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Fostering All Voices

Damien Wilson[*]

"A lawyer without books would be like a workman without tools."
--Thomas Jefferson[1]

In our ever-evolving world, where technology reigns and the age of pen and paper is behind us, law review journals remain foundational to the shifting legal landscape. It is not solely the journal that holds value, but the individuals who contribute their insights. The *New England Law Review* provides law students a platform to articulate their interests and explore nuanced legal topics.

Law students are vital to the legal field, injecting fresh perspectives and diverse experiences into critical discussions. As the future guardians of justice, *New England Law Review* members recognize the importance of diversity in all its forms. Each individual's unique journey and background enrich the collective dialogue and encourage new ideas and discussions that challenge established norms.

Every contributor brings a distinct viewpoint to navigating the complexities of the law, enhancing debates, and fostering innovation. This rich tapestry of perspectives not only broadens understanding of legal principles, but also cultivates an environment where every voice is acknowledged and valued. Embracing a wide array of opinions ensures that the legal profession remains vibrant, dynamic, and relevant.

Regardless of how much the world evolves and how information is delivered, the *New England Law Review* remains committed to fostering and promoting all voices, regardless of their background. These authors'

[*] Executive Online Editor, *New England Law Review*, Vol. 59.

[1] *From Thomas Jefferson to Thomas Turpin, 5 February 1769*, FOUNDERS ONLINE, https://perma.cc/KT7N-3D4X (last visited Mar. 20, 2025).

dedication and hard work are pivotal; without their contributions, lawyers would be deprived of the essential tools necessary to instigate meaningful change in society. We hope the enclosed pieces will enlighten, spark new discussions, and further illuminate the legal community.

How Much Is Your Life Worth?: How the Government Struggles Between Settlement Collections Under the False Claims Act and the Principle of a Person's Livelihood

*Alexa Hirt**

INTRODUCTION

One sentence approved by the FDA in 1995 sparked the mass production, marketing, prescribing, and consumption of a schedule II narcotic.[1] One sentence led to the deaths of 727,000 individuals.[2] One sentence caused the first wave of the opioid epidemic.[3] That one sentence is: "delayed absorption as provided by OxyContin tablets, is *believed* to reduce the abuse liability of a drug."[4] Relying on the word "believed," the producers of OxyContin, Purdue Pharmaceuticals ("Purdue"), and Purdue's directors, the Sackler family, made OxyContin one of the most prescribed Schedule II narcotics in the country for pain

* J.D. Candidate, New England Law | Boston (2024). I would like to give a special thank you to my husband Anthony, who has provided me with constant love and support in everything I do, my parents for raising me to be the person I am today, and the *New England Law Review* Staff for their commitment and hard work. This piece is dedicated to anyone who has ever been or continues to be impacted by the opioid epidemic–please know your lives and voices matter.

[1] *See* Caitlin Esch, *How One Sentence Helped Set Off the Opioid Crisis*, MARKETPLACE, https://perma.cc/F7G5-8ZFB (last updated Oct. 21, 2020).

[2] *Understanding the Opioid Overdose Epidemic*, CDC (Nov. 1, 2024), perma.cc/3V4Y-B3G7.

[3] Esch, *supra* note 1.

[4] Esch, *supra* note 1 (emphasis added); *See Opioid Crisis: The Letter that Started it All*, BBC (June 2, 2017), perma.cc/3526-LTS9 ("The original letter, titled, 'Addiction Rare in Patients Treated with Narcotics.'").

management.[5] OxyContin's success depended not on the caliber of the drug, but rather on the marketing and promotion Purdue and the Sacklers deployed to consumers and physicians.[6] Purdue developed a lucrative bonus structure to rigorously push OxyContin through sales representatives and falsely presented the addictiveness and usage to physicians to increase prescriptions.[7] As part of its marketing, Purdue provided patients with coupons for a free seven-to-thirty day supply of OxyContin.[8] Thirty-four thousand of these coupons were distributed in 2001 alone.[9]

Purdue's relentless marketing scheme added fuel to the ongoing opioid epidemic, as death rates increased significantly from 1999 to 2001.[10] Since 1996, nearly one million individuals over the age of twelve abused OxyContin at least once in their lifetime, either un-prescribed or for a non-prescribed purpose.[11] Despite increasing addiction and death, the word "believed" survived; the FDA took no action for *five* years, until it finally removed and amended OxyContin's warning label in 2001 to include its true risks.[12]

In 2019 the Department of Justice ("DOJ") entered into a settlement agreement with Purdue for over $8 billion in criminal and civil resolutions, which was used partly towards resolving False Claims Act allegations.[13] Specifically, Purdue violated the Anti-Kickback Statute and engaged in illegal Off-Label Marketing practices during its production and distribution of OxyContin.[14] As part of the DOJ settlement agreement, Purdue entered into a bankruptcy deal with the government, which included a provision shielding the Sackler family from liability in civil and criminal

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[5] Esch, *supra* note 1.

[6] Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 225 (2009).

[7] *Id.* at 222.

[8] *Id.*

[9] *Id.*

[10] *See Understanding the Opioid Overdose Epidemic*, *supra* note 2.

[11] *OxyContin Fast Facts*, NAT'L DRUG INTEL. CNT., perma.cc/V4MT-JGLP (last visited May 5, 2025).

[12] *See* U.S. GEN. ACCT. OFF., OXYCONTIN ABUSE AND DIVERSION AND EFFORTS TO ADDRESS THE PROBLEM, REP. NO. 04-110, at 9 (2003).

[13] *An Update on the False Claims Act and the Opioid Crisis*, GOLDBERG KOHN (Aug. 31, 2022), perma.cc/C4SY-5UH2.

