" ACEs, more evidence would be needed, but Garrett met at least 1 out of 5 "expanded" ACEs. He lived in foster care multiple times. [288]

b. How The ACE Test Supports a Different Approach for the Mentally Ill

ACEs provide a convincing explanation that "traumatic events are not innate weaknesses in capacity, but rather things that happen to a person within the environments where they are."[289] Despite millions of dollars' worth of research poured into studying genetic patterns of mental health, there is still a failure to find consistent genetic links, even for schizophrenia.[290] Instead, there seem to be other risk factors at play causing later mental illness: "[p]overty, unemployment, inferior schools, social isolation [and] substandard housing all are breeding grounds for trauma."[291] "Trauma breeds further trauma; hurt people hurt other people."[292]

If the risk factors can be addressed upstream, this further supports solutions for the mentally ill that are *outside* the criminal justice system, which is punitive and reactive.[293] While 25 percent of children have at least one ACE or trauma before becoming an adult, 40-75 percent of low-income children experience multiple traumas or ACEs.[294] As an ACE score rises, injection use, alcoholism, and chronic depression in adulthood also rise.[295] As the ACE researcher Felitti states, for adults "we may be treating today experiences that happened fifty years ago."[296]

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287 *See*, *e.g.*, State v. Garrett, 2019-Ohio-2672, 140 N.E.3d 16 (12th Dist.) (stating Garrett's aunt stated Garrett "was in and out of her life due to emotional and physical abuse at the hands of [Garrett's mother]" and his mother was an "absentee parent" leading to many foster care placements); State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 23–27, ¶ 283–90, ¶ 306–13 (stating "Garrett's stepfather struck him with a belt in December 2006" and Garrett's maternal grandmother once called Children Services because "Garrett was dirty, had a diaper rash, and was hungry" and "Garrett's father was in prison the entire time Garrett was growing up").

288 *Garrett*, 2019-Ohio-2672; *Garrett*, 2022-Ohio-4218, at ¶ 23–27.

289 David Dante Trout, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601, 609 (2018).

290 *See*, *e.g.*, VAN DER KOLK, *supra* note 94, at 153–54.

291 *Id.* at 350.

292 *Id.*

293 *See*, *e.g.*, Nembhar & Lima, *supra* note 278 ("ACEs are linked to negative health outcomes, lifelong instability, and increased risk of future violent victimization and perpetration, but when criminal legal system leaders develop crime reduction strategies, they often focus only on deterring crime or appealing to rational choice.").

294 Trout, *supra* note 291, at 610.

295 VAN DER KOLK, *supra* note 94, at 148.

296 *Id.*

Sadly, Garrett was exposed to multiple traumatic events as a child. In addition to his already high ACEs, Garrett experienced at least two traumatic events. First, when Garrett was 3 years old, his little brother died of sudden infant death syndrome ("SIDS").[297] Garrett's grandmother stated that Garrett "seemed traumatized" after his little brother died.[298] When Garrett was 5 years old, medical negligence caused a traumatic brain injury to his little sister, and she has since remained in a vegetative state.[299] Garrett's mother never sought counseling for Garrett for these traumas; she was dealing with her own pain.[300] Ultimately, based on the ACE test and traumas, Garrett's SDOH were severely stressed.

There is no reason this must continue; society can treat these issues in childhood. Much like mandating car seats in the 1980s saved over 10,000 children's lives in the future, investing resources into diagnosing and reversing the effects of ACEs can likely prevent many adults from either becoming mentally ill or later cycling through the criminal justice system at all.

c. Why Preventive Measures in Childhood Are So Important for A Healthy Adulthood

Preventive measures in childhood are crucial because exposure to trauma and stress can physically change the brain, which is extremely difficult to address in adults once the changes set in.[301] "Traumas frequently result in stress, and exposure to constant stress can lead to an overstimulated amygdala, underdeveloped hippocampus, and subsequently, an underdeveloped prefrontal cortex, which influences decision making."[302] As a result, because the prefrontal cortex helps regulate emotion, those suffering damage in this region have an impaired ability to control their emotions.[303] Unsurprisingly, then, those who were exposed to violence as children are at higher risk of perpetrating violence themselves. [304]

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297 *See* State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 23–27.

298 *Id.* at ¶ 283–90.

299 State v. Garrett, 2019-Ohio-2672, 140 N.E.3d 16 (12th Dist.).

300 *Id.*

301 VAN DER KOLK, *supra* note 94, at 148 ("As children matured, they didn't "outgrow" the effects of their early experiences . . . Felitti [noted] "'Traumatic experiences are often lost in time and concealed by shame, secrecy, and social taboo.' [T]he study revealed that the impact of trauma pervaded these patients' adult lives.").

302 Nembhar & Lima, *supra* note 278.

303 *Id.*

304 *See id.*

At the juvenile level, "difficulties in neural and cognitive functions, such as those associated with ACEs, have often been found in young people who commit crimes or engage in delinquent activity."[305] "[T]he child witness who fears, sees, and relives violence may react to the experience with post-traumatic stress disorder ("PTSD") or other conditions that potentially re-wire her brain, impair cognitive abilities, imperil learning, and condition her body for an array of life-threatening addictions and illnesses over time." [306]

For example, an inmate from Cook County, Illinois reported that he witnessed his mother being murdered when he was young.[307] As an adolescent, he received a PTSD and bipolar disorder diagnosis. [308] Over his adult years, he went to prison for drug-related offenses and drifted in and out of the hospital when he felt suicidal.[309]

Testimony from Garrett's defense expert, a forensic psychologist named Dr. Reardon, hints at the effects Garrett's childhood had on his ability to function normally. Dr. Reardon argued that Garrett's psychological conditions were "a consequence of some of the severe neglect and abuse that he was subjected to during his infancy, childhood, and adolescence."[310] For one, bipolar disorder results in "a dysregulation of energy, of thought, of emotion."[311] Additionally, RAD "does not allow "normal attachment people in their environment, typically mom and dad initially, maybe grandparents."[312] Dr. Reardon testified that Garrett is a "poster child" for RAD "based on his lengthy [child services] history, lack of family stability, the deaths of siblings . . . in early childhood, and general lack of stable attachment figures."[313]

In Garrett's trial, the state's medical expert agreed with Dr. Reardon's RAD diagnosis but disagreed with the doctor's assessment at the time Garrett killed his daughter.[314] On the other hand, Dr. Reardon determined that Garrett "was in an acute dissociative episode" when he killed his daughter, which resulted in "a severe disruption of the normal integration of consciousness, memory, emotion, and behavior."[315]

While unknown what Garrett's actual mental state was during that specific time, however, as Dr. Reardon ultimately concluded, "that on

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305 *Id.*
306 Trout, *supra* note 291, at 603.
307 Ford, *supra* note 190.
308 *Id.*
309 *See id.*
310 State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 23–27.
311 *Id.*
312 *Id.*
313 State v. Garrett, 2019-Ohio-2672, 140 N.E.3d 16 (12th Dist.).
314 *Garrett*, 2022-Ohio-4218, at ¶ 28–31.
315 *Id.*

looking at Garrett's history, there was 'no mystery to how he got to where he got to.'"[316] The failure to address Garrett's RAD and dysfunctional childhood situation inhibited his healthy psychological development, which created a situation ripe for something to go astray, which it horribly did.[317] While Garrett's adult behavior is in no way excused, and his crimes were horrific,[318] rectifying negative ACEs leading to mental health and behavioral problems in childhood appears to be a common-sense approach to avoiding such tragic results as an adult.

d. How High ACEs and Unresolved Trauma Leads to Juvenile Delinquency and Why We Should Change

Unsurprisingly, as hinted earlier, childhood trauma often leads to entering the criminal justice system as juveniles and adults.[319] As juveniles, those children who have at least one "report of abuse or neglect are 47 percent more likely to participate in delinquent acts." [320] Further, an overwhelming 90 percent of juvenile offenders have experienced a traumatic event in their childhood, and 30 percent meet the requirements for PTSD.[321] Even more, with each additional ACE for youths, the risk of their violence increases by 35 to 144 percent.[322] Structural racism causes children of color to often experience more ACEs as well.[323]

As for adults, after being convicted in criminal court, a San Diego outpatient clinic gave normative male adults and then four different offender groups of male adults—nonsexual child abusers, domestic violence offenders, sexual offenders, and stalkers—the ACE test. [324] The offender group had 4 times as many ACEs as the normative group.[325]

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316 *Id.* at ¶ 23–27.

317 *Id.* at ¶ 23–31.

318 *Id.* at ¶ 333–40 ("Garrett's decision to murder [sic] Nicole and [Kristina] was senseless, horrific, and terrible.").

319 *See* James A. Reavis et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live before We Possess Our Own Lives?*, 17 PERMANENTE J. 44 (2013).

320 Christopher Freeze, *Adverse Childhood Experiences and Crime*, FED. BUREAU INVESTIGATION L. ENF'T BULL. (Apr. 9, 2019), https://leb.fbi.gov/articles/featured-articles/adverse-childhood-experiences-and-crime.

321 *Id.*

322 *See* Reavis et al., *supra* note 321, at 45.

323 *See generally* Donte L. Bernard et al., *Racial Discrimination and Other Adverse Childhood Experiences as Risk Factors for Internalizing Mental Health Concerns among Black Youth*, 35 J. TRAUMA STRESS 473 (2022).

324 Reavis et al., *supra* note 321, at 44.

325 *Id.* at 47.

It is not surprising, then, that children with numerous ACEs face significantly higher risks of ending up in the criminal justice system.[326] As they cycle through the system, as children and adults, their trauma is often ignored, which never solves the lasting negative effects that trauma causes.[327] Essentially, many of these children are set up for failure by a failure to employ upstream thinking.

With this in mind, juveniles are often in need of psychological support, not purely punitive measures.[328] When viewing ACEs this way, it reveals evidence that factors outside young people's control are causing them to act out, and societal policies are significantly at fault.[329] If ACEs are addressed in childhood, then these children are more likely to succeed as adults. For example, upstream thinking might involve providing parents and schools with necessary resources and investing in policies that improve socioeconomic aspects such as education and housing, which may give children the stability they need to develop healthily, thereby reducing involvement with the criminal justice system.[330]

Interestingly, Garrett never entered the criminal justice system, either as a juvenile or an adult, until the time of the murders.[331] Dr. Reardon testified that "people generally don't start their criminal career with an offense like this."[332] It appears the psychological effect of his upbringing was delayed, but still, Garrett was quite young when the murders occurred, which was at age 24. Regardless, addressing the ACE problems early will hopefully keep individuals with long trauma histories out of prison, and ultimately, from causing further pain and even death to others like Garrett.[333]

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326 Belinda Astridge et al., *A Systematic Review and Meta-Analysis on Adverse Childhood Experiences: Prevalence in Youth Offenders and Their Effects on Youth Recidivism* 140 CHILD ABUSE & NEGLECT 1 (2023).

327 *Most Justice-Involved Youth Affected by Traumatic Childhood Experiences*, JUST. POL'Y INST. (July 7, 2010), https://justicepolicy.org/press/most-justice-involved-youth-affected-by-traumatic-childhood-experiences/.

328 *Id.*

329 *See*, *e.g.*, Trout, *supra* note 290, at 603–05 (considering the cause of trauma, "children's reactions to complex trauma represent the natural symptomatology of severe structural inequality - legally sanctioned environments of isolated, segregated poverty." Relatedly, "[s]tructural denials of opportunity come about through the decisions and policies of institutions - e.g., schools, housing policy, transportation spending, and law enforcement.").

330 Reavis et al., *supra* note 321.

331 State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 227–32.

332 *Id.*

333 *See*, *e.g.*, ROTH, *supra* note 1, at 151, 159 (describing the case of Jamie Wallace, a mentally ill man who killed his own mother, yet was a "victim of the system" himself).

3. Integrating Leverage Point 3 with 2

Leverage point 3 is also an ideal spot to integrate leverage point 2 for the mother. Because negative interpersonal patterns are often intergenerational, having the mother take the ACE test will demonstrate where issues may arise and show healthier alternatives.[334] Indeed, in state prisons, about 75 percent of women in have a mental illness when compared to 55 percent for men.[335] This is partly because "women in the criminal justice system are far more likely to have experienced trauma, physical abuse, and sexual abuse and/or to have substance use problems, all conditions that are closely connected to mental illness."[336]

While there is not enough evidence in the legal record to fully analyze Garrett's mother's ACEs, it would not be surprising if her ACEs were also high. As mentioned earlier, hurt people hurt other people.[337] Trauma breeds trauma.[338] Along with maternal education, Garrett's mother may have benefited from learning and healing her own trauma.

4. Mentorship: Leverage Point 4

Finally, leverage point 4 is the presence of one healthy adult mentor for every child. If a parent is healthy, this is the ideal mentor, but many parents are not. It then falls to another adult to step up – whether a family member, friend, coach, teacher, or mentor through an organized program.[339] Without healthy adult role models, many children face negative consequences.[340] With healthy role models, however, a child is more likely to thrive in the long term, especially psychologically and emotionally.[341] This supports the reversal of the ACE effect and epitomizes upstream thinking.

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334 *See*, *e.g.*, Trout, *supra* note 291, at 603 n.5 (stating the "effects [of trauma] can linger intergenerationally through the descendants of Holocaust survivors and African-American slaves.").

335 ROTH, *supra* note 1, at 113.

336 *Id.* at 113–14.

337 *See id.* at 113.

338 *See id.*

339 *See, e.g.*, BIG BROS. BIG SISTERS, https://www.bbbs.org (last visited Sept. 6, 2025); *Becoming a Man*, YOUTH GUIDANCE, https://www.youth-guidance.org/bam-becoming-a-man/, (last visited Sep. 6, 2025).

340 *See*, *e.g.*, Atif Hamna et al., *The Impact of Role Models, Mentors, and Heroes on Academic and Social Outcomes in Adolescents*, 14 CUREUS 2, 2 (2022) ("Just as role models can have a positive influence on adolescent development, role models who participate in socially inappropriate and illegal behaviors can have a negative effect. These "negative role models" have been linked to externalizing behaviors such as violent and nonviolent delinquency, internalizing behaviors such as feelings of anxiety and depression, and substance use behaviors.").

341 *See*, *e.g.*, *id.* ("An association between having a role model with positive outcomes, such as elevated self-esteem, performance in school, and resilience has been established previously. Studies have

For example, "juveniles who have had productive and protective relationships with adults—such as those often exemplified by caring and involved law enforcement officers—are 13 percent less likely to engage in crime."[342] Young people deserve at least one healthy role model.[343] As one esteemed psychiatrist argued, "[b]eing able to feel safe with other people is probably the single most important aspect of mental health; safe connections are fundamental to meaningful and satisfying lives."[344]

The importance of a mentor can be shown in the example of Anthony Ramirez-Di Vittorio ("Ramirez-Di Vittorio"), who grew up in southwest Chicago.[345] If Ramirez-Di Vittorio took the conventional ACE test, he would likely have several because his parents divorced, and his brother was violent, used cocaine, and was arrested.[346] He stated, "I was a good kid in an at-risk environment . . . [but] [m]y saving grace was my mom, who raised me with beautiful values—to respect people, be nice."[347]

In addition to his mother's support, Ramirez-Di Vittorio credits a male mentor, a martial arts instructor he met at age 23, as crucial in his personal development.[348] The instructor challenged and affirmed Ramirez-Di Vittorio: "[h]aving a male role model filled a hole that [he] felt in his life, and it sparked a search for meaning and identity." Furthermore, it led to the creation of his program: BAM.[349]

Garrett appeared to have some mentors. For one, Dr. Reardon testified that Garrett's years playing football in high school and his relationship with his coach were "the healthiest period of adolescence" for Garrett.[350] Additionally, during this time, the mother of a fellow football player provided refuge for Garrett at her home.[351] Calling herself Garrett's godmother, she considered her house to be a house of safety for children in the neighborhood who lived in unstable home environments.[352] Still, Garrett's experience shows that a mentor alone is not a sufficient leverage point; ideally, the leverage point needs to be combined with the others.

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also shown that having positive role models can protect against engaging in high-risk behaviors, such as participation in violence, sexual intercourse, and substance abuse.").

342 Freeze, *supra* note 322.

343 *See*, *e.g.*, *id.* ("[Y]oung people deserve strong adult leaders. Too often, youths—particularly those in high-crime areas—have become disappointed and disenfranchised by grown-ups who fail to listen to them or understand the context in which they struggle to survive.").

344 VAN DER KOLK, *supra* note 94, at 81.

345 HEATH, *supra* note 39, at 118.

346 *See id.* at 117–18; *The Original ACE Study, supra* note 282.

347 HEATH, *supra* note 39, at 118.

348 *Id.*

349 *Id.* at 117–20.

350 State v. Garrett, 2022-Ohio-4218, 216 N.E.3d 569, ¶ 291–96.

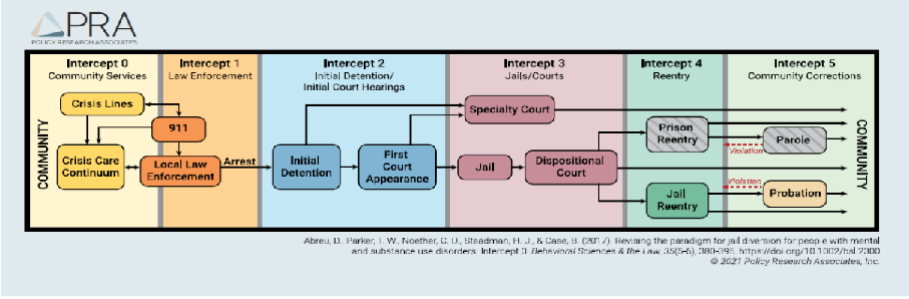
351 *Id.* at ¶297–305.

352 *Id.*

5. Community Services and Law Enforcement: Leverage Points 5 and 6

While the goal is to get the mentally ill completely out of the criminal justice system, there are two important leverage points just outside and within the system that deserve investment. The leverage points can be visualized in an already existent paradigm called the Sequential Intercept Model ("SIM").[353] Developed in the early 2000s, SIM "is a framework that identifies a series of points at which communities can intervene to prevent individuals with mental and substance use disorders from entering or remaining in the criminal legal system."[354] There are six intercepts: Intercept 0 (Community Services); Intercept 1 (Law Enforcement); Intercept 2 (Initial Detention/Initial Court Hearings); Intercept 3 (Jails/Courts); Intercept 4 (Reentry); and Intercept 5 (Community Corrections).[355]

Diagram 10: The Sequential Intercept Model [356]



353 Erin Collins, *supra* note 186, at 1627; *The Sequential Intercept Model: Advancing Community-Based Solutions for Justice-Involved People with Mental and Substance Use Disorders*, POL'Y RSCH. ASSOC., https://www.prainc.com/sim/ (last visited Sept. 1, 2025) [hereinafter *Sequential Intercept Model*]; *see*, *e.g.*, Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1522 ("One model for thinking more systematically about the relationships between the different stages in the criminal justice process and the different actors involved is the sequential intercept model used in the mental health setting.")

354 Collins, *supra* note 186, at 1627; *see also Sequential Intercept Model, supra* note 355 (SIM "developed over several years in the early 2000s by Mark Munetz, MD, and Patricia A. Griffin, PhD, along with Henry J. Steadman, PhD . . . The SIM was developed as a conceptual model to inform community-based responses to the involvement of people with mental and substance use disorders in the criminal justice system.").

355 *Sequential Intercept Model*, *supra* note 355.

356 *Id.*

Looking at the SIM diagram, the two leverage points of interest for this Article are Intercept 0 (Community Services) and Intercept 1 (Law Enforcement).

a. Community Services: Leverage Point 5

Community Services, or Intercept 0, "encompasses the early intervention points for people with mental and substance use disorders *prior* to being charged for an offense by law enforcement."[357] This stage "connects people who have mental and substance use disorders with services before they come into contact with the criminal justice system" and "[e]nables diversion to treatment before an arrest takes place."[358]

Practically, intercept 0 can take a variety of forms.[359] There are hotlines serving as alternatives to 911 (e.g., 988), which can connect people to clinics without involving the police.[360] Another option includes mobile crisis outreach teams, which allow behavioral health clinicians to respond directly to those suffering mental health or substance abuse issues.[361] Yet another option is law enforcement-friendly crisis services, which allow a law enforcement officer to bring people that police would normally arrest to "stabilization units, crisis living rooms, or respite centers."[362] In another approach, Cook County created The Mental Health Transition Center, where mental health professionals, like psychologists, teach individuals basic emotional skills they missed out on as children because of dysfunctional families. [363]

Obviously, because Garrett had no criminal record before age 24, and he committed murder, which is an inappropriate crime for diversion, this intercept does not apply to Garrett. And this partly proves the point for why this intercept is insufficient to solve the decriminalization of mental illness. It may work for cases like Bergalia, but it does not work for those whose psychological problems are likely to lead to criminal problems. The intercept is more of a band-aid than a cure.

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357 *Intercept 0: Community Services*, SUBSTANCE ABUSE MENTAL HEALTH SERV. ADMIN., https://www.samhsa.gov/criminal-juvenile-justice/sim-overview/intercept-0 (last visited Sep. 1, 2025).

358 *Id.*

359 *See id.*

360 *Id.*

361 *Id.*

362 *Id.*

363 Ford, *supra* note 190.

b. Law Enforcement: Leverage Point 6

Even if resources are funneled into intercept 0, many will still make it through to intercept 1, which is when "law enforcement and emergency services respon[d] to people with mental and substance use disorders."[364] After responding, this stage "[e]nds when the individual is arrested or diverted into treatment." [365]

Practically, intercept 1 can also take a variety of forms. One of the most popular programs is called a crisis intervention team ("CIT"). [366] Much like the Domestic Violence High Risk Team mentioned earlier, to prevent homicide from domestic violence,[367] a CIT creates "connections between law enforcement, mental health providers, hospital emergency services and individuals with mental illness and their families" to prevent the mentally ill from ending up in jail or prison.[368] There is strong evidence that methods like CIT result in arrest reduction for low-level crimes.[369] CIT training helps educate dispatchers to understand mental illness and when police are actually needed.[370] Further, training helps law enforcement officers recognize mental health systems and de-escalate tense situations in the field.[371]

Another tool includes "partnerships between law enforcement and behavioral health clinicians or case managers.[372] Finally, data sharing or tracking helps to identify frequent users of 911 or emergency services, which helps responders develop a more effective response.[373] Even more, if police are taught about the connection between ACEs and illegal activity, it will help develop a more effective response plan than simply cycling juveniles through the court system.[374]

Both Intercept 0 and Intercept 1 can be considered upstream from the subsequent intercepts. Unfortunately, once a mentally ill individual enters Intercept 2, the "revolving door" often gets set in motion. As can be seen, MHCs courts sit in Intercept 3, which is reacting to the failure of intercepts 0 and 1 in part to address the problem. MHCs may help some mentally ill

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364 *Intercept 1: Law Enforcement,* SUBSTANCE ABUSE MENTAL HEALTH SERV. ADMIN., https://www.samhsa.gov/criminal-juvenile-justice/sim-overview/intercept-1 (last visited Sep. 1, 2025).

365 *Id.*

366 ROTH, *supra* note 1, at 242–49.

367 *Id.* at 86.

368 *Crisis Intervention Team (CIT) Programs*, NAT'L ALL. ON MENTAL HEALTH, https://www.nami.org/advocacy/crisis-intervention/crisis-intervention-team-cit-programs/ (last visited Sep. 2, 2025).

369 Perlin & Lynch, *supra* note 202, at 689.

370 *Intercept 1: Law Enforcement, supra* note 366.

371 *See*, *e.g.*, *id.*; ROTH, *supra* note 1, at 57.

372 *Intercept 1: Law Enforcement, supra* note 366.

373 *See id.*

374 *See* Freeze, *supra* note 322.

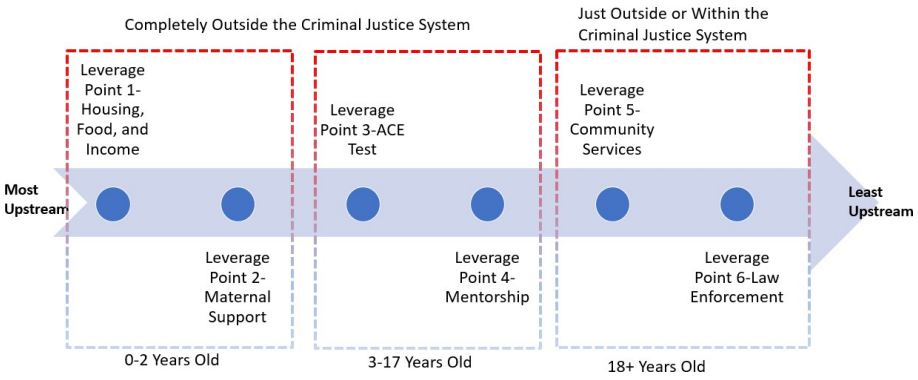
individuals, but a promising long-term solution considers how to stop mentally ill individuals from reaching intercept 2 at all.

While SIM provides a snapshot of how the mentally ill currently cycle through the criminal justice system, SIM scholars identified an "ultimate intercept" outside their own diagram to solve the decriminalization of mental illness completely.[375] The "ultimate intercept" is an "accessible and robust mental health system, one that provides individuals with services, housing, and treatment, and operates independently of the criminal legal system."[376] This mental health system would contain "[1] competent, supportive clinicians; [2] community support services, such as case management; medications; vocational and other role supports; [3]safe and affordable housing; and [4] crisis services," and the services should be "available and easily accessible to people in need." [377] This Article attempts to provide tools that support this "ultimate intercept."

6. Putting it All Together: How to Practically Use the Leverage Points

While SDOH can predict whether a person will likely have a negative health outcome—whether physical or mental—they are not currently *directly* connected to alleviating the decriminalization of the mentally ill. The systems and upstream thinking approach fixes that, along with the identification of the leverage points. Now that the framework is explained, the practical aspect involves when to invest in the leverage points to prevent the criminalization of the mentally ill. An upstream visual of an ideal order is below.

Diagram 11: Ideal Upstream Continuum[378]



375 Collins, *supra* note 186, at 1628.

376 *Id.*

377 Collins, *supra* note 160, at 249–50.

378 Graph created by the author based upon the author's leverage points and familiarity with upstream thinking and systems thinking.

In an ideal world, the largest payoff would likely be achieved by investing in leverage points 1 and 2 simultaneously, from before a child is born until the child is 2 years old. Because leverage points 1 and 2 fulfill a child's basic needs and foundational psychological needs, a child is set on a strong pathway, even if there are obstacles in other SDOH like education and neighborhood.

The idea is that if both mother and child have access to housing, food, and income security, then the mother can better focus on the psychological needs of herself and her child. An added bonus is if the ACE test is administered to the mother during leverage point 2, it will allow her the opportunity to break any intergenerational negative parenting habits she learned from her own family. Because early childhood development has proved so important in later outcomes of adult life, it makes sense to invest at this stage of a child's and a mother's life.

At all times, leverage point 1 should be satisfied before anything else because it is challenging to focus on psychological needs without it. If, however, leverage point 2 is skipped, the child is not at a complete loss, but it creates much more psychological risk. This is where leverage points 3 and 4 help a child whose parent(s) fail to provide the psychological support a child needs. There are health privacy and other safety dynamics at play in determining whether an ACE test can be administered appropriately for a child between the ages of 3-17, but that problem is beyond the scope of this Article. For purposes of this Article, the point is that the ACE test will show where psychological deficiencies exist in a child's interpersonal system, which allows them to be corrected, and decreases the stress in the social and community context SDOH. If the ACE diagnostics are poor, then a child should be set up with a mentor as soon as possible. Even if the child cannot leave a dysfunctional family unit, which is causing the high ACE score, this option provides the child at least one stable and healthy adult to look up to. Without it, the child will likely flounder.

Next, the least upstream leverage points to alleviate the criminalization of the mentally ill are investments in leverage points 5 and 6. Education of law enforcement and creation of realistic diversion channels will alleviate, but not solve, the mentally ill cycling through the criminal justice system revolving door. These leverage points are still likely the best investments compared to the remaining SIM intercepts, however, because at least the mentally ill are not being treated for mental illness inside prisons and jails. Instead, they would be funneled to community health centers and other non-punitive avenues.

Obviously, all of this will cost money, but ultimately it will save money in the long term.[379] If implemented correctly, the costs will evaporate from the criminal justice system and be funneled upstream instead. The results will not be immediate. It will take years for the leverage point investments to pay off. This is not a quick fix. Yet, it will lead to healthier people in general, not just alleviating the smaller problem of the criminalization of the mentally ill.

CONCLUSION

This Article shows that alleviating the criminalization of the mentally ill is not impossible; it just requires targeted investment. If America continues doing things the same way—not investing in upstream efforts and trying to solve this problem through the criminal justice system—the problem will never start moving towards a solution. The SDOH will remain unchanged, and health justice will not be achieved. The revolving door involving future individuals like Bergalia and tragic latecomers like Garrett will continue to enter the criminal justice system.

The hypothesis of investing in the six leverage points, especially 1 and 2, requires thinking differently. The benefits of a mother being able to provide both the basic and psychological needs for her child will likely result in the absence of something: an adult who is not mentally ill cycling in and out of jail and prison. Testing the hypothesis would require patience, a leap of faith, and extensive data collection. Yet, it is a risk worth taking.

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379 The full breakdown of costs of this new approach is beyond the scope of this Article.

ROYAL CANIN V. WULLSCHLEGER: A SEA CHANGE IN SUPPLEMENTAL JURISDICTION?

William G. Beatty*

INTRODUCTION

In *Royal Canin U.S.A., Inc. v. Wullschleger*,[1] decided January 15, 2025, the Supreme Court of the United States answered the following question: in a case originally filed in state court, which combined federal law and state law claims, that was removed to federal court by the defendant based on federal question jurisdiction, but in a post-removal amendment to the complaint, the plaintiff abandons all of her federal claims, does the federal court lose its supplemental jurisdiction over the remaining state law claims? In doing so, the court resolved what it referred to as a "split" among the federal appellate circuits.

In a 9-0 decision, the Supreme Court held that it does.[2] Did this decision represent a sea change in the nature and scope of supplemental jurisdiction, which would differ from every federal appellate decision that has considered the effect of post-amendment revisions to a plaintiff's pleadings,[3] or can the decision be attributed to the well-established principle that an amended pleading trumps the original? [4]

This paper contends that, whether rightly or wrongly decided, the *Royal Canin* decision did indeed (1) represent a fundamental change in the concept of supplemental jurisdiction[5] in removal cases;[6] (2) that the case upon which the Royal Canin Court relied as stating the "pertinent rule"[7] can be readily distinguished;[8] (3) the decision runs contrary to decades of Supreme Court

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1 Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22 (2025).

2 *Id.* at 43–44.

3 *See infra* Section VI.C.

4 *See, e.g.,* Rockwell Int'l, Corp. v. United States, 549 U.S. 457, 473–74 (2007); *see also* 6 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1476 (3d ed. 2024).

5 Hereinafter sometimes referred to as "ancillary" or "pendant" jurisdiction. *See Royal Canin U.S.A., Inc*., 604 U.S. at 32.

6 *Id.* at 32–33 (discussing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 722 (1966)).

7 *Id.* at 32 (citing *Rockwell Int'l, Corp.*, 549 U.S. at 473–74).

8 *See infra* Section V (discussing *Rockwell Int'l, Corp.*, 549 U.S. at 457).

precedent and unanimous federal appellate precedent;[9] (4) the decision appears to be in conflict with the discretion-granting language of 28 U.S.C.§ 1367,[10] and (5) the Supreme Court's ruling in *Royal Canin*[11] will have a negative impact on American commerce.[12]

I. THE FOUNDATIONS OF "ANCILLARY" JURISDICTION

The concept of the jurisdiction of federal courts extending beyond purely federal claims to encompass related "other questions of law or fact" was first broached by Chief Justice John Marshall in the case of *Osborn v. Bank of the United States*. [13] In speaking for the Court, Justice Marshall said:

> We think, then that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that [entire] cause, although other questions of fact or of law may be involved in it.[14]

Early in the next century, the often-cited case of *Siler v. Louisville & Nashville Railroad Co.*,[15] involved a challenge to state regulation of commodity transportation rates on the grounds that they were confiscatory, interfering with interstate commerce, and deprived the railroad of property without due process of law, while also denying them equal protection under the law in violation of the Fourteenth Amendment.[16] The Supreme Court explained the federal courts' authority over state law in the following terms:

> The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the [federal] circuit court jurisdiction, and, having properly obtained it, that court had the right to decide *all* questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.[17]

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9 *See infra* Sections II and IV.
10 *See infra* Section VI.
11 Royal Canin U.S.A., Inc. v. Wullschleger, 75 F.4th 918, 923 (8th Cir. 2023).
12 *See infra* Section IX.
13 Osborn v. President of the Bank of the U.S., 22 U.S. 738 (1824).
14 *Osborn*, 22 U.S. at 823.
15 Siler v. Louisville & Nash. R.R. Co., 213 U.S. 175 (1909), *abrogated on other grounds by*, Penhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117–20 (1984).
16 *Id.* at 191.
17 *Id.*

Lincoln Gas & Electric Light Co. v. City of Lincoln [18] involved a city ordinance that assessed an annual occupation tax upon gas companies operating in the City of Lincoln, Nebraska.[19] Gas company owners challenged the ordinance on the grounds that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as certain provisions of state law.[20] The federal district court held that the ordinance violated state law (the Nebraska Constitution) and issued an injunction against its enforcement.[21] On appeal to the Supreme Court, the Court stated that if the complaint "presented a substantial controversy under the Constitution of the United States, . . . the jurisdiction [of the federal trial court] extended to the determination of *all* questions, including questions of state law, and irrespective of the disposition made of the federal question." [22]

In *Stark Bros. Nurseries & Orchards Co. v. Stark*,[23] the plaintiff brought suit for patent infringement as well as for monetary damages under state law for unfair competition.[24] The federal trial court awarded damages but only for damages incurred after the trademark was registered, not when it was first issued.[25] The Supreme Court affirmed the damage award, in accordance with the aforementioned time limitation, calling the claims asserted by the plaintiff under the state law theory of unfair competition as being "inseparable" from the plaintiff's federal law claim.[26]

In *Moore v. New York Cotton Exchange*,[27] the plaintiff filed a federal antitrust case.[28] The defendant filed a counterclaim, alleging non-federal claims, which arose out of the same transaction involved in the plaintiff's complaint.[29] The federal complaint was dismissed on the merits, leaving the state-law counterclaim.[30] The Supreme Court held that the federal trial court had subject matter jurisdiction over the residual state-law counterclaim even after the dismissal of the federal claim because the state-law counterclaim was so integral to the federal claim that the court must retain jurisdiction.[31]

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18 Lincoln Gas & Elec. Light Co. v. Lincoln, 250 U.S. 256 (1919).
19 *Id.* at 258–59.
20 *Id.*
21 Lincoln Gas & Elec. Light Co. v. Lincoln, 182 F. 926, 930 (8th Cir. 1919).
22 *Lincoln Gas & Elec. Light Co.*, 250 U.S. at 264 (emphasis added).
23 Stark Bros. Nurseries & Orchards Co. v. Stark, 255 U.S. 50 (1921).
24 *Id.* at 51.
25 *See id.* at 52.
26 *Id.*
27 Moore v. New York Cotton Exch., 270 U.S. 593, 603 (1926).
28 *Id.*
29 *Id.*
30 *Id.* at 608.
31 *Id.* at 607–10 (explaining that the federal trial court maintained jurisdiction because defendant's counterclaim was so integral to the case sought in the plaintiff's complaint).

The doctrine of ancillary jurisdiction was subsequently "clarified" by *Hurn v. Oursler*,[32] a case which discussed the division of authorities regarding the scope of federal jurisdiction over related state-law claims, particularly when an adverse ruling by the court, or voluntary action on the part of the plaintiff, eliminated the federal claims that afforded subject matter jurisdiction in the first place.[33]

The *Hurn* case involved a plaintiff who accused the defendant of federal copyright infringement, as well as state-law claims of unfair business practices and unfair competition.[34] The federal claims were disposed of by the trial court, leaving the state-law claim of unfair competition.[35] The trial court dismissed the state-law claim for want of jurisdiction.[36] On review, the Supreme Court said that the question in the case was "whether the claim of unfair competition was properly dismissed for lack of jurisdiction, or, likewise, should have been considered and disposed of on the merits." [37]

The Supreme Court stated that:

> [T]he rule (of pendant jurisdiction) does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only is a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case on nonfederal ground; in the latter, it may not do so upon the nonfederal cause of action.[38]

In the case at bar, the Court said,

> [T]he claim of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances. . . . [T]he claims of

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32 Hurn v. Oursler, 289 U.S. 238, 247 (1933).

33 *Id.* at 248.

34 *Id.* at 249.

35 *Id.* at 240.

36 *Id.*

37 *Id.*

38 *See id.* at 245–46; *see also,* Louisville & Nash. R.R. Co. v. Garrett, 231 U.S. 298, 303 (1913); Ohio Tax Cases, 232 U.S. 576, 586 (1914); Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 508 (1917); Davis v. Wallace, 257 U.S. 478, 482 (1922); Sterling v. Constantin, 287 U.S. 378, 393–94 (1932). *But see,* Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U.S. 166, 169 (1906).

> infringement and unfair competition averred in the present bill of complaint are not separate causes of action, but different grounds asserted in support of the same cause of action. [39]

Ultimately, however, the Court did not have the opportunity to apply this rule of law to the case since the case was dismissed before a decision was reached.[40]

II. EARLY CASES REGARDING THE IMPACT OF POST-REMOVAL ACTIONS BY THE PLAINTIFF UPON THE COURT'S SUBJECT MATTER JURISDICTION

Early cases addressing the present issue reveal that the Supreme Court has almost invariably considered the plaintiff's post-removal activity as irrelevant to a federal court's continuing exercise of subject matter jurisdiction in a properly removed case.[41]

One of the earliest rulings on whether a federal court retained subject matter jurisdiction, *Mollan v. Torrance*, was decided by the Supreme Court in 1824. This case questioned whether a diversity case could be impacted when, subsequent to filing, a party initially aligned with one side became non-diverse with a party on the other side.[42] Chief Justice John Marshall said, "It is quite clear that the jurisdiction of the Court depends upon the state of things *at the time of the action brought*, and that after vesting it cannot be ousted by subsequent events." [43]

This principle was applied to modifications of the amount of requested damages in *Kirby v. American Soda Fountain Co*.[44] There, the amount of requested damages was decreased below the statutory minimum after removal.[45] The Supreme Court ruled that this reduction in damages had no impact on the federal court's jurisdiction in a diversity case. This decision was in line with "the general rule that when the jurisdiction of a circuit court

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39 *Hurn*, 289 U.S. at 246–47.

40 During the pendency of the suit the plaintiffs amended their complaint to make it apply to only an uncopyrighted version of the play, thus removing any federal grounds on which the original pleading was based. As a result the case no longer concerned federal copyright infringement, so the trial court was within its discretion to dismiss without prejudice the state-law claim of unfair competition for want of federal subject matter jurisdiction. *Id.* at 248.

41 *See, e.g.*, Mollan v. Torrance, 22 U.S. 537, 540 (1824); Kirby v. Am. Soda Fountain Co., 194 U.S. 141, 146 (1904); Clarke v. Mathewson, 37 U.S. 164, 172 (1838).

42 *Mollan*, 22 U.S. at 539.

43 *Id.* (emphasis added).

44 *See generally Kirby*, 194 U.S. 141.

45 *Id.* at 146.

of the United States has once attached, it will not be ousted by subsequent changes in the condition."[46]

In 1880, the Supreme Court held that "[t]he right of removal, if claimed, in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand *when the petition for removal is filed*." [47]

A decade later, the Court, in *Louisville & Nashville R. Co. v. Wangelin*,[48] said "it is equally well settled that in any case the question [of] . . . removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, [and that this] is the test of the right to removal." [49]

Salem Trust Co. v. Manufacturers' Finance Co.[50] involved a dispute filed in state court between two citizens of different states over the rights to proceeds held by a finance company.[51] The defendant removed the case to federal court based on diversity of citizenship.[52] Post-removal, the plaintiff attempted to defeat subject matter jurisdiction by seeking to join the stakeholder who was a citizen of the same state as the plaintiff, thereby potentially defeating diversity.[53] The Court determined that the stakeholder was not a necessary party to the litigation, since its only role was to turn over the proceeds to the party entitled to them, as determined by the trial court.[54] Citing precedent, the Supreme Court affirmed the denial of the motion to remand, saying:

> Jurisdiction cannot be defeated by joining formal or unnecessary parties. The right of removal depends upon the case disclosed by the pleadings *when the petition is therefore filed* . . . and is not affected by the fact that one of the defendants is a citizen of the same state as the plaintiff, if that defendant is not an indispensable party of the controversy between plaintiff and defendant who are citizens of different states.[55]

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46 *See, e.g.*, *id.* (citing Morgan's Heirs v. Morgan, 15 U.S. 290, 297 (1817)) (stating "the general rule is, that a court, once having jurisdiction of a cause, will keep it;"); *Clarke*, 37 U.S. at 172 (stating that "[a] suit properly commenced between citizens of different states, still proceeds; although the parties may, before its termination, become citizens of the same state."); Cooke v. United States, 69 U.S. 218, 218 (1864) (holding that "jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy."); *see also* Kanouse v. Martin, 55 U.S. 23, 24 (1852) (error for the state court to refuse request for removal).

47 Barney v. Latham, 103 U.S. 205, 210 (1880) (emphasis added).

48 Louisville & Nash. R.R. Co. v. Wangelin, 132 U.S. 599, 601 (1890).

49 *Id.* (emphasis added).

50 *S*alem Trust Co. v. Mfrs.' Fin. Co., 264 U.S. 182, 188 (1923).

51 *Id.*

52 *Id.* at 188–89.

53 *Id.*

54 *Id.* at 189–90.

55 *Id.* (emphasis added) (citing Barney v. Latham, 103 U.S. 205, 215 (1880)).

Next, the often-cited case of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,[56] involved a post-removal attempt by the plaintiff to manipulate the trial court's subject matter jurisdiction in this diversity case by voluntarily reducing the amount of damages claimed to an amount below the jurisdictional limit (then, $3000.00 per 28 U.S.C. §41).[57] The Supreme Court rejected the jurisdictional objection, saying:

> If the plaintiff could, no matter how bona fide his original claim in state court, reduce the amount of his demand to defeat federal jurisdiction, the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill-founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to state court at his election.[58]

Lastly, in *Pullman Co. v. Jenkins*,[59] plaintiffs attempted to defeat diversity by filing a post-removal amendment to the complaint, which added a non-diverse party.[60] The Supreme Court, reversing the Ninth Circuit's own reversal of the district court's refusal to remand the case, said that: "The second amended complaint should not have been considered in determining the right to remove, which in a case like the present one was determined according to the plaintiffs' pleadings at the time of the petition for removal."[61]

These cases are the foundation for later decisions holding that post-removal activity on the part of the plaintiff, such as attempting to add an unnecessary, non-diverse party to destroy diversity, or amending the amount of damages sought to an amount below the statutory minimum, will not impact the defendant's statutory right of removal, nor defeat the federal trial court's subject matter jurisdiction.

III. GIBBS, ROSADO AND THERMTRON: THE FOUNDATIONS OF MODERN SUPPLEMENTAL JURISDICTION

Until the Supreme Court's decision in *United Mine Workers of America v. Gibbs*[62] in 1966, the prevailing standard for the legitimate application of pendant jurisdiction was the *Hurn*[63] test which held that "state law claims are

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56 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290 (1938).
57 *Id.*
58 *Id.* at 294.
59 Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1938).
60 *Id.*
61 *Id.*
62 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 722 (1966).
63 *See* Hurn v. Ousler, 289 U.S. 238, 246 (1933).

appropriate for federal court determination if they form a separate but parallel ground for relief [that] also is sought in a substantial claim based on federal law."[64] Citing precedent, the Supreme Court said in *Hurn* that,

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single wrong.[65]

The Supreme Court later stated that the dependence of the definition of pendant jurisdiction on varying concepts of "cause of action" made the definition "murky"[66] and difficult for district courts to apply.[67] Commentators argued that the phrase "cause of action" was the source of confusion because the phrase could mean one thing for one purpose and something different for another.[68] The Supreme Court responded by issuing the following definition with emphasis on both its *power* and its *discretion,* much as 28 U.S.C. § 1367(a) and (c) eventually would:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,' and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'. The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. (citation omitted) The state and federal claims must derive from a *common nucleus of operative fact.* But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[69]

After discussing the power-conferring aspect of pendant jurisdiction, the Court went on to discuss the discretionary aspect of the doctrine:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of *discretion,* not of the plaintiff's right. . . [I]f it appears that the state issues

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64 *United Mine Workers of Am.,* 383 U.S. at 722.

65 *Hurn*, 289 U.S. at 246 (quoting Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927)).

66 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988).

67 *Id.*

68 United States v. Mem. Cotton Oil Co., 288 U.S. 62, 67–68 (1933).

69 *United Mine Workers of Am*., 383 U.S. at 725 (emphasis added) (quoting U.S. CONST. art. III, § 2).

> substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendant jurisdiction is particularly strong. [70]

Thus, the Supreme Court declared a new standard for the exercise of pendant jurisdiction, both in terms of its power-conferring features as well as its discretionary aspect, thereby replacing the *Hurn* standard of when pendant jurisdiction should be exercised or declined.[71]

The *Gibbs* case was followed in 1970 by *Rosado v. Wyman*,[72] a case involving the compatibility of a New York social services law[73] with the federal Social Security Act of 1935.[74] Among the issues in the case was the ability of the district court to exercise pendent jurisdiction over a state administrative action after the federal claims had been rendered moot.[75] The Supreme Court ruled that pendent jurisdiction did not depend on the underlying federal claims being present throughout the case by stating:

> We are not willing to defeat the commonsense policy of pendant jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation – by a conceptual approach that would require jurisdiction over the primary [federal] claim at all stages as a prerequisite to resolution of the pendant claim. The Court has shunned this view.[76]

The Supreme Court noted "if the federal claims are dismissed before trial, the state claims should be dismissed as well." [77] The Supreme Court subsequently explained that this "statement simply recognizes that in the usual case in which all federal law claims are eliminated before trial, the balance of factors to be considered under the pendant jurisdiction doctrine—judicial economy, convenience, fairness and comity—will point toward declining to exercise jurisdiction over the remaining state law claims." [78]

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70 *Id.* at 726–27 (emphasis added).
71 *Id.*
72 Rosado v. Wyman, 397 U.S. 397 (1970).
73 N.Y. STATE FINANCE LAW § 55 (McKinney 1969).
74 42 U.S.C. § 602(a)(23).
75 *Rosado*, 397 U.S. at 404.
76 *Id.* at 405 (citing Moore v. N.Y. Cotton Exch., 270 U.S. 593 (1926); Hurn v. Oursler, 289 U.S. 238 (1933)).
77 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).
78 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

The case of *Thermtron Products, Inc. v. Hermansdorfer* [79] is noteworthy for both its unusual fact pattern and the Supreme Court's limitation on the discretionary authority of a district court to remand a properly removed case under 28 U.S.C. § 1447(c).[80] It also discussed the circumstances under which a remand order is reviewable, despite the general prohibition of appellate review of remand orders set forth in 28 U.S.C. § 1447(d).[81]

In *Thermtron,* the plaintiffs (Hermansdorfer and one other), citizens of Kentucky, brought suit against the defendants (Thermtron and one of its employees, both citizens of Indiana) in a Kentucky state court, seeking damages for personal injuries in an automobile accident involving the Thermtron driver.[82] The defendants removed the case to the United States District Court for the Eastern District of Kentucky.[83] The district judge informed the parties that he was too busy to hear the case, and that "there is no available time in which to try the. . . action in the foreseeable future, and that an adjudication on the merits of the case would be expedited in state court." [84]

The defendants insisted that they had a right to have their case heard in federal court, and the district judge agreed.[85] However, the judge concluded that due to the combination of his crowded docket and the priority of other cases, the "plaintiff's right of redress" was "severely impaired [which] would not be the case if the cause had not been removed from the state courts."[86] The district judge thereupon remanded the case to the Kentucky state courts.[87]

The defendants appealed to the Sixth Circuit, which ruled that it lacked jurisdiction because of the prohibition against appellate review of remand orders in 28 U.S.C. § 1447(d).[88] The Supreme Court granted the defendants' petition for certiorari.[89]

The Supreme Court acknowledged that while § 1447(d) generally "prohibits review of all remand order issues pursuant to §1447(c) whether erroneous or not," [90] the question before the Court was "whether § 1447(d)

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79 Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976).
80 *Id.* at 343.
81 *Id.* at 345–46.
82 *Id.* at 337.
83 *Id.* at 338.
84 *Id.* at 339.
85 *Id.* at 340.
86 *Id.* at 340–41 (quoting the trial court record).
87 *Id.* at 339.
88 *Id.* at 342.
89 *See id.* at 341.
90 *Id.* at 343.

also bars review where a case has been properly removed and the remand order is issued on grounds *not* authorized by §1447(c)." [91]

The Court curtailed the district judge's extra-statutory exercise of discretion and issued a writ of mandamus compelling a return of the remanded case, saying that case law "would support the use of mandamus to prevent nullification of removal statutes by remand orders resting on grounds having no warrant in the law."[92]

IV. FROM COHILL TO ROCKWELL: THREE RULINGS AND ONE VERY IMPORTANT FOOTNOTE

The law of remand was announced in *Carnegie-Mellon University v. Cohill* [93] when the Supreme Court answered the question of "whether a district court has *discretion* to *remand* a removed case to state court when all federal-law claims have been dropped out of the action and only pendant state-law claims remain?" [94]

Until *Cohill,* the courts felt bound by the *Thermtron* decision regarding how to handle state-law claims remaining in a case after disposal of the federal claim(s) that had given rise to federal jurisdiction and allowed for removal of the case.[95] *Thermtron* suggested that a district court could not remand a removed case outside of the specific statutory authorization in the then-existing version of 28 U.S.C. § 1447(c), which read as follows: "If at any time before final judgment it appears that the case was *removed improvidently and without jurisdiction,* the district court shall remand the case [96]

The *Cohill* case was filed by a former employee of Carnegie Mellon University who alleged that the defendants violated various federal and state age discrimination laws.[97] The case was originally brought in state court but was timely removed by the defendants to federal court pursuant to 28 U.S.C. § 1441(a).[98] Six months after removal, the plaintiffs moved to amend their complaint to delete the federal age discrimination claims, leaving only the related state-law claims, and also moved to remand the case back to state court.[99] The district court, mindful of *Thermtron's* restrictions, acknowledged that the case was not improvidently removed and was

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91 *Id.*
92 *Id.* at 353.
93 *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988).
94 *Id.* at 348.
95 *Id.* at 346.
96 *See Thermtron Prods., Inc*., 423 U.S. at 342.
97 *Carnegie-Mellon Univ*., 484 U.S. at 345.
98 *Id.* at 357.
99 *Id.* at 358.

jurisdictionally proper, taking note of several appellate decisions since *Thermtron* that had approved the remand of removed state-law claims when the claim providing the basis for removal had been eliminated from the suit.[100] The district court then ordered a remand of the remaining state-law claims.[101]

On appeal, the Third Circuit majority held that *Thermtron* precluded the district court from ordering a remand, but after a rehearing *en banc*, the decision of an evenly divided court resulted in the district court's order being undisturbed.[102] The Supreme Court granted certiorari to resolve the split in authorities as to whether a district court has the discretionary authority to remand the case, as opposed to dismissing the pendant claims.[103]

The Supreme Court said that the pendant jurisdiction doctrine, as crafted in the *Gibbs* case, strongly supports the conclusion that while a district court may relinquish jurisdiction over a removed case involving pendant claims, the court also has discretion to remand the case to the appropriate state court instead of dismissing it.[104]

The Court noted that remand, as opposed to dismissal, made practical sense for both the litigants and the courts.[105] Suppose a plaintiff filed a timely lawsuit in state court that combined federal and state-law claims, and the defendant subsequently removed to federal court. If the federal claims were dropped from the case, and the district court determined that it was inappropriate to retain jurisdiction over the remaining state law claims, the only course for the district court, being bound by *Thermtron,* was to dismiss them. If, in the interim, the statute of limitations had expired, the plaintiff, who had initially filed a timely lawsuit in state court might find his claim precluded, whereby a remand would prevent this problem. Additionally, even where a re-filing in state court would not be precluded by a statute of limitations, a remand, rather than a re-filing, saves both litigants and courts time and money, resulting in a more prompt and efficient resolution of the controversy.[106]

The defendants appeared prescient when they expressed a concern "that a plaintiff whose suit has been removed to federal court will be able to regain a state forum simply by deleting all federal law claims from the complaint and requesting that the district court remand the case." [107]

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100 *Id.* at 356.
101 *See* Boyle v. Carnegie-Mellon Univ., 648 F. Supp. 1318, 1320 (W.D. Pa. 1985).
102 Carnegie-Mellon Univ., 484 U.S. at 359.
103 *Id.* at 348.
104 *Id.* at 351.
105 *Id.*
106 *Id.* at 353.
107 *Id.* at 357.

This is precisely what happened thirty-seven years later in *Royal Canin*, *infra*, but instead of allowing a discretionary remand, the Court made it mandatory, thereby changing the fundamental framework of supplemental jurisdiction, despite decades of precedent stating the contrary.[108]

City of Chicago v. International College of Surgeons,[109] involves the interplay of federal law principles and local administrative regulations, provides a primer on removal jurisdiction and the broad scope of the "arising under" clause of Article III.[110] It also affords a review of the *Gibbs* standard for the exercise of supplemental jurisdiction, and when such exercise should be declined. Speaking for the Court Justice O'Connor said:

> Depending on a host of factors, including the circumstances of the particular case, the nature of the state law claims, the character of the governing law, and the relationship between that state and federal claims, district courts may decline to exercise jurisdiction over supplemental state law claims. The statute [28 U.S.C. § 1367(c)] thereby reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, "a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity." [111]

Sometimes landmark legal decisions can spring from fairly mundane fact patterns. Just as the *Royal Canin* case, *infra*, began as a case about dog food, so too the *Rockwell* case was a controversy about pond sludge.[112] The Supreme Court's opinion in *Rockwell International Corp. v. United States*[113] involved an invention for the containment and storage of nuclear waste at Rocky Flats nuclear weapons facility in Colorado which involved mixing the waste with pond sludge and concrete, allowing it to harden so it could be buried.[114] The inventor of the process discovered that the process didn't work, and that the formerly solid blocks of waste were deteriorating, causing an unwanted release of toxic waste into the environment.[115] He reported this problem to his employer, Rockwell, who responded by laying him off.[116] Rockwell continued to claim the project was successful, which allowed it to receive money for the disposal efforts from the federal government.[117] The laid-off employee reported the matter to the FBI, which initiated an

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108 *See* Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 43–44 (2025).
109 *See generally* City of Chi. v. Int'l Coll. of Surgeons, 522 U.S. 156, 159 (1997).
110 *See generally id.* at 163.
111 *Id.* at 164–65 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988)).
112 *Royal Canin U.S.A., Inc*., 604 U.S. 22; Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007).
113 *Rockwell Int'l Corp*., 549 U.S. 457.
114 *Id.* at 460–61.
115 *Id.* at 461.
116 *Id.*
117 *Id.*

investigation.[118] Rockwell was charged with, and pleaded guilty to, various environmental violations and agreed to pay $18.5 million in fines.[119]

The *Rockwell* case is not well known for its fact pattern, but rather for a pair of procedural pronouncements by Justice Scalia.[120] The opinion is enigmatic in that it is widely cited by both those who favor *Royal Canin*-type remands and those who oppose them; proponents cite a singular sentence within the opinion, while opponents cite a footnote.[121]

The court explained the effect by stating that just as the inclusion of false allegations in an original complaint will defeat jurisdiction, [122]"[s]o also will the withdrawal of those allegations, unless they are replaced by others that establish jurisdiction. Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, *courts look to the amended complaint to determine jurisdiction.*"*[123]*

Justice Kagan quotes this clause as the principal authority for the no-jurisdiction remand that the plaintiffs were allowed to conduct in *Royal Canin, infra.[124]*

However, the passage quoted above also includes a footnote to the opinion that reads as follows: "It is true that, when a defendant removes a case to federal court based on the presence of a federal claim, *an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction.*" [125]

As discussed, *infra,* the *Rockwell* case provides only dubious support for the result reached in *Royal Canin,* since *Rockwell* was a case originally filed in federal court, whereas *Royal Canin* had its origins in state court and was removed to federal court.[126] Additionally, *Rockwell* did not involve supplemental jurisdiction, nor the circumstances in which a remand was discretionary or (as in *Royal Canin*) mandatory, issues that were at the heart of the *Royal Canin* case.[127]

Royal Canin U.S.A., Inc. V. Wullschleger reached the Supreme Court against this background of procedural jurisprudence and decades of federal precedent.

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118 *Id.* at 461–62.
119 *Id.* at 462–63.
120 *Id.* at 467–69, 473.
121 *Id.* at 474 n.6.
122 *Id.* at 473–74 (citing Anderson v. Watt, 138 U.S. 694, 701 (1891)).
123 *Id.* (emphasis added) (citing Wellness Cmty. v. Wellness House, 70 F.3d 46, 49 (7th Cir. 1995)).
124 Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 33 (2025).
125 *Rockwell Int'l Corp.,* 549 U.S. at 474 n.6 (emphasis added) (citing Carnegie-Mellon Univ. v Cohill, 484 U.S. 343, 346, 357 (1988)).
126 *Rockwell Int'l Corp.*, 549 U.S. at 463; *Royal Canin U.S.A., Inc.*, 604 U.S. 22.
127 *Royal Canin U.S.A., Inc*., 604 U.S. 22.

V. THE ROYAL CANIN CASE

Royal Canin began as a case about dog food.[128] Royal Canin sells a variety of dog foods, allegedly geared toward a dog's specific digestive condition, available only with a veterinarian's prescription, at a premium price.[129] Ms. Wullschleger purchased the specialized dog food, believing that it contained medication specifically formulated to address her dog's particular health issue.[130] She also purchased the dog food under the belief that the Federal Food and Drug Administration had evaluated the product.[131] Disappointed to discover that the dog food for which she had paid a premium price was simply that . . . expensive dog food, with no specialized medical ingredients, the disgruntled pet owner brought a class action in Missouri state court on behalf of all similarly situated Missouri purchasers of Royal Canin products, asserting various state law claims, including purported violations of the state marketing laws, state antitrust laws and unjust enrichment laws.[132] The complaint also made numerous references to federal law, including the Food and Drug Act.[133]

Royal Canin removed the case to federal court pursuant to the Class Action Fairness Act,[134] citing both diversity of citizenship and federal question jurisdiction.[135] The district court granted the plaintiffs' motion to remand, finding no basis for federal jurisdiction, and the defendant sought leave to appeal, which the Eighth Circuit accepted to resolve the issue of federal question jurisdiction.[136]

A. The First Appeal: *Wullschleger I*

In its first of two visits to the Eighth Circuit, the court focused on two prior Supreme Court decisions, which set the standard for when a federal court can assume jurisdiction over a federal issue that is embedded in a state law claim.[137] The first was *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*,[138] standing for the principle that "[w]hen determining whether a case 'arises under' federal law, resolution depends on whether a

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128 *Id.*
129 *Id.* at 28.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 28 U.S.C. § 1332(d).
135 *Royal Canin U.S.A., Inc.*, 604 U.S. at 28–29.
136 *Id.*
137 Wullschleger v. Royal Canin U.S.A., Inc., 953 F.3d 519 (8th Cir. 2020).
138 Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005).

federal forum may entertain a state law claim implicating a disputed and substantial federal issue 'without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" [139]

The *Grable* case was followed up eight years later by another Supreme Court decision discussing federal jurisdiction over state law claims having federal implications.[140] The case of *Gunn v. Minton* [141] established the following four-part test to determine the existence of federal jurisdiction over federal issues imbedded in state law claims: the court is to examine the allegations in the complaint and the relief sought to determine if the federal issue surrounding the state law claim is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." [142]

Since the plaintiffs' complaint, while allegedly premised on state law claims, was replete with alleged violations of federal law on the part of Royal Canin, the Eighth Circuit concluded that the "Plaintiffs' dependence on federal law permeates the allegations [as well as the claim for relief] such that the antitrust and unjust enrichment claims cannot be adjudicated without reliance on and explications of federal law." [143]

The Eighth Circuit then reversed the district court's remand order, retaining the case in federal court, and remanded it to the district court for further proceedings.[144] Mrs. Wullschleger was not happy with her case being stuck in federal court. She amended her complaint to eliminate every reference to federal law, cutting out the antitrust and unjust enrichment claims, and narrowed her request for injunctive relief in order to attempt to have her case remanded back to the Missouri State court.[145] The district court believed that federal jurisdiction still existed, and pursuant to the defendant's motion, eventually dismissed the case on the merits, resulting in the second trip to the Eighth Circuit.[146]

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139 *Wullschleger*, 953 F.3d at 521 (quoting Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005)).

140 Gunn v. Minton, 568 U.S. 251, 258 (2013).

141 *Id.*

142 *Id.*

143 *Wullschleger*, 953 F.3d at 522.

144 *Id.*

145 Plaintiff's Amended Complaint, Wullschleger v. Royal Canin U.S.A., Inc., No. 4:19-cv-00235-GAF, 2020 WL 8458289 (W.D. Mo. Nov. 11, 2020).

146 Wullschleger v. Royal Canin U.S.A., Inc., No. 19-00235-CV-W-GAF, 2022 WL 1164662 (W.D. Mo. Mar. 22, 2022).

B. The Second Appeal: *Wullschleger II*

Complicating the case was the fact that the essential key to federal jurisdiction thus far was the court's determination that the plaintiffs' antitrust and unjust enrichment claims fell into a special category in which "state law claims implicated significant federal issues."[147]

But now those federal claims were gone.

The Eighth Circuit's decision to remand the case to state court was an apparent deviation from the "time-of-filing" rule, which dictates that if federal jurisdiction is present at the time of removal, post-removal amendments to the complaint, even ones that abandon federal claims or reduce the amount in controversy below the jurisdictional limits, do not disturb the federal court's subject matter jurisdiction.[148]

The court said, however, that there is some doubt that the time-of-filing rule even applies to federal question cases, and certainly not to the extent it does in diversity cases." [149]

The basis for the Eighth Circuit's ruling the second time around was based on the somewhat esoteric distinction between the "state of things" and the "alleged state of things," [150]

The court explained that just as a plaintiff can add a federal claim after removal to cure a subject matter jurisdictional defect,[151] so can a plaintiff defeat subject matter jurisdiction by replacing a diverse defendant with a non-diverse one,[152] or in this case by "*subtracting* a claim or two," as happened here, to eliminate federal question jurisdiction.[153]

Justice Scalia in *Rockwell Int'l Corp. v. United States*,[154] described the difference between the original complaint and the original complaint *as amended* and held that "when a plaintiff files a complaint *in federal court* and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."[155]

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147 *Wullschleger*, 953 F.3d at 521–22 (quoting Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (holding that federal courts may exercise their "arising under" jurisdiction where "a state claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal court may entertain without disturbing any congressionally approved balance of federal and state jurisdictional responsibilities.'")).

148 *See, e.g.,* Harper v. AutoAlliance Int'l., Inc., 392 F.3d 195, 210 (6th Cir. 2004) (emphasis added) (holding that "[t]he existence of subject matter jurisdiction is determined by examining the complaint as it existed *at the time of removal.*").

149 Wullschleger v. Royal Canin U.S.A., Inc., 75 F.4th 918, 924 (8th Cir. 2023) (*Wullschlerger II*).

150 *Id.* at 923.

151 *See* Bernstein v. Lind-Waldock & Co., 738 F.2d 179, 185 (7th Cir. 1984); ConnectU LLC v. Zuckerberg, 522 F.3d 82, 92 (1st Cir. 2008).

152 Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP., 362 F.3d 136, 142 (1st Cir. 2004); Highway Constr. Co. v. McClelland, 15 F.2d 187, 188 (8th Cir. 1926) (per curiam).

153 *Wullschleger*, 75 F.4th at 924 (emphasis in original).

154 Rockwell Int'l Corp. v. United States, 549 U.S. 457, 473–74 (2007).

155 *Id.* (emphasis added) (citing Wellness Cmty. v. Wellness House, 70 F.3d 46, 49 (7th Cir. 1995)); Boelens v. Redman Homes, Inc., 759 F.2d 504, 508 (5th Cir. 1985).

But *Rockwell* would appear to have only limited precedential value, since Wullschleger filed her original complaint in a Missouri state court, not in federal court, and as she pointed out in her brief before the Supreme Court, this is a case asserting "Missouri claims by Missouri citizens against Missouri defendants" based on violations of Missouri deceptive marketing laws.[156] In fact, as previously mentioned, a footnote to the *Rockwell* opinion states that: "It is true that, when a defendant removes a case to federal court based on the presence of a federal claim [like the FDA-related claims in this case], an amendment eliminating the original basis for federal jurisdiction generally does *not* defeat jurisdiction." [157]

Nevertheless, the Eighth Circuit, after first vacating the district court's initial remand of the case and then vacating the district court's dismissal order, sent the case back to the district court with directions to remand it to the Missouri state court.[158]

C. All of the Federal Appellate Circuits Disagree with the Eighth Circuit

The Eighth Circuit was hardly in the majority when it determined that the post-removal amendment to the complaint, eliminating all federal claims, deprived the court of subject matter jurisdiction.[159] In fact, every federal appellate circuit to have considered the issue has held that post-removal amendments to a complaint, which remove federal claims from the pleading, *do not* impact federal jurisdiction after it has already been vested with the court, thereby disagreeing with the Eighth Circuit's approach that an amended complaint, based entirely upon state law, supersedes the original complaint, rendering it "without legal effect", and can thereby strip a federal court of subject matter jurisdiction, including supplemental jurisdiction over remaining state law claims.[160] The federal appellate circuits referenced below have uniformly held that once the federal district court is vested with valid jurisdiction over a matter because of a proper removal, no post-removal action on the part of the plaintiff, including the filing of an amended complaint abandoning all federal claims, had any adverse effect on the federal court's continuing jurisdiction over whatever remained of the case.

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156 *See* Brief for Respondents at 2, Royal Canin U.S.A., Inc., v. Wullschleger, 604 U.S. 22, 28 (2025) (No. 23-677).

157 *Rockwell Int'l Corp*., 549 U.S. at 482 n.6 (emphasis added).

158 *Wullschleger*, 75 F.4th at 924.

159 *See, e.g.,* Ching v. Mitre Corp., 921 F.2d 11, 13 (1st Cir. 1990); In Touch Concepts, Inc. v. Cellco P'ship, 788 F.3d 98, 101 (2d Cir. 2015); Collura v. City of Phila., 590 F. App'x 180, 184 (3d Cir. 2014).

160 *Wullschleger*, 75 F.4th at 924.

1. First Circuit

In *Ching v. Mitre Corp.*,[161] the plaintiff's original complaint combined claims under the Age Discrimination in Employment Act[162] with alleged violations of state law prohibiting employment discrimination against the handicapped.[163] The defendant removed the case to federal court.[164] When faced with a motion for summary judgment based upon the statute of limitations, the plaintiff "moved to amend his complaint by striking his sole federal claim and sought to remand the action to state court." [165]

After the district court granted the defendant's summary judgment motion, the plaintiff appealed the district court's refusal to remand, as well as the removal itself.[166] The First Circuit applied precedent from sister circuits and concluded that "An amendment to a complaint after removal designed to eliminate the federal claim will not defeat federal jurisdiction", and it was within the district court's discretion whether to remand or retain the remaining state law claims.[167]

2. Second Circuit

The case of *In Touch Concepts v. Cellco Partnership* [168] concerned a plaintiff who filed a class action lawsuit alleging a series of exclusively state-law claims.[169] The defendant removed the case to federal court under the Class Action Fairness Act (CAFA),[170] after which the plaintiff amended the complaint to drop all class action allegations, which was the defendant's sole basis for removal.[171] Nonetheless, the Second Circuit relied on the Rockwell footnote [172] and determined it was proper for the district court to retain jurisdiction, and ultimately rule on the merits of the case,[173] citing the footnote from theSupreme Court's *Rockwell* decision,[174] which stated that

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161 *Ching*, 921 F.2d at 12.

162 Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*

163 *Ching*, 921 F.2d at 12.

164 *Id.*

165 *Id.* at 13.

166 *Id.*

167 *Id.* at 14 (citing 28 U.S.C. § 1441(c)).

168 *See generally* In Touch Concepts, Inc. v. Cellco P'ship*,* 788 F.3d 98 (2d Cir. 2015).

169 *Id.* at 100.

170 28 U.S.C. § 1332(d).

171 *In Touch Concepts, Inc.,* 788 F.3d at 100.

172 Rockwell Int'l Corp. v. United States, 549 U.S. 457, 474 n.6 (2007) (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 346, 357 (1988)) ("when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction.").

173 *In Touch Concepts, Inc.*, 788 F.3d at 102.

174 *Id.* at 101.

"when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." [175]

3. Third Circuit

The plaintiff in *Collura v. City of Philadelphia,*[176] dropped his federal civil rights claim from his second amended complaint and sought a remand of his remaining state-law claims.[177] The Third Circuit held that "federal jurisdiction cannot be defeated by amending the complaint to eliminate federal claims after removal."[178]

4. Fourth Circuit

In *Brown v. Eastern States Corp.*,[179] a shareholder brought suit in a state court to enjoin a proposed corporate reorganization plan.[180] The case was removed to federal court by the defendant on the grounds that the plaintiff's claims implicated several federal statutes.[181] The plaintiff attempted to avoid the jurisdiction of the federal court by amending the complaint to eliminate all reference to rights arising under federal statutes.[182] The district court denied the plaintiff's subsequent motion to remand.[183] The Fourth Circuit affirmed, reasoning that "the fact that plaintiff subsequently amended his complaint in an attempt to eliminate the federal question did not make remand proper", and that 28 U.S.C. § 1447(c) "clearly establish[es] the rule that the case is not to be remanded if it was properly removable upon the record as it stood at the time that . . . the petition for removal was filed."[184]

Brown was followed by *Brinkley v. Loughran,*[185] holding that once a case is properly removed to federal court based on federal question jurisdiction, "it is not permissible for the plaintiff to bring about the remand

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175 *Rockwell Int'l Corp.*, 549 U.S. at 474 n.6 (citing Carnegie-Mellon Univ. v. Cohill, 494 U.S. 343, 346, 357 (1988)).

176 Collura v. City of Phila., 590 F. App'x 180 (3d Cir. 2014) (per curiam).

177 *Id.* at 183.

178 *Id.* at 184.

179 *See generally* Brown v. E. States Corp., 181 F.2d 26 (4th Cir. 1950).

180 *Id.* at 27.

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* at 28–29.

185 *See generally* Binkley v. Loughran, 714 F. Supp. 776 (M.D.N.C. 1989).

of an action by amendment of the complaint to eliminate any basis for the federal claim." [186]

5. Fifth Circuit

The Fifth Circuit, in a case entitled *16 Front Street, L.L.C., v. Mississippi Silicon, L.L.C.*,[187] held that "The rule that the plaintiff cannot oust removal jurisdiction by voluntarily amending the complaint to drop all federal questions serves the salutary purpose of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute."[188]

6. Sixth Circuit

In *Harper v. AutoAlliance Int'l., Inc.*,[189] the Sixth Circuit focused on judicial economy as the reason for the district court to retain jurisdiction over state law claims when the plaintiff amended the complaint to delete the Title VII Civil Rights Act claims which had served as the basis for the defendant's notice of removal.[190] While generally, the court said, "[I]f the federal claims are dismissed before trial . . . the state claims should be dismissed as well,"[191] but noting, as to supplemental jurisdiction, the "[d]ismissal is not mandatory [and] is a doctrine of discretion, not of plaintiff's right." [192]

Citing a prior Sixth Circuit case, the court said:

> It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint *as it existed at the time the petition for removal was filed* . . . When a subsequent narrowing of the issues excludes all federal claims, whether a pendent state claim should

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186 *Id.* at 778 (citing 14 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3739 (2d ed. 1985)). *But see* Harless v. CSX Hotels, Inc., 389 F.3d 444, 447 (4th Cir. 2004) (finding no abuse of discretion on the part of the district court for permitting plaintiff to make repeated amendments to her complaint for the purpose of avoiding federal jurisdiction); Wood v. Crane Co., 764 F.3d 316, 322 (4th Cir. 2014) (holding "there is no categorical prohibition against manipulation of a federal forum to avoid federal jurisdiction.").

187 16 Front St., L.L.C. v. Miss. Silicon, L.L.C., 886 F.3d 549 (5th Cir. 2018).

188 *Id.* at 558 (quoting Boelens v. Redman Homes, Inc., 759 F.2d 504, 506 (5th Cir. 1985)).

189 *See generally* Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195 (6th Cir. 2004).

190 *Id.* at 199.

191 *Id.* at 210 (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)) (citing Taylor v. First of Am. Bank – Wayne, 973 F.3d 1284, 1287 (6th Cir. 1992)).

192 *Id.* (quoting Baer v. R&F Coal Co., 782 F.2d 600, 603 (6th Cir. 1986)).

> be remanded to state court is a question of judicial discretion, not of subject matter jurisdiction. [193]

Notions of judicial economy also influenced the court's decision because the case had been on the district court's docket for almost two years, discovery had been completed, and a fully-briefed motion for summary judgment was ripe for the district court's ruling.[194] Thus, the court noted, if remanded, the case "could have wasted judicial resources and resulted in additional delay, [so] the district court's discretion was not abused in denying remand."[195]

Additionally, suspicions regarding forum manipulation arose due to the plaintiff's actions. As the district court noted, "[s]uch timing appears suspicious and raises questions about Plaintiff's motives in seeking remand." [196]

7. Seventh Circuit

In the Seventh Circuit, similar to the decision in the *In Touch* case from the Second Circuit, a plaintiff in a post-removal amendment, where removal was predicated on CAFA, attempted to defeat federal jurisdiction by dropping the class action component of the case.[197] The court said, in a per curiam opinion, that "jurisdiction under CAFA is secure even though, after removal, plaintiffs amended their complaint to eliminate the class allegations, [due to the] well-established general rule . . . that jurisdiction is determined at the time of removal, and nothing filed after removal affects jurisdiction." [198]

8. Eighth Circuit

The Eighth Circuit is internally contradictory, having reached diametrically opposed opinions on the issue of continuing jurisdiction following a post-removal amendment to the pleadings. In an early case from 1926, a case was originally filed in state court, but removed to federal court

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193 *Id.* at 210–11 (quoting Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 758 (6th Cir. 2000)) (emphasis in original).

194 *Id.* at 211.

195 *Id.*

196 *Id.* at 212.

197 *Id.*

198 *In re* Burlington N. Santa Fe Ry. Co., 606 F.3d 379 (7th Cir. 2010) (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293 (1938)); *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (per curiam).

on the basis of diversity of citizenship.[199] Subsequent to the removal, the plaintiff amended the complaint, adding a non-diverse party, although there was an unsettled question as to whether that non-diverse party remained in the case for its duration.[200] It was argued that since the court had valid subject matter jurisdiction at the time of removal, and no motion to remand was ever made, the court's jurisdiction was not impacted by a post-removal change to the pleadings.[201] The court said that while this is a correct statement of the general rule, as applied to the facts of this case, it could not agree with this contention.[202] Explaining its ruling, the court said:

> While it is the general rule that jurisdiction, once having attached, will not be divested by subsequent events, yet there is an exception to this rule: The plaintiff, after jurisdiction has attached, may so change his pleading voluntarily that the court will no longer have jurisdiction on the face of the pleading. If this is done, it becomes the duty of the court to remand the case, if it be a removed case.[203]

The court based its decision on the predecessor of 28 U.S.C. § 1447(c), formerly § 37 of the Judicial Code, which (then as now) requires a district court, at any time before final judgment, to remand a removed case if it becomes apparent to the court that it lacks subject matter jurisdiction.[204]

Over eighty years later, and before its two appellate decisions in *Royal Canin,* the Eighth Circuit held that a post-removal amendment to the complaint, eliminating the federal claims in an attempt to destroy federal question jurisdiction, would not impact the court's ability to continue its exercise of jurisdiction over the matter.[205] In this case, the plaintiff attempted to force a remand of a properly removed case by amending the complaint to eliminate all pension-related claims that had implicated ERISA, that had provided an avenue for removal by the defendant on the basis that the state law claims in plaintiff's original complaint had embedded aspects that were necessarily federal in character, the Eighth Circuit said:

> [Plaintiff] argues that there was no federal question on the face of his amended complaint – i.e., the complaint in which he omitted his pension-related claim – and that the district court therefore did not have subject matter jurisdiction. The claim is meritless. '[J]urisdiction is determined at

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199 Highway Const. Co. v. McClelland, 15 F.2d 187, 188 (8th Cir. 1926).
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*; 28 U.S.C. § 1447(c).
205 McLain v. Anderson Corp., 567 F.3d 956, 965 (8th Cir. 2009).

> the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated.[206]

When addressing this contradiction, the Eighth Circuit, in the second appeal in *Royal Canin*,[207] relegated the aforementioned case to a footnote, saying: "To the extent that *McLain v. Anderson Corp.* (citation omitted) is inconsistent with *McClelland,* we will follow the latter."[208]

9. Ninth Circuit

In a pair of decisions involving attempts to deprive the federal courts of subject matter jurisdiction via post-removal amendments to the complaints, the Ninth Circuit took a conservative approach to the issue, following the general rule that post-removal amendments do not adversely impact the court's authority to decide the case, no matter how much the amendments alter the complaint.[209]

In *Williams v. Costco Wholesale Corp.*,[210] the plaintiff brought an action in state court that combined alleged violations of federal and state law.[211] Following the defendant's removal of the case to federal court, the plaintiff amended his complaint to eliminate the federal claims, added additional state-law claims, and then sought a remand to state court, which the district court granted.[212] The plaintiff's attempt to deprive the federal court of subject matter jurisdiction by eliminating his federal claims backfired on him. Even though he got rid of the federal claims, the state law claims in the amended complaint demonstrated diversity of citizenship, an independent ground for jurisdiction. As a result, the Ninth Circuit said the district court was bound to exercise pursuant to what the court termed as "'a virtually unflagging obligation' to exercise the jurisdiction conferred upon [it] by the coordinate branches of government and duly invoked by the litigants."[213]

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206 *Id.* (quoting Quinn v. Ocwen Fed. Bank FSB, 470 F.3d 1240, 1248 (8th Cir. 2006)).

207 Discussed in Section VI B, *infra.*

208 Wullschleger v. Royal Canin U.S.A., Inc., 75 F.4th 918, 923 n.3 (8th Cir. 2023) (citing Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (stating that "when faced with conflicting panel opinions, the earliest opinion must be followed 'as it should have controlled the subsequent panel that created the conflict.'") (citing T.L. *ex rel.* Ingram v. United States, 443 F.3d 956, 960 (8th Cir. 2006))).

209 Williams v. Costco Wholesale Corp., 471 F.3d 975, 976 (9th Cir. 2006); Broadway Grill, Inc. v. Visa Inc. 856 F.3d 1274, 1275 (9th Cir. 2017).

210 *Williams*, 471 F.3d at 976.

211 *Id.*

212 *Id.* at 977.

213 *Id.* (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) and United States v. Rubenstein, 971 F.2d 288, 293 (9th Cir. 1992)).

Broadway Grill, Inc. v. Visa Inc.,[214] was a class action case filed in California state court.[215] Following the defendant's removal to federal court under the Class Action Fairness Act (CAFA),[216] plaintiffs attempted to change the definition of the class to include only California citizens, thereby eliminating the minimal diversity that supported jurisdiction under CAFA.[217] The district court remanded, but the Ninth Circuit reversed, since nothing under federal law authorizes plaintiffs "to amend their class definition [post-removal, to] . . . add or remove claims in such a way that would alter the essential jurisdictional analysis." [218]

10. Tenth Circuit

In the Tenth Circuit, two district court cases demonstrate the courts' reluctance to remand a properly removed case following an amendment by the plaintiff eliminating the federal claims that were part of the original complaint, in an effort to defeat federal subject matter jurisdiction.[219]

In *Casias v. Distribution Mgmt. Corp.*,[220] the plaintiffs filed a class action complaint in state court alleging violations of a state labor law.[221] Defendants removed pursuant to the minimal diversity of citizenship standards under CAFA.[222] Plaintiffs filed their motions to amend and to remand by attempting to exclude out-of-state class members to defeat the minimal diversity requirement of CAFA and hence defeat the federal court's subject matter jurisdiction.[223]

The defendants opposed the motions, arguing that the court's original jurisdiction under CAFA was fixed at the time of removal, and that plaintiffs could not deprive the court of its jurisdiction by an amended complaint altering the definition of the class sought to be certified.[224] The Magistrate Judge to whom the plaintiffs' motions were referred undertook a "supplemental jurisdiction" analysis, finding that if leave to amend was

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214 *Broadway Grill, Inc*., 856 F.3d at 1275.

215 *Id.* at 1275–76.

216 28 U.S.C. § 1332(d).

217 Plaintiff contended that post-amendment, the case was a "local controversy", an exception to federal jurisdiction under CAFA for cases in which two-thirds of the class members are citizens of the state of filing, and a "significant" defendant is a citizen of that state as well. *See id.* § 1332(d)(4).

218 *Broadway Grill, Inc*., 856 F.3d at 1279.

219 Casias v. Distrib. Mgmt. Corp., No. 1:11-CV-00874 MV/RHS, 2012 WL 4511364, at *1 (D.N.M. Sept. 26, 2012); N.M. Top Organics-Ultra Health, Inc. v. Blue Cross, No. 1:22-cv- 00546, 2024 WL 1345638, at *1 (D.N.M. January 24, 2024).

220 *See Casias*, 2012 WL 4511364.

221 *Id.* at *12; N.M. Minimum Wage Act, N.M. STAT. ANN. §§ 50-4-19–30.

222 *Casias*, 2012 WL 4511364, at *2.

223 *Id.* at *3.

224 *Id.*

granted, the case would involve only state law issues and the court would no longer have original jurisdiction over the case under CAFA.[225] The magistrate Judge recommended granting both of the plaintiffs' motions.[226]

The district judge rejected the magistrate's recommendations since a "supplemental jurisdiction" analysis was inappropriate, since there was only one set of claims—an action under the state's minimum wage law—and supplemental jurisdiction applies only when a case has one or more claims over which the district court has original jurisdiction *and* one or more additional claims over which the court does *not* have original jurisdiction, but because they are so related to the original jurisdiction claim as to form "part of the same case or controversy"[227]

Moreover, jurisdiction is determined at the point of removal, and it "is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot 'oust' the federal court of jurisdiction."[228]

Recently, in *N.M. Top Organics – Ultra Health, Inc. v Blue Cross and Blue Shield of New Mexico*,[229] another class action case originally filed in state court, the plaintiffs brought an action pursuant to the Employee Retirement Income Security Act (ERISA),[230] which the defendants removed to federal court, citing complete preemption under ERISA over state law claims, as well as original jurisdiction under CAFA.[231] The plaintiffs then filed an amended complaint dropping the ERISA claim and contending that there was no jurisdiction under CAFA because the amended complaint raised an entirely local controversy.[232] Plaintiffs moved to remand the case, claiming that the federal court no longer had subject matter jurisdiction.[233] The court rejected the attempt to remand, stating that the ERISA claim in the plaintiff's original complaint vested the court with jurisdiction upon removal and that the post-removal amendment, which dropped the federal claims, was ineffective in its attempt to divest the court of jurisdiction.[234]

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225 *Id.* at *2.

226 *Id.*

227 *Id.* at *4–5 (quoting 28 U.S.C. § 1367(a)).

228 *Id.* at *1, *6 (quoting S. REP. NO. 109-14 (2005)).

229 N.M. Top Organics-Ultra Health, Inc. v. Blue Cross, No. 1:22-cv-00546, 2024 WL 1345638, at *1, *1 (D. N. M. Jan. 24, 2024).

230 *Id.* at *3.

231 *Id.* at *3–4.

232 *Id.* at *4–5.

233 *Id.* at *5.

234 *Id.* at *11 (citing *In re* Burlington N. Santa Fe Ry. Co., 606 F.3d 379, 380–81 (7th Cir. 2010) ("The well-established general rule is that jurisdiction is determined at the time of removal, and nothing filed after removal affects jurisdiction.")).

11. Eleventh Circuit

Lastly, in the case of *Behlan v. Merrill Lynch*,[235] the Eleventh Circuit affirmed a district court's denial of a plaintiff's motion to remand after it appeared that the plaintiff's federal cause of action against the brokerage was preempted and barred by the Securities Litigation Uniform Standards Act.[236] The Eleventh Circuit applied precedent and concluded that the district court "had discretion to retain jurisdiction over the state law claim even after [plaintiff] amended the complaint to remove the federal cause of action."[237] Additionally, the remaining state law claims so closely mirrored the abandoned federal law claim that the district court did not err when it denied the plaintiff's motion to remand the remainder of the case to state court.[238]

D. The Supreme Court's Opinion, Resolving a so-called "Split" in Authorities

Royal Canin, U.S.A., Inc. sought and obtained a writ of certiorari following the Eighth Circuit's decision to remand the case to the Missouri state court.[239] Justice Kagan, writing for a unanimous court, began her opinion with a self-described "judicial primer," recounting the foundational aspects of federal jurisdiction, with emphasis on its limited nature.[240]

Following that, the opinion outlines "the procedural back-and-forth that eventually landed Wullschleger's case" before the Supreme Court,[241] which will not be repeated here. The essence of the Court's opinion is captured in the following single paragraph that precedes multiple pages setting forth its statutory and precedential justification:

> When a plaintiff amends her complaint following her suit's removal, a federal court's jurisdiction depends on what the new complaint says. If (as here) the plaintiff eliminates the federal-law claims that enabled removal, leaving only state-law claims behind, the court's power to decide the dispute dissolves. With the loss of federal-question jurisdiction, the court loses as well its supplemental jurisdiction over the state claims. That conclusion fits the text of [28 U.S.C.] § 1367, governing supplemental jurisdiction. And it accords with a bevy of rules hinging federal jurisdiction

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235 Behlen v. Merrill Lynch, 311 F.3d 1087, 1096 (11th Cir. 2002).
236 *Id.*
237 *Id.* at 1095.
238 *Id.* at 1092.
239 Royal Canin U.S.A., Inc. 144 S. Ct. 1455, 1455 (2024).
240 Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 28 (2025).
241 *Id.* at 28–29.

> on the allegations made in an amended complaint, because that complaint has become the operative one.[242]

The Supreme Court began the justification for its ruling by reviewing the text of 28 U.S.C. § 1367—the supplemental jurisdiction statute.[243] Following the jurisdiction-conferring language of subsection (a), granting the federal courts with the authority over state law claims that are "so related" to the underlying federal claim as to "form part of the same case or controversy",[244] comes the discretion-granting language of subsection (c) under which the courts "may decline to exercise supplemental jurisdiction" in certain enumerated circumstances, including: (3) if the district court "has dismissed all claims over which it has original jurisdiction." [245]

"So, although supplemental jurisdiction persists, the district court need not exercise it."[246] Contrast this dismissal language with cases of a voluntary amendment to the complaint, which eliminates all underlying federal claims.[247] As stated in the *Rockwell* case, an amendment to the complaint excising all federal claims divests a court of supplemental jurisdiction over the remaining state-law claims, and no distinction is drawn between cases filed initially in federal court and those that are there pursuant to removal, since 28 U.S.C. § 1367(a) applies to both.[248]

This is because "courts conceive of amendments to pleadings as potentially jurisdiction-changing events", and an amendment, which displaces the preceding complaint, "can either create or destroy jurisdiction." [249]

Finally, having cited *Rockwell* as controlling precedent for the proposition that an amendment complaint, in a case originating in federal court, serves as the governing pleading in the case post-amendment, the Court went on to explain the two-sentence footnote in *Rockwell* that appears to dictate an opposite conclusion for cases removed to federal court.[250] That sentence reads, in pertinent part: "It is true that, when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." [251]

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242 *Id.* at 30–31.
243 *Id.* at 31.
244 28 U.S.C. § 1367(a).
245 *Id.* § 1367(c)(3).
246 *Royal Canin U.S.A., Inc*., 604 U.S. at 32.
247 Rockwell Int'l Corp. v. United States, 549 U. S. 457, 473–474 (2007).
248 *Id.* at 473–474; *Royal Canin U.S.A., Inc*., 604 U.S. at 32–33.
249 *Royal Canin U.S.A., Inc*., 604 U.S. at 35.
250 *Id.* at 41–43.
251 *Rockwell Int'l Corp*., 549 U.S. at 457 n.6.

This sentence appears to comport with the vast majority of federal appellate decisions cited *infra.*[252] The Supreme Court in *Royal Canin* dismissed the footnote as *dictum,* however, not controlling the outcome in *Rockwell,* which "was an original federal case, not a removed one," and thus was "outside the issue being decided in that case" having "no bearing on the Court's conclusion about jurisdiction in original cases." [253]

The Court therefore concluded that when the plaintiff amended her complaint to delete all claims that were, or could be interpreted as, federal in nature, which enabled the removal of the case to federal court in the first place, thereby leaving only (purely) state law claims behind, the federal court lost its supplemental jurisdiction over those state law claims, and they had to be remanded to state court.[254]

While none of the above-mentioned cases from the various federal appellate circuits were expressly overruled by the Supreme Court in the *Royal Canin* decision, the unanimous nature of the decision clearly indicates that the Court is taking a different approach to supplemental jurisdiction than most federal judicial circuits have taken in the past.

VI. DOES ROYAL CANIN CONFLICT WITH 28 U.S.C. § 1367?

It is at least arguable that the mandatory remand holding of *Royal Canin* conflicts with the discretionary remand language of 28 U.S.C. § 1367(c).

In December of 1990, Congress added § 1367 to Title 28 of the United States Code, "which codified the judge-made doctrines of ancillary and pendant jurisdiction[255] into a newly created category, 'supplemental jurisdiction.'"[256] As the Supreme Court noted in *Arbaugh v. Y&H Corp.*,[257] § 1367 affords litigants an "opportunity . . . to pursue complete relief in a federal-court lawsuit." [258]

§1367 has two principal components: the power-granting provision of § 1367(a), and the discretion-granting language of § 1367(c).[259] The power-granting provision is couched in *mandatory* language. It states that "in any civil action of which the district courts have original jurisdiction, the district

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252 *Royal Canin U.S.A., Inc*., 604 U.S. at 32.

253 *Id.* at 42.

254 *Id.* at 32–33.

255 *See generally* United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966); 28 U.S.C. § 1367.

256 Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims,* 9 LEWIS & CLARK L. REV. 295, 295–310 (2005); Judicial Improvements Act of 1990, Pub. L. No. 101–650, § 310(a), 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367 (2000)).

257 Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

258 *Id.* at 506.

259 Edward H. Cooper, *An Alternative and Discretionary § 1367*, 74 IND. L. J. 153, 155 (1998).

courts *shall* have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." [260]

The discretion-granting language, found in § 1367(c), by contrast, is phrased in *permissive* language and describes the circumstances under which the district court *may* (but not "must", or "shall") decline to exercise jurisdiction over a claim which it would otherwise have the power to adjudicate under § 1367(a).[261] Such circumstances include when "the claim raises a novel or complex issue of State law; the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; the district court has dismissed all claims over which it has original jurisdiction, or in *exceptional circumstances*, there are other *compelling reasons for declining jurisdiction*."[262] In all such cases, a decision not to retain supplemental jurisdiction over a related state law claim is based on discretion; it is "not based on a jurisdictional defect."[263]

This last circumstance can be read to indicate that in the absence of *exceptional circumstances* and *compelling reasons* to decline jurisdiction of a closely related state-law claim, the court should retain jurisdiction so that a litigant has the opportunity to obtain the type of "complete relief" that *Arbaugh* said was a reason for Congressional adoption of § 1367.[264]

It is clear that *discretion* is a hallmark of § 1367.[265] The Supreme Court, discussing the nature of discretionary jurisdiction under § 1367, said that:

> With respect to supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. A district court's decision whether to exercise that jurisdiction. . . is purely discretionary. '[When] all that remains before the federal court are state-law claims. . .[t]he district court retains discretion to exercise supplemental jurisdiction [over them].'[266]

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260 28 U.S.C. § 1367(a) (emphasis added).

261 *Id.* § 1367(c).

262 *Id.* (emphasis added).

263 *See* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 640 (2009).

264 Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

265 *See* City of Chicago. v. Int'l Coll. of Surgeons, 522 U.S. 156, 173 (1997) (holding that § 1367 "confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise.").

266 *Carlsbad Tech., Inc*., 556 U.S. at 640 (quoting 13 WRIGHT AND MILLER'S FEDERAL PRACTICE & PROCEDURE § 3567.3 (3d ed. 2008)).

Indeed, a district court's decision to exercise or not exercise supplemental jurisdiction is reviewed under an *abuse of discretion* standard.[267]

The *Royal Canin* decision strips the district courts of any discretion to retain supplemental jurisdiction over closely related state-law claims after a voluntary amendment to the complaint by the plaintiff abandoning the federal claims initially asserted that served as the keys to the federal courthouse.[268] Compelling a remand of the state-based claims regardless of the presence or absence of any of the factors of § 1367(c) that would otherwise guide the district court's jurisdictional determination is a frustration of the well-settled law of supplemental jurisdiction.[269] Such a denial of Congressionally granted discretion is unprecedented and represents a dramatic shift away from decades of precedent regarding the retention of supplemental jurisdiction, despite a plaintiff's attempts to manipulate it through post-removal activity.

VII. AMENDED VS. ORIGINAL COMPLAINT CONSIDERATIONS

In removal cases, the clash between looking only at the *amended* complaint to determine the subject matter jurisdiction of the federal court, both as to any federally-based claims as well as supplemental jurisdiction over related state-law claims or to consider the state of the pleadings at the time of removal, can be resolved by treating removal cases differently from those originally filed by the plaintiff in federal court, which was a stance advocated for by the defendant's counsel in oral argument before the Supreme Court in *Royal Canin*.[270]

Such a distinction would be consistent with Justice Scalia's opinion in *Rockwell,* as well as with the federal appellate cases cited by Justice Scalia in support of such a distinction, principally in the case of *Boelens v. Redman Homes, Inc.*[271] In *Boelens*, the plaintiff brought a personal injury claim under four federal statutes, along with various state law claims.[272] The federal counts included one under the Magnuson-Moss Warranty Act (MMWA).[273] The Fifth Circuit ultimately ruled that the plaintiff did not have a cognizable claim under the MMWA and sent the case back to the district court to dismiss

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267 *See* Austin v. City of Montgomery, 196 F. App'x 747, 754 (11th Cir. 2006).

268 Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 43–44 (2025).

269 Deborah J. Challener & John B. Howell, III, *Remand and Appellate Review When a District Court Declines to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)*, 81 TEMP. L. REV. 1067, 1073–1075 (2008).

270 Transcript of Oral Argument at 6, Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22 (2025) (No. 23-677).

271 Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985).

272 *Id.* at 506.

273 15 U.S.C. §§ 2301–2312.

that claim for lack of subject matter jurisdiction.[274] Meanwhile, the plaintiff amended the complaint to drop the remaining federal claims but went to trial on the remainder of the complaint.[275] On appeal, the plaintiff asked the Fifth Circuit not to dismiss the case for lack of subject matter jurisdiction over the state-law claims because the complaint, as originally filed, invoked three other federal statutes besides the MMWA, each of which was arguably sufficient to confer subject matter jurisdiction on the federal district court, contending that only the original complaint, and not the amended complaint, should be considered in determining jurisdiction.[276]

In examining precedents, the Fifth Circuit noted two distinct bodies of cases on the issue of pendant jurisdiction following the elimination of the federal claims that allowed access to federal court in the first instance: one setting forth the rules for cases that originated in federal court, and a distinct body of law for removed cases.[277]

As to the latter, the court said: "[I]t is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed."[278]

Citing "the majority view," the court continued, "[A] plaintiff's voluntary amendment to a complaint after removal to eliminate the federal claims upon which removal was based will not defeat federal jurisdiction."[279]

Noting the degree of discretion granted by statute [280] to the federal courts,[281] the Fifth Circuit stated that "[a]lthough the voluntary dropping of all federal claims by a plaintiff in a removal case does not oust federal jurisdiction, the federal court may still exercise its discretion *not* to retain pendant jurisdiction over the remaining state law claims," [282] also observing

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274 *Boelens*, 759 F.2d at 506.

275 *Id.*

276 *Id.* (citing Mobile Oil Corp. v. Kelley, 493 F.2d 784 (1974)), *cert. denied*, 419 U.S. 1022 (1974).

277 *Id.* at 506–07.

278 *Id.* at 507 (quoting IMFC Pro. Servs., Inc. v. Latin Am. Home Health, Inc. 676 F. 2d 152, 157 (1982)).

279 *Id.* A footnote to the case cites, as additional authority, *In re* Greyhound Lines. 598 F.2d 883, 884 (5th Cir. 1979); Westmoreland Hosp. Ass'n v. Blue Cross, 605 F.2d 119, 123–24 (3d Cir. 1979), *cert denied*, 444 U.S. 1077 (1980); Hazel Bishop, Inc. v. Perfemme, Inc., 314 F.2d 399, 403 (2d Cir. 1963); Brown v. E. States Corp., 181 F.2d 26, 28 (4th Cir. 1950); Austwick v. Bd. Of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983); Armstrong v. Monex Int'l. Ltd., 413 F. Supp. 567, 569 (N.D. Ill. 1976).

280 *See* 28. U.S.C. §1367(c).

281 *See* Section VI.

282 *Boelens,* 759 F.2d at 507 n.2 (emphasis added).

the split in authority as to whether pendant state-law claims not retained must be dismissed, or simply remanded by the district courts.[283]

Explaining the rationale for its ruling, the Fifth Circuit said:

> The policy behind this rule is obvious. When a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal. A federal forum for federal claims is certainly a defendant's right. If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court. The jockeying is a drain on the resources of the state judiciary, the federal judiciary and the parties involved; tactical manipulation [by the] plaintiff . . . cannot be condoned. [284]

The court continued, "The rule that a plaintiff cannot oust removal jurisdiction by voluntarily amending the complaint to drop all federal questions [also] serves the salutary purpose of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." [285]

In contrast, the court noted that these same considerations are not present in a case of original federal question jurisdiction, where the plaintiff, rather than the defendant, is invoking the jurisdiction of the federal court.[286] There, the court said,

> [W]e must look to the amended complaint in assessing original federal question jurisdiction . . . consistent with the general rule [in cases of that type] that an amended complaint ordinarily supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading. [287]

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283 *See, e.g.,* Cook v. Weber, 698 F.2d 907, 909 (7th Cir. 1983); Levy v. Weissman, 671 F.2d 766, 769 (3d Cir. 1982) (holding that dismissal is necessary since the only permissible grounds for a remand are those expressly provided by statute), *contra In re* Romulus Comm. Schools, 729 F.2d 431, 433 (6th Cir. 1984); Fox v. Curtis, 712 F.2d 84, 85 (4th Cir. 1983); Hofbauer v. Nw. Nat'l Bank, 700 F.2d 1197, 1201 (8th Cir. 1983); Naylor v. Case & McGrath, Inc., 585 F.2d 557, 562 (2d Cir. 1978) (holding the district courts may remand the pendant claims once the federal claim that had provided the basis for removal is eliminated).

284 *Boelens*, 759 F.2d at 507 (citing Austwick v. Bd. of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983)).

285 *Id.*

286 *Id.*

287 *Id.* at 508 (citing Wilson v. First Hous. Inv. Corp., 566 F.2d 1235, 1237–38 (5th Cir. 1978), *vacated on other grounds*, 444 U.S. 959 (1979); Int'l Controls Corp. v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Cicchetti v. Lucey, 514 F.2d 362, 365 n.5 (1st Cir. 1975); Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967); Jefferson v. H.K. Porter Co., 485 F. Supp. 356, 359 (N.D. Ala. 1980)).

The contrasting policy considerations, as well as the distinctions in precedent, justify the formal adoption of two sets of rules regarding the consequences of the abandonment of federal claims where related state-law claims remain: one set of rules for cases originating in state court and removed by the defendant, and another set of rules for cases originally filed by the plaintiff in federal court.[288] Such a duality in regulations could have been, and should have been, adopted by the Supreme Court in *Royal Canin,* but instead, the discretion granted to the district courts by 28 U.S.C. § 1367 was denied, and a remand was made mandatory.

VIII. THE PRACTICAL IMPACT OF ROYAL CANIN ON COMMERCE

The Supreme Court allowed the filing of eight amici curiae briefs, three of which were from various Chambers of Commerce organizations. These briefs discussed the impact that would occur if the Court were to affirm the Eighth Circuit, which it did on January 15, 2025.[289]

They argued that upholding the Eighth Circuit ruling would "undermine[] predictability in jurisdictional rules, encourage[] forum manipulation and degrade[] a defendant's statutory right of removal."[290] Specifically, the Chambers of Commerce pointed out that "[t]his Court has consistently recognized the importance of predictability in jurisdictional rules."[291]

Justice Scalia, concurring in the judgment in *Sisson v. Ruby*,[292] explained that "vague boundar[ies] . . . [are] to be avoided in the area of subject-matter jurisdiction whenever possible."[293] The predictability that comes with clear and well-settled jurisdictional rules is valuable to all parties involved, including companies "making business and investment decisions."[294]

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288 *Boelens*, 759 F.2d at 507–08.