[14] *Id.*

wrongdoing.[15] The settlement agreement faced backlash, ultimately working its way through the judicial system to the Supreme Court which decided on its legality in June 2024.[16] The Supreme Court held that the Sackler family was not entitled to hide behind the protections of the non-consensual third party release, thereby extinguishing the settlement agreement and reopening negotiations.[17]

This Note will discuss the grave missteps when using non-consensual third-party releases, specifically those used under the False Claims Act ("FCA"), the Anti-Kickback Statute ("AKS"), and Off-Label Marketing ("OLM") claims; further, these releases should not be allowed to protect wrongdoers from personal liability. This Note will also suggest that Congress better protect the public's healthcare interest by enforcing the FCA, and more specifically, the AKS and OLM, and having better deterrence mechanisms. Part I outlines the healthcare industry, physicians and prescribing practices, and the acts and statutes that surround the landscape. Part II discusses how millions have succumbed to addiction or suffered because of the fraudulent actions and inadequate protections currently in place and provides an overview of the Supreme Court's recent ruling in Harrington v. Purdue Pharma L.P. Part III comments on how the Supreme Court's ruling in Harrington v. Purdue Pharma L.P. finally holds Purdue and the Sacklers accountable to opioid victims and argues that a non-consensual third-party release would have frustrated the victims' fundamental rights. Part IV discusses the statutes and acts the DOJ and Congress have enacted against members of the healthcare industry, arguing they do not go far enough to punish or deter corporations from wrongdoing. Additionally, Part IV encourages the removal of non-consensual third-party releases not only from the Sackler family, but in all cases of irreparable harm or death, and emphasizes increasing deterrence to better protect the public interest and place a higher emphasis on human livelihood over a settlement payout.

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[15] Abbie VanSickle & Jan Hoffman, *What to Know About the Purdue Pharma Case Before the Supreme Court*, N.Y. TIMES (Dec. 4, 2023), perma.cc/YCN3-KRTH.

[16] *Id.*

[17] Brian Mann et al., *Supreme Court Overturns Opioid Settlement with Purdue Pharma that Shielded Sacklers*, NPR (June 29, 2024, 7:00 AM EST), perma.cc/DLE4-DRKY.

I. Background

A. *The Healthcare Industry*

To understand the significance of the FCA, AKS, or OLM in protecting individuals taking prescription medications, it is necessary to examine the lifecycle of a drug from production to consumers.[18] Initially, after discovery, a drug starts to undergo preclinical research, clinical research, and FDA review.[19]

Undergoing FDA review requires a company to send the Center for Drug Evaluation and Research ("CDER") the evidence of clinical testing they individually performed and demonstrate the safety and effectiveness of the drug for the proclaimed intended uses.[20] In conjunction with reviewing this information, the CDER will also review the company's proposed labeling to ensure accuracy.[21] The CDER's research consists of drug quality, effectiveness, and the necessary safety provisions required to provide an FDA stamp of approval.[22]

FDA approval signifies the drug is effective in providing its benefits and that these benefits outweigh the risks the public faces.[23] The pillars of the framework encompassing FDA approval include: "[a]nalysis of the target condition and available treatments . . . [a]ssessment of benefits and risks from clinical data . . . [and] [s]trategies for managing risks."[24] Following FDA approval, a drug is readily available on the market and can be prescribed by physicians.[25] Often, prescribing a certain drug is initially encouraged by a

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[18] *See* Veronica Salib, *Understanding the Pharmaceutical Drug Development Life Cycle*, TECHTARGET (Apr. 27, 2023), https://perma.cc/V2JE-CMHH.

[19] *See generally id.* ("The life cycle of pharmaceutical products is a long, drawn-out process, sometimes taking decades.").

[20] *Development & Approval Process | Drugs*, FDA, https://perma.cc/QTY2-P7KB (last visited May 5, 2025).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See generally* Eloise McLennan, *Inside the Colourful History of Pharma Advertising*, DEEP DIVE PHARMAPHORUM, perma.cc/VSZ4-9SAJ (last visited May 5, 2025) ("[T]oday's advertising efforts are a far cry from the outlandish claims made in the early days of the pharma industry.").

pharmaceutical representative ("pharmaceutical rep").[26]

1. Physician-Pharmaceutical Rep Evolution

A pharmaceutical rep works for the pharmaceutical company to promote, distribute, and sell a drug to physicians, who then prescribe the product to patients.[27] The mannerisms and methods by which pharmaceutical reps sell drugs to physicians have evolved over the years, shifting from a focus on the caliber of the drug to a focus not only on the product but also on the attributes of the physicians themselves.[28] Today, pharmaceutical reps interact with physicians on a daily basis, discussing products, dosage, prescription rates, and competitors.[29]

In 2012, the pharmaceutical industry spent nearly $90 billion on physician-pharmaceutical relationships, accounting for about 60% of the industry's marketing costs.[30] Generally, physicians report having a positive attitude toward pharmaceutical reps.[31] Whether they are providing educational information, pricing details, or specific attributes of their drugs, pharmaceutical reps can be a beneficial resource to physicians.[32]

However, while these relationships can be beneficial, they can lead to temptation and abuse from both the physician and the pharmaceutical rep through kickbacks.[33] A kickback is an illegal gift or monetary compensation provided to a physician by a pharmaceutical rep in exchange for adding the rep's drug to their list of prescriptions.[34] Although the FCA and AKS outlaws kickbacks, pharmaceutical companies still provide about $2 billion per year

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[26] Adriane Fugh-Berman & Shahram Ahari, *Following the Script: How Drug Reps Make Friends and Influence Doctors*, 4 PLoS Med. 621, 621 (2007). *See generally* McLennan, *supra* note 25 ("Pharma companies employ a variety of tactics to increase brand awareness and promote their products.").

[27] Fugh-Berman & Ahari, *supra* note 26.

[28] *See generally* Fugh-Berman & Ahari, *supra* note 26 ("In 2000, pharmaceutical companies spent more than 15.7 billion dollars on promoting prescription drugs in the United States.").