289 *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners, Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22 (2025) (No. 23-677), 2024 WL 3329758; Brief of Amici Curiae State Chambers of Commerce in Support of Petitioners, *Royal Canin U.S.A., Inc*., 604 U.S. 22 (No. 23-677), 2024 WL 3329759; Brief of Amicus Curiae The Missouri Chamber of Commerce and Industry in Support of Petitioners, *Royal Canin U.S.A., Inc*., 604 U.S. 22 (No. 23-677), 2024 WL 731179.

290 *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 18–22, *Royal Canin U.S.A., Inc.*, 604 U.S. 22 (No. 23-677), 2024 WL 3329758.

291 *Id.* at 18.

292 Sisson v. Ruby, 497 U.S. 358, 375 (1990).

293 *Id.*

294 Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010).

Unpredictability in jurisdictional matters, by contrast, "eat[s] up time and money as the parties litigate, not the merits of their claims, but which court is right to decide those claims."[295] *Royal Canin* is a case in point. Before landing in the Supreme Court the case had produced, over the course of seven years, *two* district court opinions, both with different results, and *two* federal appellate court opinions, both also reaching different conclusions, and a trip to the nation's highest court, all without finally resolving the merits, and "all dedicated to addressing whether the district court had jurisdiction to decide the case in the first place."[296]

The impact of Royal Canin on businesses was examined by the Missouri Chamber of Commerce in its amicus brief as follows:

> Until now, businesses . . . have relied upon the protection afforded by the stable, predictable rule that if a federal court has jurisdiction when the case is removed, then it retains jurisdiction throughout the case. But that rule is no longer. Now, businesses can only guess whether the case will remain in federal court, for plaintiffs can amend their complaint to drop any reference to federal law. That destabilizing effect will be felt most profoundly by small businesses, [which] lack the resources to engage in extensive legal maneuvering before reaching the merits and may feel compelled to settle – even if they have strong defenses.[297]

Moreover, Royal Canin "disrespects the defendant's important right of removal . . . and degrades this right by subjecting the defendant's "statutory right of removal . . . to the plaintiff's caprice."[298] That right of removal, "and the protection of a federal forum it enables, are particularly important to business defendants." [299] It functions as "a critical tool for ensuring that [businesses] receive a fair hearing and [are] not subject to 'the local prejudices of state courts.'"[300]

The Supreme Court's decision in *Royal Canin* dramatically altered all of this.

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295 *Id., accord*, Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464 n.13 (1980) ("litigation over whether the case is in the right court is essentially a waste of time and resources").

296 Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 20, *Royal Canin U.S.A., Inc*., 604 U.S. 22 (No. 23-677), 2024 WL 3329758.

297 *See* Brief of Amicus Curiae The Missouri Chamber of Commerce and Industry in Support of Petitioners at 3, *Royal Canin U.S.A., Inc.*, 604 U.S. 22 (No. 23-677), 2024 WL 731179.

298 Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 21, *Royal Canin U.S.A., Inc*., 604 U.S. 22 (No. 23-677), 2024 WL 3329758 (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938)).

299 *See, e.g.,* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction,* 41 AM. U. L. REV. 369, 412–13, 424 (1992).

300 *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 21, *Royal Canin U.S.A., Inc*., 604 U.S. 22 (No. 23-677), 2024 WL 3329758 (quoting 14 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3721 (rev. 4th ed. 2024)).

CONCLUSION

While the full effects of the *Royal Canin* opinion have yet to be felt, it is anticipated that plaintiffs will take full advantage of the broader range of pleading options afforded by the Supreme Court's decision, and will avail themselves of the safe harbor of remand if they want to exit federal court for any number of reasons; an unfavorable judge, an anticipated unfavorable ruling, unfavorable law in general, or an unfavorable jury pool.

Suppose plaintiffs want to avoid the possibility of federal jurisdiction altogether. In such a case, they can simply compose their complaints to consist of purely state-law claims against one or more non-diverse defendants, thereby taking advantage of the pleading standards of some states[301] that are even more liberal than the notice-pleading standards of the federal courts.[302]

Should plaintiffs want to combine federal claims with their state-law claims, they can file their hybrid complaints in state court and take the chance that the defendant(s) will not remove in a timely manner.[303] If removal occurs, however, plaintiffs can amend their pleadings to drop their federal claims and obtain a *Royal Canin*-type mandatory remand, assuming that their remaining state-law claims do not implicate an independent ground for federal court subject matter jurisdiction, *e.g.* diversity.[304] The near assurance of a return trip to state court also, in some instances, allows plaintiffs to take advantage of a more liberal approach to damages,[305] to class certification,[306]

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301 In Iowa, for example, "a motion to dismiss may be properly granted *only* when there exists *no conceivable set of facts* entitling the non-moving party to relief . . . Under [Iowa's] notice-pleading standards, nearly every case will survive a motion to dismiss for failure to state a claim under which relief may be granted." Young v. HealthPort Techs., Inc., 877 N.W. 2d 124, 127 (Iowa 2016) (emphasis added).

302 In federal courts, by contrast, plaintiffs can defeat a motion to dismiss only under the higher "plausibility standard" of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559, 563–63 (2007); *see also,* Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009) (holding that Twombly applies to all federal cases). *But see* Marcus Gadson, *Federal Pleading Standards in State Court,* 121 MICH. L. REV. 409, 422 (2022) (pointing out that courts in Delaware, Kansas, Minnesota, Montana, New Mexico, New York, North Carolina, Oklahoma, Tennessee, Washington State, and West Virginia have disapproved of Twombly and/or Iqbal.).

303 *See* 28 U.S.C. § 1446(b)(1)–(2).

304 *See, e.g.,* Williams v. Costco Wholesale Corp., 471 F.3d 975, 987 (9th Cir. 2006).

305 At time of writing, 24 states allow plaintiffs to make a demand for a lump sum to the jury and to support that demand with a per diem calculation. *See* John Campbell et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments,* 95 WASH. U. L. REV. 1, 7 (noting that 11 other states allow either lump-sum demands or per diem calculations in closing arguments).

306 In some states the standard of proof for class certification is only a "prima facie showing" that the statutory requirements are satisfied, whereas in contrast, federal law requires plaintiffs, at the class certification stage, to prove that "the class action device is superior to other methods of resolving the claims." Ferreras v. Am. Airlines, Inc., 946 F. 3d 178, 183 (3d Cir. 2019); *see also* Fed. R. Civ. P. 23(b)(3).

and, depending on whether the state jurisdiction follows the *Daubert* or *Frye* rules, the admission of expert evidence.[307]

It should be noted that all of these arguments and many more, and all of these authorities and many more, were presented to the Supreme Court prior to its decision in *Royal Canin* in the form of the superb *amici curiae* brief filed on behalf of the State Chambers of Commerce.[308]

The *Royal Canin* decision can, without a doubt, arguably be said to have worked a sea change on the nature and scope of the supplemental jurisdiction in the federal courts. For over two centuries, from the days of the first Justice Marshall, the Supreme Court had adhered to the rule that the federal court's subject matter jurisdiction, once vested, could not be ousted by subsequent events.[309] Now, a plaintiff can divest a federal court not only of its original federal question jurisdiction, but also of its supplemental jurisdiction over related state law claims, with a simple amendment to the complaint.

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307 Under the standard announced in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), as codified in Rule 702 of the Fed. R. Evid., in determining the admission of expert testimony, "a court considers whether the expert's knowledge will help the trier of fact understand the evidence or determine a fact in issue, whether the proposed testimony is based on sufficient facts or data, and whether the testimony is the product of reliable principles and methods. A recent amendment to Rule 702, effective December 1, 2023, further tightened the admissibility standard by clarifying that (i) the expert's opinion ought to reflect a reliable application of the principles and methods to the facts of the case, and (ii) the party putting forth the expert must demonstrate all four elements of Rule 702 by a preponderance of the evidence." *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 13, Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22 (2025) (No. 23-677), 2024 WL 3329758; Six states, however, (California, Illinois, Minnesota, New York, Pennsylvania and Washington, representing roughly 30% of the country's population, continue to follow the less rigorous general-acceptance standard of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Brief of Brief of Amici Curiae State Chambers of Commerce in Support of Petitioners at 13–14, *Royal Canin U.S.A., Inc.*, 604 U.S. 22 (No. 23-677), 2024 WL 3329759.

308 Attorneys Scott A. Eisman, Matthew Rublin, Carla Sung Ah Yoon, Eric Mahr and Claire L. Leonard of Freshfields Bruckhaus Deringer US LLP's New York and Washington, D.C. offices authored the brief and are to be credited with the arguments and authorities presented in this Section.

309 *See* Mollan v. Torrance, 22 U.S. 537 (1824); Conolly v. Taylor, 27 U.S. 556, 565 (1829).

ONCE UPON A TIME: A KINESTHETIC APPROACH TO TEACHING EVIDENCE

Peter C. Alexander,[*] Cheryl T. Page,[**] and Hannah G. Chapman[***]

INTRODUCTION

Evidence is a popular law school course, one that is often required. Students enroll in Evidence hoping to learn the rules of the courtroom, and many will transfer their knowledge of the evidence rules to assist them in Trial Advocacy and in practice.[1] One section of Evidence at the Southern Illinois University Simmons Law School (hereinafter "SIU") intentionally utilizes trials as an integral part of the course to help students apply and retain the Federal Rules of Evidence.[2]

I. LAW SCHOOL PEDAGOGY

Experiential education in law schools has become increasingly important in recent years, offering a practical and hands-on approach to legal learning.[3] This approach complements traditional classroom-based teaching methods and can have several advantages, including enhancing overall learning, better preparing students for practice, and providing opportunities for students who may underperform on tests to excel when demonstrating practical skills.[4] As we examine the relevance of Christopher Columbus Langdell, the MacCrate Report, and Bloom's taxonomy, it is evident that experiential education offers several advantages in the following context: Christopher Columbus Langdell, a legal scholar and educator, is often

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1 At Southern Illinois University Simmons Law School, Evidence is a pre-requisite or a co-requisite course for Trial Advocacy. *See Southern Illinois Simmons Law School Course Descriptions Catalog*, S. ILL. UNIV. SIMMONS L. SCH., https://law.siu.edu/_common/documents/course-catalog.pdf (last visited Aug. 28, 2025).

2 FED. R. EVID.

3 Daniel M. Schaffzin, *So Why Not an Experiential Law School - Starting with Reflection in the First Year*, 7 ELON L. REV. 383, 386 (2015).

4 *See generally id.*

associated with the development of the case method of legal education.[5] Langdell's case method has become the foundation for the traditional law school classroom experience.[6] While Langdell's case method has its merits, it primarily focuses on analytical and doctrinal aspects of the law.[7] Experiential education complements this approach by emphasizing the practical application of legal principles and skills, an element of legal education absent in Langdell's method.

The MacCrate Report, officially titled "Legal Education and Professional Development-an Educational Continuum," was published by the American Bar Association (ABA) in 1992.[8] The McCrate Report emphasizes the need for legal education to bridge the gap between theory and practice.[9] The Report recommends integrating skills training, ethics, and professional responsibility into the law school curriculum.[10] Its emphasis on practical skills aligns with the goals of experiential education.

Bloom's taxonomy is a framework for classifying educational objectives, ranging from lower-order thinking skills, such as remembering and understanding, to higher-order thinking skills, such as applying, analyzing, evaluating, and creating.[11] Experiential education typically focuses on higher-order skills by requiring students to actively engage with legal problems, apply legal principles to real-world scenarios, and critically evaluate their decisions and strategies.[12]

The benefits of experiential education include enhanced learning experiences that students receive from the practical application of theories learned in law school as they work, learn, and grow in a legal environment.[13] Experiential education encourages active learning, enabling students to apply legal concepts in real-world settings.[14] This hands-on approach deepens their understanding of the law and fosters critical thinking and problem-solving skills.

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5 Russel L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518 (1991).

6 *The Case Study Teaching Method*, HARV. L. SCH., https://casestudies.law.harvard.edu/the-case-study-teaching-method/ (last visited Aug. 30, 2025).

7 *See generally* Bruce A. Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890-1915*, 46 HIST. OF EDUC. Q. 192 (2006).

8 A.B.A., LEGAL EDUCATION AND THE PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

9 *See id.* at 3.

10 *See id.* at 278.

11 *See* BENJAMIN S. BLOOM ET AL., TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS 2 (1956).

12 CHERYL TAYLOR PAGE (SHELLY), BRIDGING THEORY AND PRACTICE: THE ROLE OF EXPERIENTIAL LEARNING IN SHAPING PRACTICE READY LAW SCHOOL GRADUATES 14 (2024).

13 *Id.*

14 *Id.*

Preparation for practice is another benefit of experiential education.[15] Experiential education better prepares law students for the realities of legal practice.[16] It bridges the gap between theory and practice by exposing students to client interactions, legal research, legal writing, negotiation, advocacy, and other essential lawyering skills.

Experiential education may benefit students who struggle with traditional testing methods. It allows those who underperform on exams to shine when they demonstrate their skills, creativity, and practical knowledge in a working environment. Exposure to experiential learning can often ignite a passion in students' hearts who may not excel in a traditional classroom setting. Experiential learning has a way of opening students' eyes to the many possibilities of practicing law.

Ethical and professional development also showcase the benefits of experiential education. Experiential learning often includes ethical and professional responsibility components, aligning with the MacCrate Report's emphasis on ethics and professionalism.[17] The incorporation of professional responsibility into experiential learning helps instill the ethical values and responsibilities lawyers must apply to their practice. Real-world experience is another benefit of experiential education. Simulations, clinics, externships, and other experiential programs simulate real-world legal practice. Students can work on actual cases, interact with clients, and gain exposure to various practice areas while enhancing their professional readiness.

Finally, adaptability is also a crucial component of experiential education. Experiential education can adapt to the legal landscape. It allows law schools to incorporate emerging legal issues, technologies, and practice methodologies into their curriculum, ensuring students remain current in their knowledge and skills.

Clearly, experiential education in law schools builds upon the principles of Christopher Columbus Langdell, the MacCrate Report, and Bloom's Taxonomy. Experiential learning offers a dynamic approach to legal learning that enriches students and helps them to understand the law, providing them with the practical skills and ethical foundation needed to excel in legal practice. Moreover, it provides a more inclusive educational environment, allowing diverse students to thrive based on their demonstrated skills and abilities.

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15 *Id.*

16 *Id.* at 64–65.

17 *Id.* at 32; W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 2 (1999).

II. EVIDENCE CLASS AT SOUTHERN ILLINOIS UNIVERSITY SIMMONS LAW SCHOOL

One section of Evidence at SIU requires students to memorize the Federal Rules of Evidence[18] and participate in five mini-trial exercises as the semester progresses. Each trial exercise focuses on the rules introduced in the prior three weeks of the course. As the class progresses, the students are expected to use all the rules learned thus far in the course. The professor ties the trial exercises to the textbook,[19] and bases each fact pattern on fractured fairy tales or nursery rhymes to avoid memorization of multiple fact patterns.

For example, the course begins with an introduction to evidence terminology, common law objections,[20] burdens and presumptions, and judicial notice. When discussing burdens and presumptions, the students are introduced to "the mailbox rule," which is an important rebuttable presumption that allows an attorney to introduce evidence that a party properly addressed a letter, applied proper postage, and deposited said letter in a U.S. Mail depository, whereupon the jury is instructed that it may assume that the recipient received the letter unless the recipient offers counter-proof that it was not received.[21] The next topics covered are authentication and the "Best Evidence Rule."[22]

Once the students have wrestled with these initial concepts, their first trial involves the beloved nursery rhyme characters "Jack & Jill." As the story goes, Jack and his wife Jill went up the hill to fetch a pail of water, but Jack fell down and "broke his crown," and Jill came tumbling after . . . because the City of Storyland failed to maintain the hill for its citizens![23] In the class's version of the story, the City of Storyland owns and controls the hill. The hill has a well at the top because the citizens do not have running water, so everyone must climb the hill to obtain water.[24] In this scenario, the students representing the plaintiffs and the defendant must call one predetermined witness on each side of the case and conduct a direct examination of each side's witness and cross-examine the witness called by opposing counsel.[25] To add to the "Jack & Jill" story, one additional set of facts is incorporated

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18 *See generally* FED. R. EVID.; Schaffzin, *supra* note 3, at 386.

19 CHRISTOPHER B. MUELLER ET AL., EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS (9th ed. 2019).

20 "Common law objections" generally include those objections that most attorneys use at trial, but which are not codified in the Federal Rules of Evidence. They include, "asked and answered," "argumentative," "cumulative," etc. *See* Mike Robinson, *Types of Objections in Court: A Guide*, CLIO (Sep. 8, 2025), https://www.clio.com/blog/objections-in-court/.

21 For a helpful explanation of the mailbox rule, see Malla Pollack, *Proof Supporting Rejection of Presumption Created by Mailbox Rule*, 200 AM. JUR. PROOF OF FACTS 3d 263 (2022).

22 FED. R. EVID. 1002.

23 *See infra* Appendix A.

24 *See infra* Appendix A.

25 *See infra* Appendix A.

into the fact pattern: Jack had a prior fall about one year earlier, and, at that time, Jill wrote the Mayor of Storyland a letter to put the Mayor on notice of the City's sloppy care and maintenance of the hill.[26] The Mayor, however, denies receiving the letter.[27]

The student advocates, who are pre-assigned, must work through the facts and prepare one witness to testify for each side with awareness of the evidentiary rules covered in the course thus far. In the interest of time, the class never conducts a complete trial. One witness per side is usually enough for students to wrestle with the evidence concepts that apply to the current trial exercise. For students not assigned to participate in a particular trial, their names are placed into a hat, and one student is selected to be the judge during the plaintiff's case-in-chief. A second student is then selected to be the judge during the defendant's case-in-chief. Randomly selecting judges incentivizes all students to review the material and helps ensure that they are prepared to preside over a portion of the trial, should they be selected. In addition, the judges must not only rule on objections but also state the basis for their rulings.

Student reactions to the trial exercises have been overwhelmingly positive. In the fall 2023 semester, the teaching-evaluation score for the course was 4.83 out of a possible 5.0 on the Likert scale.[28] Two of the many questions asked on the SIU evaluation form were particularly informative. One question asks students to rate whether the course included non-written activities that increased the student's understanding of the law on a one-to-five scale, with five being "strongly agree."[29] The mean score of the students who responded to that question was 4.89, which is a higher score than the overall law school mean of 4.11 for that question.[30] A second question asks students to share how much effort they put forth in the course, with a 5.00 representing that the student believed that they put forth considerable effort.[31] For this question, the mean score of the students who responded to the question was 4.74; the overall law school mean for this question was 4.42.[32] One can reasonably infer from the student evaluation responses that they enjoyed this method of learning and that students felt they put forth slightly more effort in Evidence than in their other courses.

It should not be surprising that students reacted positively to the trials. Often called "learning by doing" through "using one's own experiences and

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26 *See infra* Appendix A.

27 *See infra* Appendix A.

28 *See Teaching Evaluation of Professor Peter Alexander for Evidence Fall 2023*, S. ILL. UNIV. SIMMONS L. SCH. (2023) (on file with S. Ill. Univ. Simmons L. Sch.) [hereinafter *Teaching Evaluation*].

29 *See id.*

30 *See id.*

31 *See id.*

32 *See id.*

practices to learn," the trials reflect kinesthetic learning.[33] "Kinesthetic learning methods include live demonstrations, simulations, video demonstrations, role-playing, internships and externships, and interactive instruction."[34] Kinesthetic learning is closely related to Bloom's Taxonomy of Learning, and education experts have long recognized that "distinguishing types of learning (not to be mistaken with learning styles) and calling for different teaching methods for each learning type."[35]

Bloom's Taxonomy is a classification of the different outcomes and skills that educators set for their students (learning outcomes).[36] The taxonomy was proposed in 1956 by Benjamin Bloom, an educational psychologist at the University of Chicago. The terminology now includes six levels of learning.[37] Educators may use these six levels to structure the learning outcomes, lessons, and assessments of courses:

> (1) **Remembering:** Retrieving, recognizing, and recalling relevant knowledge from long-term memory; (2) **Understanding:** Constructing meaning from oral, written, and graphic messages through interpreting, exemplifying, classifying, summarizing, inferring, comparing, and explaining; (3) **Applying:** Carrying out or using a procedure for executing, or implementing; (4) **Analyzing:** Breaking material into constituent parts, determining how the parts relate to one another and to an overall structure or purpose through differentiating, organizing, and attributing; (5) **Evaluating:** Making judgments based on criteria and standards through checking and critiquing; and (6) **Creating:** Putting elements together to form a coherent or functional whole; reorganizing elements

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33 *See* Stephen E. Schilling & Rebecca M. Greendyke, *How to Win a CALI Award: Some Personal Advice from Two Law Students Who Have Done It*, 36 UNIV. DAYTON L. REV. 168, 174 (2011); Preliminary research has shown that kinesthetic learning results in increased learning outcomes for all students. *See Kinesthetic Learning*, TEACH THE EARTH (May 21, 2009), https://serc.carleton.edu/NAGTWorkshops/mineralogy/xtlsymmetry/kinesthetics.html.

34 Schilling & Greendyke, *supra* note 33.

35 *See* Paul D. Callister, *Time to Blossom: An Inquiry Into Bloom's Taxonomy as a Hierarchy and Means for Teaching Legal Research Skills*, 102 L. LIBR. J. 191, 197 (2010) (citing Maureen F. Fitzgerald*, What's Wrong with Legal Research and Writing? Problems and Solutions,* 88 L. LIBR. J. 247 (1996)).

36 EDMUND BILON, USING BLOOM'S TAXONOMY TO WRITE EFFECTIVE LEARNING OBJECTIVES 25 (2019); For an explanation of another framework for classroom instruction, known as the Explicit Direct Instruction, see JOHN R. HOLLINGSWORTH & SILVIA E. YBARRA, EXPLICIT DIRECT INSTRUCTION: THE POWER OF THE WELL-CRAFTED, WELL-TAUGHT LESSON (2d ed. 2018).

37 EDMUND BILON, *supra* note 36, at 29.

> into a new pattern or structure through generating, planning, or producing.[38]

"Like other taxonomies, Bloom's is hierarchical, meaning that learning at the higher levels is dependent on having attained prerequisite knowledge and skills at lower levels."[39] "Bloom's taxonomy is a powerful tool to help develop learning outcomes because it explains the process of learning:

> (1) Before you can ***understand*** a concept, you must ***remember*** it.
> (2) To ***apply*** a concept, you must first ***understand*** it.
> (3) In order to ***evaluate*** a process, you must have ***analyzed*** it.
> (4) To ***create*** an accurate conclusion, you must have completed a thorough ***evaluation***."[40]

In Evidence, the goal is simple: Help the students memorize the Federal Rules of Evidence and several important cases that interpret the Rules and lead them to an understanding of how the Rules are applied at trial and pre-trial. How one goes about directing student learning to meet the goal is a more complex endeavor.

There are many techniques for training students to become trial lawyers. However, Evidence at SIU combines the traditional delivery of evidence rules via lecture and modified Socratic dialogue with an introduction to trial advocacy. Students not only participate in mini-trials, but they also work in law firms to present material each class session from the front of the classroom, similar to what lawyers experience in continuing legal education courses.

A. Scaffolding

Lev Vygotsky's scaffolding,[41] commonly referred to as "scaffolding," is a process used in the classroom where a teacher or capable student helps a

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38 *Id*. at 29–30.

39 Jessica Shabatura, *Using Bloom's Taxonomy to Write Effective Learning Outcomes*, UNIV. OF ARK. TIPS (July 26, 2022), https://tips.uark.edu/using-blooms-taxonomy.

40 *Id.*

41 Indeed Ed. Team, *Vygotsky's Scaffolding: What It Is and How To Use It*, INDEED (June 6, 2025), https://www.indeed.com/career-advice/career-development/vygotsky-scaffolding ("Vygotsky's scaffolding is a theory that focuses on a student's ability to learn information through the help of a more informed individual. When used effectively, scaffolding can help a student learn content they wouldn't have been able to process on their own.").

student within their "Zone of Proximal Development" ("ZPD").[42] When the student and teacher begin working together, the teacher models most of the work, explaining how and why they do things to help the student comprehend the content.[43] As the student becomes more comfortable with the material, the educator provides less assistance, and the student does more of the work on their own.[44] The scaffolding continues to decrease until the student has mastered the content and no longer needs any scaffolding.[45]

Vygotsky's scaffolding is a theory that focuses on a student's ability to learn information through the help of a more informed individual.[46] When used effectively, scaffolding can help a student learn content they wouldn't have been able to process on their own.[47] "Scaffolding is a method of teaching that helps learners understand educational content by working with an educator or someone who has a better understanding of the material."[48] The concept states that students learn more when working with people who have a broader scope of knowledge than the student learning the content.[49]

"One of the main benefits of scaffolded instruction is that it provides for a supportive learning environment. In a scaffolded learning environment, students are free to ask questions, provide feedback, and support their peers in learning new material."[50] Faculty members who incorporate scaffolding in the classroom become more of a mentor and facilitator of knowledge rather than the content expert upon whom students rely for most of their learning.[51] In a scaffolded learning environment, "[s]tudents share the responsibility of teaching and learning through scaffolds that require them to move beyond their current skill and knowledge levels. Through this interaction, students can take ownership of the learning event."[52]

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42 Cynthia Vinney, *What Is the Zone of Proximal Development? Definition and Examples,* THOUGHTCO. (Jan. 11, 2024), https://www.thoughtco.com/zone-of-proximal-development-4584842#:~:text=For%20example%2C%20imagine%20a%20student,it%20with%20guidance%20and%20support (defining a Zone of Proximal Development as "the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers.").

43 Indeed Ed. Team, *supra* note 41.

44 *Id.*

45 *See id.*; *see also Teaching Evaluation, supra* note 28.

46 *See* Indeed Ed. Team, *supra* note 41; *see also Teaching Evaluation, supra* note 28.

47 Indeed Ed. Team, *supra* note 41.

48 *Id.*

49 *Id.*

50 Ctr. for Innovative Teaching and Learning, *Instructional Scaffolding to Improve Learning*, N. ILL. UNIV., https://www.niu.edu/citl/resources/guides/instructional-guide/instructional-scaffolding-to-improve-learning.shtml [https://perma.cc/Q3CZ-7TXT] (last visited Jan. 26, 2024).

51 *Id.*

52 *Id.*

"The educators or students teaching the learners scaffold the material in smaller chunks so the learner can expand their understanding of the material more than they would on their own."[53] It is widely accepted that:

> Vygotsky's scaffolding began when other theorists applied his theory, called the zone of proximal development (ZPD) in the classroom. ZPD concentrates on what a learner can do by themselves versus what they can do with the help of someone else. You may visualize ZPD as a series of three concentric circles. The smallest circle represents what the student can learn on their own. The circle surrounding the smaller one describes the skills a student can do with the help of an educator. The largest circle represents skills that the student can't do yet, even with the help of others.[54]

When developing learning objectives for a law school course, a professor must spend quality time distilling a course's materials into a set of bullet points that capture what the students should know after completing the course. The most effective objectives consider the prior knowledge that the students already have and build on that knowledge base.[55] However, caution must be exercised when developing learning objectives to avoid using verbs that are not observable or measurable.[56] Some words to avoid include believe, comprehend, experience, feel, know, listen, realize, recognize, think, and appreciate.[57]

Before enrolling in Evidence, most law students have been exposed to first-year law subjects like Civil Procedure, Criminal Law, Legal Research, and Legal Writing. These courses provide a strong foundation for the learning expected to take place in Evidence. The Evidence course is an opportunity to build upon the knowledge base that students bring into the class, and the learning objectives must recognize the strengths and weaknesses of students, often prior to meeting them.

At SIU, the learning objectives for one professor's Evidence course, as stated in the course syllabus, are probably not too different from the syllabi at other law schools. Students who successfully complete this course should be able to complete the following tasks:

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53 Indeed Ed. Team, *supra* note 41.

54 *Id.*; *see also* Karen J. Sneddon, *Square Pegs and Round Holes: Differentiated Instruction and the Law Classroom*, 48 MITCHELL HAMLINE L. REV. 1095, 1104 (2022).

55 *See generally* BILON, *supra* note 36, at 29.

56 Indeed Ed. Team, *supra* note 41 ("Vygotsky's scaffolding is a theory that focuses on a student's ability to learn information through the help of a more informed individual. When used effectively, scaffolding can help a student learn content they wouldn't have been able to process on their own.").

57 Vinney, *supra* note 42 (defining A Zone of Proximal Development is defined as "the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers.").

> (1) Students will memorize the Federal Rules of Evidence and understand the policies and precedent that underlie the Rules.
> (2) Students will be able to appreciate how a trial proceeds in federal court.
> (3) Students will be able to apply the Federal Rules of Evidence through simulated trials, memorandum-drafting, written assessments, and offers of proof.
> (4) Students will be able to critique structures of power and institutions from the standpoint of embedded privilege and social norms.
> (5) Students will be able to identify and critically reflect upon the various aspects of one's identity.
> (6) Students will be able to apply one's self-awareness of their biases to enact strategies to respond to unconscious and conscious biases.
> (7) Students will be able to effectively employ strategies of active listening, empathy and effective allyship during classroom discussions and group work.
> (8) Students will be able to critically reflect on their professional identity, recognizing the impact of internal and external factors on their identity.[58]

Notably, these objectives avoid the broad, vague language that many professors use when writing learning objectives. It is also important in a course that embraces kinesthetic instruction and learning to place students on notice that they are expected to actively participate in the classroom experience.[59]

III. STUDENT REACTIONS

A. Student Testimony

As a teaching assistant for this course, I was placed in a unique position to aid students in comprehending complex evidentiary concepts from the very beginning of the class. At the beginning of the semester, many students had reservations about the Evidence class, such as how it would be structured, how the trials would work with so many students, and what the

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58 Peter C. Alexander, *Evidence Syllabus*, S. ILL. UNIV. SIMMONS L. SCH. (Fall 2023) (on file with author).

59 *See, e.g.,* Nantiya Ruan, *Student, Esquire? The Practice of Law in the Collaborative Classroom*, 20 CLINICAL L. REV. 429, 459 (2014) (describing factors to consider when drafting learning objectives in a collaborative classroom).

process would be like to prepare for the trials. By the end of the semester, uncertainty about the course had disappeared as students developed confidence in the courtroom and with the rules of Evidence.

In conjunction with Professor Alexander, a short survey was created and sent to students as an opportunity for them to share their thoughts about the Evidence course. The following subsections and question prompts are dedicated to the thoughts of the students from the Fall 2023 Evidence course.[60]

1. What did you like most about the Evidence course you were enrolled in, and why?

One student responded, "I liked the Friday trials the most. It gave me an opportunity to practice and experience examining witnesses. I found it interesting to apply the skills I learned in class and seeing the different approaches my classmates took."[61] Another offered, "I enjoyed the pace that was set and learned how to apply the rule while we were learning the rule. It cemented the rule better in my brain so that I could understand the application in real-time while learning what the rule did. The pace was helpful to me because we cemented the rule in learning before we moved on to the next one."[62] "I liked that we were able to put what we learned into practice through trials. It's one thing to learn about something, but to see it in action is extremely beneficial."[63]

A third student commented, "I liked the interactive situations that we were presented with in a role-playing setting. This allowed me to apply what we were taught in the lecture. The practical application worked well with the lecture in my opinion. So much so, that when I was a summer intern, with a student license to practice supervised law, I won a preliminary hearing in circuit court. I do not think I would have been able to do this without having practiced cross-examination [during] the trial exercises in evidence."[64]

A fourth student commented, "I liked the interactive component the most. Being able to put my learning of the evidence rules to practice was invaluable to my ability to cement them to memory. Because we had a mock

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60 I owe a very special thank you to the students who assisted me in the authoring of this article by sharing their thoughts about the Evidence course. This would not have been possible without you all, and I am eternally grateful to each and every student that was in the course in the Fall of 2023.

61 Alexander & Chapman, Survey Response from Jack Lakenburges, S. Ill. Univ. Simmons L. Sch. Class of 2025 (2024) (on file with author) [hereinafter Survey Response from Jack Lakenburges].

62 Alexander & Chapman, Survey Response from Kathryn Pettersen, S. Ill. Univ. Simmons L. Sch. Class of 2025 (2024) (on file with author) [hereinafter Survey Response from Kathryn Pettersen].

63 Alexander & Chapman, Survey Response from Sharilyn Lane, S. Ill. Univ. Simmons L. Sch. Class of 2025 (2024) (on file with author) [hereinafter Survey Response from Sharilyn Lane].

64 Alexander & Chapman, Survey Response from Oliver Foreman, S. Ill. Univ. Simmons L. Sch. Class of 2025 (2024) (on file with author) [hereinafter Survey Response from Oliver Foreman].

trial every few weeks, we spent every few weeks gathering with our groups to discuss the material, ensure we all understood it, and planned our mock trial accordingly. My first time sitting at [] counsel table was enlightening [] because it made me realize just how quickly you have to recognize an evidence issue and act on it. I took what I learned in this class with me to my 2L summer clerk position, where I was tasked with keeping track of all objections and the judge's rulings on them. I found myself in the moment analyzing the situation and determining what my arguments would be if I were counsel and how I would rule if I were the judge. I will forever be grateful for the opportunity that my Evidence class provided me with."[65] A fifth student commented, "I appreciated the real-world [sic] applications of the principles taught in the course. The trial exercises and doctrinal teaching helped me see how evidence plays a crucial role in litigation. The practical examples made abstract concepts more concrete and easier to understand, which was incredibly helpful for grasping the material."[66]

2. What did you like least about the Evidence course you were enrolled in, and why?

Most students responded similarly, with one student writing, "I cannot think of anything I disliked. If anything, I felt the case law for some of the rules was not very helpful."[67] Another wrote, "To be honest, I don't think there was anything that I didn't like about the class. It was structured well and created an atmosphere in which I could fully learn and understand the rules."[68] A third stated, "There was nothing that I truly disliked about the class. A suggestion that I have would be to go even farther with experimenting into the court process of criminal versus civil. This would allow students to see that there are different procedures, like motions on suppression of evidence and preliminary hearings. For criminal court, it would be good to let students know that the rules of evidence are not really adhered to during probation revocation hearings, or bond hearings."[69] The only respondent to provide helpful criticism wrote, "It's very minor, but allowing groups to choose roles for the trials sometimes lead [sic] to groupmates not pulling their weight."[70]

A fourth student wrote, "The only negative thing I can say about the course itself was that the textbook was difficult to follow at times, and I found

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65 Alexander & Chapman, Survey Response from Ashley Dorsey, S. Ill. Univ. Simmons L. Sch. Class of 2025 (2024) (on file with author) [hereinafter Survey Response from Ashley Dorsey].

66 Alexander & Chapman, Survey Response from Amber Alexander, S. Ill. Univ. Simmons L. Sch. Class of 2025 (2024) (on file with author) [hereinafter Survey Response from Amber Alexander].

67 Survey Response from Jack Lakenburges, *supra* note 61.

68 Survey Response from Kathryn Pettersen, *supra* note 62.

69 Survey Response from Oliver Foreman, *supra* note 64.

70 Survey Response from Sharilyn Lane, *supra* note 63.

myself struggling to prepare for class during the first few weeks as I was just trying to orient myself with the book."[71] A fifth student wrote, "While the course content was engaging, the volume of material covered in a limited time felt overwhelming. I would have liked more time for deeper discussions on some of the more complex evidentiary rules, like hearsay exceptions and privilege issues, which are both nuanced and critical."[72]

3. Were the trial exercises in the course helpful and/or valuable to your learning? Why or why not?

One student wrote, "Yes, I liked applying myself to the problem and learning the proper method to examine witnesses. I feel that my experience in the class gave me a head start for my summer internship. I felt very comfortable applying the rules of evidence when watching the examination of witnesses and understanding why my boss asked the questions he did."[73] Another said, "The trial exercises were valuable and very helpful to me. I think playing both sides, a witness and a judge, were valuable experiences that helped me understand the rule. As the attorney, you had to guide the witnesses where you wanted them to go while still using each rule we used. As a witness, I could see the side of the story unfolding and learn how to help the attorney get the story out. As the judge, I found it helpful to learn how to apply the rules to any given objection. It was fast-paced and made thinking on your feet valuable, and since that's how real trials go, I think that it was important that we only had a certain time slot and had to do the most with what we had."[74] A third offered this reaction: "I think they were extremely valuable. Like I mentioned above, we got to practice and see the rules of evidence in action. Many in our class want to be trial lawyers after graduation, so having that practice allowed them to get a taste of what trials would look like instead of going into an actual trial blind."[75] A fourth student was more definitive in stating his support for the trial exercises. He wrote, "Absolutely. These exercises not only show students what court would be like in limited fashion, but it could also reveal their career path into focusing on litigation or shying toward transactional law."[76]

A fourth student wrote, "These were my favorite parts of the course, and I found them more helpful in preparing myself for practice than some of my experiential learning courses."[77] A fifth student wrote, "Yes, the trial

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71 Survey Response from Ashley Dorsey, *supra* note 65.
72 Survey Response from Amber Alexander, *supra* note 66.
73 Survey Response from Jack Lakenburges, *supra* note 61.
74 Survey Response from Kathryn Pettersen, *supra* note 62.
75 Survey Response from Sharilyn Lane, *supra* note 63.
76 Survey Response from Oliver Foreman, *supra* note 64.
77 Survey Response from Ashley Dorsey, *supra* note 65.

exercises were very valuable. They allowed me to practice applying the Federal Rules of Evidence in a simulated courtroom setting, which helped solidify my understanding. It also allowed me to develop practical skills such as making objections and arguing admissibility in real time, which is not something that can be learned purely from reading or lectures."[78]

4. Did the Evidence course meet your expectations? Why or why not?

The student reaction to the course overall was very positive. One student wrote, "Yes, the course exceeded my expectations. Prior to taking the course, I was not aware of the importance of the rules of evidence. After the course, I feel comfortable and confident that the class will be very helpful in passing the bar and my future practice."[79] Another added, "Yes. I understand the rules better and can apply them in a manner that is quick and efficient."[80] A third student enthusiastically stated, "I would argue that it exceeded my expectations. I was nervous going into the class because Evidence can be intimidating due to the number of rules and exceptions students must memorize, but the use of trial exercises made it less intimidating and more interesting. I can't [sic] think of a better way to prepare future attorneys for trial."[81] A fourth student added, "Yes. Professor Alexander not only answered relevant questions, but he was helpful during trial exercises in showing what is permitted in a court of law traditionally."[82]

A fourth student wrote, "The Evidence course exceeded my expectations for all of the reasons I have already provided. I intend to encourage others to take Professor Alexander's Evidence course to gain the knowledge that comes with it."[83] A fifth student wrote, "Yes, the course met my expectations in terms of both content and teaching style. It provided a solid foundation in the rules of evidence, and the hands-on components exceeded my expectations. The experiential learning component made the course not only more engaging, but also more impactful for my future career in law."[84]

B. Observations as a Teaching Assistant

As the teaching assistant, my responsibility was to prepare students for their first trial experience by preparing a case to go to trial while utilizing the

78 Survey Response from Amber Alexander, *supra* note 66.
79 Survey Response from Jack Lakenburges, *supra* note 61.
80 Survey Response from Kathryn Pettersen, *supra* note 62.
81 Survey Response from Sharilyn Lane, *supra* note 63.
82 Survey Response from Oliver Foreman, *supra* note 64.
83 Survey Response from Ashley Dorsey, *supra* note 65.
84 Survey Response from Amber Alexander, *supra* note 66.

concepts learned during class sessions in the first few weeks. There was a clear expectation that students would use the concepts they learned in class during the trials. The trials also served as a method to help students get out of their comfort zone, as many of them had not participated in mock trials or debate-style competitions before entering law school. For many students, the trials were a new and novel experience that prompted quite a bit of anxiety. Another aspect of my responsibilities as the teaching assistant for the class was to alleviate students' anxiety and to make sure they felt a sense of comfort with the topics they needed to recall during the trials.

One way I alleviated the students' anxiety was to hold regular office hours each week on Tuesdays and Thursdays from 1:00 p.m. to 2:30 p.m. at the law school. On occasion, I would also stay after class so that students could ask questions and perform vignettes in the courtroom where they would be performing their trials.

Before becoming the teaching assistant for Evidence, I was lucky enough to have built a sense of camaraderie with many of the students in the class through various leadership roles that I held at SIU Simmons Law School. However, there were some students with whom I had no prior experience. One of the more fulfilling aspects of the teaching assistant role I experienced was at the end of the semester, when the whole class came together to perform and showcase what they had learned in the evidence class during the final comprehensive trial. Over the course of the semester, students who were quiet and not as outgoing or involved during the first half of the semester indicated that they felt comfortable coming to me as their teaching assistant because I was their peer, shared classes with many of them, and they did not feel intimidated by me. When the final trial of the semester took place, the quieter students had their chance to shine, and to say that they were impressive is an understatement.

One of the most fulfilling aspects of being a teaching assistant is watching the students in class grow and develop as future attorneys over the course of the semester. The differences between the first and final trials were dramatic in the most positive way. I believe that giving students the chance to showcase what they had learned in a practical sense over the course of the semester solidified the difficult Evidence concepts necessary to be a successful attorney.

The Evidence class at SIU is, in my opinion and the opinions of many students, *the most practical class* that the school has to offer. This conclusion is directly attributable to the simulation learning style that Professor Alexander implements in the class. Not only is it practical to teach the Evidence class this way, but for myself and many students in the class, the final was easy because we had gone through several trials applying the concepts that we learned as opposed to simply memorizing the rule statements. The trials served as checkpoints for students' understanding of

the Evidence concepts. When the trials were occurring, students were able to note what they understood in a practical and conceptual sense, as well as discover whether or not they understood the concepts enough to answer questions about them on the final exam.

C. Personal Testimony

I enrolled in the Evidence course in the Fall of 2022. At the time, there were approximately 25 students in the class. Although Evidence traditionally runs in the Spring semester, the course was offered in the fall that year to provide students interested in joining the mock trial team exposure to the Federal Rules of Evidence.

Before taking Evidence, I considered litigation work after law school. However, Evidence solidified that idea for me. I found the simulation-style learning of Evidence, as well as how the course itself was structured, made the concepts easier to comprehend. I saw how they are practical and will, without a doubt, appear in trial work. I tried out for the mock trial team in November 2022 and was grateful to earn a spot on it. I felt confident going to a tournament-style competition to showcase what I knew about the Federal Rules of Evidence because the course's simulation-focused learning style required me to apply the more difficult concepts to adequately complete it.

I am a wholehearted believer in the simulation learning style in the classroom for courses that are based on practicality, such as the Evidence course. I believe that the simulation-learning style through the trials essentially forces students to recall the information they had previously learned in class, as there is pressure to perform well in front of peers. Additionally, Evidence was not a class that students skipped. Students wanted to participate in the class, and they understood they were receiving practically-based knowledge and information from the lectures and trials which would be useful for their future careers. The trials were a way to showcase the knowledge of Evidence concepts and provided students with the opportunity to observe how their peers formed different theories for the same case.

When students take SIU's Evidence course, they are not only learning about the Rules of Evidence but also learning about trial advocacy. There is no other course that I have taken, aside from Trial Advocacy, that teaches students in a manner that is as effective as the Evidence course.

CONCLUSION

There are many approaches to teaching Evidence. At some schools, the theory of the Rules of Evidence might be the primary focus; at other schools, the application of the rules might be the focal point. At the SIU Simmons

Law School, students who enroll in Evidence find that the professors intentionally infuse real-world exercises into the curriculum so that students understand not only the language of the Federal Rules of Evidence but also the application of those rules in a trial setting. In one section of the course, experiential education is front and center as each class session is designed to build toward a short trial exercise in which students can conduct the direct examination and the cross-examination of a witness, while their classmates take turns acting as the judge and ruling on objections.

The kinesthetic approach to teaching Evidence at SIU has proven to provide students with helpful tools as they prepare for exams and participate in class discussions and exercises. Students consistently report that by memorizing the Federal Rules of Evidence in small bites and applying the rules learned to short trials, they were better able to internalize the rules and use them creatively and confidently. Perhaps the pedagogical method described in this article could be used in other doctrinal classes. Perhaps we owe it to our students—and to their future clients—to find out!

APPENDIX

Evidence Trial Problems

Jack & Jill v. City of Storyland, Case No. 1

Facts: "Jack and Jill went up the hill to fetch a pail of water. Jack fell down and broke his crown, and Jill came tumbling after." What you may not know is that Jack and Jill, like so many other residents of Storyland, have no running water in their house. Consequently, they must go to the top of Saluki Hill and draw water from a well owned and operated by the City. In addition, the City of Storyland has been pretty lax about maintaining the grounds around the well (it is public land) and, often, the grass is very high.

Jack had fallen down Saluki Hill before. Approximately two years ago, while he was on a water run, Jack slipped on grass that was extremely long and wet, and he broke his right arm. Jill wrote the City a letter, informing the Mayor that the City must take better care of public land (which the Mayor denies receiving), but Jack did not sue at that time because they had adequate insurance. Jack recently lost his job and also his insurance benefits.

This time, however, since he fractured his skull ("broke his crown"), Jill insisted that he sue. Jack's complaint alleges that the City of Storyland was negligent in failing to maintain the public land around the well and in failing to mow the grass on Saluki Hill. Jack seeks $75,000 for medical bills and for pain and suffering. Jill seeks an additional $25,000 for loss of consortium. The City of Storyland filed an answer, denying Jack's allegations, and an affirmative defense of contributory negligence in which the City alleges that Jack was struggling because of the weight of the water (which was too much for him) and he did not watch where he was going.

At 9:00 a.m., on the morning after Jack's fall, Jill was walking to the hospital to see him, and she saw the City's Parks & Recreation Department workers frantically mowing Saluki Hill. There were nearly twenty-five employees either mowing or raking.

Concepts:
Common Law Objections
Judicial Notice [201]
Authentication [901]
Using a Writing/Best Evidence [1001-1008]
Relevance [401, 402, 403]

Assignment:

A. Plaintiffs' counsel are to call Jill to testify as part of the Plaintiffs' case-in-chief (Groups A. E. I), and the Defendant's attorneys are to cross-examine her (Group B, F, J).

B. Defense counsel are to call the Mayor as part of its case-in-chief (Group C, G, K), and Plaintiff's counsel are to cross-examine him/her (Group D, H, L).

*****COPY*****

April 1, YR-2

Mayor Jones
City Hall
Storyland, IL 62901

Re: Slip and Fall

Dear Mayor Jones:

Two days ago, my husband, Jack, slipped and fell on Saluki Hill while he was fetching a pail of water. The grass was nearly two feet high and very wet because it was dew-covered. As my husband started down the hill, he lost his footing on the wet grass and fell. He broke his arm.

Luckily, we have medical insurance that will cover his medical expenses. However, the City needs to be aware of this dangerous condition and should make sure, in the future, that the grass is mowed regularly. For years, the townspeople have commented that your administration is very careless in taking care of the public lands around town; this is just one more example of your inability to safeguard the people of the community.

Please see to it that, in the future, the grass on Saluki Hill is mowed and that the area around the well atop the hill is groomed.

We would like to be able to vote for your reelection when the time comes. You have been a far better Mayor than the last guy, but you have to do a better job on Saluki Hill.

Sincerely,

/s/ Jill

Jill

Estate of Dumpty v. King's Hospital Ambulance Co., Case No. 2

Facts: "Humpty Dumpty sat on a wall; Humpty Dumpty had a great fall. All the King's horses and all the King's men couldn't put Humpty together again!" Everyone knows that part of the story; however, the part you may not be aware of is that the King's Hospital Ambulance did not arrive at the scene of Mr. Dumpty's accident until 45 minutes after he had fallen!

Needless to say, when the ambulance attendants, Lady Annabelle and Lord Marcus, did arrive, Mr. Dumpty was a goner! The attendants tried to revive Mr. Dumpty, but he had been in "shell shock" for too long and his "eggsternal" damage was just too great! One of the witnesses to the accident, Lady Gwendolyn, claims to have overheard Lady Annabelle say, "Marcus, you have got to stop your drinking; this time we can't cover up the problem!"

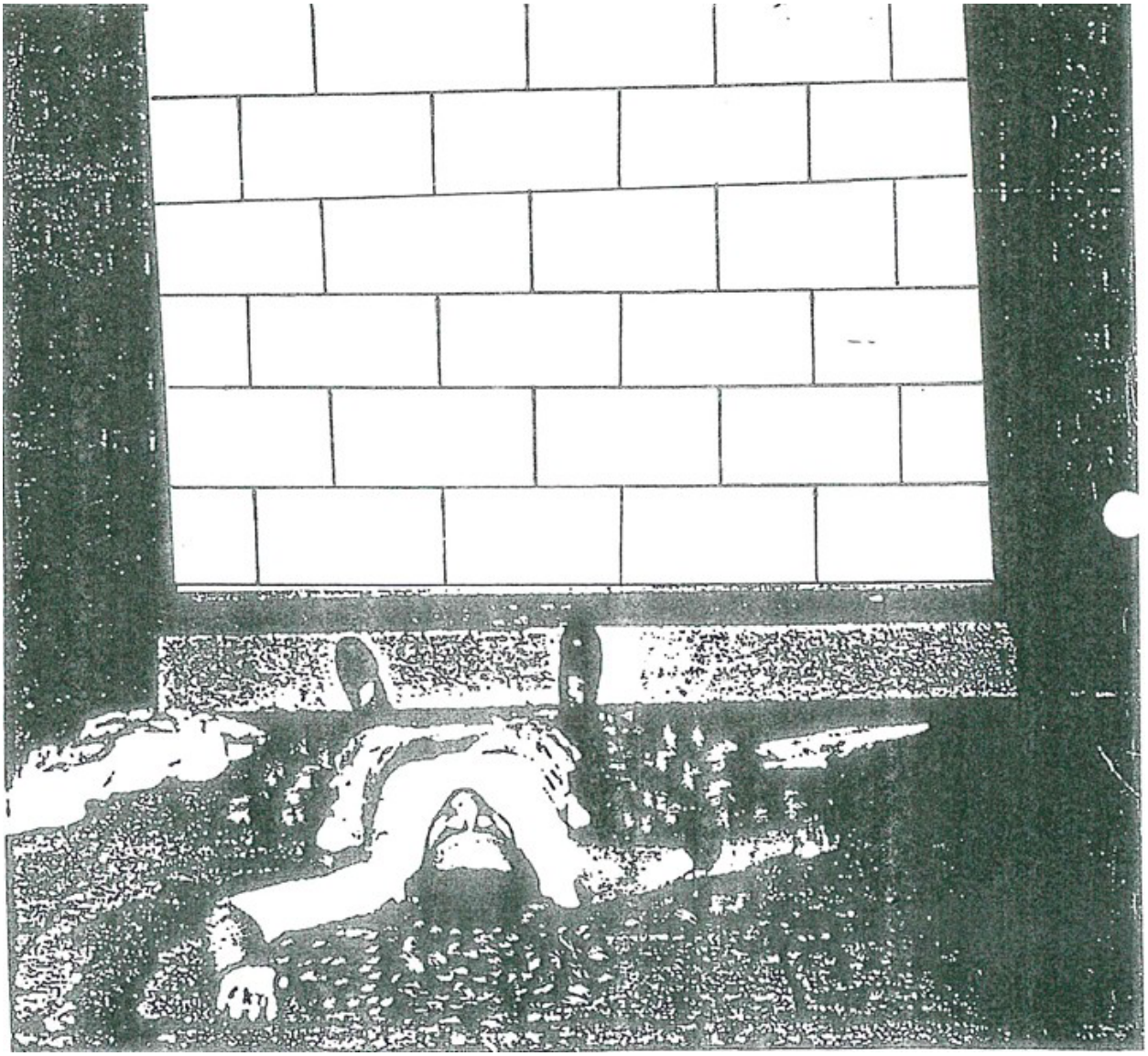
Apparently, this is the third time that an ambulance driven by Lady Annabelle and Lord Marcus (the King's nephew) was very late to an accident scene. The first time, about one year ago, Marcus told his supervisor that he had been given bad directions and got lost. The second time, about six months ago, Annabelle told her supervisor that fumes from the ambulance's engine had backed up into the cab and she and Marcus had to pull over because Marcus had begun to vomit! But, curiously, Annabelle admitted that she did not smell any fumes, nor had she become sick.