[29] Freek Fickwieler et al., *Interactions Between Physicians and the Pharmaceutical Industry Generally and Sales Representatives Specifically and their Association with Physicians' Attitudes and Prescribing Habits: A Systematic Review* 1 (BMJ OPEN 2017).

[30] *Id.*

[31] *Id.* at 3.

[32] *Id.*

[33] *See id.* at 10.

[34] *See id.*

in illegal gifts to physicians.[35]

The temptation between both the pharmaceutical rep and the physician can often blur the line between what is considered an appropriate relationship, and what becomes classified as a kickback. For example, a positive pharmaceutical rep and physician relationship can be seen where a rep provides a physician with educational pamphlets containing details on the contents of the drug and its intended purposes.[36] However, this line becomes blurred when rather than providing a physician with a free educational pamphlet, the pharmaceutical rep takes the physician out to a lavish four-course meal.[37]

Studies have shown that accepting any gifts from pharmaceutical reps, even notepads and pens, are likely to influence a physician's behavior when prescribing drugs.[38] Not only does this increase the likelihood of prescribing the drug advertised by the pharmaceutical rep, but it lowers the physicians' defenses when being told about the drug and its potential side effects, especially when these interactions occur multiple times.[39] For example, in 2011, Pfizer reported 80% of its 200,000 doctors were included in payments received reports because they were taken out for more than one dinner.[40]

B. *Acts, Statutes, Protections, and Enforcements in the Healthcare Industry*

Many cases in the healthcare industry, whether brought publicly or through whistleblowers, claim violations of the False Claims Act.[41] The FCA was enacted in 1863 by President Abraham Lincoln for the protection of Union soldiers who were defrauded in the purchasing of substandard goods and supplies during the Civil War.[42] Since its inception, lawmakers have reformed and drastically expanded the FCA to provide protections against kickbacks, whistleblower suits, and general fraudulent action against

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[35] Aaron Mitchell & Deborah Korenstein, *Drug Companies' Payments and Gifts Affect Physicians' Prescribing. It's Time to Turn off the Spigot*, STATNEWS (Dec. 4, 2020), perma.cc/T6E9-UTRZ.

[36] *See* Fickwieler et al., *supra* note 29.

[37] *See* Charles Ornstein, *Doctors Dine on Drug Companies' Dime*, PROPUBLICA (Sept. 7, 2011, 4:32 PM EDT), perma.cc/4BRY-Y7U9.

[38] Steven R. Brown, *Physicians Should Refuse Pharmaceutical Industry Gifts*, 104 AM. FAM. PHYSICIAN 348, 348 (2021).

[39] *See id.*

[40] Ornstein, *supra* note 37.

[41] *Assessing the Impact of The False Claims Act on Healthcare Delivery*, NBER (June 30, 2022), perma.cc/Y952-S7BZ.

[42] Civ. Div., *The False Claims Act*, U.S. DEPT. OF JUST., perma.cc/M7MK-F6P5 (last updated Jan. 15, 2025).

individuals.[43]

1. The Anti-Kickback Statute

The primary purpose of the Anti-Kickback Statute, under the False Claims Act, is to prohibit those in the healthcare industry from either "paying or receiving cash, or anything of value in exchange for referrals."[44] Referrals are classified as products or services to which the federal government contributes.[45] A key factor in successfully bringing an AKS claim is demonstrating the "intent to induce referrals," meaning the exchange must willfully make a physician refer one product or service over another by reason of receiving a kickback.[46] Violating the AKS is punishable by up to ten years in prison and fines of $100,000 per violation.[47]

These referrals, which result in the physician receiving remuneration, are prohibited by this statute.[48] To best understand the significance of this portion of the AKS, it is important to understand Congress's intent behind the word "remuneration."[49] Remuneration, as defined in the AKS, casts a broad net on what is "of value" when considering if one received a kickback.[50] Examples of kickbacks can include, but are not limited to "discounts, cash, goods, services, copayments [and] waivers."[51]

In 2002, Amgen, Inc. ("Amgen") produced a drug called Aranesp.[52] Following clinical trials, the FDA approved the drug for the purpose of treating chronic kidney diseases in patients with or without dialysis.[53] The company, however, marketed the drug to physicians as safe to prescribe

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[43] Benjamin McCoy et al., *Blowing the Whistle: A Primer on the False Claims Act*, THE TEMPLE 10-Q, perma.cc/9BEA-V8MR (last visited May 5, 2025).

[44] *Anti-Kickback Statute and Stark Law*, CONSTANTINE CANNON, perma.cc/J9KG-29XJ (last visited May 5, 2025).

[45] *Id.*

[46] *Id.*

[47] David W.S. Lieberman, *AKS – Anti Kickback Statute Explained*, WHISTLEBLOWER L. COLLABORATIVE (Jan. 9, 2024), perma.cc/Q9ZQ-HH3T.

[48] Benjamin Joseph, *Defining 'Referral' in the Anti-Kickback Statute*, ABA (Apr. 22, 2022), https://perma.cc/BXH7-VF3R.

[49] *See* Lieberman, *supra* note 47.

[50] Lieberman, *supra* note 47.

[51] Lieberman, *supra* note 47.

[52] Off. Pub. Affs., *Amgen Inc. Pleads Guilty to Federal Charge in Brooklyn, N.Y.; Pays $762 Million to Resolve Criminal Liability and False Claims Act Allegations*, U.S. DEP'T OF JUST. (Dec. 19, 2012), perma.cc/63MZ-P7G4 [hereinafter Off. Pub. Affs., *Amgen Inc. Pleads*].

[53] *Aranesp Darbepoetin Alfa*, AMGEN, perma.cc/9BHQ-RNLK (last visited May 5, 2025).