Lady Gwendolyn, who is a tavern-keeper in the kingdom, claims that Lord Marcus is in the tavern at least five days a week. She has always wondered how he could hold down a job because he would visit the tavern "morning, noon, and night." She does concede, however, that he does not always drink when he visits the tavern, but he *is* in there a lot.

Concepts:
Relevance [401, 402, 403]
Character [404, 405]
Habit [406]
Witnesses [601-603, 611, 612, 615]

Assignment:
A. Plaintiffs' counsel are to call Lady Gwendolyn to testify as part of the Plaintiffs' case-in-chief, and the Defendant's attorneys are to cross-examine her.

B. Defense counsel are to call Lord Marcus as part of its case-in-chief, and Plaintiff's counsel are to cross-examine him.



Three Fiddlers Music Co. v. Old King Cole, Case No. 3

Facts: "Old King Cole was a merry old soul, and a merry old soul was he. He called for his pipe; and he called for his bowl; and he called for his fiddlers three." But the problem was that the King never paid Three Fiddlers Music Co. for performing at the castle on the night in question! According to Edward, the group's agent, Old King Cole called him the night before the King was to hold a banquet for King Leopold, who was visiting from a neighboring kingdom. Edward had already booked the musicians to play another gig, but he assured King Cole that the musicians would perform. Accordingly, they canceled their previously-planned engagement.

Edward claims that Old King Cole said, "I'll double the group's usual salary because of the short notice." The usual salary for the group was $1,000 per hour, but there was a problem: Three Fiddlers Music Co. never charged Old King Cole the "usual salary" because they wanted to be assured of future business from him. The group always charged him $1,000 per event. Old King Cole's position is that he never said he would double anything, and, in any event, he would never pay $1,000 per hour because the musicians had never charged him that amount in the past and because they, frankly, were not that good! The only reason the King keeps using the group is because Edward told him that very few people book them, and the King wants to support musicians in the kingdom.

After the banquet, Edward called the palace to inquire about payment of the $10,000 that the group was owed ($1,000/hour x 5 hours and doubled per the King's instructions), and he told the King's secretary that the amount was higher than usual but that the group was no longer discounting the King's invoices and that the King had authorized the group to double its bill. The secretary told Edward that the King told her that he would pay a maximum of $12,000 for any event, so there should be no problem with the bill because it came in under the royal limit. The secretary has since moved away from the kingdom and cannot be found.

Three Fiddlers Music Co., which is owned by Edward and the three musicians who perform, has filed an action against the King, who now refuses to pay the group anything because of their "slimy business practices." The complaint alleges breach of contract and intentional interference with prospective economic advantage. The latter claim arises from an official Royal Proclamation issued by King Cole (from his balcony) to all businesses in the kingdom that they are not to use Three Fiddlers in the future.

Concepts:
Witnesses [612, 614, 615]

Present Recollection Revived [612]
Hearsay and Exceptions [801, 802, 803, 804, 805, 807]

Assignment:
A. Plaintiffs' counsel are to call Edward to testify as part of the Plaintiff's case-in-chief and the Defendant's attorneys are to cross-examine him.

B. Defense counsel are to call Old King Cole as a part of the Defendant's case-in-chief, and Plaintiff's counsel are to cross-examine him.

Note: Edward's counsel may prepare an invoice for the booking in question and one from a previous booking with Old King Cole; however, counsel must provide the King's attorneys with a copy at least 48 hours prior to trial.

Additional Note: Witnesses may not use their Witness Statements on the stand from now on. If you forget something, your attorneys will have to help you recall!

Little Miss Muffet v. Storyland Animal Shop, Case No. 4

Facts: "Little Miss Muffet sat on a tuffet, eating her curds and whey. Along came a spider and sat down beside her and frightened Miss Muffet away." Miss Muffet is a pretty frail woman; some would say that she is afraid of her own shadow! Nonetheless, she is suing the Storyland Animal Shop because one of its pet tarantulas escaped from the store and scared Little Miss Muffet. (She alleges negligent infliction of emotional distress because this is not the first time that one of the Animal Shop's tarantulas escaped its cage. Miss Muffet is complaining that she cannot sleep, eat, or function normally because of the incident.)

According to Dr. Jones, Miss Muffet's psychiatrist for the past two years, Miss Muffet clearly suffers from low self-esteem and paranoia, which stems from an incident in her childhood when her brother put a snake, a bug, and a leech in her bed when she was in elementary school and Miss Muffet found them in bed with her the next morning! She hasn't been "right" since!

However, Storyland Animal Shop hired a psychiatrist to examine Miss Muffet and that doctor, Dr. Jackson, believes that Miss Muffet is merely "a scam artist trying to get rich by suing Storyland Animal Shop." So, might Dr. Jones, apparently. In a casual conversation with Dr. Jackson, a week after the incident involving the tarantula, Dr. Jones sad that s/he thought Miss Muffet was "probably in it for the money." Also, during her radio show last month, Dr. Jones said in passing that "many people reach back to their childhood trauma(s) to justify suing people as an adult for relatively minor emotional disturbances later in life."

In addition, Miss Muffet's life-long friend and mentor, Mother Goose (a Mother Superior and certified counselor in the local Catholic convent), claims that Miss Muffet has always been "a little high-strung and slightly off center." Mother Goose claims that there is really nothing wrong with Miss Muffet; she is just a little eccentric and craves attention more than most people. Mother Goose doubts the validity of Miss Muffet's claim, but the Mother Superior is the aunt of the owner of the Storyland Animal Shop. She is not particularly close to her relative, however, because of her position within the church.

Concepts:
Opinion Testimony (Rules 701-705)
Hearsay (Rules 801-807)

Assignment:
A. Plaintiffs' attorneys are to call Dr. Jones to testify as part of the Plaintiff's case-in-chief and the Defendant's attorneys are to cross-examine the doctor.

B. Defense attorneys are to call Mother Goose as part of its case-in-chief and Plaintiff's counsel will cross-examine her. *Defense counsel may also call Dr. Jackson to testify.*

DR. JONES
1414 Storyland Rd.
Storyland, IL

Education:

1989-1993	Yale University, New Haven, CT Ph.D. Abnormal Psychology
1985-1989	Harvard University, Cambridge, MA M.D. Specialty in Psychiatry
1981-1985	Johns Hopkins Univ. Baltimore, MD B.S. Biology (*magna cum laude*)

Employment:

1993-present	The Physician's Group, Storyland, IL Staff Psychiatrist
1989-1993	Yale University, New Haven, CT Research Assistant to the Chair of the Biology Department

Honors:

2001	Who's Who in Midwest Medicine
2010	Who's Who in Medicine

MOTHER GOOSE
Storyland Convent
1 E. Main St.
Storyland, IL

Education:

2005	Univ. of Notre Dame, Notre Dame, IN Certificate—Emotional Disorder Counseling
1971-1974	I received religious instruction from the Roman Catholic Church in preparation for becoming a nun.

1969-1971	McKendree University, Lebanon, IL M.S. Clinical Psychology (GPA: 4.0)
1964-1969	Southern Illinois Univ., Carbondale, IL B.A. Psychology and Religious Studies (graduated first in my class)

Employment:

1979-present	Holy Cross Order, Roman Catholic Church Nun and Mother Superior. Responsibilities include church duties and counseling parishioners as directed by the clergy.

Honors:

2015 and 2022	American Counseling Society Counselor of the Year

People v. Goldie Locks, Case No. 5

Facts: Everyone knows the story of Goldie Locks, traveling through the forest on a winter day and coming upon the house owned by the Behr family. She ate some porridge, sat in a chair and broke it, and slept in a bed and broke it. Baby Behr discovered Ms. Locks, told his/her parents, and they called the police. As a result of what the Behrs call her "unlawful entry into the house," the Behrs claim that Ms. Locks caused damage to their property in the amount of $1,005.00.

The police have charged Ms. Locks with Home Invasion, the elements of which are: (1) the intentional (2) entering of the dwelling place of another (3) without permission of the owner. Home Invasion in this jurisdiction is a major felony. The police have also charged Ms. Locks with Criminal Property Damage, the elements of which are: (1) intentionally or knowingly (2) damaging property of another and (3) which has a value of $1,000.00 or more. This crime is a low-level felony; however, if the property is valued under $1,000.00, it is a misdemeanor.

Ms. Locks, who is 23-years old, pleaded "not guilty" and asserted a defense of Necessity, claiming that she was walking through the woods, thought she was suffering from frost bite and felt faint. Furthermore, Ms. Locks did not believe the Behrs would be home (since it was hibernation season). Also, Ms. Locks has had a previous run-in with the law; five years ago, she was convicted of breaking and entering into another house. The crime was a felony, but she was given three years' probation.

Necessity is defined as follows: "Conduct otherwise criminal is justifiable if, as a result of pressure from natural forces, the defendant reasonably believes that her conduct is necessary to avoid harm and that the need to protect oneself outweighs the harm that could be caused by her conduct." The test is an objective one.

Concepts:
Everything we have covered!

Assignment:
A. The government's attorney must call Baby Behr (who is 5-years old) to testify as part of its case-in-chief and the Defendant's attorneys are to cross-examine him/her. You may also call Mr./Ms. Smith (a furniture salesperson in town who has been selling furniture for 6 years and who teaches a course at the local community college on furniture restoration), as an expert to

value the property that was damaged. His/Her valuation: $1,005.00. Smith has never been an expert before.

B. The Defendant's attorneys must call Goldie Locks to testify as part of her case-in-chief and the government's attorneys must cross-examine her. You may also call Mr./Ms. Jones (a furniture salesperson in town who has been selling furniture for 14 years and who has provided "dozens of furniture appraisals" as an expert in past trials), to value the property that was damaged. His/Her valuation: $300— "the stuff was junk"!

FIELD GOALS

Carolyn Young Larmore*

INTRODUCTION

> Overall, the work the firm is doing is very new and foreign to me, so I am excited to dive into this new area of law and learn as much as I can to continue to grow the toolbox of skills I will have in the future I look forward to what these next few months will bring and to reach the goals I have for this externship.[1]

This excerpt from a reflective journal is typical of a law student extern just beginning a semester-long adventure. They are thrust into an unfamiliar environment where they will be challenged like never before. The first thing we ask of them is to set goals for the 14 weeks in which they will experience the real world of law practice.

It is widely acknowledged that student goal setting is an important first step in the externship journey.[2] At the start of their externships, students are asked to identify several goals they would like to accomplish, share them with their supervisor, and work toward them throughout the semester or summer.[3]

But while goal setting may be the *best* practice, what does it look like *in* practice? To answer this question, I analyzed more than 200 of the reflective journals in which students outlined their externship goals, as well as the final journals in which those same students reflected on whether they achieved those goals. I sought to categorize students' goals by type and popularity, and to investigate why students felt they met their goals or why they fell short

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1 First Externship Journal No. 184 [hereinafter "First Student Journal"], on file with the author. All journal excerpts quoted herein are used with permission of the student and reproduced anonymously.

2 *See* GILLIAN DUTTON ET AL., EXTERNSHIP PEDAGOGY & PRACTICE 10, 14–15 (2023); Megan Bess, *Transitions Unexplored: A Proposal for Professional Identity Formation Following the First Year*, 29 CLINICAL L. REV. 1 (Fall 2022); DEBORAH MARANVILLE ET AL., BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 101–245 (LexisNexis 2015).

3 MARANVILLE ET AL., *supra* note 2, at 101–245.

Section II of this Article reviews where goal setting fits within the pedagogical framework of externships, giving an overview of the theory behind the practice. Section III discusses the types of goals externship literature usually suggests students choose and lays out the goal-setting protocol at Chapman University Fowler School of Law as one model of how goal setting works throughout the externship semester.

Section IV describes the analysis of two years' worth of goal-setting journals, including how they were coded and sorted. This section then incorporates charts illustrating which categories were most and least popular among student externs. Section V contains the analysis of the semester-end journals, in which students reflect on whether they achieved their goals and assesses the reasons students gave for success or failure.

Section VI introduces several lessons to be learned from the preceding analysis and suggests how externship faculty may consider altering their pedagogical approach to goal setting, based upon the study's results. Finally, Section VII offers a brief conclusion to the Article.

I. PEDAGOGY OF GOAL SETTING

Setting goals for an externship is a practice well-supported by the literature.[4] Numerous externship and business writers agree that it's an important first step in the process of learning from practice.[5] For example, it has been said that "[r]igorous and specific goal setting correlates with higher levels of performance" and that "feelings of success derive from pursuing and attaining important and meaningful goals."[6] Thus, this Article will begin with an examination of the pedagogical underpinnings of the practice of student goal setting.

At the outset, student goal setting should be distinguished from the setting of learning objectives for the entire class. ABA Standard 302 requires that law schools must "establish learning outcomes that shall, at a minimum, include competency in

> (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper

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4 *See id.*; DUTTON ET AL., *supra* note 2, at 10, 14–15; Bess, *supra* note 2.

5 *See* DUTTON ET AL., *supra* note 2, at 10, 14–15; Bess, *supra* note 2; MARANVILLE ET AL., *supra* note 2, at 101–245; *see also* Rakshitha Arni Ravishankar & Kelsey Alpaio, *5 Ways to Set More Achievable Goals*, HARV. BUS. REV. (Aug. 30, 2022) ("Setting goals is a deeply meaningful exercise. Research shows that it motivates us, gives us a sense of purpose, and helps us feel accomplished."); Annabel Acton, *How To Set Goals (And Why You Should Write Them Down)*, FORBES (Nov. 3, 2017), https://www.forbes.com/sites/annabelacton/2017/11/03/how-to-set-goals-and-why-you-should-do-it/#6f2abc96162d.

6 *See* Bess, *supra* note 2, at 23.

> professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.[7]

Suggestions for course-wide learning objectives intended for the externship include things like "articulat[ing] the concept of professional identity," "[p]erform[ing] ethically with attentiveness to all relevant rules of professional conduct," "[e]ngaging in effective self-reflection that fosters learning from experiences and transferring those lessons to more complex problems and to other settings," and "recogniz[ing] and articulat[ing] the elements of problem-solving in the practice situation and display[ing] those elements in their legal work."[8] These are big-picture goals that an externship faculty member can help the entire class work toward through field work, reading assignments and class discussion.

Moving beyond course-wide objectives, individual goals are established and tailored to each student's externship placement. These are often more specific than the course-wide goals, tailored to the needs of a particular student at a particular placement.

Rather than rely only on course-wide goals, "[w]hen students set their own learning agenda or professional development plan, they are more likely to take ownership of their externship experience and be proactive about accomplishing their goals."[9] In other words, setting individual learning goals is a form of self-directed learning.

Self-directed learning is at the heart of the externship experience. Picture a typical extern in her first semester of her second year of law school. During her first year of law school, she experienced authority-directed learning. The law school selected her first-year courses for her – all she had to do was show up and complete the assigned work. Even in her second year, she may have selected what courses to take, but the professor designed the syllabus and assignments. An externship offers a break from such rigid learning practices. First and foremost, the student chose the externship she wanted to do – the DA's office, rather than the local court, for example. Hopefully, she did so because of the skills she might gain at the former rather than the latter. Further, throughout the externship, the student has a chance to articulate to her supervisor what *she* wants to get out of the experience, the types of assignments *she* wants to complete, and experiences *she* wants to participate in or observe. This is self-directed learning.

Explained another way, "self-directed learning is 'a process by which individuals take the initiative, with or without the assistance of others, in

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7 A.B.A., 2024–2025 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2024).

8 MARANVILLE ET AL., *supra* note 2, at 226–27.

9 DUTTON ET AL., *supra* note 2, at 181.

diagnosing their learning needs, formulating learning goals, identifying the human and material resources for learning, choosing and implementing appropriate learning strategies, and evaluating learning outcomes.'"[10] In the externship context, "self-directed learning through the development of critical thinking is still the overall primary goal "[11]

One key aspect of self-directed learning in the externship context occurs when the extern "identifies goals he or she hopes to achieve from the externship experience and shares those goals with the supervisor, thus making them shared goals."[12] In setting goals for the externship, students "take ownership of their externship experience." Thus, "[g]oal setting is an important part of intentional learning, which is integral to the pedagogy of experiential learning."[13]

Once a student selects goals for their externship, it is best practice to share them with their supervisor.[14] Professors should make sure that the student "communicate[s] those goals to the field supervisor, and [] take steps to assure that the supervisor structures the field experience and assigns tasks in alignment with those goals."[15] Doing so also "allows supervisors to give students feedback on their goals, which can help the student revise goals as needed to best align with the anticipated learning experience at the externship placement."[16] Sharing goals with a supervisor also creates "a 'learning alliance'" between supervisor and student."[17] In other words, discussion of goals between student and supervisor "helps to confirm that the student's goals are attainable and to facilitate meaningful assignments and feedback in furtherance of the student's articulated goals."[18]

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10 Neil Hamilton, *Leadership of Self: Each Student Taking Ownership Over Continuous Professional Development/Self-Directed Learning*, 58 SANTA CLARA L. REV. 567, 578–79 (2018) (quoting MALCOLM KNOWLES, SELF-DIRECTED LEARNING: A GUIDE FOR LEARNERS AND TEACHERS 18 (1975)).

11 Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic*, 5 CLINICAL L. REV. 347, 371 (1999). *But see* Linda Morton, Janet Weinstein & Mark Weinstein, *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs,* 5 CLINICAL L. REV. 469, 485 (1999) (noting the "tensions in treating students as 'adults' and, at the same time, making sure they have the quality of externship experience we believe they should.").

12 Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 CLINICAL L. REV. 611, 643 (2003).

13 *Id.*

14 *See infra* Section III.B.1.

15 MARANVILLE ET AL., *supra* note 2, at 225.

16 Bess*, supra* note 2, at 24.

17 *Id.*

18 DUTTON ET AL., *supra* note 2, at 182.

II. WHAT GOALS STUDENTS MAY SET AND HOW THEY SET THEM

A. Possible Goals and Goal Setting Methods

When sitting down to set their goals for the semester's externship, a student might feel overwhelmed at the universe of possibilities. Students may be unsure of where to begin. The literature on goal setting suggests that providing students with a variety of guidance regarding what skills they might want to work on helps the student begin setting goals.

First, "[e]xternship teachers [] may want to focus students on setting goals in the three contexts of legal education: knowledge ("thinking like a lawyer"), skills ("doing like a lawyer"), and values ("being a lawyer").[19] Or, to further narrow down concrete goals a student might set, externs might be directed to review common lawyer competencies and choose tangible goals from those lists.[20] One such list is of the twenty-six competencies identified by Schultz and Zedeck.[21] These include categories like Analysis and Reasoning, Researching the Law, Questioning and Interviewing, Writing, Organizing and Managing One's Own Work, Networking and Business Development, Diligence, and Stress Management.[22] Each of these could serve as a goal for a student to work on, or at least a starting point for developing a more specific goal.[23]

To help narrow down the numerous competencies available to externship students, Kass *et al.,* has identified seven common goals individual externship students may choose to pursue:

> (1) Identify and build selected and focused lawyering skills and doctrine particular to the placement type, as part of a lawyering process to promote transfer;
> (2) Articulate the meaning of equal access to justice and the lawyer's duty to promote it, and ways to further access to justice during own career;
> (3) Increase understanding of how law, the legal system, and other social and economic institutions function in the lives of

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19 *Id.* at 181.

20 *Id.*

21 Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620, 630 (2011).

22 *Id.*

23 *See* ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT (2016) (finding another source of lawyer competencies is the IAALS Foundations for the Whole Lawyer, but the seventy-six skills and attributes it contains may overwhelm a first-time extern without some editing down by the faculty member).

> people, particularly the most marginalized: (a) understand the importance of malleability of facts; (b) develop and use critical insights about how law functions; (c) see clients and problems in context;
> (4) Work effectively with professionals from other disciplines as expected in the particular area of practice;
> (5) Articulate the principles and components of effective and ethical law office management;
> (6) Develop appreciation for which practice types and venues will suit them;
> (7) Recognize the significance of work-life balance and identify strategies for achieving it.[24]

Finally, there are numerous ways to implement the goal-setting process.[25]"One is the backwards resume, whereby students reflect on the skills they would like to add to their resume during their externship. Personality assessments, journaling, and other self-reflection tools" also help externs "identify the types of experiences that would be helpful in achieving goals."[26] Once their goals are identified, externs fill out a "goals form, learning agenda, or professional development plan."[27] Finally, "[e]xternship pedagogy commonly incorporates reevaluating goals throughout the externship experience, reflecting on what has been accomplished."[28]

B. The Process at Chapman

Moving on from the myriad of goal setting methods and strategies employed at different law schools to the particular method used at Chapman University, Dale E. Fowler School of Law, the following section gives an in-depth view of one school's goal setting process.

1. Introduction and First Reflection

I first introduce students to goal setting during the new extern orientation. I ask them to think about three goals for the semester, with an emphasis on honesty. I tell them not to pick a goal because it sounds good or looks good on paper. Rather, I suggest they ask themselves "what do I want

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[24] Carolyn Wilkes Kaas et al., *Delivering Effective Education in Externship Programs*, *in* BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 216, 229 (LexisNexis 2015).

[25] DUTTON ET AL., *supra* note 2, at 10, 181–190.

[26] Bess*, supra* note 2, at 24.

[27] DUTTON ET AL., *supra* note 2, at 10, 181.

[28] Bess*, supra* note 2, at 24.

to be better at fourteen weeks from now?"[29] For inspiration, I show them the twenty-six competencies identified by Schultz and Zedeck, emphasizing some of the competencies that may seem less obvious to law students as worthy goals, such as networking and stress management.

Then, the students are given their first reflective journal assignment as follows:

> Pick 3 learning goals to accomplish during your externship. Discuss these goals with your supervisor/judge so that he or she knows what you want from the externship and what types of experiences might aid you. Write about your conversation with your supervisor: did he or she suggest any changes, additions or deletions to your list? How did it feel to talk with your supervisor about your goals?[30]

As explained *supra*, the primary purpose of having students share their goals with the supervising attorney is to make sure both extern and attorney are "on the same page" with regard to what the student hopes to accomplish. This gives the supervisor an opportunity to craft assignments and experiences that will help the student start working toward their goals.[31] But having a verbal conversation, rather than simply sharing a written document, has another benefit: it helps students practice their oral communication skills in a professional environment, something the vast majority of students could use experience with. When reflecting on how they felt about the interaction, as students are asked to do in the journal, students often report that they felt "nervous"[32] at first but afterwards felt "empowered and invigorated"[33] to embark on the externship semester.

Finally, in the journal the students produce, most students list their three goals, then write a paragraph describing what prompted them to choose each goal. I read each journal entry and give the students feedback on their goal selection, stressing which goals I think are most interesting or worthy, suggesting alterations to the goals chosen when needed, or giving tips on how to start working toward a given goal.

2. Mid-Semester Review

Students next reflect on their goals halfway through their externship semester. The Mid-Semester Review Form, which the student fills out and

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29 *See* Kaas et al., *supra* note 24, at 225 ("Immersed as they are in real practice, externship students can, and should, also readily envision and experiment with who they want to become as lawyers.").

30 Carolyn Young Larmore, First Reflective Journal Assignment (on file with author) [hereinafter Reflective Journal].

31 *See infra* Section II.

32 *See*, *e.g.,* Reflective Journal, *supra* note 30, at 49, 90.

33 *See id.* at 34.

then shares with their supervisor, asks students to list the three goals they chose at the outset of the semester, and to consider whether "you feel like you are being assigned appropriate work or activities to help you achieve your goals?"[34] If they answer "no" or "sometimes," they are asked to "please describe how you would like to see your assignments or activities modified to help you achieve your goals (e.g., increased complexity of work, different subject matter of assignments, more opportunities for observation)."[35]

The purpose of revisiting goals mid-semester is two-fold. For most students and their supervisors, it serves merely as a reminder of the student's goals from their initial meeting so the pair may continue to work toward them. For a few students and supervisors, it offers an opportunity to course-correct, shifting their work assignments or other work experience as needed to better align with the student's stated goals.[36]

3. Final Reflection

Finally, the goal setting process is completed with the student's last reflective journal at the end of the semester. In it, students are asked to:

> Review your first journal entry. Did you achieve your learning goals? What was the most important factor in helping you to achieve them? For those goals you did not achieve, why not? Were they too ambitious or unrealistic? Did you receive insufficient assistance from your supervisor? Did you realize they were not really important to you after all? What could you have done differently to have achieved them?[37]

The purpose of this reflection is to help students articulate and appreciate the progress they have made toward their goals, and to plan for future experiences in which they might continue to work toward them.

III. WHAT GOALS ARE STUDENTS REALLY CHOOSING?

With the above pedagogy and process of goal setting in mind, let us now turn to what goal setting looks like in practice. After we assign students the task of setting goals for their externship semester, what goals are they choosing? In other words, putting ideals and pedagogy aside, what are real students saying about what they hope to get out of their externships?

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34 *See* Mid-Semester Review Form (on file with author).

35 *See id.*

36 DUTTON ET AL., *supra* note 2, at 182 ("A mid-semester self-evaluation can serve as a helpful tool for students to consider whether they have made progress toward achieving their goals and to facilitate the identification of new goals.").

37 *See* Final Student Journal (on file with author).

A. Coding Process

To assess the kinds of goals students set for their externships, I examined two years' worth of first journals from students I supervised from Spring 2022 through Spring 2024, totaling 201 students. These students worked in state and federal courts (6%), government agencies (14%), private law firms (63%), in-house law departments (13%), and public interest organizations (4%).[38] They externed for between one and five units during the school year, up to six in the summer, and up to ten units if they were working for a federal judge.[39] All received a grade of "pass" for their externship.[40] Some were first-time and some were repeat externs.[41] Thus, some students are represented two or three times in the data, with goals chosen for their first and then their second and even third externships.[42]

To embark on an in-depth analysis of the students' articulated goals, I coded and categorized each goal listed in the first reflective journal. As explained *supra*, the students were asked to set three goals for the semester's externship, which, for 201 students, should have amounted to 603 individual goals to examine. However, upon analyzing each journal for this project, many "single" goals were revealed to be two or even three distinct goals. For example, a student's single goal listed as wanting to "improving research and writing" was really two separate goals: "improve research" and "improve writing."[43] Thus, I found a total of 684 goals from these 201 extern students, or approximately three and a half goals per student.

The process of coding the goals was carried out in two steps. First, I read each journal and jotted down the three or more goals listed, trying to stay as true as possible to the student's characterization of the goal. As I reviewed each additional journal, I tallied each goal as either a new goal not yet encountered, or a repetition of a goal already coded for. After I read all 201 journals and had a rough list of goals, I grouped the goals into umbrella categories, fit related goals under their respective umbrellas, combined similar goals and eliminated duplicates. The result was eight umbrella categories composed of thirty-four individual goals. I then re-examined each of the 201 journals to re-code them using the finalized list.

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38 Kaas et al., *supra* note 24, at 241.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.* at 243.
43 *Id.* at 242.

B. Description of Goals

The categories I settled on after assessing each goal-setting journal were: A) Research, writing and analysis skills; B) Other lawyering skills; C) More general learning; D) Mentorship/networking; E) Office life; F) Improve quality/efficiency of work; G) Intangibles; and H) Secure a job post-bar.

Category A, "Research, writing and analysis skills," encompasses some of the most basic and common skills-focused goals. Most of these are skills that students would have begun developing in the classroom during their first year of law school,[44] but would like to improve upon during their externship. The goals under this umbrella are:

(1) Improve research
(2) Improve writing generally / produce sample
(3) Learn or improve contract drafting / redlining
(4) Learn or improve pleadings and written discovery
(5) Learn or improve motions practice
(6) Learn or improve other practice-area specific writing
(7) Improve analysis

Category B, "Other lawyering skills," is made up of the following six goals that are more advanced than those in Category A. These are skills less likely to have been explored in the classroom, as follows:

(8) Learn how to take or defend a deposition
(9) Learn or improve ADR skills (mediation, negotiation, arbitration)
(10) Attend court
(11) Make court appearance
(12) Learn or improve client communication skills
(13) Learn or improve public speaking / communication skills w/ others, attorneys.

Category C, "More general learning," includes five goals that I saw as having to do with learning about the law more generally. The goals in this category reflect students' desire to see the "big picture" of law practice,

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[44] For example, in addition to a traditional legal research and writing class, Chapman students take a one-credit Civil Procedure Lab in conjunction with their Civil Procedure class in which they learn to draft pleadings and written discovery. *See JD First-Year Curriculum*, CHAP. UNIV.: FOWLER SCH. L., https://www.chapman.edu/law/academic-programs/curriculum-courses.aspx (last visited Aug. 23, 2025).

though it also includes one seemingly advanced goal which is to "focus on a specific area of law." A student who listed this goal may have already "learn[ed] about an area of law," and in their second externship, seeks to dig deeper into one sub-area of the practice. The goals in this category are:

(14) Shadow an attorney
(15) Learn about an area of law (to make career choice)
(16) Focus on a specific aspect of an area of law
(17) Work on or observe a case from start to finish
(18) Complete "variety of tasks"

Category D, "Mentoring/networking" is self-explanatory and contains just two goals:

(19) Develop mentoring relationship
(20) Network

Category E, which I've dubbed "Office life," contains six goals related to the work of a law office, or just an office in general. They are:

(21) First office job / learn to be a professional
(22) Learn how to bill
(23) Learn about the day-to-day practice of law
(24) Learn how in-house law departments work
(25) Learn how to run own firm / how firm/office works
(26) Learn how DAs offices work

Category F, "Improve quality/efficiency of work," emerged as a small but important category, especially for repeat externs, as these students appeared to have received prior feedback about their weaknesses in two main areas:

(27) Focus on attention to detail
(28) Focus on efficiency / organization / time management

Category G, which I've labeled "Intangibles" for lack of a better title, consists of five goals which appeared in many journals, are important attributes for attorneys to possess, but are likely hard to quantify when assessing whether they were ultimately achieved:

(29) Gain confidence / conquer imposter syndrome

(30) Develop work-school-life balance
(31) Learn about lawyer decision-making / problem-solving / thinking like lawyer
(32) Learn when/how to ask questions
(33) Work on positive attitude / leadership / accepting criticism

Category H, "Secure a job post-bar," contains just one goal that defies grouping with others, as it's quite singular: do what it takes to get hired by this placement post-bar. Sometimes students will clearly articulate that they hope to be hired after graduation, but I also used this category when students wrote that their goals were to "impress" their supervisor or "add value" to the organization. Thus, the only goal under this umbrella is:

(34) Get hired

Before moving on to discuss the popularity of each identified goal, it may be enlightening to examine whether the goals students choose align with the goals the literature suggests they pursue. In other words, are these the goals we thought students should choose?

Of the seven broad goals Kass, *et al.,* lays out as appropriate for externship students, most show up in the thirty-four categories of goals I identified. For example, "Identify and build selected and focused lawyering skills and doctrine particular to the placement type"[45] shows up as any number of the specific lawyering skills students sought to work on (numbers 1-13 in my list). Similarly, Kass, *et al.*'s' "Articulate the principles and components of effective and ethical law office management"[46] covers the various office life-related skills of this study's 21 through 26.

On the other hand, one of Kass, *et al.*'s' goals categories made no appearance among the two years' worth of goals examined in this study, as not a single student wrote that they wanted to examine "the meaning of equal access to justice."[47] This is likely because students might need some prompting to select a goal like this. A goal of this type may be something students come to contemplate during the semester, especially if a companion seminar broaches the topic, but it is not something students would necessarily be thinking about in week one of their externship when goals are chosen.

Finally, several goals chosen by my students did not appear on Kass *et al.*'s list at all. These were in the categories of "Improve quality/efficiency of work," "Intangibles" (such as "gain confidence / conquer imposter

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45 Kaas et al., *supra* note 24, at 238.
46 *Id.*
47 *Id.*

syndrome" and "learn when/how to ask questions") and "Secure a job post-bar." These types of goals are often selected by repeat externs who may have struggled with completing projects quickly or feeling comfortable when they had to ask questions, and thus they want to improve in their second externship experience. As for securing a job post-bar, I know of no externship literature that would suggest future employment should be the focus of the educational experience that is an externship, however the reality is that students are indeed hoping to parlay externships into post-graduate job opportunities. Put simply, if it is a real student goal, externship faculty should be aware of it and do what they can to support it.[48]

C. Percentages and Popularity of Goals

With student goals defined and each student's goals organized accordingly, the next step is to calculate how common each goal is by tallying the goals and converting them to percentages. The chart below contains the complete data set, followed by explanations.

Goals Categories	Raw #	% of 684 Goals	% of 201 Students
A) Research, writing and analysis skills	292	29.5 %	N/A
1. Improve research	64	9.4%	31.8 %
2. Improve writing generally / produce sample	74	10.8 %	36.8 %
3. Learn or improve contract drafting / redlining	14	2%	7%
4. Learn or improve pleadings and written discovery	17	2.5%	8.5%
5. Learn or improve motions practice	19	2.8%	9.5%
6. Learn or improve other practice-area specific writing	6	0.9%	3%
7. Improve analysis	8	1.2%	4%
B) Other lawyering skills	124	18.1%	N/A

[48] This paper will address what pedagogical changes externship faculty may want to make based on student goals. *See infra* Section V.D.

8. Learn how to take or defend a deposition	13	1.9%	6.5%
9. Learn or improve ADR skills	9	1.3%	4.5%
10. Attend court	26	3.8%	12.9 %
11. Make court appearance	16	2.3%	8%
12. Learn or improve client communication skills	43	6.3%	21.4 %
13. Learn or improve public speaking / communication skills w/ others, attorneys	17	2.5%	8.5%
C) More general learning	156	22.9%	N/A
14. Shadow an attorney	8	1.2%	4%
15. Learn about an area of law (to make career choice)	95	13.9 %	47.5 %
16. Focus on a specific aspect of an area of law	34	5%	16.9 %
17. Work on or observe a case from start to finish	13	1.9%	6.5%
18. Complete “variety of tasks”	6	.9%	3%
D) Mentoring/networking	54	7.9%	N/A
19. Develop mentoring relationship	13	1.9%	6.5%
20. Network	41	6%	20.4 %
E) Office Life	48	7.0%	N/A
21. First office job / learn to be a professional	4	.6%	2%
22. Learn how to bill	8	1.2%	4%
23. Learn about the day-to-day practice of law	9	1.3%	4.5%
24. Learn how in-house law departments work	12	1.8%	6%
25. Learn how to run own firm / how firm/office works	13	1.9%	6.5%
26. Learn how DA’s offices work	2	.3%	1%
F) Improve quality/efficiency of work	24	3.5%	N/A
27. Focus on attention to detail	6	.9%	3%

28. Focus on efficiency / organization / time management	18	2.6%	9%
G) Intangibles	54	7.9%	N/A
29. Gain confidence / conquer imposter syndrome	19	2.8%	9.5%
30. Develop work-school-life balance	4	.6%	2%
31. Learn about lawyer decision-making / problem-solving / thinking like lawyer	20	2.9%	10%
32. Learn when how to ask questions	6	.9%	3%
33. Positive attitude / leadership / accepting criticism	5	.7%	2.5%
H) Secure a job post-bar	22	3.2%	N/A
34. Get hired	22	3.2%	%
Total	684	100%	341%

The two columns of percentages listed on the right side of the chart reflect two approaches to the data. The first concerns how often a goal was listed among the total 684 goals. This method gives a sense of the goal's overall popularity, and each percentage adds up to 100% total.[49] For example, of all the 684 goals students chose, "(1) Learn about an area of law (to make career choice)" was named 95 times, or 13.9% of the time. This does not mean that 13.9% of the students chose this goal. Rather, we must look at the second column of percentages for that figure.

The second column of percentages depicts how often a goal was chosen by each of the 201 students. It tells us how often any single student would name a particular goal among their three or more listed goals. Taking the "1) Learn about an area of law (to make career choice)" as an example again, if that goal were listed 95 times, and each extern would only list such a goal once among their selected goals, then we can calculate that 47.5% of students named that as one of their goals. Further, note that the percentages in the column do not add up to 100%, as students chose not one but three or more goals. Rather, the total percentage for this method is 341%, which matches

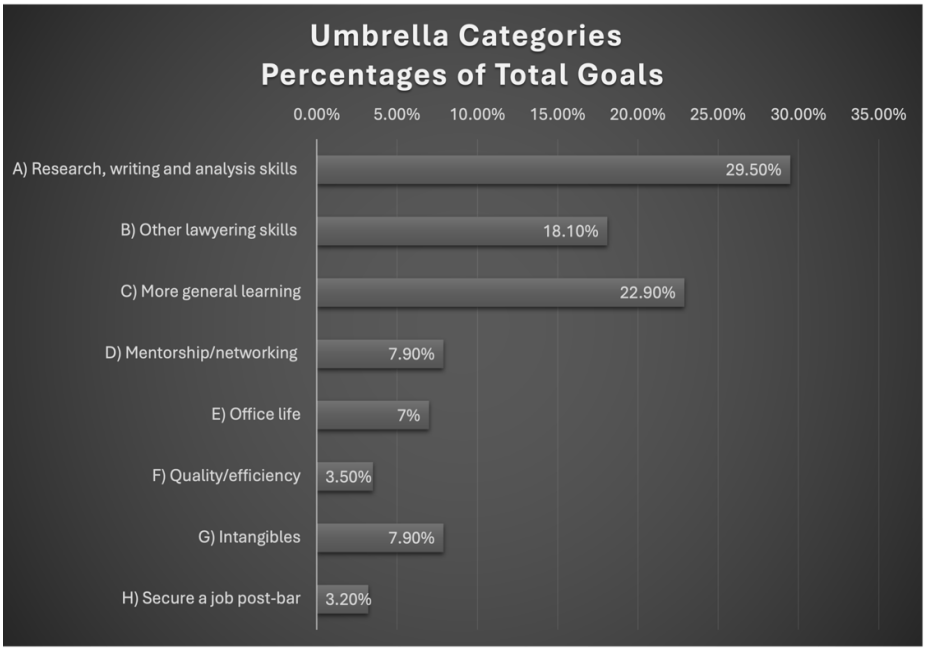
[49] Percentage may not add up to exactly 100% due to rounding of small percentages.

the fact that the average number of goals students selected was approximately three and a half.

An additional feature of the above chart is that, while I was able to calculate percentages for the individual goal categories in the second column regarding the 201 students, I could not do the same for the umbrella categories in that column. This is because, with very few exceptions, a single student would only list an individual goal one time, so when we calculate the percentage for that individual goal by dividing by 201, we get an accurate reflection of the number of students choosing that goal. The umbrella categories, on the other hand, contain as many as seven sub-goals, of which a single student might select more than one. Therefore, dividing the raw total of umbrella category goals by 201 students would give a skewed picture of how many individual students chose a goal in that umbrella category.

1. Umbrella Categories and Observations

With that background in methodology explained, we are ready to dive into the results to learn from the types of goals students are choosing. First, the following chart illustrates how popular or unpopular each umbrella category of goals was.



As seen in the chart, the umbrella category of "A) research, writing and analysis skills" made up 29.5% of the total goals, "B) other lawyering skills"

was 18.1%, meaning that tangible lawyering skills, both common and more specialized, made up nearly half — 47.6% — of all student goals.

The third category of "C) more general learning," with subcategories like "learn[ing] about an area of law (to make career choice)," amounted to 22.9%. Only 7.9% of the goals fit category D) regarding the desire for "mentorship and networking," as well as category G) regarding "intangibles" such as "thinking like a lawyer" and "gaining confidence." Category E) with the focus on "office life" amounted to only 7% of total goals. Finally, the lowest interest was found in category F) regarding the desire to improve "quality or efficiency of work," which amounted to only 3.5%, and in category H) regarding the hope to "secure a job post-bar" made up just 3.2% of the articulated goals.

One significant result is the percentage of students interested in the umbrella category of "E) office life." While the umbrella category accounts for only 7% of all goals, the individual categories like "learn how to bill" and "learn how to run own firm / how firm/office works," when added together, were named by 24% of all students. That nearly one quarter of students are looking to understand office life, including how to run their own firm someday, is worth paying attention to.

Another point to notice is that, in the category of "D) networking/mentorship," many more students focused on the former than the latter. Together, the umbrella category made up less than 10% of the total goals, yet networking was vastly more popular than mentorship: whereas over 20% of all students claimed to want to work on their networks during their externship, only 6.5% were interested in developing a mentoring relationship. It is possible that these students assumed that networking would take more effort to achieve, and thus should be listed as a goal, whereas mentorship would come naturally as part of the supervisor/extern relationship itself. I would hazard that this is not the case, and that more students should focus on finding a mentor as part of their externship.

Finally, the category of "F) improve quality/efficiency of work" merits some inquiry. These students, though few, believe they are slow to accomplish tasks and that they make too many mistakes. The question is, are they appropriately self-aware, or are they too hard on themselves? A previous study I conducted with Anahid Gharakanian revealed that "[s]tudents generally rated themselves more negatively than their supervisors rated them" on various categories of legal skills like research and writing.[50] We concluded that the discrepancy could mean that "students could use a boost of confidence, student[s] could use more feedback from their supervisors to

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[50] Anahid Gharakhanian, Carolyn Young Larmore & Chelsea Parlett-Pelleriti, *Achieving Externship Success: An Empirical Study of the All-Important Law School Externship Experiences*, 45 S. ILL. U. L.J. 165, 193 (2021).

let them know how well they are actually doing, or it could be the result of the students' less experienced perspective compared to the supervisors."[51] In any event, the students who set this category of goals for themselves might benefit from learning that supervisors are generally happier with student work than students are with their own performances.

2. Individual Goals and Observations

Turning now to the thirty-four individual goals identified in the reflective journals, the most popular among students by far was "15) learn about an area of law (to make career choice)" at 13.9% of goals and 47.5% of students. This goal is how I coded journals in which students stated that they wanted to learn more about an area of law generally, particularly to see if it was a practice area they were interested in. When students wrote that they were already familiar with an area of law, usually from a prior externship, but wanted to become more adept with a particular aspect of that practice area, I coded it as "16) focus on a specific aspect of an area of law." That goal accounted for 5% of the total goals and 16.9% of students. When the two goals are considered together, they amount to 18.9% of the total goals and 64.4% of students. It is significant that this many students are interested in exploring an area of law, generally or in detail, though it was not a surprise. It is confirmation of one of the primary reasons a student may extern in the first place.

Next were three specific skills-focused goals: "2) improve writing generally / produce sample" was at 10.9% of goals and 36.8% of students, "1) improve research" at 9.3% of goals and 31.8% of students, and "12) learn or improve client communication skills" at 6.3% of goals and 21.4% of students. These four goals alone made up more than 40% of all goals.

Finally, rounding out the top five individual goals was "20) network" at 6% of goals and 20.4% of students. In other words, one out of five students hoped to build their professional network during their externship.

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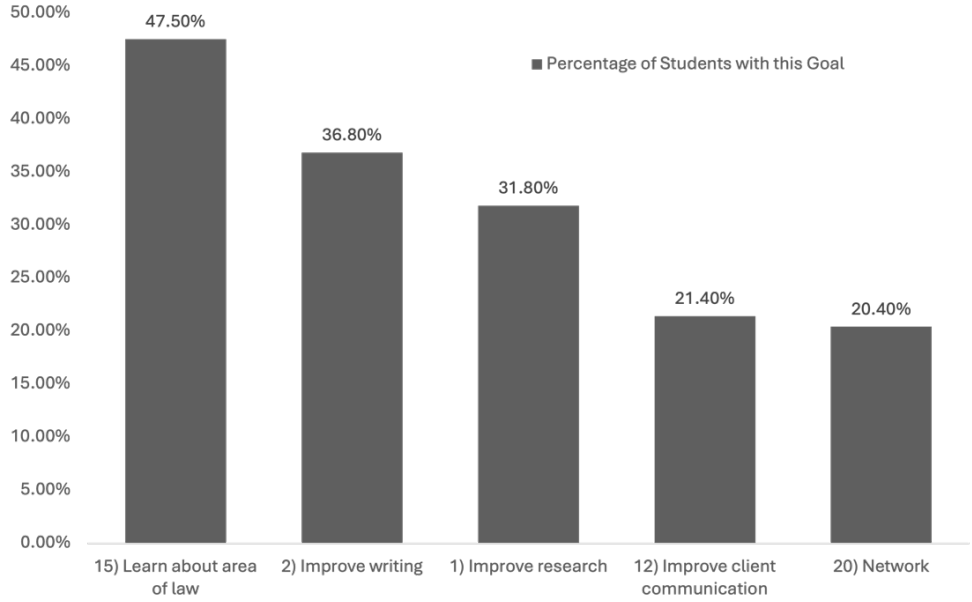
[51] *Id.*



Other individual goals to pay attention to are those that focus on aspects of professional life that may be new to a student, such as "20) network," "21) first office job / learn to be a professional," "29) gain confidence / conquer imposter syndrome," "32) learn when how to ask questions," and "33) positive attitude / leadership / accepting criticism." Taken together, they make up 11% of all goals, which is not surprising given how many law students identify as first-generation college students. According to LSSSE, 26% of law students are first-gen,[52] many of whom have no experience with professional work and no professional network to draw on.[53]

Finally, I was not surprised by the relatively small percentage of students —10.9% — who listed obtaining post-graduation employment as a goal. First, this is likely a goal for repeat externs who have already spent some time in the same placement and know they want to continue working there, rather than a goal that a first-time extern would select. Further diminishing the percentage of students who would choose this goal is that students may have being hired in mind but are hesitant to make it an "official" goal that they discuss openly with their supervisor. Given these two caveats, that more than 10% of students *still* listed getting hired as a goal is significant.

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52 LSSSE, REPORT ON FIRST-GEN LAW STUDENTS: LOWER GRADES, MORE DEBT (Oct. 26, 2023) (on file with SIU Law Journal).

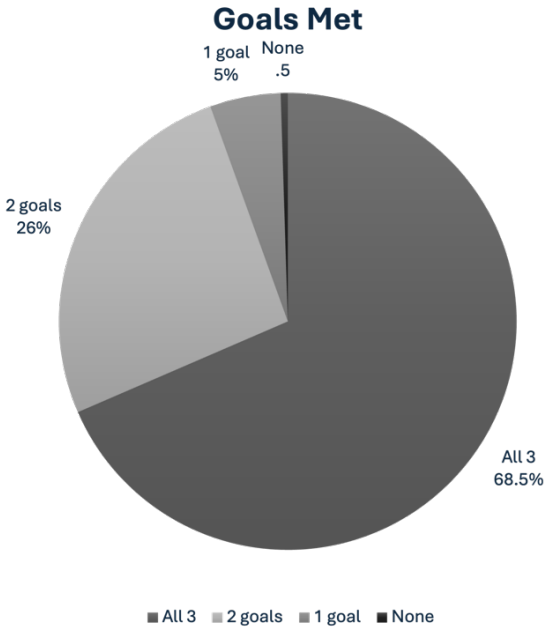
53 Jacqueline M. O'Bryant & Katharine Traylor Schaffzin, *First-Generation Students in Law School: A Proven Success Model*, 70 ARK. L. REV. 913, 920–21 (2018).

IV. ARE EXTERNS MEETING THEIR GOALS?

After fourteen weeks of working in the field, students are asked to evaluate their experience, including whether they felt they met the three goals they set for themselves in week one. By examining whether students are meeting these goals, as well as why or why not, there is much to be learned about an externship program and how it might be improved.

A. The Underlying Data

To determine whether students are meeting their goals, I again examined 201 journals, this time the final journal of the semester, in which students reflect on whether they achieved their externship goals. The results were as follows: out of 201 journals, 138 students, or 68.5%, reported that they met all three of their goals.[54] Fifty-one students, or 26%, wrote that they met two of their goals, and 10 students, 5%, met just one. A single student, .5%, claimed to have met none of their goals at all.



[54] Whereas the previous section of this study found 684 total goals, or about three and a half goals per student, that figure was the result of my own coding system splitting compound goals like "improve research and writing" into two separate goals. In the semester-end reflections on goals, however, students looked back at the goals as they self-reported them, and there was no way to unpack them in terms of which part of a compound goal they reported to be or not be met. Therefore, this section of the study treats the total number of goals as just 603: three each for all 201 students.

This data is encouraging. First, more than two-thirds of students reported having met all three of their goals. That is heartening, as it means that the majority of externs feel they have developed skills they would not otherwise have had but for the externship experience. Further, 26% of student felt they achieved two of their three goals; when added to the 68.5% who achieved three, the resulting statistic is that 94.5% of students report meeting at least two of their three goals. That is fantastic.

Looked at another way, for those who did not meet their goals, 10.5% met only one, or none, of their goals. When added to those 25.4% of students who failed to meet just one of their three goals, there were more than a third of students who failed to meet one, two or all three goals. The reason these students fell short will be examined *infra*.

B. Why Were Goals Met?

Determining that students overwhelmingly met two or three of their goals is reassuring, but not informative unless we examine the factors that helped students achieve them. Only that way can we help future externs to do the same.

To examine why students were able to meet their goals, I reviewed the section of their final journals in which they were asked to reflect on what helped them to achieve their stated goals. Students were not asked to give a separate reason as to why each of the three goals they selected were achieved, so many answered this question with a more general response regarding achieving goals in general. Still others who achieved all three goals did not write about why they did so at all. Thus, I was not able to do more than observe the types of reasons students gave for achieving goals in general, as opposed to creating a category-specific chart with percentages like in the previous section.

1. Supervisor Support and Feedback

Upon review of these final reflection journals, the overwhelming reason students gave for their ability to achieve their goals was the support of their supervisor. Students reported that their supervisors were sure to give them assignments that matched their needs, were generous with their feedback and served as great mentors. For example:

> Everyone was welcoming and eager to explain what they do and the process of a construction defect case. It was fascinating to combine all the puzzle pieces to understand how each person's role fits in. The fact that all the

> people I encountered were willing to speak openly about their experiences and jobs made it possible to achieve my goals.[55]
>
> One of the main reasons I achieved my goals was because the partners I was working for were open to mentoring me..... I was able to draft pleadings, discovery responses and communicate with clients as if I were a junior associate.....Unlike my work experience at other firms, [this firm] focused on a hands-on approach with their law clerks .....[56]
>
> My interactions with [my supervisor] have been instrumental. His encouragement, receptiveness to ideas, and genuine interest in my growth fostered an environment where voicing my ambitions felt natural.[57]
>
> The most crucial factor in achieving this goal was the supportive relationship with [my supervisor], who not only acknowledged the relevance of my goals but went further, suggesting additional projects to provide a well-rounded perspective on in-house legal challenges.[58]

Supervisors were praised not just for their support of the externs but specifically for giving helpful feedback on assignments. For example:

> Thanks to the guidance and feedback from [my supervisor] and all the other attorneys, I've learned valuable techniques to improve efficiency without sacrificing thoroughness. It now takes me way less time to research and write motions and I don't feel so paralyzed by starting a project.[59]
>
> I was also provided with helpful training and writing tools from my supervising attorney. I received feedback on my writing which was extremely helpful and will help me moving forward as I continue my legal career at [the placement].[60]

It was no surprise to find that supervisors play such a crucial role in helping students achieve their goals. In a previous study I conducted with Anahid Gharakanian, we found through a variety of empirical methods that "the externship supervisor plays a critical role in the extern's success."[61] For example, 82% of the externs surveyed in that study reported that their "relationship with their supervisor" was "one of their top three factors

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55 Final External Journal Number 17, (unpublished journal) (on file with author).
56 Final External Journal Number 39, (unpublished journal) (on file with author).
57 Final External Journal Number 181, (unpublished journal) (on file with author).
58 Final External Journal Number 108, (unpublished journal) (on file with author).
59 Final External Journal Number 171, (unpublished journal) (on file with author).
60 Final External Journal Number 78, (unpublished journal) (on file with author).
61 Gharakhanian, Larmore & Parlett-Pelleriti, *supra* note 50, at 202.

contributing to their externship success," and scored twenty percentage points above the second most helpful factor.[62]

2. Self-motivation

Interestingly, only a handful of students in the current study claimed anything akin to "their own motivation" led them to achieve their goals. According to the previous study mentioned *supra*, this was the second-most common reason students gave for why they felt their externship was successful, yet only a few students in the current project seemed to feel the same. For example:

> The most important factor in helping me achieve these goals was maintaining a hard work ethic throughout the duration of the externship. Even though many of the assignments my supervisor gave me appeared daunting at first blush, I was determined to give each assignment my best effort and submit something rather than nothing. I approached virtually every project with this mentality and, in doing so, was able to receive more and more assignments throughout the semester that touched on many legal subjects and helped hone my legal writing skills.[63]

3. Variety of Additional Reasons

Many other reasons for achieving their goals were listed as well, though not as often as a positive experience with a supervisor and great feedback were listed. These included asking a lot of questions[64], the opportunity to observe[65], taking the initiative[66], asking for feedback if it wasn't forthcoming[67], working well with the office staff, not just the supervising attorney[68], being able to review good samples[69], a mid-semester review that helped refocus the supervisor on the student's goals[70], and spending enough time at the externship placement to see improvement.[71]

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62 *Id.*; *see also* Blanco & Buhai, *supra* note 12.

63 *See* Final Student Journal No. 59.

64 *See* Final Student Journal No. 3; *see* Final Student Journal No. 120; *see* Final Student Journal No. 135.

65 *See* Final Student Journal No.70; *see* Final Student Journal No.76; *see* Final Student Journal No. 184.

66 *See* Final Student Journal No. 19; *see* Final Student Journal No. 84.

67 *See* Final Student Journal No. 41; *see* Final Student Journal No. 131.

68 *See*, e.g., Final Student Journal No. 93; *See* e.g., Final Student Journal No.192.

69 *See, e.g.,* Final Student Journal No. 146; *see* e.g., Final Student Journal No. 194.

70 *See* Final Student Journal No. 160.

71 *See* Final Student Journal No. 175.

4. Goal Achievement: An Ongoing Process

Finally, many students reflected that they achieved all their goals, but only "partially," recognizing the progress they made while acknowledging that they still had room to grow. As one student whose goal was to observe or participate in trial explained:

> I have not been able to experience trial yet, but I was able to partially start helping with one by creating the exhibit binders and jury instructions. It ended up settling before trial though. I can tell … I have learned so much and have become way more comfortable in doing assignments and asking questions of my supervisor.[72]

Another student whose goal was to work on her writing reported that

> I do feel like I have a long way to go with those skills because writing is not an area that I am very comfortable with . . . but I am confident that what feedback I have gotten will guide me as I continue to write more substantive work.[73]

It is to be expected that students may feel they only partially achieved a goal in just fourteen weeks. These are students, after all, just starting out on a career that requires a lifetime of learning. But journaling about what they still have to learn helps them recognize and articulate that the practice of law takes just that: practice.

C. Why Were Goals Not Met?

For the third of students who failed to meet at least one goal, there were a variety of common reasons given for feeling they came up short. As with the reasons goals were met were discussed *supra*, the reasons students gave for not achieving a goal cannot be discussed as percentages of the whole. A tally and calculation could not be done both because a handful of students did not give a clear reason why they struggled to achieve their goal or goals, and because those who did offer a reason often described something quite unique to their goal or their externship placement such that categorization was impossible. Thus, I will discuss the general trends observed.

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[72] *See* Final Student Journal No. 46.

[73] *See* Final Student Journal No. 91.

1. Lack of Time

One of the most common responses students gave when asked why they could not meet their goals was that they simply ran out of time. Some complained that the fourteen-week externship in which students work no more than twenty hours per week, but often as few as nine hours weekly, was not enough time to accomplish what they had set out to do.[74] For example, a student who wanted to see a case "from start to finish" never got to see that occur in the short time they were in the office.[75] As another student explained:

> My first goal was to try and get a better handle of when to push forward on a case . . . and when to settle. I did not learn that at all, and that is no one's fault—that was just an unrealistic goal to be able to master in just a few short months.[76]

Still others suggested not that the externship semester was too short, but that they were too busy with other assignments or classes to do things like attend office meetings or observe court or depositions:

> Sometimes these events were held during my school hours or at a super inconvenient time that made it almost impossible to attend. Another barrier to achieving this goal [of attending trials and depositions] is that when I am invited to watch or attend these events, I usually have other time-consuming assignments from a different attorney that has a hard deadline and needs to be submitted quickly. [77]

2. Remote Work

The remote nature of some externships was a complaint of many students, especially those whose goals involved things like networking or observation.[78] For example, one student made little progress toward building a larger professional network, although they did develop a mentoring relationship with their sole supervisor:

> I didn't have much of the opportunity to [network] because all of my work was remote and I was primarily doing work [] for my supervising attorney. I met the rest of the firm's attorneys at one meeting but I didn't have much interaction with them. I did get close to my supervisor so that was definitely a plus. It's nice to feel like I have a connection somewhere considering that I come from a family of non-lawyers and sometimes feel intimidated

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74 *See*, *e.g.,* Final Student Journal No. 81; *see*, *e.g.,* Final Student Journal No. 105; *see*, *e.g.,* Final Student Journal No. 107.

75 *See* Final Student Journal No. 53.

76 *See* Final Student Journal No. 48.

77 *See* Final Student Journal No. 15.

78 *See, e.g.,* Final Student Journal No. 112; *see*, *e.g.,* Final Student Journal No. 189; *see*, *e.g.,* Final Student Journal No. 199.

> going school and having peers that have these types of connections already set up in their families.[79]

Not only are the students often working remotely, but so are their supervisors. One student complained that most of the semester they "sat on an empty floor of the office and would check in with my supervising attorney via text and phone calls."[80]

Finally, another remote work issue involved the court system. Because courts in Southern California have remained mostly remote since 2020, at least one extern was told by their supervisor that "with trials and grand jury hearings not being in person it was harder" to get students certified to go on the record.[81]

3. Poor Supervision

Many students complained that they could not meet their goals, such as improving writing skills or learning a variety of lawyering skills, because of a supervisor who failed to give constructive feedback or who was otherwise unsupportive.[82]

For example, a student who was assigned two senior attorneys to work with had a very hard time connecting with one of them, explaining that, "I haven't spoken to [one of my supervisors] in months. I keep sending her messages, no response. [I]t's a huge part of why I am ready to move on from this position. I am so stagnant right now, and it is driving me nuts." [83]

Another described their lack of interaction with their supervisor this way:

> I'm not sure if I learned any attorney skills at this firm since I didn't talk to the attorneys very much. Everyone was so busy, that my main source of communication with attorneys was through email. In a sense . . . I learned some attorney skills by reading deposition and hearing transcripts, but I wasn't able to shadow the attorneys speaking to clients.[84]

Similarly,

> I told the attorneys that I wanted to shadow one of our partners to go to family and probate courts with him. They told me to email him. So, I did,

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79 *See* Final Student Journal No. 9.

80 *See* Final Student Journal No. 67.

81 Final Student Journal Number 35.

82 *See, e.g.*, Final Student Journal No. 53; *see, e.g.*, Final Student Journal No. 61; *see, e.g.*, Final Student Journal No. 95; *see, e.g.*, Final Student Journal No. 175.

83 *See* Final Student Journal No. 49.

84 *See* Final Student Journal No. 94.

> but he told me to talk to his assistant. … The assistant did not respond to me. I followed up with another email a week later, and she told me that he was going to be on vacation for two weeks. When the vacation time ended, I emailed her again. No response. I've also seen him a couple of times in our office and he made no mention of it.[85]

Regarding feedback, some students complained about the lack of freely-given feedback on their writing assignments, noting that:

> while my supervisor could be helpful and informative in explaining background information about clients and the law to me, I hoped to get more feedback in real-time from him. Sometimes I had to constantly ask for feedback before I got any in the beginning; however, towards the end of the externship, the feedback became more regular, which was helpful going forward.[86]

4. Poor Goal Selection or Bad Luck

A fair number of externs recognized that they did not meet some of their goals because the goals were not well-tailored to the nature of work found at the placement itself, usually because the students did not fully understand what types of work could be found at the law firm or agency.[87] For example, one student in the entertainment field "did not learn about different genres of deals such as podcast deals or influence[r] deals" because, it turned out, the law firm where they were working specialized in other areas.[88] Another extern did not get the client interaction they wanted because they did not speak fluent Spanish, a requirement for most client interactions at that agency.[89]

Another way in which goals were poorly chosen was in articulating them too broadly or generally.[90] For example, one student reflected that they "didn't achieve my goal of 'improving my litigation skills' because it was ambiguous and too broad. I should have been more specific as to what aspect I wanted to improve on."[91]

Others just hit a bit of bad luck, with emergencies occurring at the placement that dictated a more pressing need for their time and skills, or cases happening to settle all at once.[92] As one student described, "[d]ue to the

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85 *See* Final Student Journal No. 139.

86 *See* Final Student Journal No. 104.

87 *See, e.g.*, Final Student Journal No. 3; *see, e.g.*, Final Student Journal No. 5; *see, e.g.*, Final Student Journal No. 13; *see, e.g.*, Final Student Journal No. 196.

88 *See* Final Student Journal No. 30.

89 *See* Final Student Journal No. 65.

90 *See, e.g.,* Final Journal Numbers 58; *see, e.g.*, Final Student Journal No. 186.

91 *See* Final Student Journal No. 138.

92 *See, e.g.*, Final Student Journal No. 69, 123, 135, 140.

nature of the work we had available this summer . . . [t]here were not many contracts to draft and/or review" so they were "disappointed that the summer did not entail more of this work as this is the area of law that I am looking to get into …."[93] Similarly, one student had hoped to learn more about mediation, but "the opportunity just did not arise."[94]

Nonetheless, when the original goal was not achievable due to circumstances beyond the student's control, several externs were able to make lemonade from the opportunities available, for example, learning a lot about preliminary hearings by preparing for them, even if they kept getting continued.[95] As one student explained:

> The second goal centered around gaining exposure to trial experiences. Although I couldn't fulfill this goal through in-person trial attendance due to the lack of opportunities to accompany an attorney to a courthouse, I was able to engage extensively in trial preparatory work. Having drafted several mediation briefs, complaints, motions, and discovery documents, my understanding [of] trial dynamics has increased exponentially.[96]

5. Other Hard-to-Categorize Reasons

Finally, the journals in which students reflected on their unachieved goals contained a variety of unclassifiable, but significant, reasons for not meeting those goals. These included a disorganized office environment,[97] inconsistent work schedule of the student and the supervisor,[98] the student's goal of developing work-life balance not being modeled by the supervisor,[99] priorities for the externship being set by someone above the direct supervisor,[100] the student feeling "burned out" and overworked,[101] and the student's own "imposter syndrome kick[ing] in" preventing them from working on their self-confidence.[102]

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93 Final Student Journal No. 107.
94 Final Student Journal No. 129.
95 *See* Final Student Journal No. 162.
96 Final Student Journal No. 154.
97 *See* Final Student Journal No. 22.
98 *See* Final Student Journal No. 46.
99 *See* Final Student Journal No. 55.
100 *See* Final Student Journal No. 65.
101 *See* Final Student Journal No. 112.
102 *See* Final Student Journal No. 130.

D. Potential Improvements to Externship Programs in General and Goal-setting Process in Particular

The goals research conducted in the study has suggested several potential improvements to externship programs, and their goal-setting pedagogy, as follows:

1. Emphasize Role of Supervisor

It should go without saying that supervisors are the crux of a good externship experience.[103] However, this study has revealed not just that a poor supervision experience—lack of feedback, lack of mentorship, poor assignment selection, etc.—makes the externship a little less enjoyable for the student, but can also inhibit them from achieving the very goals they have set out for themselves.[104] This must be kept in mind when selecting and evaluating supervisors, and when producing training materials or training supervisors, so that supervisors are reminded repeatedly what we expect of them. We must also share this information with our externship students, for example, encouraging them to seek out feedback and relevant and challenging assignments from their supervisors when these are not forthcoming.

2. Better Support for Remote and Hybrid Externships

The student experience in remote and hybrid externships reflected in their end-of-the-semester journals suggests that, while these placements have the potential to be valuable experiences, more can be done so that students can get the most out of them.

First, the remote experience of the externship itself should be examined and extra effort made to ensure that students are getting an educational experience. As Walsh and Lintal have recognized, these externships have their benefits, such as giving "students the opportunity to manage their own workload, to structure their schedule for individual productivity and success and to train themselves in the discipline of self-accountability."[105] However, to make sure that "students can still learn about office culture and avoid social isolation in a virtual setting, it is necessary for faculty and externship site supervisors to embed opportunities for social interaction within the program, including communicating face-to-face via videoconference technology

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103 *See supra* Section V.B.1.

104 *See generally supra* Section V.

105 Lucy Johnston-Walsh & Alison Lintal, *Tele-Lawyering and the Virtual Learning Experience: Finding the Silver Lining for Remote Hybrid Externships & Law Clinics After the Pandemic*, 54 AKRON L. REV. 735, 764 (2021); *see also* DUTTON ET AL., *supra* note 2, at 128–30 (discussing benefits and drawbacks of remote externships).

whenever possible."[106] Further, "[m]aintaining a well-rounded experience with opportunities for observation, collaboration, client/supervisor/colleague interaction are essential to the virtual experience which should not simply be limited to conducting legal research and writing remotely from home."[107] Reviewing hundreds of journals in which many students lamented the shortcomings of their remote externships should be a wake-up call that remote and hybrid externships are here to stay, and that they need our attention to coax the most educational experience out of them.

With regard to goal setting specifically, externs in remote externships must be made aware of their unique attributes and potential limitations so they choose goals that better align with the remote experience. Networking, for example, is still possible in a remote externship, but students should consider leaving it off the goals list in favor of goals more easily achieved in a remote or hybrid setting.

3. Allow Higher-Unit and Repeat Externships

The sheer number of students who complained that they could not meet their goals due to the lack of time allotted to their externships suggests schools may want to revisit lower externship unit caps and restrictions on repeating externships at the same placement. As of 2023, only 50% of law schools allow students to extern full-time for 10 or more credits.[108] Only about 55% of schools allow repeat externships in the same office.[109] Changes to one or both of these policies at individual schools could help students to make more progress on their externship goals via more quality time at their placements.

Absent a major policy overhaul, in an externship where credit hours remain low, or in which the student will only complete one semester, students should be encouraged to select their goals with a cognizance of the time limitations they are facing.

4. Offer Support for Goals Common to Many Externs

In areas where this study has revealed common goals among a critical mass of externs, faculty supervisors can offer them more direct support.

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106 Johnston-Walsh & Lintal, *supra* note 105, at 764; *see also* DUTTON ET AL., *supra* note 2, at 128–30.

107 Johnston-Walsh & Lintal, *supra* note 105, at 764; *see also* DUTTON ET AL., *supra* note 2, at 128–30.

108 ROBERT R. KUEHN ET AL., CTR. FOR STUDY OF APPLIED LEGAL EDUC. (CSALE), 2022–23 SURVEY OF APPLIED LEGAL EDUCATION 10 (2023), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/64fb7bd82fdee48e57e8ef04_Report%20on%202022-23%20CSALE%20Survey.rev.9.8.23.pdf.

109 *Id.* at 45.

Perhaps the professor could distribute reading on research tips and tricks or dedicate a session of the seminar to networking practice. For example, I have begun giving reading on overcoming imposter syndrome in law students as a result of learning how many students have the goal of working on their confidence in the workplace.[110]

5. Reinforce How Students Communicate Goals to Supervisors

One major restructuring of the goal-setting process I am contemplating undertaking is how students share their goals with their supervisors at the beginning of the semester. As described in Section III.B. *supra*, my students verbally describe their three goals to their supervisor, followed by a conversation about how they might work together to meet those goals. However, for some students it appears these conversations may not be detailed or concrete enough, because they revealed in their final journals that they did not meet their goals because their supervisors failed to give them the proper assignments to help them do so. Perhaps students could produce a "goals report" for their supervisor after the initial conversation, in which they confirm the goals they discussed and list the corresponding assignments they should expect throughout the semester. This goals report could be revisited at the mid-semester mark to help ensure that supervisor and student stay on course with these assignments.

6. Offer Opportunity to Adjust Goals Mid-semester

Another lesson to be gleaned from the study of students who did not achieve their chosen goals is that students should be given an opportunity to change or adjust their goals mid-semester. Currently, my students are given the opportunity in their mid-semester reviews to remind their supervisor of their goals and ask for changes in the type of work they are assigned that better align with those goals. However, as noted *supra*, sometimes goals can't be met not because the right types of assignments are lacking, but because of bigger obstacles like a remote work set up or a slew of settled cases. Rather than offering different assignments as the only method to meet goals, we should recognize that changed circumstances sometimes call for the changing of goals as well. I will be adding a section on my mid-semester review in which students can choose new goals for the second half of the semester and explain what prompted their choice. They would then share this new goal with their supervisor just as they did the original set of goals.

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[110] *See* David A. Grenardo, *The Phantom Menace to Professional Identity Formation and Law Success: Imposter Syndrome*, 47 U. DAYTON L. REV. 369, 371 (2022).

7. Encourage Continuing Learning Journey

One potential pedagogical shift I have rejected is the notion that students must pick concrete goals that can be measured and achieved in fourteen weeks. For example, some scholars have suggested that goals be "SMART": Specific, Measurable, Achievable, Relevant, and Time-bound.[111] While some goals may be best articulated this way, others like "improve writing skills" can be more vague and hard to measure, and that is okay. As I have observed in my review of hundreds of goals journals, students seem to have the right attitude about not fully "achieving" a particular goal, instead recognizing that they made strides toward something they will continue to work on throughout their careers.[112] As one extern explained, "in terms of further improving my writing skills, I am pleased with the progress I have made but acknowledge that there is always room for refinement."[113]

One concrete way to encourage students to view their goals as something they will continue to work on is, rather than asking students what goals they want to set and "achieve" (which my goals journaling assignment did), asking instead what skills or areas they would like to "improve," "develop" or "work on" (which my assignment now does). Similarly, at the end of the semester, rather than asking if students "met" or "achieved" their goals, I will ask instead what "strides" they made toward the self-improvement they set out to work on. This shift in language supports the understanding that externships offer just the first step in learning to be a lawyer, and that the skills and qualities students begin to work on in law school will be ones they continue to develop throughout their careers in the law.

CONCLUSION

Goal setting at the outset of an externship semester is a valuable tool for student professional development. In turn, the study of the goal-setting process has revealed much about the mindset of the student extern, and how externship faculty might support their learning journey. While students set some common, and some individualized goals, the extent to which they achieve them is influenced by numerous factors, including supervisor support, personal motivation, and the structural dynamics of the externship environment. The findings of this study underscore the need for more support of our students to not only facilitate effective goal setting but also addresses the challenges students face in realizing their objectives. By implementing

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111 *See* DUTTON ET AL., *supra* note 2, at 181–182.

112 *See generally supra* Section V.

113 Final Student Journal No. 8.

targeted improvements—such as enhancing supervisor involvement, providing more support for remote and hybrid experiences, and increasing hours worked at the field placement—externship faculty can better equip students for success. Ultimately, fostering an environment that prioritizes goal achievement not only enriches an extern's learning experience but also cultivates the skills and resilience necessary for a successful future legal career.

THE CRUMBLING FLSA COLLECTIVE ACTION: HOW *BRISTOL-MYERS SQUIBB* SHAPES THE REACH OF FEDERAL WAGE CLAIMS

Elijah Phillips*

INTRODUCTION

President Joe Biden, in his Farewell Address to the Nation, warned that "an oligarchy is taking shape in America of extreme wealth, power, and influence that literally threatens our entire democracy, our basic rights and freedoms, and a fair shot for everyone to get ahead."[1] This statement comes when our country is shifting backwards to an era where the law values business interests over the citizens' interests.[2] This thinking was prominent before the Great Depression and the New Deal in the time of Chief Justice Taft's[3] Supreme Court.[4] Taft's Court sided with businesses 47% of the time.[5] With such high percentages, it is no wonder the People and the Nation required a New Deal in the late 1930s to, among other things, reestablish a

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* Elijah Phillips is a third-year law student at Southern Illinois University Simmons Law School. I would like to thank Taylor Phillips, my Wife, for her unwavering support. Without her, I would have never reached this point, and I am forever grateful for everything she has provided to my life. This Note is dedicated to Taylor and SRP, who both make every day wonderful. I would also like to thank Professor Stanley Cox for his assistance in both helping me find this topic and for his edits and advice throughout the drafting process.

1 Press Release, Joe Biden, President, Remarks by President Biden in a Farwell Address to the Nation (Jan. 15, 2025), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2025/01/15/remarks-by-president-biden-in-a-farewell-address-to-the-nation/ (on file with author).

2 *See* Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 MINN. L. REV. 49, 49, 53–54 (2022) (indicating that business have succeeded in the Roberts Court 63.4% of the time which is a large increase from the preceding three Courts: the Rehnquist Court (48.4%), the Burger Court (43.2%), or the Warren Court (29.4%)). The Roberts Court additionally began more similarly to the Rehnquist Court, siding with businesses only 53% of the time in 2005, but in 2020, the Court sided with businesses 83% of the time. *Id.* at 59.

3 Chief Justice Taft is better known as President William Howard Taft. He served as President of the United States before becoming Chief Justice of the Supreme Court. *William Howard Taft*, THE WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/bios/william-taft (last visited Mar. 30, 2025).

4 *See* Epstein & Gulati, *supra* note 2, at 54 (indicating that the Taft Court was "business friendly" and existed from 1921-1929).

5 *Id*. At first, this may not seem to be a high percentage, but consider the expense involved for a plaintiff to bring an action against a business. A business is much less impacted in bringing an action forward because these businesses have much more money to pay for legal fees and weaponize the justice system. This means that any case that comes forward against a business is likely to be more egregious than any action brought by a business.

balance in the power between businesses and the People.[6] In 1933, President Franklin Roosevelt took office and brought with him plans to end the Depression, prevent future depressions, and, notably, support the ailing working class with sustainable jobs and improved working conditions.[7] These plans became legislation and collectively became known as the New Deal.[8] As part of the New Deal, the Roosevelt Administration wanted to uplift the working class, and the Fair Labor Standards Act (FLSA)[9] was passed to assist with this goal.[10] Since then, the FLSA has been prominent in balancing the power between companies and their employees by establishing a federal minimum wage, placing restrictions on child labor, and creating a procedure through which workers can join their similar claims to sue their employer collectively.[11]

Today, just like when it was enacted, the FLSA is required to protect the oppressed working class.[12] At the same time, businesses have experienced exponential economic growth, while workers have received minimal benefits for their labor.[13] With each passing year, large corporations

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6 *See id.* at 55–56 (explaining that the Taft Court was very skeptical of any governmental regulations on businesses, which can be seen in cases addressing minimum wage, maximum hours, and child labor). It is also noteworthy, that the Taft Court saw the highest amount of cases involving businesses within the last century, with nearly 60% of all cases from 1921–1929 having businesses as either one party or both. *Id.* at 56.

7 *The Great Depression, the Dust Bowl, and New Deal in Oklahoma*, OKLA. HIST. SOC'Y, https://www.okhistory.org/learn/depression3 (last visited Mar. 30, 2025) (explaining that the New Deal included banking regulation, agriculture reform, work relief programs, union protection programs, and the Social Security Act).

8 *Id*. Interestingly, the New Deal was named as such due to a speech by President Roosevelt during his acceptance speech after he accepted the nomination for President in 1932. *Id.*

9 The Fair Labor Standards Act is a collection of statutes protecting workers' rights from sections 201 to 219 of title 29 of the United States Code. 29 U.S.C. §§ 201–219 [hereinafter FLSA].

10 *See* Bryan Driscoll, *What is the Fair Labor Standards Act (FLSA)?*, TECH. ADVICE (Sep. 17, 2024), https://technologyadvice.com/blog/human-resources/fair-labor-standards-act-meaning/ (explaining how the FLSA was relevant when passed and how its continual updates have kept it relevant with the development of business and technology).

11 *See generally* SARAH A. DONOVAN, CONG. RSCH. SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 15–16 (2023).

12 This is most notable in the service industry, which generally makes around $33,330 per year when $41,600 is generally considered a livable salary. Rick Wartzman & Harin Contractor, *America's working class barely scrapes by. An outdated image of them doesn't help*, FORTUNE (Jan. 13, 2025 11:00 EST), https://fortune.com/2025/01/13/america-working-class-service-jobs/. As an example of this problem, a Walmart employee who has worked with the company for over twenty years reports only earning $17.78 per hour, which is below the necessary $20 per hour needed for a livable wage. *Id.*

13 Since 1978, workers have typically only seen a pay increase of 24%, while CEO's have seen a pay increase of 1,084%. Josh Bivens, Elise Gould & Jori Kandra, *CEO pay declined in 2023 But it has soared 1,085% since 1978 compared with a 24% rise in typical workers' pay*, ECON. POL'Y INST. (Sep. 19, 2024), https://www.epi.org/publication/ceo-pay-in-2023/.

continue to grow exponentially in both revenue and size.[14] Companies have reached a point where each company has substantial power due to its revenue and size, and it can freely discard employees and hire new employees to take their place. This imbalance leads to employees being overworked, not compensated for their overtime hours, or paid substandard wages. The FLSA was established to prevent such bullying by companies.[15]

However, the pro-business trend has resurfaced in United States jurisprudence, as the Roberts Court has been even more pro-business than the Taft Court.[16] The Roberts Court has ruled in favor of businesses 63.4% of the time.[17] The pro-business trend has firmly established itself again, and the FLSA has become its newest victim.[18] Recently, the FLSA has come under attack, resulting in Federal Appellate Courts stripping it of much of the authority and power it has used to protect workers' rights for the last 80 years.[19] The FLSA allows employees similarly harmed by a corporate policy to consolidate their claims.[20] The FLSA does not impose any territorial limits on opt-in plaintiffs, stipulating only that they must be "similarly situated" to the original plaintiff and that they must consent to joining the collective action.[21] This allows all "similarly situated" plaintiffs to join together to fight back against the injustice committed by their employer. However, since the United States Supreme Court's decision in *Bristol-Myers Squibb v. Superior Court of California, San Francisco County*, federal courts have been

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14 *See* Vijay Govindarajan et al., *The Gap Between Large and Small Companies Is Growing. Why?*, HARV. BUS. REV. (Aug. 16, 2019), https://hbr.org/2019/08/the-gap-between-large-and-small-companies-is-growing-why (explaining that larger companies are exponentially growing in revenue while small companies are remaining stagnant, causing the small companies to fail at a much greater rate). Additionally, according to the number of employees, the two largest companies based in the United States, Walmart and Amazon, employ a little over half of all employees within the top ten largest companies. *See Companies ranked by number of employees*, COMPANIESMARKETCAP, https://companiesmarketcap.com/largest-companies-by-number-of-employees/ (last visited Mar. 31, 2025) (totaling Walmart, Amazon, United Parcel Service, Home Depot, Concentrix, UnitedHealth, Target, Kroger, Marriot International, and Berkshire Hathaway).

15 DONOVAN, *supra* note 11, at 1–3.

16 Epstein & Gulati, *supra* note 2, at 54–57.

17 *Id.* at 54.

18 *See id.* at 54, 59 (explaining that the Roberts Court has on average been more pro-business but has also increasingly become more so as time has passed, with it siding with businesses 83% of the time in 2020). The United States Supreme Court has not taken up the FLSA problem addressed in this Note but, the Court has significant authority in determining the direction the rest of the Federal Courts should go. This has presumably led to the Court of Appeals judges becoming more pro-business.

19 Canaday v. Anthem Cos., Inc., 9 F.4th 392, 404 (6th Cir. 2021); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861, 866 (8th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 387–88 (3d Cir. 2022); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 731 (7th Cir. 2024).

20 29 U.S.C. § 216(b).

21 *See id.* ("An action to recover the liability . . . may be maintained against any employer . . . by any one or more employees for and in behalf of themselves and other employees similarly situated. No employee shall be a party plaintiff . . . unless he gives consent in writing . . . and such consent is filed in the court which such action is brought.").

dismissing these plaintiffs from lawsuits because the plaintiffs' claims lack a connection to the state where the federal court is located.[22] These dismissals have occurred because a few courts of appeals have found that their court lacks personal jurisdiction to adjudicate these plaintiffs' claims.[23] Each dismissed plaintiff has a choice: take their lawsuit to a court with personal jurisdiction or drop the claim entirely.[24]

The consequences of the dismissal are severe to the plaintiff because the action, which started in one court with a large group of plaintiffs, has now turned into many small groups having to take the claim to separate courts. The employees then realize that the claim is not worthwhile because the cost to bring the claim to federal court will be greater than any recovery the employee may receive. The only way the claim would be worthwhile is if all the plaintiffs could work together in one court, but now each small group would have to bring their claims into different courts, pay court fees, and attorney fees. The result is that the potential recovery for each small group is less than the costs associated with bringing the actions. Thus, a large collective claim has been turned into no claim, allowing the company to become immune from liability. This signals that companies can continue to shortchange their employees to make an extra buck, and the law will do nothing to stop them. This results in severe injustice for the underpaid employees; however, the decision by a few appellate courts that led to this injustice was wrong. The courts that decided this way misconstrued the meaning of *Bristol-Myers Squibb*.[25] Justice Sotomayor warned of this possible misinterpretation in her *Bristol-Myers Squibb* dissent by stating, "[T]he effect of today's opinion will be to curtail–and in some cases eliminate–plaintiffs' ability to hold corporations fully accountable for their nationwide conduct."[26]

In the same way that *Daimler* made corporations "too big for general jurisdiction," corporations today are becoming too big for the FLSA.[27] Such

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22 *See, e.g.*, *Canaday*, 9 F.4th at 404; *Vallone*, 9 F.4th at 866; *Fischer*, 42 F.4th at 387–88; *Vanegas*, 113 F.4th at 731.

23 *See, e.g.*, *Canaday*, 9 F.4th at 404; *Vallone*, 9 F.4th at 866; *Fischer*, 42 F.4th at 387–88; *Vanegas*, 113 F.4th at 731.

24 *See Vanegas*, 113 F.4th at 738 (Rovner, J., dissenting) ("FLSA plaintiffs will not be required to bring suit in only limited jurisdictions and may struggle to bring suit at all.").

25 Justice Sotomayor indicates in her dissent that Bristol-Myers Squibb did not decide the issue of whether collective claims could be brought in federal court and left it as an open question. Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 277 (2017) (Sotomayor, J., dissenting). Indeed, the majority opinion does leave the question open of how the Bristol-Myers Squibb decision would interact with the Fifth Amendment which defines the personal jurisdiction of the federal court when it is not bound by Rule 4(k). *Id.* at 269.

26 *Id.* at 278.

27 Daimler AG v. Bauman, 571 U.S. 117, 143 (2014) (Sotomayor, J. concurring). While Daimler concerned general jurisdiction rather than specific jurisdiction which is at issue in FLSA actions,

a result is not necessary, nor is it ideal. The history of the FLSA indicates that the legislature's purpose was to allow employees to join their suits together to reduce costs and burdens for the plaintiff employees.[28] The text of the statute's collective action reflects such a purpose.[29] The appellate courts that have dismissed plaintiffs this way have overread *Bristol-Myers Squibb* by requiring each opt-in plaintiff's claim to have personal jurisdiction with the forum.[30] This overreading has led them to apply Federal Rule 4(k), which does not apply to this situation.[31] However, a different path can be taken that is legally correct and has already been travelled by an appellate court.[32] This different path allows the courts to adequately balance the intent of the legislature, efficiency, the defendant's rights, and justice for the plaintiffs.

I. HISTORY AND BACKGROUND OF THE FAIR LABOR STANDARDS ACT

A. The History and Purpose of the FLSA

The FLSA was passed in 1938 as part of the New Deal legislation under President Franklin Roosevelt.[33] At the time of FLSA's passing in 1938, it would affect industries representing one-fifth of the employees within the United States.[34] The Act was considered revolutionary because it mandated that employees be paid twenty-five cents an hour.[35] The Act aimed to create better working conditions and provide livable wages.[36] Before the FLSA was passed, children were overworked, individuals were underpaid, and

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the words remain true. *Id.* at 133–34. Justice Sotomayor indicates in BMS that the Court's decision mirrors the effect of Daimler by creating limits upon specific jurisdiction. *Bristol-Myers Squibb Co*., 582 U.S. at 269. Slowly, but surely, personal jurisdiction is becoming the shield which protects all nationwide corporations from liability. This causes substantial harm to the employees of these businesses who have little choice but to accept the lesser pay and continue their work.

28 Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited Apr. 1, 2025).

29 29 U.S.C. § 216(b).

30 Canaday v. Anthem Cos., 9 F.4th 392, 404 (6th Cir. 2021); Vallone v. CJS Sol. Grp., LLC, 9 4th 861, 866 (8th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 387–88 (3d Cir. 2022); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 731 (7th Cir. 2024).

31 *Canaday*, 9 F.4th at 398–400; *Fischer*, 42 F.4th at 382–86; *Vanegas*, 113 F.4th at 727–29.

32 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 92–97 (1st Cir. 2022).

33 Grossman, *supra* note 28.

34 *Id.*

35 *Id.*; *See* FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 392 (1941), https://archive.org/details/4926315.1938.001.umich.edu/page/n1/mode/1up ("[d]o not let any calamity-howling executive with an income of $1,000 a day, . . . tell you . . . that a wage of $11 a week is going to have disastrous effect on all American industry.").

36 Grossman, *supra* note 28.

employees were disregarded as expendable.[37] President Roosevelt even had a note given to him by a young girl before a rally in Massachusetts while campaigning for another term in 1936 that informed him that local sewing factories were employing two hundred young girls and only paying them four to six dollars a week.[38] President Roosevelt took this letter as a sign that the time for change was now, as he continued campaigning for workers' rights.[39] The people were ready to change society by imposing such necessary changes on employees, but the judiciary was hesitant until then.[40] Consistently, the judiciary had reiterated that labor laws would be left to the states' discretion.[41] That stance changed over time as new justices entered the Supreme Court and the People elected those who supported workers' rights into Congress.[42] The FLSA indicated that society was prepared to change, and this readiness for change was strong enough to sway the Supreme Court, allowing workers' rights to take center stage for the first time in the history of the United States.[43]

The FLSA became law over eighty years ago, but it still significantly impacts employees' rights.[44] The Act requires that employees receive minimum wage and overtime pay for any time over forty hours a week.[45] This is important because the corporation holds more authority over the employee, allowing employers to take advantage of employee vulnerabilities. Before the FLSA, if a corporation wished to pay its employees less, its only fear would be that the employees would leave. There would not be a need for reform if an employee could quit their job once their employer began treating them poorly by cutting their pay or refusing to pay them for their overtime hours. However, this is not reality. If one business lowers its wages, then all similar companies will also reduce their wages. Businesses do this to earn more profit and stay competitive. Suddenly, employees are paid little while

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37 *Id.*

38 *Id.* Accounting for inflation, this pay ranges from $91.42 to $137.12 for today. *U.S. Inflation Calculator*, COINNEWS MEDIA, https://www.usinflationcalculator.com/ (last visited Apr. 1, 2025). Assuming the young girl worked forty hours a week, which it is likely they worked more, that amounts to only $2.29 per hour to $3.43 per hour. This rate would be well below the minimum wage today. *List of Minimum Wage Rates by State 2025*, MINIMUM-WAGE.ORG, https://www.minimum-wage.org/wage-by-state (last visited Apr. 1, 2025).

39 Grossman, *supra* note 28.

40 *Id.*

41 *Id.*

42 *See id.* (noting President Roosevelt indicated in a fireside chat that he would expand the Supreme Court until it permitted enforcement of federal labor laws. Describes how one Justice decided to shift his opinion on the matter, switching the majority stance of the Court. The Justice largely denied that this was the actual reason for his change in opinion, but it is an interesting coincidence).

43 *Id.*

44 Lisa Nagele-Piazza, *The FLSA After 80 Years: How Has It Changed and What Lies Ahead?*, SOC'Y FOR HUM. RES. MGMT. (Apr. 16, 2018), https://www.shrm.org/topics-tools/employment-law-compliance/flsa-80-years-how-changed-lies-ahead.

45 *Id.*

corporations' profits skyrocket. The FLSA addresses this issue by creating legal incentives for corporations to pay at least the minimum wage.[46] Otherwise, employees will file lawsuits against their employer.[47] The FLSA has remained true to its original purpose of promoting employees by equalizing the power between employees and employers.[48]

B. The FLSA Collective Action Procedure

The FLSA permits "similarly situated" plaintiffs to bring collective actions,[49] and the federal courts have developed ways to certify and proceed with these actions.[50] The complaint is served upon the defendant by the named plaintiff.[51] Next, the plaintiff and the court work together to define "similarly situated" and certify the collective action.[52] The certification process consists of two phases.[53] The first phase occurs when the pleading stage of the lawsuit ends, requiring the plaintiff-employee to demonstrate a factual nexus between the suit and a reasonable basis for bringing the suit collectively.[54] In this first phase, the courts broadly define "similarly situated," allowing a broad group of plaintiffs to opt in.[55] Once all relevant discovery has been completed, the second phase begins, and the court narrows the initial definition of "similarly situated" based on what was found during discovery.[56] The courts allow a broad group of plaintiffs to proceed through discovery because only the defendant company will have information regarding corporate policies and payroll, which will be necessary to determine who is truly "similarly situated." [57] If "similarly situated" is defined more narrowly in the second phase, after discovery, then plaintiffs

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46 *See* 29 U.S.C. § 216(b) (explaining that employers may face lawsuits and liability for unpaid minimum wages).

47 Sherrie Scott, *What Are the Benefits of the Fair Labor Standards Act?*, CHRON, https://smallbusiness.chron.com/benefits-fair-labor-standards-act-2957.html (last visited Apr. 1, 2025).

48 *Id.*

49 § 216(b).

50 PAUL DECAMP & EPSTEIN BECKER GREEN, DEFENDING WAGE AND HOUR COLLECTIVE ACTIONS UNDER THE FLSA: OVERVIEW 8, 12 (2025), Westlaw Prac. Law.

51 *Id.* at 8.

52 *Id.*

53 *See id.* at 8–10 (noting that two circuits have decided to certify FLSA collective actions differently, but for the purpose of this Note, there is no need to go into detail regarding the minority views).

54 *Id.* at 8–9.

55 *Id.* at 9.

56 *Id.*; *An Overview of the FLSA "Collective Action,"* BRICKER GRAYDON (Mar. 1, 2012), https://www.brickergraydon.com/insights/publications/An-Overview-of-the-FLSA-Collective-Action [hereinafter *Collective Action*].

57 *See generally* Michael Homans & Gerald D. Wells III, *FLSA Collective Actions from Demand Letter to Verdict: Key Issues and Turning Points for Plaintiffs and Defendants*, HOMANSPECK (Apr. 2024), https://www.homanspeck.com/flsa-collective-actions-from-demand-letter-to-verdict-key-issues-and-turning-points-for-plaintiffs-and-defendants/.

who joined but now have been determined not to be similarly situated are dismissed and allowed to proceed with their claim elsewhere.[58]

When courts determine the meaning of "similarly situated," the majority uses a three-prong test.[59] The court first considers the differences in factual scenarios and employment settings of the plaintiffs.[60] Next, the court determines if the defendant company will have different defenses against each plaintiff.[61] Finally, the third prong requires the court to be fair in its application of the action to both the plaintiff and the defendant.[62] All the plaintiffs who clear these three prongs are considered similarly situated.

II. ANALYSIS

Although a majority of circuits disagree,[63] opt-in plaintiffs should not be dismissed from FLSA collective actions due to a lack of personal jurisdiction. Circuits are using the Supreme Court's decision in *Bristol-Myers Squibb* and Rule 4(k) of the Federal Rules of Civil Procedure to dismiss opt-in plaintiffs, thereby frustrating the entire purpose of the FLSA, which is to support workers' rights.[64] Although the FLSA has existed since 1938, and the *Bristol-Myers Squibb* decision was not made until 2017,[65] Circuit Courts of Appeals began dismissing opt-in plaintiffs by overreading the *Bristol-Myers Squibb* holding.[66]

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58 DECAMP & GREEN, *supra* note 50, at 9.

59 *See id.* at 10 (noting that courts must determine the meaning of "similarly situated" because it is not defined explicitly in the FLSA and observing that the prevailing test lacks concrete support); *see also* Campbell v. City of L.A., 903 F.3d 1090, 1114 (9th Cir. 2018) ("[the test] is, in effect, a balancing test with no fulcrum." Second, the fairness prong is misplaced because it allows a court to have great discretion in allowing or disallowing an FLSA collective action).

60 DECAMP & GREEN, *supra* note 50, at 12.

61 *Id.*

62 *Id.*

63 Canaday v. Anthem Cos., Inc., 9 F.4th 392, 404 (6th Cir. 2021); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861, 866 (8th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 387–88 (3d Cir. 2022); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 731 (7th Cir. 2024).

64 *Canaday*, 9 F.4th at 404; *Vallone*, 9 F.4th at 866; *Fischer*, 42 F.4th at 387–88; *Vanegas*, 113 F.4th at 731.

65 Grossman, *supra* note 28; *see generally* Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255 (2017).

66 *Canaday*, 9 F.4th at 404; *Vallone*, 9 F.4th at 866; *Fischer*, 42 F.4th at 387–88; *Vanegas*, 113 F.4th at 731.

A. How Courts Currently Address the Issue

1. Bristol-Myers Squibb

Bristol-Myers Squibb was a Supreme Court decision that further defined the concept of personal jurisdiction.[67] This decision further defined a particular type of personal jurisdiction called specific jurisdiction.[68] Specific jurisdiction satisfies personal jurisdiction and due process by establishing that the defendant has significant contacts with the forum and that those contacts are sufficiently related to the plaintiff's claim to satisfy due process.[69] This means that a defendant must have a certain amount of contact with the jurisdiction, such as selling products to the state or hiring within the state.[70] Additionally, the defendant's contacts with the forum must sufficiently give rise to the plaintiff's claim.[71] As the *Bristol-Myers Squibb* Court explained, "[T]here must be an affiliation between the forum and the underlying controversy, principally, [an] activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation."[72] Simply, this means that "the suit must arise out of or relate to the defendant's contacts with the forum."[73] Thus, specific jurisdiction of the Fourteenth Amendment exists when the defendant's contacts with the forum give rise to the plaintiff's claim.[74]

The *Bristol-Myers Squibb* case presented a unique question to the court: whether California's allowance of out-of-state plaintiffs whose injury had no connection to the forum to opt-in to a collective action created through California state law violated the defendant's due process rights.[75] In an 8-1 decision, the Court emphatically answered that Bristol-Myers Squibb's constitutional due process rights were violated and ordered that the out-of-state plaintiffs, without connection to the forum, be dismissed.[76] *Bristol-Myers Squibb* held that a state court cannot exercise specific personal jurisdiction over plaintiffs' claims when the plaintiff neither lives nor was injured in the state.[77]

The FLSA collective action was caught in the aftermath of this decision. Corporations began to argue that opt-in plaintiffs who lacked a connection to the forum did not meet the personal jurisdiction requirement specified in

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67 *See generally Bristol-Myers Squibb Co.*, 582 U.S. 255.

68 *See generally id.*

69 *Id.* at 262.

70 *Id.* at 262–64.

71 *Id.* at 264.

72 *Id.* (internal quotation marks omitted) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

73 *Id*. at 262 (internal quotation marks and brackets omitted) (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)).

74 *Id.* at 261–62. It is important to remember that BMS decided a question regarding specific jurisdiction of only the Fourteenth Amendment. *Id.* at 261.

75 *Id.* at 258–61.

76 *Id.* at 269.

77 *Id* at 264–66, 269.

Bristol-Myers Squibb.[78] The Third, Sixth, Seventh, and Eighth Circuit Courts of Appeals have all ruled that *Bristol-Myers Squibb* applies to FLSA collective actions, resulting in the dismissal of plaintiffs from these lawsuits.[79] In making these decisions, the circuit courts relied on *Bristol-Myers Squibb*, Rule 4(k) of the Federal Rules of Civil Procedure, and legislative intent.[80] One circuit, the First Circuit, has determined that the *Bristol-Myers Squibb* decision does not apply to FLSA collective actions.[81] Even though the First Circuit is outnumbered, its ruling is not incorrect.

2. Rule 4(k)

The same circuits, which have been overexpanding the *Bristol-Myers Squibb* holding, are now using Rule 4(k) to dismiss plaintiffs who lack a connection with the states where the federal court sits.[82] This further frustrates the purpose of the FLSA by requiring the dismissal of opt-in plaintiffs without connection to the forum.[83] Rule 4(k) acts as a territorial limit upon the federal courts throughout the United States by requiring that personal jurisdiction is only met in cases where a defendant is served with a complaint and summons while being "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[84] Three circuit courts have determined that Rule 4(k) expressly bars opt-in plaintiffs from joining lawsuits if they have no connection with the forum because they could not bring these lawsuits in a court of general jurisdiction, i.e., a state trial court.[85] Another applicable prong of Rule 4(k) that allows for a federal court to exercise personal jurisdiction is "when [it is] authorized by federal statute."[86]

The First Circuit Court of Appeals has held that *Bristol-Myers Squibb* does not apply to the FLSA and should remain as it has been since its enactment.[87] The Court of Appeals split with other circuits and decided that the scope of a collective action brought by the FLSA is not limited by *Bristol-*

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78 *See, e.g.*, Vanegas v. Signet Builders, Inc., 113 F.4th 718, 722 (7th Cir. 2024).

79 *Id.* at 731; Canaday v. Anthem Cos., Inc., 9 F.4th 392, 404 (6th Cir. 2021); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861, 866 (8th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 387–88 (3d Cir. 2022).

80 *Canaday*, 9 F.4th at 402; *Vanegas*, 113 F.4th at 725.

81 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 92–93 (1st Cir. 2022).

82 *Canaday*, 9 F.4th at 398–400; *Fischer*, 42 F.4th at 382–86; *Vanegas*, 113 F.4th at 727–29.

83 Scott, *supra* note 47.

84 FED. R. CIV. P. 4(k)(1)(A).

85 *Canaday*, 9 F.4th at 398–400; *Fischer*, 42 F.4th at 382–86; *Vanegas*, 113 F.4th at 727–29; *see* FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons . . . establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located").

86 FED. R. CIV. P. 4(k)(1)(C).

87 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 92–93 (1st Cir. 2022).

Myers Squibb, affirming the district court's decision.[88] The court reasons that Rule 4(k) does not limit federal courts' jurisdiction but rather applies to the service and summons for federal courts.[89] Additionally, opt-ins are not required to serve a summons in the FLSA collective actions, so there is no reason for an opt-in plaintiff to be required to go through a rule regarding service.[90] Having established this, the court reasons that the only limitation on personal jurisdiction is found within the Fifth Amendment's due process clause, which, in the First Circuit's mind, means that the minimum contacts test applies to the entirety of the United States rather than only the state in which the district court sits.[91]

B. Why the Current Application of *Bristol-Myers Squibb* and Rule 4(k) to the FLSA is Inadequate

The Circuit Courts of Appeals use of *Bristol-Myers Squibb* and Rule 4(k) is wholly inadequate. First, *Bristol-Myers Squibb* does not apply because it is concerned with state law,[92] state courts,[93] and forum shopping.[94] Additionally, the plaintiffs joining the claim in *Bristol-Myers Squibb* were not treated the same way as FLSA collective action opt-in plaintiffs are treated.[95]

1. Bristol-Myers Squibb Does Not Apply to the FLSA

First, the *Bristol-Myers Squibb* decision should not be applied to the FLSA collective actions because the *Bristol-Myers Squibb* decision concerned a state law-created collective action, while the FLSA is created by federal law.[96] This is an important distinction because, in *Bristol-Myers Squibb*, the due process rights of the defendant company were violated because the company was being held liable for claims unrelated to

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88 *Id.* at 97–100.

89 *Id.* at 92–97.

90 *Id.* at 93–97.

91 *Id.* at 99.

92 Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 258-60 (2017).

93 *Id.* at 258.

94 *Id.* at 264; *see* Vanegas v. Signet Builders, Inc., 113 F.4th 718, 734 (7th Cir. 2024) (Rovner, J., dissenting) ("[F]orum shopping at the expense of another state's sovereignty . . . was a concern animating the BMS decision.") (citing Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 369–70 (2021)).

95 *Bristol-Myers Squibb Co*., 582 U.S. at 258; Grant McLeod, *In A Class of its Own: Bristol-Myers Squibb's Worrisome Application to Class Actions*, 53 AKRON L. REV. 721, 746 (2019); *see Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting) (explaining that the complaint is not required to be amended to add an opt-in plaintiff's name at any point of the proceeding).

96 *Bristol-Myers Squibb Co*., 582 U.S. at 258–60; 29 U.S.C. § 216(b).