Aranesp at a dosage differing from what the FDA approved.[54] To entice physicians to prescribe Aranesp at the desired dosage, Amgen made "charitable contributions" to a charity of the physician's choice.[55] After five years, the DOJ charged Amgen with violating the AKS and OLM for their illegal remunerations to physicians.[56] Ultimately, Amgen settled with the government for over $760 million.[57]

This violation was more than a mere technicality—the false advertisement of appropriate dosages impacted many patients' lives.[58] Patients trusted their doctors, only to be prescribed amounts which led to profits of roughly $300 per administration for Amgen and the physician to split.[59] This remuneration, among the thousand others enforced by Amgen, turned the small corporation into a Fortune 500 company, "all the while they were told that it was good for the patient."[60]

2. Off-Label Marketing

OLM is "[t]he use of pharmaceuticals for unapproved symptoms or conditions, in unapproved patient groups, or in unapproved dosages."[61] Put simply, when a pharmaceutical company attempts to promote a drug for a purpose not listed on the laundry list of FDA-approved purposes, the company engages in OLM.[62]

Under the False Claims Act, by promoting a drug for an "off-label" purpose, pharmaceutical companies cause pharmacies to claim payment from the government for fraudulent goods or services.[63] To be illegal, the off-label conduct must be prompted and promoted by the pharmaceutical

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[54] David Pittman, *Amgen Agrees to Pay $762 Million in Aranesp Case*, MEDPAGE TODAY (Dec. 18, 2012), perma.cc/8HGP-X8BW.

[55] *See* Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52.

[56] Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52.

[57] Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52.

[58] *See* Peter Whoriskey, *Anemia Drug Made Billions, But at What Cost?*, WASH. POST (July 19, 2012), perma.cc/URH2-YCWE.

[59] *Id.*

[60] *Id.*

[61] *Off-Label Pharmaceutical Marketing: How to Recognize and Report It*, CTRS. FOR MEDICARE & MEDICAID SERVS., perma.cc/X8A5-M4PY (last visited May 5, 2025).

[62] Nick Repucci, *An Examination of Off-Label Marketing and Promotion: Settlements, Issues, and Trends*, 13 J. OF HEALTH CARE COMPLIANCE 15, 16 (2011).

[63] *Id.*

company.[64] A physician has every right to prescribe a drug, whether for an on-or-off-label purpose, so long as it is supported by its best medical evidence.[65] However, when a physician is misled to believe a drug treats a condition by the pharmaceutical company, and then prescribes the drug for this reason, illegal OLM has occurred.[66] OLM is the most dangerous form of pharmaceutical fraud,[67] as it harms thousands of people and costs publicly funded healthcare programs billions of dollars.[68] This form of pharmaceutical fraud is punishable by $11,000 per false claim and up to triple damages.[69] OLM can present itself in many ways, such as "provid[ing] physicians with free samples of a drug, giv[ing] sales representatives financial incentives for off-label drugs, [or] giv[ing] doctors kickbacks for prescriptions."[70]

For example, in 2010, Allergan, Inc. ("Allergan") produced a drug called Botox for the intended purpose of plastic surgery.[71] Following clinical trials, the FDA approved the drug to treat eyelid spasms, excessive sweating, bladder disorders, migraines, and skin wrinkles.[72] Allergan, however, marketed and influenced providers to increase prescriptions of Botox for off-label purposes such as "headaches and spasms in children with cerebral palsy."[73] In persuading physicians to prescribe Botox for these purposes, Allergan provided illegal kickbacks to these physicians in the form of business advisory services, dinners, and payments.[74] In the end, Allergan was fined $600 million under the False Claims Act for engaging in

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[64] Deborah Mazer & Gregory D. Curfman, *FDA Sanctions Off-Label Drug Promotion*, HEALTH AFFS. (July 19, 2016), https://perma.cc/7ERZ-LGNB.

[65] *Id.*

[66] *Id.*

[67] *Off-Label Pharmaceutical Marketing and Unlawful Drug Promotion*, WHISTLEBLOWERS INT'L., perma.cc/CA4W-LBS7 (last visited May 5, 2025).

[68] *Id.*

[69] *False Claims Act*, UNIV. OF OKLA. OFF. OF COMPLIANCE, https://perma.cc/5CTY-9HRX-(last visited May 5, 2025).

[70] *Pharmaceutical Fraud: What is Off-Label Marketing*, CASE IQ, perma.cc/7MUG-VSNA (last visited May 5, 2025) [hereinafter *Pharmaceutical Fraud*].

[71] *Id.*

[72] Hannah Nichols, *Botox: Cosmetic and Medical Uses*, MEDICALNEWSTODAY, perma.cc/MJ2T-ZQFG (last updated Jan. 11, 2024).

[73] *Pharmaceutical Fraud*, *supra* note 70.

[74] Eric Sagonowsky, *Feds Say Astellas, Amgen Will Fork Over $125M to Settle Charity Kickback Probes*, FIERCE PHARMA (Apr. 25, 2019), https://perma.cc/HWS8-C2G3.

pharmaceutical fraud by OLM.[75]

Parents teach their children the dangers of taking medications which are not prescribed to them.[76] However, a new fear has emerged in today's landscape—what happens when the physician is the one providing medication for an unintended purpose?[77] One family sued Allergan and received a verdict of $6.75 million because their child was prescribed Botox to treat his cerebral palsy, a non-FDA approved purpose.[78] Their child suffered from seizures and breathing troubles, both of which are now chronic symptoms that did not occur before the prescription of Botox.[79] Much like the Amgen example,[80] the family in the Allergan case trusted their physicians to provide proper care to their children.[81]

3. Non-Consensual Third-Party Releases

Non-consensual third party releases fall under Chapter 11 bankruptcy, as they relate to the law and how they play into settlement agreements.[82] A non-consensual third party release provides protections to a non-debtor third party from liability or claims which do not relate to the bankruptcy agreement.[83] In the context of Purdue, the Sackler family argued they should receive a non-consensual third party release because their personal distribution of money in the settlement agreement should not be related to them accepting liability.[84]

There is much controversy over providing individuals with releases, including one of the most important issues—whether the bankruptcy court

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[75] *Pharmaceutical Fraud*, *supra* note 70.