California.[97] However, the court was applying California law, not Federal law.[98] The Court was hesitant about applying the law of one state to an employee who neither worked nor resided there, [99]which was precisely the case in *Bristol-Myers Squibb*.[100] There, the court was imposing California law on residents of Texas, Ohio, and 31 other states,[101] even though the injury did not occur there, nor did they have any other connection to California.[102]

California law allowed these out-of-state plaintiffs to join their claims with those of California residents who shared similar claims.[103] The result was California over-exercising its authority and violating the due process rights of the defendant company.[104] However, this is not a concern for the FLSA because the FLSA collective action is created by federal law.[105] Federal law applies to every corporation within the United States, regardless of any other circumstances. The company understands that it must comply with the FLSA in every state, and employees can take the same action under the FLSA regardless of which state the employee lives in or works in.

Therefore, the due process concern present in *Bristol-Myers Squibb* is absent in FLSA actions because the company is aware that it must comply with the FLSA in every state in the United States.[106] While in *Bristol-Myers Squibb*, the company could only expect California law to be applied to California residents or those injured in California.[107] Thus, the FLSA, being a federal law that applies throughout the United States, is an essential distinction between the collection action of *Bristol-Myers Squibb* and the FLSA collective actions because a collective action brought through the FLSA will not violate the company's due process rights.

The FLSA's universal nature allows individuals to know and expect that they must adhere to it if they are in the United States.[108] Thus, the defendant will not face surprises if held accountable in any federal district within the United States. The defendant can conform its actions to abide by the law, thus satisfying the due process concern that the BMS Court

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97 *Bristol-Myers Squibb Co.*, 582 U.S. at 258.

98 *Id.*

99 *Id.* at 264–66.

100 *Id.*

101 *Id.* at 258–59.

102 *Id.* at 265–69.

103 *Id.* at 268.

104 *Id.* at 264–66.

105 29 U.S.C. § 216(b).

106 *See generally id.; Bristol-Myers Squibb Co*., 582 U.S. 255.

107 *Bristol-Myers Squibb Co*., 582 U.S. at 264–66.

108 *See generally* 29 U.S.C. §§ 201–216; *see* Water v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 92–93 (1st Cir. 2022) ("There is no contention here that the opt-in plaintiffs lack such contacts with the United States; . . . or that BMS directly governs a suit in federal court under a federal statute"). It is important to note that the BMS Court did not make any determination about whether the BMS decision applied to the Fifth Amendment. *Bristol-Myers Squibb Co*., 582 U.S. at 269.

expressed. Additionally, the court's concern about states potentially reaching beyond their boundaries is corrected because a federal court will be applying federal law to everyone equally.[109]

Second, the *Bristol-Myers Squibb* decision should not be applied to FLSA collective actions because the decision concerned a state court exercising jurisdiction, whereas these FLSA collective actions concern a federal court exercising jurisdiction.[110] A state court is bound only to handle issues that arise within its state or have some connection with the state.[111] On the other hand, federal courts have jurisdiction over any claim that arises in the United States under the Fifth Amendment, which limits the federal court's jurisdiction to all claims that occur within the United States.[112] This means that the federal courts can constitutionally adjudicate any claim within the United States, while state courts are bound to adjudicate claims in their state. Oftentimes, federal courts are bound by the jurisdiction of the state court in which they reside through Rule 4(k), but that is not always the case, as the federal court can also have jurisdiction through Rule 4(k)'s 100-mile rule or a federal statute.[113] The 100-mile rule allows a federal court to adjudicate claims when the party joined by either rule 14 or 19 is served within 100 miles of the federal court.[114] The 100-mile rule is evidence that a federal court is not bound by the boundaries of the state where the court resides, as the rule may allow the federal court to adjudicate claims that occurred in an adjacent state.[115] Consider the federal court in East St. Louis, Illinois. A claim could arise in St. Louis, Missouri, but be within the 100-mile reach of the federal court in East St. Louis. The East St. Louis federal court could adjudicate the claim from Missouri because it is within the 100-mile reach of the federal court. Similarly, a federal court can exercise jurisdiction over any claim throughout the United States if a federal statute allows.[116] These are both evidence that the federal courts' jurisdiction is limited by Rule 4(k) and that the authority granted to them by the Fifth Amendment is broader and allows adjudication of any claim that arises in the United States. This is important because, in FLSA collective actions, opt-in plaintiffs are not subject to Rule

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109 This addresses the fear expressed by the Bristol-Myers over a state court applying state law to non-residents who have no connection to their state. *Bristol-Myers Squibb Co.*, 582 U.S. at 264–66.

110 *Id.* at 258; *see generally* Canaday v. Anthem Cos., Inc., 9 F.4th 392 (6th Cir. 2021); Vallone v. CJS Sols. Grp., LLC, 9 4th 861 (8th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366 (3d Cir. 2022); Vanegas v. Signet Builders, Inc., 113 F.4th 718 (7th Cir. 2024); Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84 (1st Cir. 2022).

111 *Bristol-Myers Squibb Co.*, 582 U.S. at 264–66.

112 *Waters*, 23 F.4th at 99.

113 FED. R. CIV. P. 4(k)(1)(C).

114 FED. R. CIV. P. 4(k)(1)(B).

115 *Id.*

116 FED. R. CIV. P. 4(k)(1)(C).

4(k), and thus, the courts are not bound by the confines of the state in the same way that the California state court was in *Bristol-Myers Squibb*.[117]

Third, the *Bristol-Myers Squibb* decision should not be applied to FLSA collective actions, as a central point of the decision is to deter forum shopping. However, there is less concern for forum shopping in FLSA collective actions because they involve a federal court rather than a state court.[118] Forum shopping is when plaintiffs seek a particular court because it is more favorable to the plaintiff due to the forum's rules or laws.[119] If the Court approved California's mass tort actions, allowing out-of-state plaintiffs without connection to that State, it would encourage more plaintiffs to seek the State as a forum and would violate the balance of authority between the states.[120] The *Bristol-Myers Squibb* decision did not invalidate California's mass tort action; it only established that non-California residents and individuals whose claims did not arise out of or relate to the defendant's contact with the forum could join the mass tort actions.[121] Ultimately, a large goal of the Supreme Court was to prevent a situation where plaintiffs would seek California as a forum and California would incorrectly exercise authority over claims that other forums had a right to adjudicate instead.[122] This concern is not present in federal courts because federal courts are bound to the same law regardless of where the federal court resides.[123] As a result, federal courts decide cases more consistently than varying state courts do. No matter where the plaintiff chooses to bring the FLSA collective action, the federal court will apply the same federal law. Thus, there are fewer differences between federal courts, and forum shopping is less of a concern.

Fourth, the *Bristol-Myers Squibb* case is distinct from the FLSA cases because of how the plaintiffs in each were treated. In mass actions, such as the one at issue in *Bristol-Myers Squibb*, opt-in plaintiffs are individually named as plaintiffs.[124] However, the FLSA does not require opt-in plaintiffs to be added to the existing complaint.[125]

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117 Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 264–66 (2017).

118 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 734 (7th Cir. 2024) (Rovner, J., dissenting).

119 Jan-Peter Ewert & David Weslow, *Forum Shopping in Europe and the United States*, 66 INTA BULL. 9, 10 (2011).

120 *Bristol-Myers Squibb Co.*, 582 U.S. at 263.

121 *See id.* at 268 (explaining that plaintiffs from the same states could bring their actions together in their own states).

122 *Id.* at 264–66; *see Vanegas*, 113 F.4th at 734 (Rovner, J., dissenting) (noting that "[F]orum shopping at the expense of another state's sovereignty . . . was a concern animating the BMS decision.") (citing Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 369–70 (2021)).

123 *Vanegas*, 113 F.4th at 732 (Rovner, J., dissenting).

124 McLeod, *supra* note 95, at 746.

125 *See Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting) (explaining that the complaint is not required to be amended to add an opt-in plaintiff's name at any point of the proceeding).

Thus, opt-in plaintiffs are not named in FLSA lawsuits because the complaint is not amended to add the names of the opt-in plaintiffs.[126] For a plaintiff to opt in, it must be similarly situated,[127] and consent must be obtained from the court under Rule 5.[128] Through this opt-in procedure, an opt-in plaintiff does not serve the defendant and does not amend the complaint to add their name.[129] This is different than the individually named plaintiffs from the *Bristol-Myers Squibb* action and draws a clear distinction between the two proceedings. This distinction is important because if each plaintiff is named and serves the defendant, then it is more clearly a group of individual claims. In contrast, the FLSA is one claim with one named plaintiff and the ability for plaintiffs to opt-in if they have a similar problem with the defendant company.

Altogether, the *Bristol-Myers Squibb* holding is limited.[130] The Court held that a state cannot allow opt-in plaintiffs to join a lawsuit in the State's court through the State's law when the plaintiffs have no connection to the State because this would violate the defendant's Constitutional due process rights.[131] The circuits that have dismissed the opt-in plaintiffs in FLSA collective actions have expanded the decision too far because *Bristol-Myers Squibb* is concerned with a completely different situation from the FLSA. The *Bristol-Myers Squibb*opinion was dependent on the situation involving state law,[132] a state court,[133] and forum shopping.[134] Further evidencing a distinction, the plaintiffs in *Bristol-Myers Squibb* were named in the complaint, while the FLSA opt-in plaintiffs remain unnamed.[135] Therefore, BMS should never have been expanded to apply to the FLSA collective actions.

2. Rule 4(k) Does Not Apply to the FLSA

Rule 4(k) poses a direct problem that requires *Bristol-Myers Squibb* to be applied to the FLSA cases. Rule 4(k) imposes a limitation on a federal court's exercise of personal jurisdiction, binding that federal court to the

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126 *See id.*

127 29 U.S.C. § 216(b).

128 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting); *see generally* FED. R. CIV. P. 5.

129 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting).

130 The Bristol-Myers Squibb decision only made a decision related to the Fourteenth Amendment as applied to the states for an issue concerning state law and a state's overexercise of authority; it did not decide anything related to the Fifth Amendment. Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 268–69 (2017).

131 *Id.*

132 *Id.* at 258.

133 *Id.*

134 *Id.* at 264–66; *see* Vanegas, 113 F.4th at 734 (Rovner, J., dissenting) (noting that "[F]orum shopping at the expense of another state's sovereignty . . . was a concern animating the BMS decision." (citing Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 369–70 (2021))).

135 *See Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting) (stating that "[N]otably, there is no requirement that the complete be amended to add the opt-in plaintiff's name").

limits a state trial court would exhibit within its own state.[136] However, a federal court has jurisdiction beyond the Rule 4(k) limit, as seen in the 100-mile rule.[137] Without Rule 4(k)'s limit, the federal court would exercise personal jurisdiction through the Fifth Amendment.[138]

When the federal court follows Rule 4(k), it must limit itself to the personal jurisdiction restraints associated with a state trial court in the same state.[139] Federal circuit courts that have determined that opt-in plaintiffs must be dismissed without connection to the court's forum have found Rule 4(k) applicable and, oftentimes, the determinative point in the analysis.[140] Thus, it is necessary to show why Rule 4(k) should not be applied to opt-in plaintiffs in FLSA actions. This is not to say that Rule 4(k) does not apply to the FLSA; it still does, but only to the original named plaintiff.[141]

Rule 4(k) does not apply to the FLSA opt-in plaintiffs and, thus, should not be a reason for dismissing these plaintiffs. First, Rule 4(k)'s text indicates it is a rule regarding service and summons, not jurisdictional limitations of the federal courts.[142] Second, the history of Rule 4(k) shows that the rule concerns merely summons and service, not the jurisdictional limits of the federal court after service.[143] Third, opt-in plaintiffs join FLSA collective actions by filing a consent form with the court through Rule 5, not Rule 4.[144] Fourth, Rule 4 is not applicable because the FLSA's text already provides the requirements for opt-in plaintiffs to join the collective action.[145] Finally, FLSA opt-in plaintiffs are not bound to Rule 4 because opt-in plaintiffs do not serve the defendant in FLSA collective actions.[146]

Rule 4(k) is only concerned with service and summons.[147] The title of Rule 4(k) is "Summons."[148] Further, subheader "k" is titled "Territorial

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136 *See* Daimler AG v. Bauman, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.") (citing FED. R. CIV. PROC. 4(k)(1)(A)). This ignores the 100-mile bulge rule, which expands the scope of jurisdiction. *See* FED. R. CIV. P. 4(k)(1)(B).

137 *See* FED. R. CIV. PROC. 4(k)(1)(B).

138 *See* Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 92 (1st Cir. 2022) (explaining that the constitutional limits of the federal courts' jurisdiction is limited by the Fifth Amendment's Due Process Clause); U.S. CONST. amend. V.

139 *See* Louis J. Capozzi III, *Relationship Problems: Pendent Personal Jurisdiction After Bristol-Myers Squibb*, 11 DREXEL L. REV. 215, 234 (explaining how the N.D. of Illinois has viewed Bristol-Myers Squibb and determined that a federal court is only bound to state jurisdiction through Rule 4(k), not the Fifth Amendment).

140 Canaday v. Anthem Companies, Inc., 9 F.4th 392, 398–400 (6th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 382–86 (3d Cir. 2022); *Vanegas*, 113 F.4th at 727–29.

141 FED. R. CIV. P. 4(k)(1)(A); *Waters*, 23 F.4th at 94.

142 *Waters*, 23 F.4th at 94.

143 *Id.* at 95.

144 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting); 29 U.S.C. § 216(b).

145 § 216(b).

146 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting); § 216(b).

147 *See generally* FED. R. CIV. P. 4.

148 FED. R. CIV. P. 4.

Limits of Effective Service."[149] A title provides the scope within which all the information is governed. This leads to the conclusion that the contents of this rule only apply when service or summons is involved. Rule 4(k)(1)(A) specifically states that "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[150] The textual meaning of Rule 4 establishes that personal jurisdiction is established when service is completed, and the defendant is subject to the jurisdiction of the state trial court.[151] However, this does not mean that every case requires service for the federal court to exercise jurisdiction.[152] Rule 4 never explicitly declares that it concerns anything other than service or summons.[153] Further, the FLSA requires service and summons before the opt-in unnamed plaintiffs join, and Rule 4 does not indicate that it limits the federal court's authority after a summons has been served on the defendant.[154]

The history of Rule 4 supports the idea that Rule 4 is only concerned with summons and service and how it establishes personal jurisdiction at the time of service, which means that plaintiffs who do not serve the defendant are not bound to Rule 4.[155] This is significant because the opt-in plaintiffs of the FLSA never serve the defendant.[156] The 1993 amendment changed the title from "Process" to "Summons," supporting the notion that this rule is purposely limited to only service and summons rather than the "form of legal process" associated with the process.[157] This means that the first version of Rule 4(k) indicated that service was only effective when physically served upon the defendant within the state where the district court resided.[158] At the time, physical presence within the jurisdiction was necessary for the court to exercise jurisdiction over the defendant.[159] As technology advanced, the physical presence requirement was changed.[160] Amendments from 1980

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149 FED. R. CIV. P. 4(k).

150 FED. R. CIV. P. 4(k)(1)(A).

151 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 93 (1st Cir. 2022).

152 *See* Walden v. Fiore, 571 U.S. 277, 283 (2014) ("[A] federal district court's authority to assert personal jurisdiction in *most cases* is linked to service of process on a defendant.") (emphasis added).

153 *Waters*, 23 F.4th at 93.

154 *Id.* at 93–94.

155 *Id.* at 94.

156 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 733 (7th Cir. 2024) (Rovner, J., dissenting); 29 U.S.C. § 216(b).

157 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 93 (1st Cir. 2022) (quoting Amendments to FED. R. CIV. P. 4, 146 F.R.D. 401, 559 (1993)).

158 *Id.* at 95 (citing FED. R. CIV. P. 4(f) (1937)).

159 Burnham v. Super. Ct. Cal., Marin Cnty., 495 U.S. 604, 616–17 (1990) (citing Pennoyer v. Neff, 95 U.S. 714, 722 (1877)).

160 Daimler AG v. Bauman, 571 U.S. 117, 126 (2014) (citing Burnham v. Super. Ct. Cal., Marin Cnty., 495 U.S. 604, 617 (1990)).

onwards continually expanded the number of people who could deliver service of summons upon defendants.[161] Finally, the amendment to the key provision in this situation, Rule 4(k), was meant to make it easier to serve a defendant by allowing for service on any defendant.[162] This was continually amended to simplify service and to "clarify when service of a summons would establish personal jurisdiction."[163] This history demonstrates that the purpose of Rule 4 is to govern service, as each amendment pertains to service. If Rule 4 only governs service, there is no reason to bind an opt-in plaintiff to Rule 4 when they do not serve the defendant.

The uniqueness of the FLSA procedures makes applying Rule 4 abnormal. Normally, Rule 4(k) applies to each claim because the plaintiff would serve the defendant, thus requiring Rule 4 to be applied because it governs service.[164] The FLSA requires the original plaintiff to serve the summons upon the defendant before any opt-in plaintiffs join.[165] The opt-in plaintiffs do not serve the defendant, and the complaint is never amended to add the opt-in plaintiffs.[166] These two procedural aspects make the FLSA unique because they create a situation in which service has been completed when opt-in plaintiffs join the collective action.[167] Thus, the outcome is that Rule 4(k) does not apply to the opt-in plaintiffs because nothing in Rule 4 indicates that the federal court loses jurisdictional authority once the original named plaintiff has successfully served the defendant.[168] This procedure does not violate the defendant's due process rights because the complaint provides notice. Regardless of whether any opt-in plaintiffs join or not, the defendant will face the original plaintiff's claim in the initially established federal district court.[169]

As further evidence that Rule 4 does not apply to FLSA opt-in plaintiffs, these plaintiffs do not join the FLSA collective action through Rule 4.[170] The opt-in plaintiffs consent to join the collective action by filing a consent form with the court where the FLSA collective action is ongoing.[171] This consent

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161 *Waters*, 23 F.4th at 95–96.

162 *Id.* at 96 (citing Amendments to FED. R. CIV. P. 4, 146 F.R.D. 401, 558 (1993)).

163 *Id.*; 4 CHARLES A. WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 1007 (4th ed. 2021).

164 FED. R. CIV. P. 4(k)(1)(A).

165 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 733 (7th Cir. 2024) (Rovner, J., dissenting).

166 *See id.* (explaining that the complaint never requires amending when opt-in plaintiffs join the FLSA lawsuit).

167 This service is completed through Rule 4(k) and establishes jurisdiction through the original plaintiff. FED. R. CIV. P. 4(k)(1)(A).

168 *Vanegas*, 113 F.4th at 733. (Rovner, J. dissenting).

169 *Id.*

170 *Id.*

171 *Id.*; *see* 29 U.S.C. § 216 ("No employee shall be a party plaintiff to such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

form is not sent through Rule 4 but through Rule 5.[172] Rule 5 does not have any provision regarding jurisdiction, unlike Rule 4.[173] This is reasonable, as the text of the FLSA itself only indicates that such consent is filed with the court.[174] Notably, the FLSA's text does not suggest that the consent form is to be provided to the defendant.[175] Rule 4 governs service as "the procedure by one party in a lawsuit or legal proceeding to give another *party* an appropriate notice of the initiation of legal action."[176] If the FLSA had determined that the consent form needed to be provided to both the court and the defendant, then it would have been reasonable to require the satisfaction of Rule 4. However, such is not the case because only the court received the consent form.[177] Therefore, the consent form is correctly governed by Rule 5, and Rule 4 is not applicable to FLSA opt-in plaintiffs.

Procedurally, it is odd to apply Rule 4(k) to opt-in plaintiffs because the plain text of the FLSA already establishes the requirements for an opt-in plaintiff to join the collective action, which courts have routinely applied through the certification process.[178] The opt-in plaintiff must be similarly situated to the named plaintiff and must file a consent form with the court.[179] Courts will dismiss plaintiffs who are not sufficiently similarly situated to the named plaintiff at the end of discovery.[180] In rare situations, courts will even decertify the entire action, dismissing every opt-in plaintiff without prejudice because each plaintiff has too many individualized aspects within their claim that none of the claims can be fairly adjudicated together.[181] This procedural dismissal is accurate to the text because it is based upon the "similarly situated" requirement.[182] This requirement prevents the defendant from being surprised by claims outside the scope of the action of which the defendant was placed on notice when the named plaintiff served it before

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172 *Vanegas*, 113 F.4th at 733 (Rovner, J. dissenting); FED. R. CIV. P. 5.

173 Fischer v. Fed. Express Corp., 42 F.4th 366, 386 (3d Cir. 2022); see FED. R. CIV. P. 4(k); *see generally* FED. R. CIV. P. 5.

174 *See* § 216(b) ("[S]uch consent is filed in the court in which [the collective action] is brought.").

175 *See id.*

176 *Service of Process*, CORN. L. SCH. LEGAL INFO. INST. (July 2024), https://www.law.cornell.edu/wex/service_of_process (emphasis added).

177 *See* § 216(b) ("[S]uch consent is filed in the court in which [the collective action] is brought.").

178 *See id.* ("An action to recover the liability . . . may be maintained against any employer . . . by any one or more employees for an in behalf of himself or themselves and other employees similarly situated."); *see* DECAMP & GREEN, *supra* note 50, at 8–10.

179 § 216(b).

180 DECAMP & GREEN, *supra* note 50, at 9–10.

181 *Id.* at 4; *see* Vanegas v. Signet Builders, 113 F.4th 718, 737 (7th Cir. 2024) (Rovner, J., dissenting) ("If an opt-in plaintiff's FLSA claim is materially distinct from [the original plaintiff's] claim, then that opt-in plaintiff is not similarly situated to [the original plaintiff. Indeed, that would be a situation in which the collective action members are 'hopelessly heterogenous' from each other and decertification would be appropriate." (quoting Jonites v. Exelon Corp., 522 F.3d 721, 725–26 (7th Cir. 2008)).

182 § 216(b).

discovery.[183] Including the "similarly situated" requirement means that Congress intended for that to be the only limit on the plaintiffs as opposed to Rule 4(k) issues, which only came into being after the *Bristol-Myers Squibb* decision in 2017.

C. How Courts Should Address the Issue

If *Bristol-Myers Squibb* does not apply to FLSA opt-in plaintiffs, and Rule 4(k) is likewise not applicable, then an important question presents itself. How should we evaluate personal jurisdiction for opt-in plaintiffs? There are two ways to answer this question. First, FLSA opt-in plaintiffs should be treated the same way class members are treated for class actions.

1. FLSA Opt-Ins Should Be Treated the Same As Class Members

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure.[184] The FLSA shares similarities with class actions, which reasonably would lead one to conclude that it is meant to function nationally like a class action.[185] The similarities are that opt-in plaintiffs must show adequacy to join the action,[186] there is only ever one claim,[187] and the named plaintiff is the only party that serves the defendant.[188]

In a class action proceeding, plaintiffs must show that they are adequately similar to the established class by either having a common question of law or fact associated with the claim brought by the class.[189] The FLSA has a similar procedure in which similarly situated individuals may opt into the collective action.[190] When the FLSA was created, "similarly situated" was often used to describe plaintiffs in Rule 23 class action lawsuits.[191] Some courts have even approached certifying FLSA actions using the same factors as those for class actions.[192] In both scenarios, the

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183 DECAMP & GREEN, *supra* note 50, at 8.

184 *See generally* FED. R. CIV. P. 23.

185 *Vanegas*, 113 F.4th at 734–37 (Rovner, J., dissenting).

186 *Id.* at 735.

187 *Id.* at 736.

188 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 99 (1st Cir. 2022).

189 FED. R. CIV. P. 23(a); William C. Jhaveri-Weeks & Austin Webbert, *Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, 23 GEO. J. ON POVERTY L. & POL'Y 233, 236 (2016).

190 *See* 29 U.S.C. § 216(b).

191 Jhaveri-Weeks & Webbert, *supra* note 189, at 238.

192 DECAMP & GREEN, *supra* note 50, at 10*; see* FED. R. CIV. P. 23(a) (stating that the factors for certifying a class action is showing that there are too many parties to join them all through joinder successfully, each party shares a common question of law or fact, the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and the representative of the party must protect the interests of the entire party).

joining plaintiffs must show that their claim is sufficiently similar to the collective or class action.[193]

Class actions and FLSA claims begin as one claim, rather than the mass tort action at issue in BMS.[194] The mass tort action of BMS was created by combining many individual claims already filed.[195] However, class actions and FLSA collective actions are only ever one lawsuit.[196] Class actions begin as one collective claim with a common factual scenario and continue as one claim throughout the entire proceeding.[197] Likewise, the FLSA collective action is only one claim, which is later opened for opt-in plaintiffs to join after they have been notified of a possible claim they may have.[198] The only time FLSA collective actions or class actions become more than one claim, the new claims cease being part of the collective action or the class action.[199] This event only occurs if the court determines that the claims within either action are too different from each other to be uniformly resolved in one court.[200] This shows that class actions and FLSA collective actions are much more alike, while the FLSA collective action differs from California's mass tort action present in BMS.

The named plaintiff serves the defendant in class actions and FLSA collective actions.[201] This is important because Rule 4 governs service.[202] If a party does not need to serve the opposing party, then it makes little sense to apply Rule 4 to that party.[203] Opt-in plaintiffs consent to join the collective action through Rule 5 and never use Rule 4 because the opt-in plaintiffs do not serve the defendant.[204] Therefore, this similarity is key in uniting the two actions because Rule 4 is the limiter on jurisdiction and often the key piece that the majority of courts rely on in dismissing opt-in plaintiffs.

Judge Posner indicated no good reasons for the law to treat class actions differently from FLSA collective actions.[205] From Judge Posner's viewpoint, the law up until 2013 had generally treated these two actions similarly.[206] There can be an overlap between class actions and FLSA collective

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193 § 216(b); FED. R. CIV. P. 23(a).

194 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 736 (7th Cir. 2024) (Rovner, J., dissenting).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at 733.

199 *Id.* at 736.

200 *Id.*

201 Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 99 (1st Cir. 2022).

202 *Id.*

203 *Id.* at 97–99.

204 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting).

205 *See* Espenscheid v. DirectSatUSA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("[T]here isn't a good reason to have different standards for the certification of two different types of action, and the case law has largely merged the standards…").

206 *See id.*

actions.[207] In *Espenscheid v. DirectSat USA*, the plaintiffs brought a class action and an FLSA collective action seeking to enforce FLSA law and corresponding state laws governing wages and overtime.[208] When courts have to treat the certification of these classes differently, it leads to confusion for the plaintiffs.[209] The FLSA sought to encourage and facilitate employees' ability to bring lawsuits.[210] In seeking to implement that intent, courts should avoid confusion and treat these certifications similarly.

Additionally, Judge Posner reasoned that efficiency was the primary goal of Rule 23 class actions and FLSA collective actions.[211] Currently, the courts are overemphasizing the differences between class actions and FLSA actions; however, while there are differences, they matter little in comparison.[212] The courts often overlook the core concepts underlying class actions, and FLSA collective actions are no exception.[213] Both procedures seek efficiency[214] and allow plaintiffs to bring claims forward more easily.[215] In other words, the courts are too busy analyzing the trees to appreciate the forest.

The courts that favor applying BMS to FLSA cases have noted several differences between Rule 23 class actions and FLSA collective actions.[216] The first difference is that Rule 23 class actions require the representative named plaintiff to show the court that it will "fairly and adequately protect the interests of the class."[217] However, the courts overlook the fact that the ability of the representative party is evaluated, not just by the court.[218] The plaintiffs examine whether to opt into the FLSA collective action and evaluate whether the representative party can adequately represent their interests.[219] The court must determine whether the representative plaintiff for class actions can adequately represent the interests of the class because outside plaintiffs must opt out of the class and are thus automatically included.[220] Therefore, the court must evaluate whether the named plaintiff can protect the interests of others in the class because these other class

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207 *See generally id.*; *Collective Action, supra* note 56.

208 *Espenschied*, 705 F.3d at 771.

209 *Id.*

210 *Collective Action, supra* note 56.

211 *Espenscheid*, 705 F.3d at 772.

212 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 737 (7th Cir. 2024) (Rovner, J., dissenting).

213 *See generally* Jhaveri-Weeks & Webbert, *supra* note 189.

214 *Espenscheid*, 705 F.3d at 772.

215 *Collective Action, supra* note 56.

216 Canaday v. Anthem Cos., Inc., 9 F.4th 392, 402–04 (1st Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 372–80 (3d Cir. 2022); *Vanegas*, 113 F.4th at 723–26.

217 FED. R. CIV. P. 23(a)(4); *Venegas*, 113 F.4th at 723.

218 *Venegas*, 113 F.4th at 735 (Rovner, J., dissenting) (citing Harkins v. Riverboat Servs., Inc., 385 F.3d 1099, 1101 (7th Cir. 2004)).

219 *Id.*

220 FED. R. CIV. P. 23(C)(2)(B)(v).

members may be unaware that they are class members.[221] This lack of awareness means that they cannot opt out, represent themselves elsewhere, or defend their interests. However, the FLSA does not have this issue because plaintiffs will opt in rather than out.[222] However, when plaintiffs are required to opt in, they have a free choice and can decide whether the representative plaintiff is adequate.[223]

The next difference, which is often noted as significant, is that class action plaintiffs are automatically included if they are within the defined class and must opt out of being included.[224] The FLSA had a similar procedure when it was first created.[225] Early on, the FLSA allowed representatives to bring lawsuits on behalf of employees, resulting in unions bringing actions forward.[226] The trick was that these representatives did not require permission from the employee to bring the lawsuit.[227] This terrified businesses, which were now facing astounding amounts of litigation.[228] Under this system, plaintiffs could also wait to join the suit until a favorable judgment had been decided.[229] Congress responded by amending the FLSA to require employees to opt into the lawsuits and to allow only employees to bring them.[230] The amendment ensured that employees drove litigation forward rather than separate interest groups disconnected from the problem, and prevented plaintiffs from joining once the decision was favorable.[231] Courts should not overread the amendment to entirely divorce FLSA collective actions from class actions.

Another characteristic that courts have pointed to is that opt-in plaintiffs are referred to as party plaintiffs.[232] Following this, courts have indicated this is evidence that collective actions are more similar to the BMS mass tort action than to Rule 23 class actions.[233] However, terminology is not always absolute.[234] In other words, terms should be considered based upon their context because a word in one context can hold a different meaning from the

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221 FED. R. CIV. P. 23(a)(4).

222 29 U.S.C. § 216(b).

223 *Venegas*, 113 F.4th at 735 (Rovner, J., dissenting) (citing Harkins v. Riverboat Servs., Inc., 385 F.3d 1099, 1101 (7th Cir. 2004)).

224 FED. R. CIV. P. 23(C)(2)(B)(v).

225 Jhaveri-Weeks & Webbert, *supra* note 189, at 239.

226 *Id.*

227 *Id.*

228 *See id.* (explaining that Congress reacted quickly once unions began bringing these actions to prevent businesses from reaching financial ruin).

229 Venegas v. Signet Builders, Inc., 113 F.4th 718, 732–33 (7th Cir. 2024) (Rovner, J., dissenting).

230 Jhaveri-Weeks & Webbert, *supra* note 189, at 240.

231 *Venegas*, 113 F.4th at 732–33 (Rovner, J., dissenting).

232 *Id.* at 724; Canaday v. Anthem Cos., 9 F.4th 392, 402–03 (6th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 377 (3d Cir. 2022).

233 *Canaday*, 9 F.4th at 403; *Fischer*, 42 F.4th at 378; *Vanegas*, 113 F.4th at 726.

234 *See* Devlin v. Scardelletti, 536 U.S. 1, 10–11 (2002) ("The label "party" does not indicate an absolute characteristic").

word in a different context.[235] Such a reliance on the word alone to differentiate the FLSA from Rule 23 class actions is misguided.[236] The label of party plaintiff may merely be to indicate that these parties are not unions or representatives but actual employees who have opted in to become a party to the lawsuit.[237] When courts determine that a label implies legal consequences, they overlook the situational context and give too much weight to an inconsequential label.[238]

Ultimately, FLSA's collective actions are more like class actions than BMS's mass tort action. When evaluating these differences and similarities, it is essential to assess the significance of each difference or similarity in relation to personal jurisdiction.[239] The differences can create a rift that may be insurmountable for some to treat class and collective actions similarly, but the most important aspects are similar.[240] Opt-in plaintiffs in FLSA actions and plaintiffs who have not opted out of a class action are similar in that they both remain unnamed.[241] The complaint is not amended to list any names of the opt-in plaintiffs.[242] The FLSA defendant received a summons and a copy of the complaint before the plaintiffs opted in.[243] The only bar is that opt-in plaintiffs must show they are similarly situated to the named plaintiff.[244] This is important because the defendant will not face new charges, factual situations, or laws; it is merely litigating based on the presented issue.[245] These similarities show that the FLSA collective actions are much more similar to class actions than to the mass tort action of BMS. This means that when considering collective actions, the outcome should be closely tied to class actions, and opt-in plaintiffs should not be dismissed.[246]

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235 *Id.*

236 *See Venegas*, 113 F.4th at 736 (Rovner, J., dissenting) (explaining that the opt-in plaintiffs were called "party plaintiffs" to differentiate them from unions after the 1947 amendment).

237 *Id.*

238 *Devlin*, 536 U.S. at 10–11; *Venegas*, 113 F.4th at 736 (Rovner, J., dissenting).

239 *Venegas*, 113 F.4th at 737 (Rovner, J., dissenting).

240 *Id.;* Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 99 (1st Cir. 2022).

241 *Venegas*, 113 F.4th at 733 (Rovner, J., dissenting).

242 *Id.*

243 DECAMP & GREEN, *supra* note 50, at 8.

244 *Id.* at 8–10; 29 U.S.C. § 216(b).

245 *Venegas*, 113 F.4th at 733 (Rovner, J., dissenting). When considering due process and whether this outcome is just for the defendant, consider how much information the defendant has once the definition of similarly situated is established. *Id*. The defendant presumably has more information than the plaintiff and likely knows of every employee which could join in because the defendant has access to all payroll and other valuable information which the plaintiff can only gain through discovery.

246 As Justice Sotomayor feared in her Bristol-Myers Squibb dissent, class actions have been affected by the Bristol-Myers Squibb decision. Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 269 (2017) (Sotomayor, J., dissenting). The issue is still young, though, with not as deep a split as in the FLSA actions. The correct answer to whether Bristol-Myers Squibb applies to class actions is that is does not but this issue will likely need to be resolved by the United States Supreme

2. Opt-In Plaintiffs' Claims Should Be Evaluated Through the Fifth Amendment

The second answer is that the courts should evaluate opt-in plaintiffs' claims through the Fifth Amendment. This makes sense because the federal court's jurisdiction is only limited by Rule 4(k), and constitutionally, the federal court's jurisdiction is as expansive as the Fifth Amendment will allow.[247] As discussed, Rule 4(k) limits the federal court's jurisdiction by changing its personal jurisdiction limit to that of a state trial court.[248] However, the Fifth Amendment grants the federal courts a much more expansive authority. In the absence of Rule 4(k), the federal courts are free to exercise jurisdiction to their constitutional limits.[249]

Outside of Rule 4(k), federal courts are bound to the personal jurisdiction limits of the Fifth Amendment's due process clause because that amendment ensures a defendant has due process throughout the federal law and court process.[250] The Court in BMS refused to make any determinations regarding the Fifth Amendment and a federal court's jurisdiction because they were not necessary for BMS, considering that BMS was a state court.[251] The US Supreme Court has never explained the extent of the minimum contact test of the Fifth Amendment, but has now granted certiorari on a case in which it may.[252] Likely, the Fifth Amendment has a broader minimum contact test than the Fourteenth Amendment. This is because the Fifth Amendment applies to the entire United States, whereas the Fourteenth Amendment is limited in its scope.[253] The forum that a defendant would have contact with would be the United States under the Fifth Amendment.[254] This situation rarely occurs, though, because Rule 4(k) tends to limit the authority

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Court at some point. The application of Bristol-Myers Squibb to class actions is more evidence of some courts practicing pro-business law rather than fairly applying the law. For a detailed analysis and evaluation of this issue, see McLeod, *supra* note 95.

247 *See* Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 92 (1st Cir. 2022) ("[T]he constitutional limits of a federal court's jurisdiction over federal-law claims are drawn with reference to the Due Process Clause of the Fifth Amendment."); *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting) ("[A]bsent some specific direction otherwise, it is the Fifth Amendment that governs federal court jurisdiction, not the Fourteenth Amendment.").

248 *See* FED. R. CIV. P. 4(k)(1)(A).

249 *See Waters*, 23 F.4th at 92 ("[T]he constitutional limits of a federal court's jurisdiction over federal-law claims are drawn with reference to the Due Process Clause of the Fifth Amendment."); *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting) ("[A]bsent some specific direction otherwise, it is the Fifth Amendment that governs federal court jurisdiction, not the Fourteenth Amendment.").

250 U.S. CONST. amend. V; *Vanegas*, 113 F.4th at 733; *Waters*, 23 F.4th at 92.

251 *Bristol-Myers Squibb Co*., 582 U.S. at 268–69.

252 Devas Multimedia Priv. Ltd. v. Antrix Corp. Ltd., No. 20-36024, 22-35085, 22-35103, 2023 U.S. App. WL 4884882 (9th Cir. Aug. 1, 2023), *cert. granted*, 145 S. Ct. 117 (U.S. Oct. 4, 2024) (No. 24-17).

253 U.S. CONST. amend V; U.S. CONST. amend. XIV; *Waters*, 23 F.4th at 92.

254 *Waters*, 23 F.4th at 92.

of federal courts to exercise jurisdiction.[255] That is why the question has never appeared before the US Supreme Court.

If Rule 4(k) does not apply to the opt-in plaintiffs, the personal jurisdiction of their claims would be evaluated through the Fifth Amendment.[256] The test then checks that the defendant has sufficient connections with the United States to satisfy due process, whether the plaintiff's claim is related to or connected to the United States.[257] Opt-in plaintiffs easily meet this requirement in any federal district court as long as the plaintiffs were working within the United States or reside in the United States.

While this may sound unfair to the defendant because the requirement is easily met, it is not close to unfair. The defendant corporation has purposely conducted business within the United States and benefited from United States law and its people.[258] The defendant should be aware of the laws surrounding employment, as they actively employ residents of the United States. The defendant benefits from the United States, is aware that any breach of United States law could result in potential lawsuits, and has subjected itself to the law of the United States.[259]

Even if the argument is that it is unfair to hold a corporation accountable in a federal court far from the defendant, this is easily swept aside. First, the named plaintiff would have been evaluated through traditional Rule 4(k) personal jurisdiction because the named plaintiff serves the defendant.[260] This means that any challenge to personal jurisdiction would have required the federal court to assess the case through the Fourteenth Amendment for the named plaintiff.[261] Thus, the original named plaintiff's claim must be sufficiently related to the state in which the federal court resides.[262] This

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255 FED. R. CIV. P. 4(k)(1)(A).

256 *Waters*, 23 F.4th at 99; Vanegas v. Signet Builders, Inc., 113 F.4th 718, 733 (7th Cir. 2024) (Rovner, J., dissenting).

257 *Waters*, 23 F.4th at 92.

258 In this sense, it has purposefully availed itself of United States law by paying employees in the United States and operating a business in the United States. *See* J. McIntyre, Ltd. v. Nicastro, 564 U.S. 873, 882 (2011) ("The principle inquiry in cases . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign.").

259 *See id.*

260 *See e.g.*, *Waters*, 23 F.4th at 88 (indicating that the motion was only to dismiss the opt-in plaintiffs for lack of personal jurisdiction; not the original named plaintiff). The original named plaintiff is thus subject to Rule 4(k)(1)(A) and has personal jurisdiction analyzed through the Fourteenth Amendment. FED. R. CIV. P. 4(k)(1)(A).

261 *See e.g.*, *Waters*, 23 F.4th at 88 (indicating that the motion was only to dismiss the opt-in plaintiffs for lack of personal jurisdiction; not the original named plaintiff). The original named plaintiff is thus subject to Rule 4(k)(1)(A) and has personal jurisdiction analyzed through the Fourteenth Amendment. FED. R. CIV. P. 4(k)(1)(A).

262 Bristol-Meyers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 262 (2017). This is disregarding the 100-mile rule which allows a defendant to be held accountable in a federal court which is within 100 miles and could possibly be in the neighboring state. FED. R. CIV. P. 4(k)(1)(B).

requires that the plaintiff either live or work in that state.[263] This would mean that the defendant company is already sufficiently connected to the state in question, and the federal court in which the case is brought will be a court close to at least one of the defendant's places of business. It cannot be deemed unfair to hold a company accountable in a jurisdiction in which it already conducts business and is accountable to the jurisdiction's laws.

Second, the defendant is employing residents of the United States within the United States and should be aware of all laws associated with that. This means that the defendant can conform to the law of the United States because they are on notice, knowing they will be held accountable to United States law. The defendant will have had ample opportunity to seek advice regarding the law and conform its behavior to satisfy it. Overall, the defendant should not have any issues conforming to the law, and there should be no fear that the defendant will unfairly be held accountable in a jurisdiction far removed from the defendant.

D. Policy For Not Dismissing Opt-In Plaintiffs

Opt-in plaintiffs from the entire United States should be allowed to join in FLSA collective actions within any federal court because this would promote efficiency for both the judiciary and the parties,[264] promote justice,[265] promote a simpler law,[266] and promote the welfare of society.[267]

1. Efficiency

Efficiency is one of the core goals of the FLSA.[268] If similarly situated plaintiffs cannot join collective actions outside their home State or the state where they work, that will turn one lawsuit into several, many, or up to fifty.[269] Each individual plaintiff would have to join with other dismissed plaintiffs from the same home state who have similar claims to bring their actions forward together in their home state.[270] The defendant will also have

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263 *Bristol-Meyers Squibb Co.*, 582 U.S. at 264–65.

264 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 733 (7th Cir. 2024) (Rovner, J., dissenting).

265 *Id.*

266 *See* Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("Simpli[city] is desirable in law").

267 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20 (1921).

268 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting).

269 *See* Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 268–69 (2017) (explaining that the dismissed plaintiffs could bring their claims in other states where they lived); *Vanegas*, 113 F.4th at 730–31 (explaining that the dismissed plaintiffs could bring their claims in other states in which they satisfied specific jurisdiction).

270 *See Bristol-Myers Squibb Co.*, 582 U.S. at 268–69 (explaining that the dismissed plaintiffs could bring their claims in other states where they lived); *Vanegas*, 113 F.4th at 730–31 (explaining that

to defend the same case in many courts throughout the nation, which will drive up costs for the defendant.[271] The already overburdened court system will be further weighed down as well. Altogether, dismissing opt-in plaintiffs increases the burden on the plaintiffs, the defendant, and the court.

However, this is easy to avoid because one judge can handle all these actions in one court. The amount of time, energy, and resources this will save will be immense because, in this situation, each group of plaintiffs must find an attorney to represent their case and cover any attorney fees, court fees, and discovery costs. Additionally, more federal judges will be required to handle all cases. While it may seem unfair to the defendant to have all plaintiffs represented in one lawsuit, it also saves the defendant money.[272] The defendant must defend himself in every court where these lawsuits are brought forward.[273] Not only will having it handled in one court by one judge save the plaintiffs money, but it will also save the defendant's money. In these ways, resolving it all at once allows for a much more efficient resolution of the case for the plaintiffs, defendant, and the court.

2. Justice

Resolving it all at one time promotes justice. This coincides with the other goal of the FLSA, which is enforcement.[274] The goal of enforcement was to prevent companies from freely violating the FLSA.[275] The dismissal of opt-in plaintiffs directly hinders this goal because it prevents plaintiffs from recovering the earned overtime pay.[276] The signal this sends to the company is that they can save money by refusing to pay for overtime because the opt-in plaintiffs will be dismissed. Due to overwhelming legal costs, many dismissed plaintiffs will never bring the case forward again. Therefore, dismissing opt-in plaintiffs directly opposes and harms the FLSA's enforcement goal.[277]

It is necessary to determine why the companies want to challenge personal jurisdiction when it would be more efficient and cheaper for the company to handle the lawsuit in one court.[278] The underlying goal of these

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the dismissed plaintiffs could bring their claims in other states in which they satisfied specific jurisdiction).

271 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting).

272 *Id.*

273 *Id.*

274 *Id.*

275 *Id.*

276 *Id.*

277 *Id.*

278 *Id.*; FED. R. CIV. P. 12(b), (h) (establishing that personal jurisdiction is a waivable defense which the defendant in FLSA cases could opt to waive entirely by never challenging it).

companies is to push plaintiffs to drop their claims upon dismissal.[279] This is evident because companies want to take the cheapest option to minimize the company's losses. When given a choice between saving court fees and saving money due to dropped claims, the companies have been choosing to challenge personal jurisdiction to get dismissed plaintiffs to drop their claims, resulting in fewer losses for the company. In reality, the outcome is unjust because the company committed a legal wrong, and the plaintiff is losing their hard-earned money. FLSA lawsuits are brought for unpaid overtime or underpaid wages, which may not amount to a large enough amount for litigation alone.[280] Effectively, when a federal court dismisses opt-in plaintiffs, the federal court is deleting claims entirely rather than merely dismissing them because the cost of bringing the claim elsewhere outside of the large group will cost the plaintiff more than any recovery.[281] This results in plaintiffs not recovering sums of money that are small to the company but significant to an employee barely scraping by.

3. Simplicity

The law should seek simplicity and pragmatism.[282] The common person should be able to understand the law.[283] How can a common person know that a class action differs from a collective action?[284] Individuals usually have heard of class actions and will likely hear collective action, thinking it is the same as a class action. This makes it difficult for the common plaintiff to understand. Further, in situations where plaintiffs bring both collective and class action claims, if some plaintiffs are dismissed from the collective action but not the class action, then that breeds much confusion among the plaintiffs. This would result in plaintiffs not bringing valid claims forward because they do not understand that their claim was dismissed and could be brought again.[285] The attorneys representing the partially dismissed plaintiffs will also

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279 *See Vanegas*, 113 F.4th at 738 (Rovner, J., dissenting) (explaining that dismissed plaintiffs "may struggle to bring suit at all.").

280 *See id.* at 731 (explaining this is likely an issue which the writers of the FLSA sought to address by allowing for these collective actions).

281 *See id.* at 738 ("FLSA plaintiffs will not be required to bring suit in only limited jurisdictions and may struggle to bring suit at all.").

282 *See* Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("Simpli[city] is desirable in law").

283 *Id*; *see generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 74 (2012) (emphasizing the importance of the ordinary-meaning canon of interpretation because the law was designed for common people).

284 *See, e.g., Espenscheid*, 705 F.3d 770 (explaining there are instances in which these arise concurrently because the plaintiffs will bring a claim through the FLSA and bring other claims through Rule 23).

285 *See Vanegas*, 113 F.4th at 731 (Rovner, J., dissenting) (explaining that workers who would be unable to bring claims on their own rely on class action lawsuits and if their claims are dismissed they are unlikely to bring them again).

be confused or too busy to help their clients understand the situation. These partial dismissals would breed confusion when it is unnecessary. This further promotes the injustice associated with dismissing opt-in plaintiffs because the claims disappear after dismissal rather than being re-filed.

4. Welfare of Society

The goal of the law is not to formally apply rules but to promote "the welfare of society."[286] This is not to say that judges should disregard established precedents, but only that when considering whether to extend existing precedents, the judge should "let the welfare of society fix the path, its direction and its distance."[287] In applying this philosophy to the present situation, the appellate courts should refuse to dismiss the opt-in plaintiffs because that will not benefit society and the citizenry. This is reasonable when considered thoroughly. If ambiguity is addressed by favoring the side that best supports those lacking power and authority, then it promotes a stable society until Congress can determine that the law needs to be amended to reflect their true intent, or the Supreme Court clarifies the current law. Through this, injustice is avoided, with judges retaining their roles as arbitrators rather than creators of law. The consequences of dismissing opt-in plaintiffs will result in injustice, which is being committed due to the extension of a Supreme Court decision that expressly did not decide the present question.[288] Judges must remember that their decisions have far-reaching consequences that will damage many individuals and, additionally, the welfare of society. When facing such decisions, judges should make the decision that preserves the welfare of society and the citizenry rather than harming the majority.[289]

The welfare of society must be viewed as supporting the employees. Employees have seen their wages barely increase in the last 30 years, while businesses have continued to increase in revenue.[290] Companies are held up by their employees and are successful due to the employees. Thus, the stable decision for society is to rule in favor of the employees and not against them because it will allow the company to continue to support society through a paid and happy workforce. This is especially true in this context, as the employees are only asking for the wages they are due, and surely it is not a

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286 CARDOZO, *supra* note 267, at 20.

287 *Id.*

288 *See* Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 269 (2017) ("In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restriction on the exercise of personal jurisdiction by a federal court.").

289 CARDOZO, *supra* note 267, at 20.

290 Bivens, Gould, & Kandra, *supra* note 13 (noting that since 1978, workers have typically only seen a pay increase of 24%, while CEO's have seen a pay increase of 1,084%).

great disservice to a company to demand that the company pay for the wages it promised its employees.

III. ADVOCATING FOR STATE LEGISLATURES, CONGRESS, OR THE SUPREME COURT TO PROTECT WORKERS

If the Supreme Court does not clarify the meaning of BMS and how it applies to FLSA collective actions, then State legislatures and Congress can take steps to protect workers. The State legislature can pass statutes like the statute at issue in *Mallory v. Norfolk Southern Railway Co.*

A. State Legislatures

States can create a statute in which a company agrees that by doing business in that state, the company consents to appear in the state's courts.[291] This statute allows the state to establish general personal jurisdiction over the company.[292] As an example of this, Pennsylvania recently created such a statute.[293] First, Pennsylvania requires businesses to register with the State to act as a business within the State.[294] Second, Pennsylvania law stipulates that by registering with the State, the company agrees to allow Pennsylvania to have general personal jurisdiction over the company.[295] This means the company has consented to allowing Pennsylvania to adjudicate over any claims involving the company, regardless of whether it affects the citizens of Pennsylvania or not. It creates a new state where general personal jurisdiction over the company exists. General personal jurisdiction allows a defendant to have claims brought against them regardless of whether the claim has any connection with the forum because it is deemed that the defendant is at home in the jurisdiction.[296] In the context of a corporation, normally, absent a statute like that found in *Mallory*, this means the corporation is either

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291 *See* 15 PA. CONS. STAT. § 411 (2015) ("a foreign filing association or foreign limited liability partnership may not do business in this Commonwealth until it registers with the department"); 42 PA. CONS. STAT. § 5301 (establishing that by registering as a business in Pennsylvania, that Pennsylvania will be able to exercise general personal jurisdiction over the defendant).

292 *See* § 5301 (establishing that by registering as a business in Pennsylvania, that Pennsylvania will be able to exercise general personal jurisdiction over the defendant).

293 *See id.*

294 *See* § 411 ("a foreign filing association or foreign limited liability partnership may not do business in this Commonwealth until it registers with the department").

295 § 5301.