[76] *E.g.,* GenXVids (@genxvids), TIKTOK (Oct. 16, 2023), perma.cc/8AZL-Q43T.

[77] *Compare id.*, *with Botox Treatment for Cerebral Palsy*, THE BECKER L. FIRM (Jan. 25, 2015), perma.cc/Y2L3-L84K (demonstrating that fear is no longer just about a child taking something unprescribed, but rather when the doctor is prescribing the medication for the wrong reason).

[78] *Botox Treatment for Cerebral Palsy*, *supra* note 77.

[79] *Botox Treatment for Cerebral Palsy*, *supra* note 77.

[80] Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52.

[81] *See Botox Treatment for Cerebral Palsy*, *supra* note 77.

[82] *See Nonconsensual Third-Party Releases: What They Are and Why You Should Care*, BRADLEY (Mar. 14, 2022), https://perma.cc/L2Z5-9FCG [hereinafter *Nonconsensual Third-Party Releases*].

[83] *Id.*

[84] *See* Off. Pub. Affs., *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, U.S. DEP'T OF JUST. (Oct. 21, 2020), perma.cc/NP8J-BW92 [hereinafter *Global Resolution*].

has the right to provide relief to a non-debtor in this way.[85] Providing relief not only protects a non-debtor on current claims, but also on all future claims in matters relating to the specific settlement agreement.[86] Essentially, if the non-consensual third party release was accepted, the Sackler family could never be charged in any cases relating to OxyContin or opioids in the present or future.[87]

In 1982, Johns-Manville Corporation sought to reorganize under Chapter 11 Bankruptcy following a suit for potential liability relating to their asbestos products.[88] John-Manville Corporations attempted to allege lack of knowledge of the situation entirely, or its level of severity.[89] However, for nearly a decade in the late 1970s and 1980s, thousands of individuals suffered from serious illness and death over asbestos exposure from the Johns-Manville products.[90] Perhaps even worse, not only did the executives of Johns-Manville know about this exposure, they actively worked to destroy and suppress evidence and information pertaining to the dangers of asbestos exposure in their products.[91] Ultimately, a non-consensual third party release was granted in the Chapter 11 Bankruptcy agreement to ensure the passage of the settlement agreement.[92]

The Johns-Manville example is one of many that continues to this day, as Purdue and the Sackler family have sought to obtain similar relief as the Johns-Manville executives.[93] The Second Circuit held that the Bankruptcy Court has the right to impose this release on the Sackler family based on

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[85] *Nonconsensual Third-Party Releases*, *supra* note 82.

[86] *Nonconsensual Third-Party Releases*, *supra* note 82.

[87] Edward Neiger & Jennifer Christian, *Despite Its Plan Objections, UST Also Won in Purdue Ch. 11*, LAW360 (June 12, 2023, 5:22 PM EDT), perma.cc/WQ5A-A2KM ("Going forward, nonconsensual third-party releases will only be approved in extremely rare circumstances and there is no room for abuse."); *see Global Resolution*, *supra* note 84.

[88] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 90 (2nd Cir. 1988).

[89] Tara Strand, *Johns-Manville History of Asbestos Use*, MESOTHELIOMA, perma.cc/J5DQ-LUEN (last modified Mar. 27, 2025).

[90] *MacArthur Co.*, 837 F.2d at 90.

[91] Mary Ellen Ellis, *Johns Manville and Asbestos*, MESOTHELIOMA, perma.cc/MHH3-SDXK (last updated June 23, 2024).

[92] *MacArthur Co.*, 837 F.2d at 90–91.

[93] *See Nonconsensual Third-Party Releases*, *supra* note 82.

seven factors.[94] Applying these factors, the Second Circuit determined the Sackler family was entitled to the release because there was sufficient interest between the two parties, the claims appeared "intertwined" between the Sackler's and Purdue, and this release would not be "essential" to the plan.[95]

The Supreme Court was asked to decide whether to grant approval of this non-consensual third party release, considering factors as provided by case law such as: "(1) fairness, (2) necessity, and (3) specific factual findings."[96] At stake in this determination was whether the Sackler family would agree to a settlement without this provision, and the social costs if the family was not held liable as individuals.[97]

II. Factors Considered in Valuing a Person's Life

The over-prescribing of schedule II narcotics in the 1990's—including OxyContin—caused the first wave of the opioid epidemic, which saw 645,000 opioid-related deaths between 1999 and 2021.[98] From its launch in 1996 to 2002, OxyContin prescriptions increased from 670,000 per year to over six million.[99] Purdue seized an opportunity presented to them all from one sentence and sparked the first wave of the opioid epidemic.[100] More specifically, they waged a marketing plan which relied upon misleading physicians and patients into thinking OxyContin was not addictive.[101]

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[94] Jacob Mezei, *Second Circuit Picks A Side In Non-Consensual Third-Party Releases In Highly Anticipated Purdue Opinion*, JD SUPRA (June 12, 2023), perma.cc/NZ3F-4G4Y ("(1) whether there is an identity of interests between the debtors and related third parties; (2) whether claims against the debtor and third party are intertwined; (3) the scope of the releases; (4) whether the releases are essential to the reorganization's success; (5) the third party's contribution of 'substantial assets' to the reorganization; (6) whether the impacted claimholder class(es) 'overwhelmingly' support the releases; and (7) whether the plan provides fair payment of the enjoined claims.").

[95] *Id.*

[96] *Nonconsensual Third-Party Releases*, *supra* note 82.

[97] Amy Howe, *Court Conflicted Over Purdue Pharma Bankruptcy Plan That Shields Sacklers from Liability*, SCOTUSBLOG (Dec. 4, 2023, 4:42 PM), perma.cc/FK6P-KFM7.

[98] *Understanding the Opioid Overdose Epidemic*, *supra* note 2.