296 *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (explaining that general jurisdiction is general jurisdiction differs from specific jurisdiction in that general jurisdiction does not require a connection between the defendant's conduct, the plaintiff's claim, and the adjudicating forum).

incorporated in the state or has a principal place of business within the state.[297]

This is relevant to the FLSA because the courts have dismissed opt-in plaintiffs through Rule 4(k).[298] This rule forces the federal court to evaluate personal jurisdiction through the lens of a state trial court.[299] Suppose the state where the federal court resides has enacted a statute similar to the Pennsylvania statute.[300] In that case, the federal court can now exercise jurisdiction over the defendant. Since the state has jurisdiction over the defendant, the federal court would also have jurisdiction over the defendant through Rule 4(k)(1)(A).[301]

If a state passes such a statute, the opt-in plaintiffs would not be dismissed from FLSA actions brought in that state due to a lack of personal jurisdiction because the opt-in plaintiff would not need to establish specific personal jurisdiction, as the court would already have general personal jurisdiction over the defendant. The states could work together to protect the employees throughout the United States and prevent this injustice. Congress can also take a step to safeguard the FLSA and employees throughout the United States by amending the FLSA to add a clear nationwide process of service.[302]

B. Congress

Congress must take an affirmative step to protect employee rights and the FLSA. Congress would need to amend the FLSA to provide nationwide service. The courts that have dismissed the opt-in plaintiffs due to the lack of specific jurisdiction have indicated, as part of their opinion, that a nationwide service provision within the FLSA would clear this issue entirely.[303] This provision clears Rule 4(k) because it satisfies a separate rule section.[304] The Rule stipulates that personal jurisdiction is established through service if "authorized by a federal statute."[305] This allows a federal court not to have to

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297 *See* Daimler AG v. Bauman, 571 U.S. 117, 118 (2014) ("The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business.").

298 Canaday v. Anthem Cos., Inc., 9 F.4th 392, 398–400 (6th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 382–86 (3d Cir. 2022); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 727–29 (7th Cir. 2024).

299 FED. R. CIV. P. 4(k)(1)(A).

300 *See* § 5301 (establishing that by registering as a business in Pennsylvania, that Pennsylvania will be able to exercise general personal jurisdiction over the defendant).

301 FED. R. CIV. P. 4(k)(1)(A).

302 *See* FED. R. CIV. P. 4(k)(1)(B) (providing for nationwide service that can establish personal jurisdiction in any federal court which is allowed under Rule 4).

303 *Canaday*, 9 F.4th at 398–99; Vallone v. CJS Sols. Grp., LLC, 9 4th 861, 865; *Fischer*, 42 F.4th at 385; *Vanegas*, 113 F.4th at 728.

304 *See* FED. R. CIV. P. 4(k)(1)(B).

305 *Id.*

limit its jurisdiction to that of a state trial court in which the federal court sits, because it is a separate option within Rule 4(k) for establishing service and personal jurisdiction.[306] Congress must amend the FLSA to prevent the circuit courts from committing this injustice against the opt-in plaintiffs, reaffirming their original intent to equalize the power between businesses and employees.

C. Supreme Court of the United States

The United States Supreme Court should address this issue and clarify the statute's meaning. The current situation is odd, to put it bluntly. One circuit currently will not dismiss the opt-in plaintiffs,[307] while the four other circuits will dismiss the opt-in plaintiffs.[308] On its face, this is not a problem, but when you consider the number of plaintiffs that will file their FLSA claims in the First Circuit now because opt-ins will not be dismissed, it quickly becomes an efficiency problem. At this point, every plaintiff will attempt to bring the FLSA action in the First Circuit because opt-in plaintiffs will not be dismissed as long as they are similarly situated. This will result in the circuit being flooded with lawsuits throughout the United States. This will slow down the First Circuit and present a problem for the judiciary as one circuit falls behind on its cases because it handles cases from elsewhere. Thus, the Supreme Court should address this issue and clarify its meaning. This would clear up the split between the circuit courts and reestablish a consistent law throughout the United States.

CONCLUSION

Opt-in plaintiffs should not be dismissed from FLSA collective actions due to a lack of personal jurisdiction. The circuit courts of appeals that have dismissed opt-in plaintiffs due to a lack of personal jurisdiction have relied on *Bristol-Myers Squibb*[309] and Rule 4(k).[310] *Bristol-Myers Squibb* is not applicable because it concerns a completely distinct issue from the FLSA. *Bristol-Myers Squibb* concerned a state law that created collective action,[311]

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306 FED. R. CIV. P. 4(k)(1)(C).

307 *See generally* Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84 (1st Cir. 2022) (finding that jurisdiction over an opt-in plaintiff would not be improper).

308 *See generally Canaday*, 9 F.4th 392 (holding that it was not error to dismiss an action against opt-in plaintiffs); *Vallone*, 9 F.4th 861 (finding that where personal jurisdiction is not waived, it is proper to exclude claims with no connection to the forum state); *Fischer*, 42 F.4th 366; *Vanegas*, 113 F.4th 718 (holding that nationwide personal jurisdiction was not authorized in a state that did not have personal jurisdiction over the employer).

309 *Canaday*, 9 F.4th at 404; *Vallone*, 9 4th at 866; *Fischer*, 42 F.4th at 387–88; *Vanegas*, 113 F.4th at 731.

310 *Canaday*, 9 F.4th at 398–400; *Fischer*, 42 F.4th at 382–86; *Vanegas*, 113 F.4th at 727–29.

311 Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cnty., 582 U.S. 255, 258 (2017).

state courts,[312] and forum shopping.[313] The FLSA collective action does not share any of these concerns because it is created by a federal law,[314] and these cases have been adjudicated in a federal court.[315] As further evidence of the distinction between the FLSA and the collective action in *Bristol-Myers Squibb*, the plaintiffs are treated differently.[316] All of these reasons lead to the conclusion that the holding in *Bristol-Myers Squibb* has been overexpanded beyond what the Supreme Court ever intended and should not be applied to FLSA collective actions.

Once these circuits determined that *Bristol-Myers Squibb* did apply to the FLSA, they turned to requiring the opt-in plaintiffs to satisfy Rule 4(k) because their individual claims required personal jurisdiction. However, this, too, is an overexpansion. Rule 4 only concerns service, which is shown through its text[317] and history.[318] Opt-in plaintiffs filed consent forms with the court through Rule 5 to join collective actions.[319] The text creating FLSA collective actions already provides a mechanism for dismissing plaintiffs, which protects defendants by dismissing any plaintiffs who are not "similarly situated" to the named plaintiff.[320] Most importantly, opt-in plaintiffs never serve the defendant, or anyone for that matter, which means it's odd to require opt-in plaintiffs to satisfy Rule 4(k) even though Rule 4 concerns only service.[321] Therefore, Rule 4 is not applicable to opt-in plaintiffs.

If *Bristol-Myers Squibb* and Rule 4(k) are not applicable to opt-in plaintiffs, how should courts evaluate opt-in plaintiffs' claims and determine whether the court has personal jurisdiction over the claims? There are two possible solutions, both of which result in not dismissing the opt-in plaintiffs regardless of their connections to the forum. First, the courts can treat opt-in plaintiffs like they treat class members of class actions.[322] This would result in the opt-in plaintiffs not being removed. However, even the First Circuit

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312 *Id.*

313 *Id.* at 264–66; *see Vanegas*, 113 F.4th at 734 (Rovner, J., dissenting) ("[F]orum shopping at the expense of another state's sovereignty . . . was a concern animating the BMS decision.") (citing Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 369–70 (2021)).

314 29 U.S.C. § 216(b).

315 *See generally Canaday*, 9 F.4th 392; Vallone v. CJS Sols. Grp., LLC, 9 4th 861 (8th Cir. 2021); *Fischer*, 42 F.4th 366; *Vanegas*, 113 F.4th 718; Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84 (1st Cir. 2022).

316 McLeod, *supra* note 95; *see Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting) (explaining that the complaint is not required to be amended to add an opt-in plaintiff's name at any point of the proceeding).

317 *Waters*, 23 F.4th at 94; FED. R. CIV. P. 4.

318 *Waters*, 23 F.4th at 95.

319 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting); § 216(b); FED. R. CIV. P. 5.

320 § 216(b).

321 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting).

322 *Id.* at 734–37.

Court of Appeals is skeptical of this outcome.[323] Thus, according to the First Circuit, the second option is the better choice.[324] The second option is that courts evaluate their personal jurisdiction authority over the opt-in plaintiffs' claims through the Fifth Amendment.[325] The result of such an analysis is that the court can exercise jurisdiction over any claims with sufficient connections with the United States.[326] This results in the opt-in plaintiffs not being dismissed as long as each plaintiff's claim arose or relates to the United States.[327] Through either option, the outcome is that opt-in plaintiffs are not dismissed. This promotes justice by ensuring the wronged employees can receive their hard-earned pay.

When considering situations that involve a large number of people and will have lasting consequences, it is vital to consider the consequences of each decision. In this case, the decision not to dismiss the opt-in plaintiffs is the best decision because it promotes efficiency,[328] simplicity,[329] justice,[330] and the welfare of society.[331] In supporting these ideals, it is important to place yourself in the position of a dismissed opt-in plaintiff to understand the injustice that may result from a dismissal. An opt-in plaintiff joined the collective action because they did not have enough money to bring the action alone, or their claim would not result in enough recovery to justify paying for an attorney, court fees, and losing weeks' worth of work time. Once the plaintiffs are dismissed, the only likely outcome is that the plaintiffs will never bring their claim again. By dismissing the plaintiffs, the courts are deleting the claim entirely. The company that refused to pay overtime pay comes out ahead due to the dismissal, and this outcome encourages companies to continue to exploit their employees. This cannot be the best decision for society because employees who desperately need their income are losing pay, and a company that could easily pay each employee is avoiding accountability. The outcome is unjust because the company that has promised to pay the employee and required the overtime is now being rewarded for exploiting their employees. The law is not punishing this Act, but rather dismissing the opt-in plaintiffs' claims, which further encourages companies to take advantage of their employees' vulnerabilities.

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323 *See Waters*, 23 F.4th at 99 ("We agree that FLSA collective actions and Rule 23 class actions are dissimilar").

324 *Id.* at 99–100.

325 *Id.* at 96–100.

326 *Id.* at 92.

327 *Id.*

328 Vanegas v. Signet Builders, Inc., 113 F.4th 718, 733 (7th Cir. 2024) (Rovner, J., dissenting).

329 *See* Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("Simpli[city] is desirable in law").

330 *Vanegas*, 113 F.4th at 733 (Rovner, J., dissenting).

331 CARDOZO, *supra* note 267, at 20.

If state legislatures or Congress are concerned about the FLSA and the decisions these circuits have made in dismissing opt-in plaintiffs, then there are options for both the state legislatures and Congress to protect employees' rights. First, the state legislatures can enact a statute requiring a business to consent to being sued in the state as a cost of doing business there.[332] This would create a separate way for courts to exercise jurisdiction over the defendant companies through general jurisdiction.[333] Second, Congress can act by amending the FLSA to provide for a nationwide process of service.[334] This would allow plaintiffs to bring their lawsuits in any federal district court because it would satisfy Rule 4(k)(1)(C).

The Supreme Court should also consider this question involving the FLSA and clarify its opinion in *Bristol-Myers Squibb*. Currently, the circuits are split.[335] To make the law consistent throughout the United States, the Supreme Court must take up this question. The First Circuit will get many FLSA collective actions and be overburdened because that circuit has correctly determined that opt-in plaintiffs should not be dismissed. To prevent such a burden from overcoming the First Circuit, the Supreme Court should decide that opt-in plaintiffs should not be dismissed from FLSA collective actions and ensure that justice is upheld for employees across all circuits.

The United States is at a crossroads in history. Will the United States slip back into allowing companies to dictate policy and law as companies did prior to the New Deal, or will the United States uphold the ideals of the New Deal to protect employees? Currently, the law allows and sometimes encourages companies to exploit their workers. The 1920s surely taught us that a pro-business law cannot provide a sustainable economy for the working class. If the United States courts are not careful, their willful ignorance of our history will lead to an economic decline that we have not seen before. Economics aside, if courts continue to deny justice for employees, it will result in injustice without limit, as employees are continuously exploited by their employers.

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332 *See, e.g.,* 42 PA. CONS. STAT. § 5301 (establishing that by registering as a business in Pennsylvania, that Pennsylvania will be able to exercise general personal jurisdiction over the defendant).

333 *See id.*

334 Canaday v. Anthem Cos., Inc., 9 F.4th 392, 398–99 (6th Cir. 2021); Vallone v. CJS Sols. Grp., LLC, 9 4th 861, 865 (8th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366, 385 (3d Cir. 2022); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 728 (7th Cir. 2024).

335 *Canaday*, 9 F.4th 392; *Vallone*, 9 4th 861; *Fischer*, 42 F.4th 366; *Vanegas*, 113 F.4th 718; Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84 (1st Cir. 2022).

REINSURING AI: ENERGY, AGRICULTURE, FINANCE & MEDICINE AS PRECEDENTS FOR GOVERNANCE OF FRONTIER ARTIFICIAL INTELLIGENCE

Nicholas Stetler*

INTRODUCTION

The beauty of mathematics is that its truths can be confirmed. A child, if brilliant enough, can outclass even their elders—as Terence Tao did, at the age of ten, when he won the 1986 International Math Olympiad.[1] But what happens when the human mind no longer represents the frontier of reasoning?

In late 2024, Tao and a team of mathematicians decided to give leading artificial intelligence labs the ultimate test.[2] They created *FrontierMath*, a benchmark of 300 unpublished problems designed to separate genuine abstract reasoning from AI's usual statistical tricks.[3] The goal was simple: see if today's best models could handle problems, demanding deep intuition, that often stump even professional mathematicians.[4]

It was supposed to be difficult.

When asked about the difficulty of the test, Tao stated: "These are extremely challenging . . . I think they will resist AIs for several years at least."[5] And yet, within weeks, OpenAI's *o3* model solved more than 25% of the problems.[6] AI had not only passed the test—it had done so at a level that surprised even its creators.[7]

OpenAI's ambition is to develop artificial general intelligence (AGI)—systems capable of outperforming humans, not just at math, but at *everything*.[8] This aim has caused immense alarm among researchers and

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1 Terence Tao: IMO Official Results, INT'L MATH. OLYMPIAD, https://www.imo-official.org/participant_r.aspx?id=1581 (last visited Aug. 13, 2025).

2 *FrontierMath*, EPOCH AI, https://epoch.ai/frontiermath [https://web.archive.org/web/20250403211953if_/https://epoch.ai/frontiermath] (last visited Aug. 23, 2025).

3 *Id*

4 *Id.*

5 *Id.*

6 *See* Maria Deutscher, *OpenAI Details O3 Reasoning Model with Record-Breaking Benchmark Scores*, SILICONANGLE (Dec. 20, 2024, at 17:41 EDT), https://siliconangle.com/2024/12/20/openai-details-o3-reasoning-model-record-breaking-benchmark-scores/.

7 *See id.*

8 *See Our Charter*, OPENAI, https://openai.com/charter/ (last visited Aug. 14, 2025) (stating that their intention is to develop AGI which could perform any economically valuable task).

policymakers.[9] At the center of the concern lies the alignment problem: the difficulty of ensuring that powerful AI systems act in ways that reflect humankind's values, goals, and safety.[10] As OpenAI admits, "There is currently no known indefinitely scalable solution to the alignment problem. As AI progress continues, we expect to encounter new challenges that we have not observed in current systems."[11]

This moment matters not only for mathematics but for public institutions. If AI systems can now generate reasoning that rivals or exceeds that of domain experts, legal and regulatory frameworks built on assumptions of human comprehension, responsibility, and predictability begin to break down. Foundation models—general-purpose systems trained at scale and adapted across diverse applications—amplify this institutional challenge. These models blur the boundaries between capabilities, raise systemic risks, and outpace current governance mechanisms.[12]

Yet for all the attention paid to technical safeguards and governance frameworks, the conversation around AI policy has largely neglected a deeper structural challenge: how to manage the financial fallout from failure. If advanced AI systems behave in ways that are misaligned with human interests, the result may not be regulatory noncompliance but widespread economic damage or catastrophic harm. These are not hypothetical risks. As AI systems become more powerful and autonomous, the consequences of misalignment may spread faster than our ability to assign responsibility. The question, then, is not only how to control these systems, but how to anticipate, absorb, and respond to the damage when control fails.

In sectors where uncertainty, liability, and harm meet, insurers allocate risk.[13] Yet private insurers remain hesitant to cover AI—opaque risks,

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9 *See, e.g.*, "*Godfather of Artificial Intelligence" Weighs in on the Past and Potential of AI*, CBS NEWS (Mar. 25, 2023, 9:30 A.M.), https://www.cbsnews.com/news/godfather-of-artificial-intelligence-weighs-in-on-the-past-and-potential-of-artificial-intelligence/;Yoshua Bengio, *How Rogue AIs May Arise*, (May 22, 2023), https://yoshuabengio.org/2023/05/22/how-rogue-ais-may-arise/; Alan Turing, Intelligent Machinery, a Heretical Theory, Lecture Given to 51 Society at Manchester (1951), *in* THE TURING DIGIT. ARCHIVE, https://turingarchive.kings.cam.ac.uk/publications-lectures-and-talks-amtb/amt-b-4 (last visited Aug. 24, 2025); Simon Parkin, *Science Fiction No More? Channel 4's Humans and Our Rogue AI Obsessions*, GUARDIAN (June 14, 2015), https://www.theguardian.com/tv-and-radio/2015/jun/14/science-fiction-no-more-humans-tv-artificial-intelligence; Sarah Jackson, *The CEO of the Company Behind AI Chatbot ChatGPT Says the Worst-Case Scenario for Artificial Intelligence is 'Lights Out for All of Us'*, BUS. INSIDER (July 4, 2023), https://www.businessinsider.com/chatgpt-openai-ceo-worst-case-ai-lights-out-for-all-2023-1.

10 *See* STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 1036 (4th ed. 2021).

11 *See Our Approach to Alignment Research*, OPENAI (Aug. 24, 2022), https://openai.com/research/our-approach-to-alignment-research (quoting OpenAI's admission of alignment uncertainty).

12 *See* Rishi Bommasani et al., *On the Opportunities and Risks of Foundation Models* 129–30 (arXiv, Working Paper No. 2108.07258, 2022), https://arxiv.org/pdf/2108.07258.pdf.

13 *See* Anat Lior, *Insuring AI: The Role of Insurance in Artificial Intelligence Regulation*, 35 HARV. J.L. & TECH. 467, 485–87 (2022).

uncertain outcomes.[14] Without a credible financial framework for catastrophic loss, the insurance market remains underdeveloped. A federal reinsurance program—used in contexts such as nuclear energy,[15] agriculture,[16] healthcare,[17] terrorism,[18] and natural disaster[19]—could fill the gap.

In high-risk industries, insurers shape conduct by pricing risk into coverage.[20] They exclude unsafe practices, refine standards, and reward compliance.[21] The same logic could be applied to curb the issues associated with frontier AI. A robust insurance market, secured by federal reinsurance, would complement direct regulation by conditioning coverage on transparency, monitoring, and adherence to safety norms.[22] The insurance industry already plays this role in medicine, aviation, and cybersecurity.[23]

Federal reinsurance enables markets to function where risk is uninsurable. Floods,[24] crop failures,[25] and terrorism[26] each needed public intervention to absorb tail risk and encourage private participation. Frontier AI is no different. Given the scale of unknown risks, a purely private insurance market will not form without public support.[27]

Critics warn that regulators may (1) delay technical advancement and (2) exceed their institutional understanding.[28] A federal reinsurance program meets both concerns. Insurers have skin in the game.[29] Their methods—structured, adaptive, accountable—create decentralized pressure toward safety.[30] Insurance firms function as learning institutions, assessing risk and identifying new vulnerabilities. Already, foundational research on systemic risk has been coauthored by reinsurers and those working in AI safety.[31]

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14 *See id.* at 490–93.

15 *See, e.g.*, 42 U.S.C. § 2210 (2023).

16 Federal Crop Insurance Act, 7 U.S.C. §§ 1501–1524 (2023).

17 *See* 42 U.S.C. § 18001 (2010).

18 Terrorism Risk Insurance Act of 2002, 15 U.S.C. §§ 6701–6711 (2023).

19 *See* 42 U.S.C. §§ 4001–4128 (2025).

20 *See* Lior, *supra* note 13, at 518; Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165, 2173 (2024).

21 *See* Lior, *supra* note 13, at 518.

22 *See id.*

23 *See* Abraham & Sharkey, *supra* note 20.

24 *See* §§ 4001–4128.

25 *See* Federal Crop Insurance Act, 7 U.S.C. §§ 1501–1524 (2023).

26 *See* Terrorism Risk Insurance Act of 2002, 15 U.S.C. §§ 6701–6711 (2023).

27 *See* Lior, *supra* note 13, at 486, 502.

28 *See Godmother of AI Warns SB 1047 AI Bill Restricts Innovation*, CAL. CHAMBER OF COM. (Aug. 7, 2024), https://advocacy.calchamber.com/2024/08/07/godmother-of-ai-warns-sb-1047-ai-bill-restricts-innovation/.

29 *See* Lior, *supra* note 13, at 511–13.

30 *See id.*

31 *See, e.g.*, SYSTEMIC RISK OF MODELLING WORKING PARTY, DID YOUR MODEL TELL YOU ALL MODELS ARE WRONG? (Oxford Martin Sch. & Amlin, 2015), https://oms-www.files.svdcdn.com/production/downloads/academic/201511_Amlin_FHI_white_paper.pdf [hereinafter MODELS].

In this context, insurance contracts are a form of soft regulation with teeth.[32] They discourage dangerous AI practices, not by banning them, but by *making them expensive*.[33] A federal reinsurance program would not only stabilize the insurance market—it would promote both safety and innovation, creating a governance ecosystem that evolves with the field, rather than attempting to contain it.

Federal reinsurance for advanced artificial intelligence offers a credible foundation for managing risk at scale. Traditional legal tools—regulation, litigation, and voluntary guidelines—lack the institutional capacity to address deep uncertainty, widespread spillover effects, and low-probability but catastrophic harms. A public financial infrastructure distributes risk, incentivizes responsible development, and enables earlier detection of emerging threats. Precedent exists in nuclear energy, agriculture, healthcare, and finance, where federal reinsurance enables markets to function despite underlying volatility. The same institutional logic applies to frontier AI.

Part I explains how general-purpose and frontier AI models work, and why they have become a major policy concern. Part II reviews extant legal responses, including regulatory efforts in the European Union and California, recent developments in tort law, and the role of voluntary frameworks. Part III identifies a deeper structural gap: existing institutions are not equipped to govern fast-moving, high-stakes risks of this kind. Part IV draws lessons from historical cases where federal reinsurance helped manage similarly complex and uncertain domains. Part V develops a concrete proposal: a three-tiered system combining required private insurance, a shared industry risk pool, and a federal reinsurance backstop. The Conclusion shows how this structure limits financial fallout and creates both the incentives and information needed to govern advanced AI in a serious, adaptive, and forward-looking way.

I. BACKGROUND

A. Technical Foundations of AI

In principle, artificial intelligence (AI) refers to anything that is both intelligent and made by humans.[34] In practice, the term denotes digital computers that simulate human cognition.[35] These systems perform tasks that once required human intelligence such as reasoning, problem solving,

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[32] *See* Gary Marchant & Carlos Ignacio Gutierrez, *Soft Law 2.0: An Agile and Effective Governance Approach for Artificial Intelligence*, 24 MINN. J.L. SCI. & TECH. 375, 419 (2023).

[33] *See id.* at 383.

[34] *See* Alan M. Turing, *Computing Machinery and Intelligence*, 59 MIND 433, *passim* (1950); RUSSELL & NORVIG, *supra* note 10, at 1–4.

[35] RUSSELL & NORVIG, *supra* note 10, at 1–4.

learning, and decision-making.[36] While some research aims to mimic human capabilities, other efforts seek to build machines that exceed them.[37]

AI can be divided into three basic categories of capability: narrow AI, general AI, and superintelligent AI.[38] Narrow AI, also known as weak AI, is exemplified by Siri answering your questions, Netflix recommending a show, or an algorithm sorting your emails.[39]

General AI, or strong AI, is a different beast. It is the next step, a machine that can think, reason, and adapt across a broad range of tasks, much like a human.[40] Imagine a program that can carefully explain how to fly a plane, pilot the plane by itself, and then write a compelling poem about the wonders of flight. Some experts believe we might get there in a few decades.[41] Others think true general AI is either impossible or a distant dream.[42]

Beyond that is superintelligent AI: machines that would not just match human intelligence but surpass it across every domain.[43] For now, it is pure speculation, but the implications are enormous. A superintelligent system could solve problems humanity has not even imagined or pose risks we are not ready to handle.[44]

Machine learning (ML) is a specific technique at the heart of modern AI.[45] Instead of following step-by-step instructions, machine learning algorithms learn from data by spotting patterns, making predictions, and improving over time.[46] There are different flavors. Supervised learning trains on labeled examples, like a student studying the answer key.[47] Unsupervised learning seeks hidden patterns in raw data, making sense of things without explicit guidance.[48] Reinforcement learning works through trial and error, adjusting its behavior based on rewards, much like training a dog with treats.[49]

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36 *Id.*

37 *Id.*

38 RAYMOND T. NIMMER, JEFF C. DODD & LORIN BRENNAN, INFORMATION LAW § 1:16 (2024).

39 *Id.*

40 John McCarthy, *What Is Artificial Intelligence?*, STAN. UNIV. 2, 5 (2007), https://cse.unl.edu/~choueiry/S09-476-876/Documents/whatisai.pdf.

41 Max Roser, *AI Timelines: What do Experts in Artificial Intelligence Expect for the Future?*, OUR WORLD IN DATA (Feb. 7, 2023) https://ourworldindata.org/ai-timelines.

42 *Id.*

43 NIMMER, DODD & BRENNAN, *supra* note 38, at § 1:16.

44 Ronald Bailey, *Will Superintelligent Machines Destroy Humanity?*, REASON (Sep. 12, 2014) https://reason.com/2014/09/12/will-superintelligent-machines-destroy-h/.

45 NIMMER, DODD & BRENNAN, *supra* note 38, at § 1:16.

46 *Id.*

47 *See id.*

48 *See id.*

49 *See id*.

Then there is deep learning, a powerful offshoot of machine learning that relies on what are called multilayered neural networks.[50] It is what makes facial recognition work, helps voice assistants understand speech, and allows AI to generate realistic images.[51]

Another key domain is natural language processing (NLP), which teaches machines to understand and produce human language.[52] That is how chatbots, translation tools, and voice assistants manage to sound so natural.[53] But even with all these advances, machine learning and deep learning are still forms of narrow AI.[54] They are impressive, but they do not think like humans do. They excel at specific tasks, but they do not truly understand what they are doing. For now, AI remains a powerful tool, but it is still far from the kind of intelligence that could rival a human being.[55]

B. Current Applications of Artificial Intelligence

AI is already transforming industries significantly and subtly. In healthcare, it helps doctors diagnose diseases, personalize treatments,[56] and speed up drug discovery.[57] In finance, AI detects fraud, drives algorithmic trading, and refines credit scoring, enabling decisions that once took hours to be made in seconds.[58] Transportation is also feeling the shift, with self-driving cars learning to navigate city streets and AI predicting traffic accidents before they happen.[59] Meanwhile, the entertainment industry also runs on AI. Streaming services know what you will want to watch before you do,[60] and AI-powered tools can generate scripts, art, and music.[61] Even in law, a world of dense paperwork and time-consuming research, AI speeds up

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50 *See id.*

51 *See id.*

52 *See id.*

53 *See* DANIEL JURAFSKY & JAMES H. MARTIN, SPEECH AND LANGUAGE PROCESSING: AN INTRODUCTION TO NATURAL LANGUAGE PROCESSING, COMPUTATIONAL LINGUISTICS, AND SPEECH RECOGNITION WITH LANGUAGE MODELS (Jan. 12, 2025), https://web.stanford.edu/~jurafsky/slp3/ed3book_Jan25.pdf.

54 *See* NIMMER, DODD & BRENNAN, *supra* note 38, at § 1:16.

55 *See generally* Patrick Altmeyer et al., *Position: Stop Making Unscientific AGI Performance Claims* (arXiv, Working Paper No. 2402.03962, 2024), https://arxiv.org/pdf/2402.03962.

56 *See* Kevin B. Johnson et al., *Precision Medicine, AI, and the Future of Personalized Health Care*, 14 CLIN. & TRANSLATIONAL SCI. 86, 87 (2020).

57 *See* Dolores R. Serrano et al., *Artificial Intelligence (AI) Applications in Drug Discovery and Drug Delivery: Revolutionizing Personalized Medicine,* 16 PHARMACEUTICS 1328, 1341 (2024).

58 *What is artificial intelligence (AI) in finance?*, IBM (Dec. 8, 2023), https://www.ibm.com/think/topics/artificial-intelligence-finance.

59 *A Blueprint for AV Safety: Waymo's Toolkit For Building a Credible Safety Case*, WAYMO (Mar. 22, 2023), https://waymo.com/blog/2023/03/a-blueprint-for-av-safety-waymos.

60 Xavier Amatriain & Justin Basilico, *Netflix Recommendations: Beyond the 5 Stars (Part 1)*, NETFLIX TECH BLOG (Apr. 6, 2012), https://netflixtechblog.com/netflix-recommendations-beyond-the-5-stars-part-1-55838468f429.

61 *See generally About*, SUNO, https://suno.com/about (last visited Aug. 13, 2025).

document review and helps lawyers find relevant cases in minutes.[62] These are not just gimmicks. They are real shifts in how work gets completed. And as AI continues to evolve, its roles in these fields will only grow.

AI is full of promise, but it also comes with serious challenges. Bias poses a significant problem. AI learns from the datasets it is given. If those datasets contain bias, the system will pick it up and run with it, sometimes in ways that lead to unfair or even discriminatory decisions.[63] Privacy is another concern. Many AI systems thrive on personal data, raising questions about who controls that information and how it is being used.[64] Then there is the fear of job loss.[65] As AI gets better at automating tasks, entire industries could be disrupted, leaving workers wondering where they fit in.[66] And in high-stakes fields like healthcare and defense, the risks are even greater. When lives are on the line, AI needs to be not just smart, but predictable and reliable. The challenge is not just making AI more powerful; it is making sure we can trust it.

C. The Debate Over AGI

The prospect of artificial general intelligence (AGI) spurs debate among experts. Researchers at the cutting edge of machine intelligence wrestle with questions of how to design a safe AGI, yet critics argue that such efforts remain highly speculative.[67] They maintain that true AGI demands integrated reasoning, creativity, and common sense across a broad

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62 Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 99–104 (2014).

63 Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 77 (2018). https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

64 *See* Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, 2 EUR. DATA PROT. L. REV. 20 (2018), https://www.researchgate.net/publication/344746896_Data_Protection_Artificial_Intelligence_and_Cognitive_Services_Is_the_General_Data_Protection_Regulation_GDPR_'Artificial_Intelligence-Proof'.

65 *See* Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible are Jobs to Computerization?*, 114 TECH. FORECASTING & SOC. CHANGE 254 (2017), https://www.sciencedirect.com/science/article/abs/pii/S0040162516302244.

66 *See id.*

67 *See* Christopher Mims, *This AI Pioneer Thinks AI Is Dumber Than a Cat*, WALL ST. J. (Oct. 11, 2024), https://www.wsj.com/tech/ai/yann-lecun-ai-meta-aa59e2f5?gaa_at=eafs&gaa_n=ASWzDAikQoS4croXQ_N3GtdokSJ6l3O7CA3zc1puRlkm0nKWG8dbFy2SqyLlKS6df70%3D&gaa_ts=68a09b56&gaa_sig=ihHFdx7qQ780M5ngo_-lPnzG4kVPxS8_01TPMZw4B3LnpWoJtneNBoD1_0TbqXWVaQ0-09zh3zcvxSBQ3G2XQw%3D%3D; Mark Lowey, *AI Systems are Getting Better as Autonomous AI Agents Pursuing a Goal Without Humans: International AI Safety Report*, RSCH. MONEY (Feb. 12, 2025), https://researchmoneyinc.com/article/ai-systems-are-getting-better-as-autonomous-ai-agents-pursuing-a-goal-without-humans-international-ai-safety-report#:~:text=The%20pace%20and%20unpredictability%20of,before%20releasing%20a%20new%20model; Henry Kautz, *The Curious Case of Commonsense Intelligence*, 151 DAEDALUS 139, 139–50 (2022), https://direct.mit.edu/daed/article/151/2/139/110627/The-Curious-Case-of-Commonsense-Intelligence.

assortment of tasks—capabilities beyond current AI's reach.[68] Skeptics further posit that the realization of AGI may be decades away or might never happen at all, depending on how one defines "intelligence" and whether extant technical barriers can be overcome.[69]

Philosopher and mathematician Roger Penrose, for instance, contends that human consciousness eludes purely algorithmic explanation.[70] In *The Emperor's New Mind*, he invokes Gödel's Incompleteness Theorems to suggest that human beings can perceive truths that formal systems cannot prove, indicating that the mind exceeds computational confines.[71] Penrose further speculates that quantum processes in the brain may play a vital role in consciousness—a hypothesis that remains subject to ongoing scientific and philosophical scrutiny.[72]

Despite lingering doubts about AI's ultimate frontiers, major technology companies vigorously pursue more advanced and general AI. Apple, Microsoft, and Alphabet (formerly Google), among others, remain at the vanguard of research, leveraging immense resources to stake a claim in the race for ever-more capable systems. [73] Alphabet's subsidiary, DeepMind, has produced two notable products: AlphaZero, which consistently outperforms humans in chess, shogi, and Go, and AlphaFold, which surpasses expert performance in predicting protein folding—to the chagrin of the entire biopharmaceutical R&D industry.[74] Meta (formerly Facebook) has introduced CICERO, an AI designed for the strategy game *Diplomacy*, which requires negotiation, deceit, and alliance-building.[75] The ability of such systems to perform at or above human levels in varied tasks underscores AI's accelerating progress toward broader forms of intelligence.

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68 Mims, *supra* note 67; Lowey, *supra* note 67; Kautz, *supra* note 67, at 139–50.

69 Mims, *supra* note 67; Lowey, *supra* note 67; Kautz, *supra* note 67, at 139–50.

70 ROGER PENROSE, THE EMPEROR'S NEW MIND: CONCERNING COMPUTERS, MINDS AND THE LAWS OF PHYSICS 132–41 (1989).

71 *Id.*

72 *Id.*

73 Julia Kollewe, *Apple Cheers Trump with $500bn US Investment Plan; More Losses on Wall Street – As It Happened*, GUARDIAN (Feb. 24, 2025), https://www.theguardian.com/business/live/2025/feb/24/euro-hits-one-month-high-german-election-result-stock-market-dax-bank-of-england-business-live-news; Tech Giants to Spend $320 Billon on AI in 2025: Meta, Amazon, Alphabet, Microsoft Lead the Race – What About Apple, Tesla, and Nvidia? ECON. TIMES (Feb. 8, 2025), https://economictimes.indiatimes.com/news/international/us/tech-giants-to-spend-320-billion-on-ai-in-2025-meta-amazon-alphabet-microsoft-lead-the-race-what-about-apple-tesla-and-nvidia/articleshow/118068850.cms?from=mdr#google_vignette.

74 David Silver et al., *Mastering the Game of Go with Deep Neural Networks and Tree Search*, 529 NATURE 484, 484–89 (2016); John Jumper et al., *Highly Accurate Protein Structure Prediction with AlphaFold*, 596 NATURE 583, 583–89 (2021).

75 Noam Brown et al., *Human-Level Play in the Game of Diplomacy by Combining Language Models with Strategic Reasoning*, 378 SCI. 1067, 1067–74 (2022); Andrew Goff et al., *CICERO: An AI Agent That Negotiates, Persuades, and Cooperates with People*, META AI (Nov. 22, 2022), https://ai.meta.com/blog/cicero-ai-negotiates-persuades-and-cooperates-with-people/.

Artificial intelligence continues to evolve at an extraordinary pace, bringing profound transformations to multiple facets of society. While narrow AI dominates contemporary applications, research on more sophisticated systems nudges the field closer to general—if not superintelligent—forms of machine cognition. Yet as these capabilities expand, so do the attendant ethical, legal, and societal questions concerning safety, privacy, and the nature of intelligence itself. Navigating these challenges demands not only technical innovation but also robust interdisciplinary collaboration to ensure that AI's development proceeds responsibly and equitably.

II. THE LEGAL LANDSCAPE OF AI

As AI systems grow more sophisticated, they present new challenges for regulation, liability, and enforcement. Governments worldwide are grappling with how to regulate AI effectively without stifling innovation. At the same time, tort law, traditionally designed for human actors, must now account for autonomous systems that make decisions without direct human input. Alongside these formal legal mechanisms, soft law, nonbinding principles, and guidelines are emerging as a flexible tool for shaping AI governance. Together, these three areas form the foundation of how society seeks to balance the promise of AI with the need for oversight and accountability.

A. Regulatory Approaches

Regulating AI is a delicate task. Unlike traditional technologies, AI evolves, learns, and adapts, making it challenging to apply regulatory frameworks effectively. Policymakers must strike a balance between fostering innovation and preventing harm. Different jurisdictions have taken different approaches. The European Union has opted for comprehensive, preemptive regulation, while the United States has favored a more fragmented, sector-specific strategy. These differing approaches highlight the complexity of AI governance and the competing interests at play.

1. The European Union

The European Union (EU) has taken a proactive stance on AI governance. The Artificial Intelligence Act (AI Act), which came into force on August 1, 2024, establishes a harmonized legal framework across Member

States.[76] The AI Act categorizes AI systems by risk level: unacceptable, high, limited, and minimal. Each level contains corresponding regulatory requirements.[77] Systems deemed "unacceptable," such as those that manipulate human behavior through subliminal techniques, are outright banned.[78] "High-risk" AIs, including those in critical infrastructure and education, must meet stringent transparency and oversight standards before deployment.[79]

To avoid stifling innovation, the AI Act includes provisions to ease regulatory burdens on small and medium-sized enterprises.[80] Additional initiatives, such as the AI Innovation Package and the Coordinated Plan on AI, support AI development while enforcing compliance with ethical and safety standards.[81] By establishing clear obligations and enforcement mechanisms, the EU aims to establish the global standard for AI governance.[82]

2. The United States

In contrast to the EU's centralized approach, the United States has adopted a more decentralized, patchwork strategy. Federal initiatives, state legislation, and international collaborations each play a role in shaping their approach to AI governance. The National Artificial Intelligence Initiative Act of 2020 laid the foundation for coordinated AI research and development across federal agencies.[83] In October 2023, President Biden issued Executive Order 14110, which emphasized the importance of AI safety, competition, and civil rights protections.[84] A year later, the administration issued a National Security Memorandum outlining the role of AI in defense and

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76 *See generally* Krystyna Marcinek et al., *Risk-Based AI Regulation: A Primer on the Artificial Intelligence Act of the European Union*, RAND (Nov. 20, 2024), https://www.rand.org/pubs/research_reports/RRA3243-3.html#fnb7.

77 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, 2024 O.J. (L 379) 1, art. 5, annex III [hereinafter Regulation (EU) 2024/1689]; *AI Act*, EUR. COMM'N (Dec. 5, 2025), https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai.

78 Regulation (EU) 2024/1689, *supra* note 77, at art. 5.

79 *Id.* at art. 5(1)(h), 5(2)–(5) (AI Act).

80 *Id.* at art. 6, annex I (AI Act).

81 *See Commission Communication on Fostering a European approach to Artificial Intelligence*, COM (2021) 205 final (Apr. 21, 2021); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — 2021 Review of the Coordinated Plan on Artificial Intelligence*, COM (2021) 205 final (Apr. 21, 2021).

82 Regulation (EU) 2024/1689, *supra* note 77.

83 *See generally* National Artificial Intelligence Initiative Act of 2020, 15 U.S.C. §§ 9401–9462 (2025).

84 Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

intelligence operations.[85] Additionally, the Department of Commerce established the United States AI Safety Institute within the National Institute of Standards and Technology (NIST) to create guidelines and best practices for evaluating and mitigating AI risks.[86]

Internationally, the United States has promoted responsible AI use through initiatives such as the Organization of American States' AI Policy Framework and the State Department's Bureau for Cyberspace and Digital Policy.[87] While the United States regulatory landscape remains fragmented, these efforts signal a growing recognition of AI's risks and the need for oversight.

State governments have also taken the lead. Idaho's 2024 House Bill 382 addressed AI's role in crimes against children, reflecting broader efforts by states to regulate AI's societal impact.[88] Moreover, the National Conference of State Legislatures has documented various AI-related legislative efforts across different states, reflecting a growing recognition of AI's impact on society.[89]

3. California Senate Bill 1047

California, often a leader in tech policy, attempted to introduce a comprehensive AI regulatory framework through Senate Bill 1047 (SB 1047), the Safe and Secure Innovation for Frontier Artificial Intelligence Models Act.[90] The bill sought to enhance transparency and hold developers

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85 *See* National Security Memorandum on Advancing the United States' Leadership in Artificial Intelligence; Harnessing Artificial Intelligence to Fulfill National Security Objectives; and Fostering the Safety, Security, and Trustworthiness of Artificial Intelligence, 2024 DAILY COMP. PRES. DOC. 202400945 (Oct. 24, 2024), https://www.govinfo.gov/content/pkg/DCPD-202400945/pdf/DCPD-202400945.pdf; *see also* Fact Sheet, Biden-Harris Administration Outlines Coordinated Approach to Harness Power of AI for U.S. National Security, THE WHITE HOUSE (Oct. 24, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/10/24/fact-sheet-biden-harris-administration-outlines-coordinated-approach-to-harness-power-of-ai-for-u-s-national-security [https://perma.cc/XT5C-U2LF].

86 *See* Fact Sheet, U.S. Department of Commerce & U.S. Department of State Launch the International AI Safety Institutes at Inaugural Convening in San Francisco, U.S. DEP'T OF COM. (Nov. 20, 2024), https://www.commerce.gov/news/fact-sheets/2024/11/fact-sheet-us-department-commerce-us-department-state-launch-international (on file with NIST).

87 *See U.S. Mission to the Organization of American States Launches New Initiative on Artificial Intelligence*, U.S. DEP'T OF STATE (Dec. 13, 2024), https://2021-2025.state.gov/u-s-mission-to-the-organization-of-american-states-launches-new-initiative-on-artificial-intelligence/; *see also Bureau of Cyberspace and Digital Policy*, U.S. DEP'T OF STATE, https://www.state.gov/bureaus-offices/under-secretary-for-economic-growth-energy-and-environment/bureau-of-cyberspace-and-digital-policy/ (last visited Aug. 15, 2025).

88 H.B. 382, 67th Leg., 2d Reg. Sess. (Idaho 2024), https://legislature.idaho.gov/sessioninfo/2024/legislation/H0382.

89 *See generally Artificial Intelligence 2024 Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Sep. 9, 2024), https://www.ncsl.org/technology-and-communication/artificial-intelligence-2024-legislation.

90 S.B. 1047, 2023–24 Leg., Reg. Sess. (Cal. 2024) (as vetoed by Governor, Sep. 29, 2024).

accountable for the societal impacts of their technologies.[91] A noteworthy aspect of the Bill is that it focused not on all AI, but on a specific subset of high-risk systems, introducing the term "covered model" to define the types of AI subject to enhanced oversight. Under the bill, a covered model included any generative AI system trained using computer power (compute) exceeding 10^{26} FLOPS, or one that the developer had reason to believe could independently perform tasks that pose a severe risk to public safety, such as designing biological or chemical weapons.[92] However, Governor Gavin Newsom vetoed SB 1047 on September 29, 2024, arguing that the bill lacked flexibility to keep pace with AI's rapid evolution.[93] Instead, he announced alternative initiatives to safeguard Californians from AI-related risks.[94]

Despite the veto, California remains at the forefront of AI regulation. Assembly Bill 2013 (AB 2013), effective January 1, 2026, mandates disclosure of training data used in generative AI systems.[95] Additional laws restrict the role of AI in mental health services, preventing AI systems from impersonating human therapists.[96] Although SB 1047 did not become law, California's regulatory efforts demonstrate the state's commitment to AI oversight. Later, this Note will use the definition of a "covered model" as a starting point for designed target, risk-based governance mechanism. As Governor Newsom rejected the bill for its lack of flexibility, this Note will argue for an alternative governance scheme for these "covered models" that can keep pace with rapid technological development.

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91 *Id.*

92 *Id.* at § 22601(e) (defining "covered model" as a model trained using computational resources exceeding 10^26 integer or floating-point operations or capable of autonomously performing tasks posing severe risk).

93 *See* Letter from Gavin Newsom, Gov. of Cal., to the Members of the Cal. State S., (Sep. 29, 2024), https://www.gov.ca.gov/wp-content/uploads/2024/09/SB-1047-Veto-Message.pdf (on file with author).

94 *See* Press Release, Office of Governor Gavin Newsom, Governor Newsom Announces New Initiatives to Advance Safe and Responsible AI, Protect Californians (Sep. 29, 2024), https://www.gov.ca.gov/2024/09/29/governor-newsom-announces-new-initiatives-to-advance-safe-and-responsible-ai-protect-californians/ (on file with author).

95 Artificial Intelligence Training Data Transparency Act, Cal. Civ. Code § 3110 (2024).

96 *See generally* Press Release, Office of Assemblymember Mia Bonta, Assemblymember Mia Bonta Introduces Legislation to Prevent AI Systems from Impersonating Human Therapists, (Feb. 10, 2025), https://a18.asmdc.org/press-releases/20250210-assemblymember-mia-bonta-introduces-legislation-prevent-ai-systems (on file with author).

B. Tort Law: Existing Doctrines & Emerging Challenges

Tort law was built for human actors.[97] When someone causes harm through negligence or intent, the law holds them accountable.[98] What happens when an AI system causes harm? Who is responsible? The developer? The manufacturer? Or the AI system? These questions are at the heart of AI and tort law.[99]

Two recent cases—*Cruz v. Talmadge*[100] and *Nilsson v. General Motors, LLC*[101]—mark the beginning of a shift in product liability law.[102] They raise questions that courts have never had to answer before: When AI makes a mistake, who takes the blame? What does it mean for a machine to be "negligent"? Can a product itself be held liable? And if so, who—if anyone—pays?

The accident in *Cruz v. Talmadge* was both tragic and avoidable.[103] A bus, following the guidance of two GPS devices, drove straight into an overpass.[104] Passengers were injured.[105] Some were killed.[106] And their families wanted to know: Who was responsible? The bus driver had done what drivers always do—followed the GPS.[107] The AI-powered navigation system had all the necessary data to prevent the accident.[108] It knew the clearance and risk.[109] But it did not warn the driver.[110] It didn't reroute the bus.[111] And so, the plaintiffs argued that this was not just a mistake—it was a defect.[112] Their case raised a fundamental question: When an AI-powered product leads someone into danger, is the manufacturer liable for what happens next? More than that, what does "reasonable care" mean when no human made the decision?[113] Courts have long asked whether a person acted as a "reasonable driver," a "reasonable doctor," or a "reasonable

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97 *See generally* ANDREAS KUERSTEN, CONG. RSCH. SERV., IF11291, INTRODUCTION TO TORT LAW 1 (May 26, 2023), https://www.congress.gov/crs_external_products/IF/PDF/IF11291/IF11291.4.pdf.

98 *See generally id.*

99 *See* Rebecca Crootof, *The Internet of Torts*, 69 DUKE L.J. 583, 585–88 (2019); *see also* Gregory Smith et al., *Liability for Harms from AI Systems: The Application of U.S. Tort Law and Liability to Harms from Artificial Intelligence Systems*, RAND (Nov. 20, 2024), https://www.rand.org/pubs/research_reports/RRA3243-4.html.

100 *See generally* Cruz v. Talmadge, 244 F. Supp. 3d 231 (D. Mass. 2017).

101 *See generally* Complaint, Nilsson v. Gen. Motors LLC, No. 4:18-cv-00471 (N.D. Cal. Jan. 22, 2018) [hereinafter *Nilsson* Complaint].

102 *See generally Cruz*, 244 F. Supp. 3d at 233.

103 *See id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

manufacturer."[114] But when the decision belongs to a machine, how do you determine what a reasonable machine should have done?[115]

In *Nilsson v. General Motors, LLC*, a motorcyclist was riding on the highway when an autonomous vehicle—a self-driving Chevrolet Bolt—swerved into his lane.[116] The motorcyclist crashed and was injured.[117] He took General Motors to court and made a striking claim: this was not driver error, this was the car's fault.[118] There was a backup driver behind the wheel, but he was not operating the vehicle at the moment of impact.[119] The AI was driving.[120] And if a human driver can be sued for negligence—failing to use reasonable care—why should the same not be true for an AI?[121] General Motors did not fight the premise.[122] It admitted that the Bolt was required to meet the same standard of care as a human driver.[123] That admission was a turning point. But it left behind an even bigger question: If an AI-powered vehicle is negligent, who pays the price?

AI does not belong to a single person. The car had an owner. The software had engineers. The company had designers, executives, and shareholders. If an autonomous vehicle makes a bad decision, who should be responsible? The manufacturer? The owner? The company that designed the AI? The programmer who wrote the faulty line of code? The answer is not apparent. As AI grows more autonomous, it will only become harder to find.[124] These cases show that the legal system is at the start of a transformation. AI is no longer just a tool—it is a decision-maker. It is guiding vehicles, choosing routes, and determining risk. When AI makes a bad decision, courts must answer three urgent questions:

> ***(1)*** *What does reasonable care mean for a machine?* Courts have long measured human behavior against what a reasonable person would do.[125] But how do you judge a machine's choices? Some scholars suggest looking at custom,

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114 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 3 (A.L.I. 2010).

115 *See* Mark Geistfeld, *Strict Products Liability 2.0: The Triumph of Judicial Reasoning over Mainstream Tort Theory*, 14 J. TORT L. 403, 419–20 (2021).

116 *Nilsson* Complaint, *supra* note 101.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 Mark Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, 105 CALIF. L. REV. 1611, 1615–16 (2017).

122 *Nilsson* Complaint, *supra* note 101.

123 *Id.*

124 *Id.*; Abraham & Sharkey, *supra* note 20, at 2172–74.

125 *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 425 (1999).

> practice, or outcome.[126] Others point out that AI models lack intent, emotion, or experience—qualities necessary to inform a negligence analysis.[127]
> *(2) How do you define foreseeability for AI?* Humans make mistakes. However, AI operates on a massive amount of data, with predictive capabilities far exceeding those of a person.[128] If an AI-driven product causes harm, was that harm foreseeable? And if so, who should have foreseen it?
> *(3) If AI is liable, who pays?* A product is not a person. It cannot be sued, fined, or held accountable.[129] But if a self-driving car, a surgical robot, or a financial algorithm causes harm, courts must determine whether liability falls on the manufacturer, the software developer, the owner, or someone else entirely.[130]

Proposed solutions include algorithmic accountability, which holds developers liable for flawed AI decision-making and enterprise liability, which places responsibility on companies profiting from AI.[131] Insurance may also play a role, with specialized AI insurance pools spreading risk across industries.[132] As courts and legislatures confront these issues, new legal precedents will shape the evolving intersection of AI and tort law.