[99] Joanna Walters, *America's Opioid Crisis: How Prescription Drugs Sparked a National Trauma*, THE GUARDIAN (Oct. 25, 2017, 1:00 AM EDT), perma.cc/2ZZF-25GD.

[100] Esch, *supra* note 1; *Understanding the Opioid Overdose Epidemic*, *supra* note 2; *see Global Resolution*, *supra* note 84 (demonstrating how Purdue Pharma evolved from the mislabeled label into multiple counts under the False Claims Act).

[101] Esch, *supra* note 1.

In December 2023, Purdue and the Sackler family appeared before the Supreme Court regarding a settlement agreement, ironically over one provision: whether the Sackler Family, as a "nonconsensual third party," should be shielded from personal liability and unable to be tried in future opioid-related cases.[102] The Supreme Court was asked to weigh both sides of the scale and determine which side is of more value: on one side, $6 billion to be distributed to local and state governments to repair some of the aftermath following the Oxycontin epidemic; on the other side, holding Purdue Pharma and the Sackler family personally liable and not allowing them to be shielded from personal liability.[103]

In 2019, Purdue Pharma filed for Chapter 11 bankruptcy pertaining to deceptive marketing practices with OxyContin and the opioid epidemic which followed.[104] Within this bankruptcy filing, the Sackler family proposed to contribute $4.3 billion from their protected funds in exchange for a release from personal liability relating to any current or future pending opioid related suits, among other conditions.[105] The bankruptcy court confirmed this plan, and later the district court reversed.[106]

The case was then brought to the Second Circuit, which reversed the district court decision and revived Purdue Pharma's reorganization plan, thereby providing the Sackler family with a release from personal liability in all current and future opioid related claims.[107] This ruling led the case to the Supreme Court, which questioned whether a non-consensual third party release can be attached to the reorganization and bankruptcy settlement.[108]

The Supreme Court reversed the Second Circuit's ruling, finding that non-consensual third party releases are not authorized under the Bankruptcy Code.[109] The Court made its finding by looking to the provisions of the Bankruptcy Code and the spirit behind it.[110] In looking at the express language of 11 U.S.C. § 1123, which outlines permissible exculpatory provisions in Chapter 11 reorganization plans, the Supreme Court narrowed its application to "[the debtor's] rights and responsibilities, and its

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[102] VanSickle & Hoffman, *supra* note 15.

[103] VanSickle & Hoffman, *supra* note 15.

[104] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 204 (2024).

[105] *Id.* at 211–12.

[106] *Id.* at 213.

[107] *Id.* at 213–14.

[108] *Id.* at 215.

[109] *Id.* at 227.

[110] *Harrington*, 603 U.S. at 214.

relationship with the creditors."[111] Because the Sacklers were not the "debtors," as defined in the Bankruptcy Code, the permissible exculpatory provisions in § 1123—which do not require victim consent—could not apply to protect them from individual liability.[112] An opposite interpretation would provide bankruptcy courts with "limitless" powers and "endow it with the power to extinguish without their consent claims held by non-debtors—here, the opioid victims—against non-debtors (here, the Sacklers)."[113]

The Supreme Court further based its decision on the spirit behind the Bankruptcy Code.[114] Broadly looking at the context in which the Bankruptcy Code is applied, the Court opined that a debtor in bankruptcy "places virtually all its assets on the table for its creditors."[115] Also, a release generally operates to benefit debtors against creditors regarding financial reimbursement.[116] Specifically, discharge of debt, such as a non-consensual third party release, does not apply to cases such as fraud, malicious injury, or misrepresentation.[117]

In reviewing the details of Purdue's proposed reorganization, the Court emphasized that the Sackler's failed to make their full assets available to the non-debtors, the victims of the opioid epidemic, which debtors are required to do to obtain a release from liability.[118] Therefore, previous rulings granting the proposed reorganization are outside of the bankruptcy code's scope, and no text is found to support this kind of relief.[119]

The key interpretation from the Supreme Court's ruling calls out the very issue of the Sackler family attempting to hide behind a non-consensual third party release: "The Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything

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[111] *Id.* at 215–16 ("discharge not only releases or 'void[s] an past or future judgement on the' discharged debt; it also 'operat[es] as an injunction . . . prohibit[ing] creditors from attempting to collect or to recover the debt.").

[112] *Id.* at 219–20.

[113] *Id.* at 220.

[114] *See id.* at 215–22.

[115] *Id.* at 209.

[116] *See Harrington*, 603 U.S. at 211–12.

[117] *Id.* at 211–12.

[118] *Id.* at 212.

[119] *Id.* at 223–27.

close to all their assets on the table."[120]

While the Supreme Court ruled to deny the reorganization plan, the dissent addressed some concerns relating to public policy.[121] The dissenting justices opined, "opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation."[122] These justices warned that the decision of the Supreme Court could lead to far too much harm, as Congress for years has failed to address the issues that have been brought forward through Purdue Pharma.[123]

First, the dissent addressed the impact on mass tort claims, stating that the ruling in this case would likely make it harder on the bankruptcy court in the future to manage cases of abuse and ensure fair recovery for the victims.[124] The dissent then moved on to address the bankruptcy code itself, stating that the majority essentially rewrote the text of the code to disallow the Sacklers' plan.[125] Moving from the bankruptcy code, the dissent talked about creating competition amongst the opioid victims and was concerned that denying the reorganization plan would make opioid victims race to file claims before others—essentially depleting the Sacklers' funds prior to everyone getting their fair share.[126] The dissent opined that regardless of the outcome of the case, every victim would continue to be impacted, which further allowed room for future victims to meet the same fate from other pharmaceutical companies.[127]

ANALYSIS

Throughout history, the False Claims Act, specifically the Anti-Kickback Statute and Off-Label Marketing suits, has provided the Government billions of dollars in settlement agreements with healthcare corporations that violated the law and placed human lives on the line.[128] However, these settlement agreements often include provisions shielding the individuals

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[120] *Id.* at 223.

[121] *Id.* at 220–21.

[122] *Harrington*, 603 U.S. at 227.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 228.

[126] *Id.* at 227–29.

[127] *Id.*

[128] Off. of Pub. Affs., *False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022*, U.S. DEP'T OF JUST. (Feb. 7, 2023), perma.cc/5T4Z-QBJS.

behind the corporations from personal liability, or just neglect to address these individuals entirely.[129] By allowing these provisions and continuing to ignore these individuals, the government is forced to give inadequate punishment, allowing the cycle to continue in exposing the American public to harm.[130]

III. The Supreme Court Ruling Empowers the Opioid Victims in Looking Forward Following Denial of Purdue Pharma's Bankruptcy Reorganization Plan

In its ruling, the Supreme Court opined, "'fewer than 20 percent of eligible creditors participated [in receiving eligible funds]' . . . and 'thousands of opioid victims voted against the plan . . . plead[ing] with the bankruptcy court not to wipe out their claims against the Sacklers without their consent.'"[131] Not only would the release have excluded thousands of victims from litigation altogether, but any redress would pale in comparison to the injuries caused by the Sacklers and OxyContin.[132] Such a result fails to uphold a long-standing policy of the judicial system: to provide complete redress to victims of mass torts.[133] By outlawing non-consensual releases between non-debtors in bankruptcy proceedings, the Supreme Court affirmed the victims' rights to seek redress through the judiciary, empowering them—rather than shielding corporate directors—to exercise a fundamental and guaranteed right.[134]

A. *The Majority Opinion Protects the Victims' Constitutional Rights, while the Dissent Purports to Shield Corporate Directors*

Consensual and non-consensual third-party releases aim to provide

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[129] VanSickle & Hoffman, *supra* note 15.

[130] Nina Totenberg, *It's Money v. Principle in Supreme Court Opioid Case*, NPR (Dec. 4, 2023, 5:21 PM EDT), perma.cc/AD2X-P3MX ("On the principle side are a relatively small number of victims, and the U.S. Trustee, who oversees bankruptcies. They object to the deal because it shields the Sacklers from any further lawsuits, and leaves the family with more than half their wealth, even though they were intimately involved in the aggressive and false marketing of OxyContin.").

[131] Abbie VanSickle, *Supreme Court Jeopardizes Opioid Deal, Rejecting Protections for Sacklers*, N.Y. TIMES (June 27, 2024), perma.cc/JE23-2BPZ.

[132] *See id.*

[133] *See* Desmond v. PNGI Charles Town Gaming, LLC, 630 F.3d 351, 357 (4th Cir. 2011) (quoting *Black's Law Dictionary* 445 (9th ed. 2009)).

[134] *See* Delew v. Wagner, 143 F.3d 1219, 1221 (9th Cir. 1998) ("The Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution.").

"fair, equitable and efficient distribution of value to . . . mass tort claimants."[135] In the case of Purdue Pharma, however, a release could never achieve a fair and equitable distribution. A mere $48,000, an amount reserved for only "the most dire cases," cannot redress the $2.5 trillion lost in the economy, the half of one million individuals who lost their lives, and the grieving families of those impacted by Purdue's and the Sackler's villainous advertising.[136] The proposed $48,000 is laughable when compared to the cost of opioid treatment, which can average up to $18,000 per session.[137] The amount of any release clearly would only account for "a sliver of the damage inflicted on the American people"; indeed, "[t]he millions of families that have suffered as the result of addiction, ailments and death can never be repaid for their losses."[138]

The U.S. Trustee, who oversees bankruptcy claims under the Department of Justice, and several state governments objected to the allowance of Purdue's reorganization plan.[139] The reason for objection was twofold: on one hand, opening the Sacklers to liability could provide for more favorable settlements to individual victims, and on a broader scale, allowing the Sacklers to go through with this plan could "provide a roadmap to [corporations and wealthy individuals] to misuse the bankruptcy system in future cases."[140]

While the rapid-fire spread of OxyContin alone did not elicit an opioid epidemic, competitors still reap the benefits of the Sacklers' and Purdue's introduction of the uber-addictive drug.[141] Rather than taking Purdue's current situation as a warning sign, competitors take advantage of the opioid market's newfound vulnerability, lining their pockets with billions of dollars while the American public continues to suffer.[142] To illustrate, in 2023, of a total of 107,543 overdose deaths, an estimated 81,083 were caused by

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[135] Robert W. Dremluk, *Purdue Pharma: Will the Sacklers Get Sacked? Supreme Court Stays Effectiveness of Plan of Reorganization*, N.Y. L.J. (Sept. 17, 2023), perma.cc/863M-PE8W.

[136] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 212 (2024).

[137] *See Average Cost of Drug Rehab*, NCDAS, perma.cc/U88Q-MR88 (last visited May 5, 2025).

[138] Erik Larson, *Purdue Pharma Caused $2.15 Trillion in U.S. Economic Damage, States Say*, BLOOMBERG, perma.cc/8CY3-BNN6 (last updated Aug. 18, 2020).

[139] Phil Helsel et al., *Families of Those Lost in Opioid Crisis 'Devastated' by Supreme Court's Decision to Reject Purdue Settlement*, NBC NEWS (June 27, 2024, 10:14 PM EDT), perma.cc/5JA3-C8FG.

[140] *Harrington*, 603 U.S. at 206.

[141] *See* Lauren Kirschman, *Prescription Opioid Companies Increased Marketing After Purdue Pharma Lawsuit, UW Study Shows*, UW NEWS (Oct. 9, 2023), perma.cc/QA3Y-GVB6.

[142] *Id.*

opioids.[143] This means 75% of overdose deaths in this past year were caused by opioids.