C. Soft Law & Voluntary Governance

Regulation is not the only way to govern AI. Soft law—nonbinding guidelines, ethical frameworks, and industry standards—often fills the gaps where formal laws lag.[133] Unlike statutes and regulations, soft law can adapt quickly to technological changes, providing a flexible approach to AI oversight.[134] Scholars have documented an explosion of such instruments in

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126 *See* T.J. Hooper v. N. Barge Corp., 60 F.2d 737, 740 (2d Cir. 1932).

127 *See* Alan Chan et al., *Harms from Increasingly Agentic Systems* 4–13 (arXiv, Working Paper No. 2302.10329, 2023), https://arxiv.org/pdf/2302.10329; Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1818–19 (2009).

128 *See* Chan et al., *supra* note 124, at 4–13.

129 *See* KUERSTEN, *supra* note 97, at 1.

130 Mariano-Florentino Cuéllar, *A Common Law for the Age of Artificial Intelligence*, 119 COLUM. L. REV. 1773, 1781–82 (2019).

131 Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DEPAUL L. REV. 431, 432–33 (2020).

132 *See generally* Kenneth S. Abraham & Daniel Schwarcz, *Courting Disaster: The Underappreciated Risk of a Cyber Insurance Catastrophe*, 27 CONN. INS. L.J. 407 (2021); *see also* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 5–7 (1996).

133 *See* Marchant & Gutierrez, *supra* note 32, at 376.

134 *See id.* at 377–78.

recent years, identifying recurring themes like transparency, fairness, accountability, and human oversight across dozens of frameworks worldwide.[135]

Governments, international bodies, and industry groups use soft law to establish best practices without imposing legal mandates.[136] The Universal Declaration of Human Rights, for example, set norms before being incorporated into binding treaties.[137] Similarly, AI soft law encompasses guidelines from organizations such as the OECD,[138] the European Commission's Ethical Guidelines for Trustworthy AI,[139] and corporate AI ethics statements.[140] Mapping studies by researchers at Harvard's Berkman Klein Center[141] and ETH Zurich[142] reveal substantial international convergence around these principles, even as enforcement mechanisms remain absent. Soft law's strength lies in its ability to shape norms and influence behavior without legal coercion.[143] However, its weakness is its lack of enforceability.[144] Still, soft law often serves as a stepping stone to formal regulation.[145] It provides an indirect, adaptive mechanism for encouraging safety practices, shaping norms, and guiding institutional responses.[146] In this way, soft law and market-based strategies like

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135 Anna Jobin, Marcello Ienca & Effy Vayena, *The Global Landscape of AI Ethics Guidelines*, 1 NAT. MACH. INTELL. 389, 391 (2019); *AI Ethics Guidelines Global Inventory,* ALGORITHM WATCH (Apr. 9, 2019), https://algorithmwatch.org/en/ai-ethics-guidelines-global-inventory/.

136 Marchant & Gutierrez, *supra* note 32, at 384.

137 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

138 ORG. FOR ECON. COOP. & DEV. [OECD], RECOMMENDATION OF THE COUNCIL ON ARTIFICIAL INTELLIGENCE 6–10 (May 22, 2019), https://wecglobal.org/uploads/2019/07/2019_OECD_Recommendations-AI.pdf.

139 *See* HIGH-LEVEL EXPERT GRP. ON A.I., EUR. COMM'N, ETHICAL GUIDELINES FOR TRUSTWORTHY AI (Apr. 8, 2019), https://www.aepd.es/sites/default/files/2019-12/ai-ethics-guidelines.pdf [hereinafter TRUSTWORTHY AI] ("Include in the citation of reports the issuing body and the committee, division, or group that produced the report.").

140 *See, e.g.*, *Responsible AI at Microsoft,* MICROSOFT, https://www.microsoft.com/en-us/ai/responsible-ai [https://perma.cc/5YQB-KL78] (last visited Aug. 29, 2025); Sundar Pichai, *AI at Google: our principles,* GOOGLE (Jun. 7, 2018), https://blog.google/technology/ai/ai-principles/; Verena Fulde, *Guidelines for Artificial Intelligence,* DEUTSCHE TELEKOM (May 11, 2018), https://www.telekom.com/en/company/digital-responsibility/details/artificial-intelligence-ai-guideline-524366.

141 *See generally* Jessica Fjeld et al., *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI*, 2020 BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y RSCH., no. 1, https://dash.harvard.edu/server/api/core/bitstreams/c8d686a8-49e8-4128-969c-cb4a5f2ee145/content.

142 Jobin, Ienca & Vayena, *supra* note 132.

143 *See* Marchant & Gutierrez, *supra* note 32, at 396.

144 *See id.* at 399.

145 *See generally* Fjeld et al., *supra* note 138; *see also* Gary Marchant, Logan Tournas & Carlos Ignacio Gutierrez, *Governing Emerging Technologies Through Soft Law: Lessons for Artificial Intelligence*, 61 JURIMETRICS 1, 5 (2020).

146 Marchant, Tournas & Gutierrez, *supra* note 142, at 6.

reinsurance can work in tandem to govern frontier AI development, offering scalable alternatives to direct regulatory intervention.[147]

III. THE PROBLEM: GOVERNANCE GAP

Efforts to regulate artificial intelligence face a structural asymmetry that has long challenged administrative law: legislation moves slowly, but technology evolves at exponential speed.[148] By the time statutory frameworks are drafted, debated, and enacted, the systems they were meant to govern have often already shifted.[149] Policymakers face a complex design problem—crafting rules that are both future-proof and capable of constraining real risks in the present.[150] Yet even this challenge understates the problem. Many modern AI systems, especially large foundation models, are epistemically opaque.[151] Their inner workings are difficult to interpret, even for their developers.[152] This opacity complicates the task of regulatory design and undermines enforcement, making it hard to establish both *ex-ante* constraints and *ex post* accountability.[153]

Tort law, the common law's traditional mechanism for assigning liability,[154] is similarly strained.[155] When a self-driving car crashes, or a foundation model produces hazardous content, the causal chain is often too complex to trace using traditional fault-based doctrines.[156] Plaintiffs struggle to establish breach, foreseeability, or proximate cause when harm emerges from probabilistic systems trained on vast and dynamic datasets.[157] In many cases, developers may themselves lack a clear explanation of how their models arrived at a harmful output.[158] If liability becomes functionally unprovable, victims remain uncompensated and deterrence fails. Conversely, if liability is imposed too broadly or unpredictably, innovation may be chilled.[159]

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147 *See* Marchant & Gutierrez, *supra* note 32, at 424*; see generally* Gary E. Marchant & Braden Allenby, *Soft Law: New Tools for Governing Emerging Technologies*, 73 BULL. ATOMIC SCI. 108 (2017).

148 *See generally* Bommasani et al., *supra* note 12, at 7.

149 *See generally id.*

150 *See generally id.* at 123; *see also* Marcinek et al., *supra* note 76.

151 *See generally* Bommasani et al., *supra* note 12, at 146.

152 *See* Marcinek et al., *supra* note 76.

153 *See id.*

154 *See* KUERSTEN*, supra* note 97.

155 *See* Crootof, *supra* note 99, at 587–88.

156 *See* Smith et al., *supra* note 99.

157 *See id.*

158 *See id.*

159 *See generally* Cruz v. Talmadge, 244 F. Supp. 3d 231 (D. Mass. 2017); *Nilsson* Complaint, *supra* note 101; Mark Geistfeld, *supra* note 112, at 419–20.

Soft law—industry guidelines, voluntary codes, and technical best practices—has emerged as a pragmatic workaround. It offers speed, flexibility, and adaptability.[160] But it lacks teeth.[161] Without binding obligations or independent enforcement, soft law depends on the goodwill of the very entities it seeks to guide.[162] Worse, many soft law regimes are dominated by the largest AI developers, raising concerns about capture and self-serving standard-setting.[163] The result is a patchwork governance landscape with little external accountability and uneven adoption.[164]

Each of these regimes—regulation, tort, and soft law—aims to manage AI's risks, but each fall short in a different dimension. Regulation lags behind innovation. Tort law struggles with fault attribution under complexity. Soft law lacks legitimacy and enforcement. The failure of existing legal instruments to manage frontier AI risk reflects a more profound structural dilemma: How to govern catastrophic uncertainty without succumbing to either regulatory paralysis or laissez-faire abdication. This dilemma has animated much of the modern literature on risk and institutional design, notably Cass Sunstein's critique of strong precautionary principles as "simultaneously paralyzing and incoherent" when applied to unknown or poorly understood threats.[165] Yet Sunstein also gestures toward a more productive alternative: *precaution by institutional design*, in which governments act as insurers of last resort against systemic harm.[166] This insight reframes reinsurance not merely as a financial instrument, but as a mechanism for enacting epistemic humility—an operational form of *maximin* reasoning[167] that tolerates uncertainty without stalling innovation. By embedding precaution within a modular, market-mediated framework, federal AI reinsurance offers a pathway out of the governance trap: it incentivizes risk-awareness, catalyzes private underwriting capacity, and prepares institutional fault lines for tail events whose probability cannot be credibly estimated in advance.

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160 *See generally* Marchant & Gutierrez, *supra* note 32, at 376–78, 390; Jobin, Ienca & Vayena, *supra* note 132; TRUSTWORTHY AI, *supra* note 136; Fjeld et al., *supra* note 138.

161 *See generally* Marchant & Gutierrez, *supra* note 32, at 376–78, 390; Jobin, Ienca & Vayena, *supra* note 132; TRUSTWORTHY AI, *supra* note 136; Fjeld et al., *supra* note 138.

162 *See generally* Marchant & Gutierrez, *supra* note 32, at 376–78, 390; Jobin, Ienca & Vayena, *supra* note 132; TRUSTWORTHY AI, *supra* note 136; Fjeld et al., *supra* note 138.

163 *See* Kevin Wei et al., *How Do AI Companies "Fine-Tune" Policy? Examining Regulatory Capture in AI Governance* (arXiv, Working Paper No. 2410.13042, 2024), https://arxiv.org/pdf/2410.13042.

164 *See generally* Marchant & Gutierrez, *supra* note 32, at 376–78, 390; Jobin, Ienca & Vayena, *supra* note 132; TRUSTWORTHY AI, *supra* note 136; Fjeld et al., *supra* note 138.

165 CASS R. SUNSTEIN, WORST-CASE SCENARIOS 13 (2007).

166 *See id.* at 145 (stating that "[g]overnments might favor precautions as a kind of regulatory insurance—designed to reduce or eliminate the worst of the worst-case scenarios.").

167 *See id.* at 147–49 (describing the maximin principle as a decision rule under uncertainty that selects the policy with the least-bad worst-case outcome).

What is needed is a new governance layer: One that combines the incentive alignment of liability, the adaptability of market mechanisms, and the institutional reliability of public law.[168] Artificial intelligence is reconfiguring the structure of human decision-making.[169] Governing it will require institutions capable not only of reacting to harm, but of absorbing, pricing, and shaping systemic risk under deep uncertainty.[170]

Reinsurance—long used to stabilize high-risk sectors such as nuclear energy, agriculture, and healthcare—can provide that layer for frontier AI.[171] A federal reinsurance program would catalyze the development of a private insurance market for high-risk AI systems, translating ambiguous hazards into priced liabilities and aligning developer incentives with public safety at scale.[172]

IV. THE SOLUTION: FEDERALLY BACKED REINSURANCE

A. The Logic of Insurance & Reinsurance

Artificial intelligence is a transformative leap with no perfect historical precedent, but legal and institutional history still offers guidance.[173] When electricity reshaped industry,[174] nuclear power altered the strategic calculus of war and peace,[175] and when oil became a global economic cornerstone,[176]

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168 *See* Shauhin A. Talesh, *Insurance Law as Public Interest Law*, 4 U.C. IRVINE L. REV. 985, 993–998 (2014); *see also* Marchant, Tournas & Gutierrez, *supra* note 142.

169 *See* Cuéllar, *supra* note 127, at 1781–82; Bommasani et al., *supra* note 12, at 7, 129–130.

170 Steven M. Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 358–60 (1984) (discussing institutional roles in pricing and deterring risk); *see generally* PHILIP E. TETLOCK, SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION (2015) (discussing the notion of "deep uncertainty" in literature about forecasting and epistemic limits).

171 *See generally* John E. Gudgel, Insurance as a Private Sector Regulator and Promoter of Security and Safety (2022) (Ph.D. dissertation, George Mason University) (on file with MARS), https://mars.gmu.edu/server/api/core/bitstreams/c89687f4-4a4f-42a6-a4f3-53dd498d5321/content.

172 *See* Lior, *supra* note 13, at 470–79; Abraham & Schwarcz, *supra* note 129; Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412 (2013). *But see* Kenneth S. Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance*, 98 IND. L.J. 739, 741–43 (2023) (exploring the potential and limits of insurance institutions in managing systemic technological risk).

173 *See* Lior, *supra* note 13, at 470–74.

174 *See* CARL BENEDIKT FREY, THE TECHNOLOGY TRAP: CAPITAL, LABOR, AND POWER IN THE AGE OF AUTOMATION 189–222 (2019) (describing electricity's role in industrial transformation and labor realignment).

175 *See* DANIEL YERGIN, THE QUEST: ENERGY, SECURITY, AND THE REMAKING OF THE MODERN WORLD 370–71 (2011) (discussing the tension between growing the nuclear power industry and preventing arms proliferation: nuclear energy's dual-use dilemma).

176 *See generally* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER (1991) (narrating the geopolitics of oil and how it shaped the 20th century).

each carried profound risks that were not well understood at the outset.[177] AI may prove just as foundational—and just as dangerous.[178] It could remake markets, reorganize labor, and optimize global systems. However, it could also trigger unintended harm, ranging from opaque decision-making to catastrophic system failures.[179] In such a fast-moving context, the central question is: How does society regulate something that moves faster than our regulatory machinery?

One answer lies in insurance.[180] The insurance industry exists to do what regulation often struggles with: Price risk under uncertainty.[181] Every policy represents an implicit judgment—what can go wrong, how frequently, and at what cost. This makes insurance more than just a financial hedge; it is a disciplinary mechanism.[182] If AI developers are required to carry liability insurance for their systems, they would become accountable not only to public regulators but to private underwriters. Insurers could shape behavior by denying coverage, adjusting premiums, or excluding risky practices—tools that are often more nimble than legal mandates.[183]

Currently, however, the cyber and technology insurance markets are too underdeveloped to support this function.[184] Participation is limited, actuarial data are scarce, and underwriting models remain immature.[185] The result is a self-reinforcing cycle: High premiums deter companies from buying coverage, which in turn limits data collection and prevents accurate risk modeling, keeping premiums high.[186] This feedback loop traps the market in a pre-institutional phase—underdeveloped, uncertain, and fragile.[187]

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177 *See generally* DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER (Harv. Univ. Press 2004) (discussing historical government interventions to manage foundational risks such as nuclear power and financial collapse).

178 *See generally* STUART RUSSELL, HUMAN COMPATIBLE: ARTIFICIAL INTELLIGENCE AND THE PROBLEM OF CONTROL (2019) (regarding existential and systemic risks posed by advanced AI); *see also* Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023) (showing U.S. federal recognition of AI's transformative and risky nature).

179 Crootof, *supra* note 99, at 591–92.

180 *See* Martin Eling, *How Insurance Can Mitigate AI Risks*, BROOKINGS (Nov. 7, 2019), https://www.brookings.edu/articles/how-insurance-can-mitigate-ai-risks/.

181 *See* Talesh, *supra* note 165, at 993–98.

182 *See* Baker & Swedloff, *supra* note 169. *But see* Abraham & Schwarcz, *supra* note 169, at 741–43 (exploring the potential and limits of insurance institutions in managing systemic technological risk).

183 *See* Cristian E. Trout, *Liability and Insurance for Catastrophic Losses: The Nuclear Power Precedent and Lessons for AI* (arXiv, Working Paper No. 2409.06673, 2024), https://arxiv.org/pdf/2409.06672.

184 *See* Abraham & Schwarcz, *supra* note 129 (warning about catastrophic cyber-risk and proposing new liability frameworks). *But see* Vanessa Houlder, *Governments Should Not Be the Cyber Insurers of Last Resort*, FIN. TIMES (Mar. 17, 2024), https://www.ft.com/content/b119fd0c-f0a4-4221-bb18-4dfc23a6d81c.

185 *See* Abraham & Schwarcz, *supra* note 129. *But see* Houlder, *supra* note 181.

186 *See* Abraham & Schwarcz, *supra* note 129. *But see* Houlder, *supra* note 181.

187 *See* Abraham & Schwarcz, *supra* note 129. *But see* Houlder, *supra* note 181.

This is precisely where federal reinsurance can intervene. Reinsurance is a fundamental pillar of modern risk management, allowing primary insurers to offload part of their liability in exchange for a share of their premium income.[188] The logic is straightforward: When insurers know their exposure to catastrophic loss is capped, they are more willing to write policies in emerging or volatile markets. By assuming the tail-end of the risk curve, a federal reinsurance program for AI would enable insurers to price policies more competitively, thereby drawing more firms into the risk pool.[189]

Over time, deeper participation improves the quality of actuarial data, refines underwriting standards, and allows both public and private actors to map the risk landscape with greater fidelity.[190] This is not just market stabilization—it is governance through institutional learning.[191]

There are two principal forms of reinsurance: Proportional and non-proportional. In proportional reinsurance, reinsurers share a fixed percentage of both premiums and losses, operating almost as co-underwriters.[192] In non-proportional (or excess-of-loss) reinsurance, the reinsurer pays only when claims exceed a certain threshold. This second model is especially well-suited for AI, where the goal is not to manage routine software bugs but to absorb the costs of low-probability, high-consequence failures—the "long-tail" events that define systemic technological risk.[193]

A federal reinsurance program for AI would do more than lower premiums. It would embed incentives for safety, tying insurability to risk management practices and transparency standards.[194] It would create a mechanism for managing catastrophic events without collapsing private markets. Perhaps most importantly, it would leverage the analytical capabilities of the insurance industry itself, offering a form of adaptive, data-driven oversight that can evolve in tandem with the technology it governs.[195]

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188 *Reinsurance,* BRITANNICA MONEY, https://www.britannica.com/money/insurance/Reinsurance (last visited Aug. 13, 2025).

189 Stephen J. Carroll et al., *Assessing the Effectiveness of the Terrorism Risk Insurance Act*, RAND (2004), https://www.rand.org/pubs/research_briefs/RB9153.html.

190 Trout, *supra* note 180.

191 *See* Lior, *supra* note 13, at 479; *accord* Abraham & Schwarcz, *supra* note 129, at 465.

192 *See* Lior, *supra* note 13, at 479.

193 *See* Abraham & Schwarcz, *supra* note 129, at 464.

194 *See* Lior, *supra* note 13, at 479.

195 *See* Eling, *supra* note 177; *see, e.g., How Detailed Casualty Data Keeps World Trade Moving*, LLOYD'S LIST INTEL. (Mar. 4, 2022), https://www.lloydslistintelligence.com/thought-leadership/blogs/maritime-casualty-data-world-trade-moving.

B. Four Institutional Precedents for Federal Reinsurance

1. Nuclear Energy: The Price-Anderson Act

The Price-Anderson Nuclear Industries Indemnity Act, initially passed in 1957 and subsequently amended, was a pragmatic solution to a problem that threatened to paralyze the U.S. nuclear power industry before it began.[196] Private insurers refused to underwrite nuclear plants—not because the technology lacked promise, but because the potential liabilities were vast, novel, and incalculable.[197] Unlike fires or automobile accidents, nuclear incidents lacked actuarial baselines; there was no reliable way to estimate either their frequency or the scale of damage they might produce.[198]

To resolve this impasse, Congress enacted the Price-Anderson Act, establishing a three-tiered liability regime.[199] First, private insurers were required to provide a baseline amount of coverage for licensed reactors.[200] Second, the industry was compelled to contribute to a collective pool that would cover losses exceeding individual policy limits.[201] Finally, the federal government acted as a reinsurer of last resort, absorbing liabilities above the industry's aggregate cap.[202] The statute also provided exclusive federal jurisdiction for nuclear tort claims and established procedural standards to streamline the litigation process.[203]

The Act served two primary functions: It ensured compensation for victims of nuclear incidents while also removing liability barriers to industry participation. In doing so, it created the conditions for commercial nuclear energy to develop under a regime of bounded, shared risk. It did not eliminate liability—it redistributed it, institutionalizing a legal infrastructure capable of managing tail events too extreme for private actors alone.[204]

Artificial intelligence now stands at a similar juncture. Like nuclear energy in the mid-20th century, AI is a general-purpose technology[205] with both transformative potential and catastrophic downside risk.[206] And like

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196 Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (2023)); *see generally* Gudgel, *supra* note 168.

197 NUCLEAR REGUL. COMM'N, THE PRICE-ANDERSON ACT: 2021 REPORT TO CONGRESS 2–5 (2021), https://www.nrc.gov/docs/ML2133/ML21335A064.pdf (describing the Act's three-tier liability system, federal jurisdiction, and procedural mechanisms for managing nuclear tort claims).

198 *Id.*

199 *See* 42 U.S.C. § 2210(b)–(d) (detailing the three-layer liability regime).

200 *Id.*; NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5.

201 § 2210(b)–(d); NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5.

202 § 2210(b)–(d); NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5.

203 § 2210(b)–(d); NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5.

204 *See* NUCLEAR REGUL. COMM'N, *supra* note 194, at 1–2 (explaining that the Act aimed to compensate victims while facilitating industry participation through shared liability mechanisms).

205 Bommasani et al., *supra* note 12, at 7 (describing AI as a general-purpose technology and identifying both its positive potential and systemic risks).

206 *See* Gabriel Weil, *Tort Law as a Tool for Mitigating Catastrophic Risk from Artificial Intelligence* 5–10 (Touro Univ. Jacob D Fuchsberg L. Ctr., Working Paper No. 4694006, 2024), https://papers.

nuclear accidents, inevitable AI failures—particularly those involving large-scale misuse, misalignment, or autonomous systems—could produce consequences beyond the reach of conventional liability doctrines or private insurance capacity.[207]

A federal reinsurance program for AI, modeled on the Price-Anderson structure, would offer a layered solution: Primary coverage from private insurers; a pooled industry fund for distributed, non-systemic claims; and a federal backstop for the rare but severe events that threaten broader societal harm.[208] While the substantive risks differ, the institutional challenge is the same: How to govern technological development under radical uncertainty. Price-Anderson succeeded not by perfecting predictive models, but by building a legal architecture capable of absorbing the worst-case scenario.[209] That remains the core design problem for AI governance today.

2. Agriculture: Federal Crop Insurance

Agriculture operates in a fundamentally different risk environment. Farmers do not worry about sudden, civilization-scale catastrophes; instead, they worry about persistent, cyclical threats: droughts, floods, pests, and volatile commodity markets.[210] The losses are frequent and often predictable, but they remain financially destabilizing—especially when concentrated across regions or seasons.[211]

To manage this volatility, the federal government built the Federal Crop Insurance Program, overseen by the U.S. Department of Agriculture's Risk Management Agency.[212] Unlike reinsurance in nuclear energy, which functions primarily as a catastrophic backstop, agricultural reinsurance is embedded in a hybrid public-private structure.[213] Farmers purchase policies from private insurers, but those insurers operate under a system of federal

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ssrn.com/abstract=4694006 (arguing that traditional tort law may not suffice for catastrophic AI harms and exploring liability gaps); *accord* Abraham & Schwarcz, *supra* note 129, at 411–13 (discussing how catastrophic technological risk can exceed insurance market capacity, with implications for AI).

207 Weil, *supra* note 203, at 5–10; Abraham & Schwarcz, *supra* note 129, at 411–13.

208 § 2210; *see* NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5.

209 § 2210; NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5.

210 *See* RISK MGMT. AGENCY, U.S. DEP'T OF AGRIC., BEGINNER'S GUIDE TO CROP INSURANCE 2–3 (2021), https://www.rma.usda.gov/sites/default/files/2024-07/Beginners%20Guide%20to%20Crop%20Insurance.pdf (describing the predictable but financially destabilizing risks faced by farmers, including weather variability and price volatility).

211 *See id.*

212 7 U.S.C. §§ 1501–1524 (2023); *see generally* U.S. DEP'T OF AGRIC.: RISK MGMT. AGENCY, https://www.rma.usda.gov/ (last visited Mar. 25, 2025).

213 §§ 1501–1524; *see generally Reinsurance Agreements*, U.S. DEP'T OF AGRIC.: RISK MGMT. AGENCY, https://www.rma.usda.gov/policy-procedure/reinsurance-agreements (last visited Dec. 8, 2025).

subsidies, underwriting standards, and reinsurance guarantees.[214] This partnership enables coverage in markets where repeated losses would otherwise drive insurers out entirely.[215]

The logic is simple but profound: by socializing some portion of risk, the government transforms an otherwise fragile insurance market into a planning infrastructure. Reinsurance enables insurers to remain solvent during both good and bad years. In turn, it allows farmers to plant, borrow, and invest—despite the inevitability of loss.[216]

While the mechanics differ, the governing principle echoes that of the Price-Anderson Act: when private insurers face structural barriers to covering an essential but unstable sector, public intervention can stabilize the system without entirely displacing market forces.[217] In this way, agricultural reinsurance offers a model not for catastrophic tail risk, but for routine, distributed uncertainty—a feature that may prove equally relevant in the broader landscape of artificial intelligence governance.[218]

3. Medicine: Malpractice and the Affordable Care Act

Healthcare occupies a middle ground between farming and nuclear energy. Most medical procedures are routine and predictable, but some cases—like malpractice suits or catastrophic diagnoses—create financial volatility that private insurers struggle to absorb.[219] Reinsurance helps insurers manage this volatility by spreading high-dollar losses across larger risk pools.[220]

The Affordable Care Act (ACA) created a federal reinsurance program under 42 U.S.C. § 18061 to stabilize the individual insurance market by reimbursing insurers for high-cost enrollees.[221] The logic was

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214 §§ 1501–1524; *see generally Reinsurance Agreements, supra* note 210.

215 §§ 1501–1524; *see generally Reinsurance Agreements, supra* note 210.

216 U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-501, CROP INSURANCE: OPPORTUNITIES EXIST TO IMPROVE PROGRAM DELIVERY AND REDUCE COSTS (Jul. 26, 2017), https://www.gao.gov/products/gao-17-501 (noting that federal support enables insurers to remain solvent during high-loss years, sustaining market participation and producer confidence).

217 *See* Price-Anderson Nuclear Industries Indemnity Act, 42 U.S.C. § 2210 (2023).

218 *See* NUCLEAR REGUL. COMM'N, *supra* note 194, at 2–5 (explaining how the Act enabled nuclear development by addressing insurance market failure through layered public-private risk sharing); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 213; Bommasani et al., *supra* note 12, at 129–152 (noting that the risks posed by AI range from localized failures to systemic harms across domains).

219 U.S. GEN. ACCT. OFF., GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 15 (2003), https://www.gao.gov/assets/gao-03-702.pdf.

220 *Id.* at 15–27.

221 42 U.S.C. § 18061(b)(4); *Transitional Reinsurance Program*, CTR. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/marketplace/health-plans-issuers/premium-stabilization-programs/transitional-reinsurance-program (last visited Aug. 16, 2025).

straightforward: If insurers were shielded from the full cost of the sickest patients; they would be less likely to avoid them. But the policy's implementation raised critical legal and administrative questions.[222] In *Health Republic Insurance Co. v. United States*, the Court of Federal Claims held that the federal government had to honor unpaid risk corridor reimbursements promised under the ACA.[223] These rulings underscore a key principle: federal reinsurance mechanisms are only credible if they provide predictable and legally enforceable backstops.

Other litigation raised questions about the structure and scope of federal reinsurance. In *New Mexico Health Connections v. United States HHS*, insurers challenged methodologies used in the ACA's risk adjustment program.[224] In *Ohio v. United States*, states objected to federal mandates regulating their insurance markets.[225] Together, these cases reveal a fundamental tension: federal reinsurance can stabilize private markets, but only if designed with clear statutory authority, sustainable funding, and procedural transparency.

Reinsurance also plays a vital role in the context of medical malpractice. Catastrophic claims—birth injuries, surgical errors, wrongful death—can bankrupt smaller insurers. Reinsurance absorbs the tail-end risk, but debates continue over the role of public authority.[226] In *Gerhart v. United States HHS*, the court considered the appropriate level of federal oversight for state-run reinsurance pools.[227] Meanwhile, regulations such as 45 C.F.R. § 800.204[228] establish solvency standards for multi-state plans, while cases like *Conway v. United States*[229] and *Richardson v. United States*[230] explore the boundaries of public liability under the Federal Tort Claims Act (FTCA).[231] These precedents collectively demonstrate that medical reinsurance is not just an economic device—it is a governance institution, one that requires careful calibration between federal oversight and private-sector innovation.

What does this mean for artificial intelligence? A well-designed AI reinsurance program should combine elements from all three sectors. Like agriculture, AI failures may be frequent but non-catastrophic, demanding risk

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222 § 18061(b)(4); *Transitional Reinsurance Program*, *supra* note 218.

223 Health Republic Ins. Co. v. United States, 129 Fed. Cl. 757, 772–73 (2017); Blue Cross & Blue Shield of N.C. v. United States, 131 Fed. Cl. 457 (2017).

224 N.M. Health Connections v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1138, 1142–45 (10th Cir. 2019).

225 Ohio v. United States, 154 F. Supp. 3d 621, 627–30 (S.D. Ohio 2016).

226 U.S. GEN. ACCT. OFF., *supra* note 216, at 15.

227 *Health Republic Ins. Co.*, 129 Fed. Cl. at 772–73.

228 45 C.F.R. § 800.204.

229 Conway v. United States, 647 F.3d 228, 232–34 (5th Cir. 2011).

230 Richardson v. United States, 841 F.2d 993, 996–98 (9th Cir. 1988).

231 28 U.S.C. §§ 1346(b), 2671–2680.

pooling and routine coverage.[232] Like medicine, AI liability will likely require complex legal frameworks that blend federal standards with state-level discretion.[233] And like nuclear energy, the most extreme AI scenarios—model misalignment, emergent capabilities, or catastrophic misuse—will require a federal backstop to absorb losses too large for the private sector to bear.[234]

The challenge is to design a reinsurance architecture that is financially viable, legally robust, and institutionally flexible—one that encourages innovation while preparing for worst-case scenarios.[235] The ACA and medical malpractice models demonstrate that this is possible, but they also caution us: without reliable funding mechanisms, enforceable guarantees, and clarity regarding risk attribution, even well-intentioned reinsurance schemes can collapse under the weight of litigation and political pressure.[236] The AI context raises these stakes exponentially.[237]

4. Finance: Building an architecture of confidence

The financial sector offers a final instructive model. Like artificial intelligence, modern finance is an extremely complex,[238] opaque,[239] and inter-reliant system.[240] Therefore, failures in one corner can spread throughout the entire network.[241] The 2008 financial crisis revealed how risk pooling, opacity in modeling, and underpriced tail events could produce catastrophic outcomes.[242] In response, the federal government reaffirmed its role as insurer of last resort—not only for depositors through the FDIC,[243] but for broader financial institutions through mechanisms like the Troubled

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232 *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 213.

233 *See* Health Republic Ins. Co. v. United States, 129 Fed. Cl. 757, 772–73 (2017); § 800.204; *Conway*, 647 F.3d at 232–34.

234 *See* 42 U.S.C. § 2210 (2023)); NUCLEAR REG. COMM'N, *supra* note 194, at 1–5 (describing the Act's federal indemnity for nuclear incidents); *see generally* Bommasani et al., *supra* note 12 (identifying catastrophic AI risks including misalignment and emergent behavior).

235 *See* Blue Cross & Blue Shield of N.C. v. United States, 131 Fed. Cl. 125, 130 (2017); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 213.

236 *See Blue Cross & Blue Shield of N.C.*, 131 Fed. Cl. at 130; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 213.

237 *See* Bommasani et al., *supra* note 12, at 5, 114; Weil, *supra* note 203.

238 *See The Final Report of the Financial Crisis Inquiry Commission: Hearing Before the H. Comm. on Fin. Servs.,* 112th Cong. 1–3 (2011).

239 *See id.* at 32–34.

240 *See id*. at 36–38.

241 *See generally id.*

242 *See generally id.*

243 Federal Deposit Insurance Act, 12 U.S.C. § 1821 (2023).

Asset Relief Program (TARP)[244] and the Federal Reserve's emergency lending facilities.[245]

Of relevance here is the FDIC's structure. Created by the Banking Act of 1933,[246] the FDIC insures deposits up to a statutory limit,[247] funded by risk-adjusted premiums paid by participating banks.[248] It is not merely a backstop—it disciplines behavior by pricing risk, evaluating bank health,[249] and exercising oversight through examinations and resolution planning.[250] This model—government-backed, industry-funded, and actuarially managed—offers a robust example of *confidence infrastructure*: a system designed not only to prevent failure but also to preserve trust and continuity under stress.[251]

Artificial intelligence, especially frontier model deployment, raises similar concerns.[252] Where finance concentrates economic risk, AI may concentrate informational and decision-making risk.[253] Just as financial regulators struggle to map systemic exposure to risk across counterparties and synthetic instruments, AI regulators may face similar challenges in how foundation models propagate risk across sectors and jurisdictions.[254]

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244 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended at 12 U.S.C. § 5201 (2008)).

245 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106482, FEDERAL RESERVE LENDING PROGRAMS: STATUS OF MONITORING AND MAIN STREET LENDING PROGRAM 1 (2023), https://www.gao.gov/assets/d24106482.pdf; FIN. STAB. OVERSIGHT COUNCIL, 2023 ANNUAL REPORT (2023), https://home.treasury.gov/system/files/261/FSOC2023AnnualReport.pdf; BD. OF GOVS., FED. RSRV. SYS., 110TH ANNUAL REPORT (2023), https://www.federalreserve.gov/publications/files/2023-annual-report.pdf.

246 *See* 12 U.S.C. §§ 1811–1835a (2023).

247 § 1821(a)(1)(A).

248 12 U.S.C. § 1817(b) (2023); FED. DEPOSIT INS. CORP., A BRIEF HISTORY OF DEPOSIT INSURANCE (1998), https://www.fdic.gov/resources/publications/brief-history-of-deposit-insurance/book/brief-history-deposit-insurance.pdf; *see* EDWARD GARNETT ET AL., FED. DEPOSIT INS. CORP., REP. NO. 2020-01, A HISTORY OF RISK-BASED PREMIUMS AT THE FDIC 3 (2020), https://www.fdic.gov/analysis/cfr/staff-studies/2020-01.pdf; *see also* FED. DEPOSIT INS. CORP., RESOLUTION PLANS REQUIRED FOR INSURED DEPOSITORY INSTITUTIONS WITH $100 BILLION OR MORE IN TOTAL ASSETS; INFORMATIONAL FILINGS REQUIRED FOR INSURED DEPOSITORY INSTITUTIONS WITH AT LEAST $50 BILLION BUT LESS THAN $100 BILLION IN TOTAL ASSETS (2024), https://www.fdic.gov/board/final-rule-12-cfr-36010-federal-register-notice.pdf [hereinafter RESOLUTION PLANS].

249 *See* Adam J. Levitin, *Safe Banking: Finance and Democracy*, 83 U. CHI. L. REV. 357, 378–92 (2016); *see also* GARNETT ET AL., *supra* note 245, at 3.

250 RESOLUTION PLANS, *supra* note 245.

251 Jonathan R. Macey & Geoffrey P. Miller, *Deposit Insurance, the Implicit Regulatory Contract, and the Mismatch in the Term Structure of Banks' Assets and Liabilities*, 12 YALE J. ON REGUL. 1, 17–22 (1995); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-242, DEPOSIT INSURANCE: ASSESSMENT OF REGULATORS' USE OF PROMPT CORRECTIVE ACTION PROVISIONS 52 (2007), https://www.gao.gov/assets/gao-07-242.pdf.

252 Risto Uuk et al., *A Taxonomy of Systemic Risks from General-Purpose AI* 2–4 (arXiv, Working Paper No. 2412.07780, 2024), https://arxiv.org/pdf/2412.07780.

253 Markus Anderljung et al., *Frontier AI Regulation: Managing Emerging Risks to Public Safety* 3–4 (arXiv, Working Paper No. 2307.03718, 2023), https://arxiv.org/pdf/2307.03718.

254 Bommasani et al., *supra* note 12, at 131.

A federal AI reinsurance program could borrow from the FDIC in three ways: (1) it could require participation for high-risk developers,[255] (2) it could calibrate premiums to safety and transparency practices,[256] and (3) it could accumulate institutional expertise for managing model failure and risk spillover.[257] The goal, as in finance, is not merely to respond to crises after they happen—but to create an ecosystem where trust, accountability, and solvency are maintained in advance.

C. Applying the Reinsurance Model to Artificial Intelligence

Again, reinsurance is not a new idea. It is the reason farmers can survive bad harvests, nuclear reactors operate with congressional blessing, hospitals stay solvent despite making million-dollar mistakes, and how banks can extend enough credit for a complex economy.

However, every industry requires a distinct model. Agriculture deals with frequent but constant losses, droughts, floods, and pests. Government-backed crop insurance helps farmers stay afloat. In nuclear energy, the stakes are higher. Accidents are rare but catastrophic. Liability caps and multi-layered insurance pools keep the industry from collapsing under the weight of a worst-case scenario. Medicine sits in between, balancing routine liability with the risk of catastrophe, so insurers rely on a mix of private coverage, government programs, and legal protections. Finance offers another practical example: deposit insurance and capital rules are designed to stop minor problems from turning into full-blown crises.

Artificial intelligence may require a model that incorporates elements from all the above. Routine failures, such as bias in training data or misclassification, will occur frequently.[258] Liability will be diffuse and complex, often implicating both developers and end-users.[259] And frontier models, the most powerful, unpredictable, and general-purpose systems, may someday trigger tail events so extreme that they exceed the capacity of both courts and insurers to manage on their own.[260]

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255 12 U.S.C. § 1815(a) (2023); *see* Levitin, *supra* note 246, at 384–85.

256 12 U.S.C. § 1817(b)(1)(C) (2023).

257 RESOLUTION PLANS, *supra* note 245.

258 *See generally* NAT'L. INST. OF STANDARDS & TECH., U.S. DEP'T OF COM., NIST AI-600-1, ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK: GENERATIVE ARTIFICIAL INTELLIGENCE PROFILE 13–16 (2023).

259 *See* Weil, *supra* note 203.

260 *See id.* at 5–10; Bommasani et al., *supra* note 12, at 131.

The insurance industry is already grappling with these issues.[261] Lloyd's of London has warned that AI blurs traditional liability categories.[262] Who pays when a self-driving car is involved in a crash? Not the driver, who was not driving.[263] Not the AI itself, which is not a legal entity—at least not yet. That leaves software suppliers and manufacturers.[264] As AI expands into fields like diagnostics, investment advising, and legal decision-making, similar gaps emerge.[265] Professional liability doctrines stretch. Product liability doctrines creak.[266] The result is a system with mounting uncertainty and no consistent framework for allocating AI-driven risk.[267]

In the near term, insurers will adapt through contractual instruments: indemnification clauses, performance warranties, and bespoke policies.[268] But these tools only work in known contexts.[269] For frontier AI systems—models that exhibit emergent capabilities or potentially unaligned goals[270]—insurers lack both historical data and pricing mechanisms.[271] They face not actuarial risk, but epistemic uncertainty.[272] What they need is a structure that can price the unpriceable, at least in the aggregate.

V. THE PROPOSAL: A TRIPARTITE FRAMEWORK FOR AI RISK TRANSFER

This Note proposes a three-tiered liability and insurance framework to govern the deployment of frontier artificial intelligence (AI) systems. Drawing on historical precedents in nuclear energy, agriculture, medicine, and finance, the framework adapts longstanding risk governance tools to the

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261 *See generally* LLOYD'S, GENERATIVE AI: TRANSFORMING THE CYBER LANDSCAPE (2024), https://assets.lloyds.com/media/439566f8-e042-4f98-83e5-b430d358f297/Lloyds_Futureset_GenAI_Transforming_the_cyber_landscape.pdf.

262 *See generally* LLOYD'S, TAKING CONTROL: ARTIFICIAL INTELLIGENCE AND INSURANCE (Emerging Risk Report 2019: Technology), https://assets.lloyds.com/assets/pdf-taking-control-aireport-2019-final/1/pdf-taking-control-aireport-2019-final.PDF.

263 *See* Erin Mindoro Ezra et al., *Life on Autopilot: Self-Driving Cars Raise Liability and Insurance Questions and Uncertainties*, REUTERS (Aug. 30, 2024), https://www.reuters.com/legal/legalindustry/life-autopilot-self-driving-cars-raise-liability-insurance-questions-2024-08-30/.

264 *See* LLOYD'S, *supra* note 259, at 36.

265 *See id.* at 39; *see also Artificial Intelligence*, LLOYD'S MKT. ASS'N (Feb. 12, 2024), https://www.lmalloyds.com/LMA/Hot_topics/LMA/Hot_Topics/Artificial_Intelligence.aspx.

266 *See* Morgan Sansone, *Motor Vehicle Accidents Caused by Autonomous Vehicles: Exploring AI Liability in the Tort System*, ARIZ. ST. L.J. (Mar. 23, 2023), https://arizonastatelawjournal.org/2023/03/23/motor-vehicle-accidents-caused-by-autonomous-vehicles-exploring-ai-liability-in-the-tort-system/ (discussing the need for adaptable liability frameworks as AI technologies evolve).

267 *See* Vanessa Houlder, *Insurers Will Not Find It Easy to Share the Road with Self-Driving Cars*, FIN. TIMES (Jan. 15, 2025), https://www.ft.com/content/53aa25aa-ca33-4a67-b315-8802376639ef.

268 *See* Lior, *supra* note 13, at 495–97; *see also* Smith et al., *supra* note 99, at 30–32.

269 *See* Lior, *supra* note 13, at 495–97.

270 *See* Bommasani et al., *supra* note 12, at 131.

271 *See* Lior, *supra* note 13, at 495–97.

272 *See id.* at 460–62; MODELS, *supra* note 31, at 11–14.

unique epistemic and systemic risks posed by powerful, general-purpose models. Each tier is designed to match a specific layer of the AI risk landscape—from frequent, distributed failures to catastrophic, existential-scale events.

A. The First Tier: Mandatory Private Insurance for Frontier AI Developers

The first tier requires AI developers working with frontier models—defined by capability, scale, or compute thresholds, such as those outlined in California's SB 1047[273]—to carry private liability insurance as a condition of deployment. This mirrors the compulsory coverage required for activities that pose high but uncertain risks, such as medical malpractice or hazardous industrial operations. Private insurers would evaluate developers' safety practices, model transparency, and security controls as underwriting criteria. This would embed a market-based accountability mechanism into the AI development pipeline, encouraging best practices before systems are released.

This design aligns with recent work in AI governance that emphasizes the need for verifiable claims about the properties and development conditions of AI systems. As Brundage et al. argue, high-level ethical commitments are insufficient to guarantee safety, security, or fairness. What is needed are concrete institutional mechanisms—such as third-party auditing, red teaming, and structured transparency obligations—that enable both developers and external stakeholders to substantiate system-level claims. This proposal incorporates those exact mechanisms, not as stand-alone governance tools, but as underwriting criteria within a liability insurance ecosystem. In doing so, it transforms verification from a normative aspiration into a financial necessity. Insurers, acting as market-aligned evaluators, assume the functional role of third-party auditors, embedding accountability into the deployment pipeline without requiring ex ante regulatory mandates or universal compliance regimes.[274]

B. The Second Tier: An Industry-Funded Risk Pool for Non-Catastrophic Losses

The second tier introduces an industry-funded pool to stabilize the market for routine but unpredictable losses. Like Pool Re (the United

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273 *See* S.B. 1047, 2023–2024 Leg., Reg. Sess. (Cal. 2024) (enrolled Sep. 3, 2024), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB1047.

274 *See* Miles Brundage et al., *Toward Trustworthy AI Development: Mechanisms for Supporting Verifiable Claims* 8–15 (arXiv, Working Paper No. 2004.07213, 2020), https://arxiv.org/pdf/2004.07213.

Kingdom's terrorism reinsurance facility)[275] or the U.S. Federal Crop Insurance Program,[276] this structure would absorb correlated claims that exceed individual insurers' expectations but fall short of systemic collapse. AI-specific examples might include widespread business interruptions due to model hallucination, reputational harm resulting from biased outputs, or supply chain losses resulting from embedded AI decision failures.[277] The pooled layer would promote actuarial learning, reduce premium volatility, and enable insurers to remain solvent even during concentrated risk events.

Realizing this tier, however, depends on shared epistemic infrastructure—a common baseline for identifying, recording, and evaluating model-related harms—provided by the first tier. As Brundage et al. emphasize, effective AI governance requires not only ethical aspirations but also mechanisms that make claims about safety, fairness, and reliability verifiable.[278] Their proposed tools—such as the structured sharing of AI incidents, the use of red teaming and bias bounties, and the standardization of audit documentation—correspond to the first tier and serve as the backbone for reporting and verification in the pooled risk layer. Reinsurers and industry pools alike would benefit from these mechanisms as inputs to collective underwriting, enabling a dynamic yet accountable learning system across firms.[279]

C. The Third Tier: A Federal Reinsurance Backstop for Catastrophic Loss

Finally, the third tier provides a federal reinsurance backstop to cover the tail-end of AI risk—rare but devastating events where private capacity vanishes. Analogous to the *Price-Anderson Act* in nuclear energy[280] and the *Terrorism Risk Insurance Act (TRIA)*,[281] this federal layer would activate in the event of system-wide alignment failures, adversarial deployment of foundation models, or self-propagating harm from autonomous agents.[282] By absorbing these extreme losses, the federal government would stabilize the private insurance market, maintain developer accountability, and ensure compensability even in black-swan scenarios.[283]

Precedents underscore the feasibility of a federally backed reinsurance framework with minimal public expenditure. Under the Price-Anderson

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275 *Government-Guaranteed Insurance Against Systemic Risk (Pool Re)*, OFF. FOR BUDGET RESP. (Jul. 2022), https://obr.uk/box/government-guaranteed-insurance-against-systemic-risk-pool-re.

276 S*ee generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 213.

277 *See* Bommasani et al., *supra* note 12, at 131.

278 Brundage et al., *supra* note 271, at 8–15.

279 *See id.* at 19–21.

280 S*ee* 42 U.S.C. § 2210 (2023).

281 *See* 15 U.S.C. §§ 6701 note, 6721–6728 (2023).

282 *See* Bommasani et al., *supra* note 12.

283 *See generally* Abraham & Schwarcz, *supra* note 129.

Nuclear Industries Indemnity Act, established in 1957 to manage liability for nuclear incidents, the nuclear insurance pools have paid approximately $151 million in claims over several decades, averaging about $2.5 million per year. Notably, these costs have been borne by the private sector, requiring $*0 in* federal payouts. Similarly, the Terrorism Risk Insurance Act (TRIA), enacted in 2002 to stabilize the insurance market post-9/11, has facilitated a public-private partnership in which the federal government shares losses from certified acts of terrorism exceeding certain thresholds. As of now, the federal government has not made significant payouts under TRIA, as no terrorist events triggering the coverage thresholds have occurred since its enactment. These models demonstrate that well-structured reinsurance programs can provide substantial coverage for catastrophic risks while imposing negligible recurring costs on the federal government.[284]

D. Legal Structure and Administrative Feasibility

The reinsurance program could be housed within an existing federal risk authority—such as the Federal Insurance Office[285] or a new AI Risk Management Agency—with oversight mechanisms tied to the National Institute of Standards and Technology (NIST).[286] Actuarial models, underwriting standards, and eligibility criteria would evolve, using data collected from the first and second tiers to refine pricing and exclusions.[287] The program would function not as a regulatory substitute but as an institutional complement—a flexible layer of governance that prices the unpriceable, disciplines risky behavior, and maps the emerging landscape of AI hazards.[288]

CONCLUSION

This structure is not just a financial patch. It is a governance tool. Insurance governs by exclusion: what cannot be underwritten often cannot be deployed. It governs by pricing: riskier systems carry higher premiums or

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284 *See* ENERGY CONTRACTORS PRICE-ANDERSON GRP., RESPONSE TO U.S. DEP'T OF ENERGY NOTICE OF INQUIRY ON PREPARATION OF REPORT TO CONGRESS ON THE PRICE-ANDERSON ACT (Oct. 25, 2021), https://www.energy.gov/sites/default/files/2021-12/7.%20Brown%20for%20Energy%20Contractors%20P-A%20Group.pdf; FED. INS. OFF., U.S. DEP'T OF THE TREAS., REPORT ON THE EFFECTIVENESS OF THE TERRORISM RISK INSURANCE PROGRAM (Mar. 19, 2024), https://home.treasury.gov/system/files/311/2024ProgramEffectivenessReportFINAL6.28.2024508.pdf.

285 S*ee* 31 U.S.C. § 313 (2023); FED. INS. OFF., U.S. DEP'T OF THE TREAS., ANNUAL REPORT ON THE INSURANCE INDUSTRY 1–2 (Sep. 2023), https://home.treasury.gov/system/files/311/FIO%20Annual%20Report%202023%209292023.pdf.

286 S*ee* Exec. Order No. 14,110, 88 Fed. Reg. 75193, 75197 (Oct. 30, 2023); S.B. 1047, 2023–2024 Leg., Reg. Sess. § 22605(a)(2) (Cal. 2024).

287 *See* Lior, *supra* note 13, at 496–97; *see generally* Abraham & Schwarcz, *supra* note 129.

288 *See* Lior, *supra* note 13, at 496–97; *see generally* Abraham & Schwarcz, *supra* note 129.

require mitigation plans. And it governs by information: the underwriting process demands documentation, scenario analysis, and disclosure. In a field as complex as AI, these pressures are not secondary—they are foundational.

Moreover, even a narrow federal reinsurance program—one that applies only to the most powerful and dangerous systems—can have systemic effects. Insurers gain experience modeling high-risk AI. Developers seeking insurability adopt standardized practices. Information generated for frontier underwriting bleeds into mid-tier applications. What begins as a subsidy becomes an epistemic infrastructure: a map of the risk landscape that other actors, such as regulators, researchers, and litigants, can use.

Reinsurance will not solve AI governance. But it may be the only way to start managing catastrophic risk at scale—through incentives, not dictates; through pricing, not prohibition; through institutional design, not moral panic.

This Note argued that a federally backed reinsurance program for high-risk AI systems offers a scalable and institutionally coherent solution to the alignment problem's policy dimension. It would not only stabilize insurance markets but also generate risk intelligence, align incentives, and support an ecosystem of oversight. If designed carefully—modeled on historical precedents and tailored to the architecture of modern AI development—it could become a foundational element of AI governance in the twenty-first century.

History does not reward passivity. It rewards preparation. As our society navigates this new technological ocean, we would do well to remember that the compass and the sextant did not guide ships across treacherous waters alone. It was the contract, the risk pool, and the promise of shared responsibility that made the voyage possible. Reinsurance may now do for AI what it once did for empires and industries: transform uncertainty into direction and risk into strategy.