Justice Kavanaugh's dissent in *Harrington* seems to ignore these statistics, instead writing that the current opioid victims and future mass tort victims will suffer from the majority's abolition of non-consensual third party releases.[144] Under the guise that Purdue's and Sacklers' pre-existing indemnification agreement will "deplete the company's assets," Kavanaugh examines Purdue's reorganization plan in a vacuum, ignoring the fraudulent transfers, marketing, and overall culpability of the Sacklers and Purdue.[145] In doing so, whether intentionally or not, the dissent empowers drug peddlers and future corporate directors to engage in deceptive actions on the eve of bankruptcy.[146] Rather than chastise the Sacklers' last-second and fraudulent attempt to strain Purdue of any meaningful assets, the dissent puts the Sacklers' interests before the interests of the victims of their pill-pushing agenda.[147] To understand how the dissent purports to protect corporate directors who engage in mass torts, we can examine what the Sackler family would have gotten away with had the Court ruled differently.

As emphasized numerous times throughout the majority opinion, the Sacklers have never taken accountability for their actions. In fact, "the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits."[148] Shielding the Sackler family from liability through a non-consensual third party release would have, once again, thwarted the FCA, AKS, and OLM's punishment provisions.[149] On national television, the Sackler family advertised OxyContin to have less than a 1% rate of addiction in consumers, which on its face was not untrue.[150] However, this number only accounted for those who were *hospitalized and in a controlled setting*, not for those watching TV in the comfort of their own home, attributing this drug to aiding their pain management.[151] Studies have

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[143] Helsel et al., *supra* note 139.

[144] *Harrington*, 603 U.S. at 227–78 (Kavanaugh, J., dissenting).

[145] *Id.* at 236.

[146] *See id.* at 227–78.

[147] *See id.*

[148] *Id.* at 206 (majority opinion).

[149] S. Rep. No. 99-345 (1986); H.R. Public Law 99-634 (1986); *The Federal Anti-Kickback Statute*, BERGER MONTAGUE (Mar. 24, 2017), perma.cc/6GSF-GVGT [hereinafter *The Federal Anti-Kickback Statute*].

[150] Joseph Detrano, *The Four-Sentence Letter Behind the Rise of Oxycontin,* RUTGERS CTR. OF ALCOHOL & SUBSTANCE USE STUD. perma.cc/RFA6-ZJRL (last visited May 5, 2025).

[151] *Id.* (emphasis added).

shown the actual rate of addiction while in a hospitalized setting was as low as 1%, which it jumped to over 80% in an uncontrolled setting.[152] This rate of addiction can still be seen today, as 2.4% of 12th graders in the year 2020 still abused OxyContin for recreational purposes.[153]

OxyContin is designed to interact with nerve cell receptors, meaning the longer the drug is consumed, the more a person will need to consume to feel the same effect as the first time it was taken.[154] As recent CDC studies have shown, the dependency on an opioid only takes a few days to commence, whereas a typical OxyContin prescription prescribes taking a tablet every 12 hours for a minimum of one week.[155]

The Sackler family determined that when marketing, distributing, and producing OxyContin, the opioid should be advertised not only as filling the "gap between pain and pleasure," but also as a necessity.[156] Beyond this, the Sackler family pushed OxyContin to physicians across the nation through pharmaceutical reps who were grossly compensated and inaccurately educated about the drug.[157] While the dramatization of Netflix's show *Painkiller* can make the Sackler family's knowledge seem inaccurate, when comparing what the executives were aware of, at a base level the Sacklers were aware of the dangers they sparked.[158]

All the while, the Sacklers lined their pockets with profits earned from false depictions of OxyContin's addictiveness and prescribed uses.[159] OxyContin first appeared on the market in 1996; in the first decade that followed, the drug "generated more than $35 billion in revenue for

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[152] *Id.*

[153] *Oxycodone Addiction and Abuse,* ADDICTION CTR., perma.cc/X5Y7-D479 (last updated Feb. 13, 2025).

[154] *OxyContin Rehab and Addiction,* MICHAEL'S HOUSE, perma.cc/6MUP-A8TP (last visited May 5, 2025).

[155] *Id.*

[156] Matilde Moro, *Pain or Pleasure? The Opioid Crisis in US*, LAMPOON (Feb. 15, 2024), perma.cc/T5CN-KV7A; *See generally Painkiller* (Netflix television broadcast Aug. 10, 2023).

[157] Moro, *supra* note 156.

[158] Jim Edwards, *Amgen and the Supremes: Did the CEO Know About a Kickback Scheme?*, CBS NEWS, perma.cc/LQ55-3H83 (last updated Sept. 27, 2011, 2:31 PM EDT) [hereinafter Edwards, *Amgen and the Supremes*]; Jef Feeley, *Allergan Sued Over Botox Off-Label Marketing*, CT INSIDER (Sept. 8. 2010), https://perma.cc/WU8T-G94D; Moro, *supra* note 156. *See generally Painkiller* (Netflix television broadcast Aug. 10, 2023).

[159] Jeremy Hill & Jef Feeley, *'I Don't Know': Sackler Claims Ignorance of Oxy Death Toll*, BLOOMBERG, perma.cc/7CQM-XG3M (last updated Aug. 18, 2021, 3:23 PM EDT).

Purdue."[160] However, when asked how many people died from the misuse and consumption of OxyContin, the Sackler family's response was: "I don't know."[161] To answer for their ignorance, from 1999 to 2019 nearly half a million people died from overdoses related to opioids. The common denominator was OxyContin: while released in 1996, it did not face stricter restraints on the market until 2001, too late to prevent the wildfire of addiction.[162] In addition to the death toll Oxycontin contributed to, the rate of addiction, misuse, and severe consequences people still suffer from to this day has substantially increased.[163]

While an $8 billion settlement may seem like a generous contribution to the impact OxyContin caused on the surface, this number sadly "only accounts for a sliver of the damage inflicted on the American people."[164] The beginning of each episode of Netflix's limited series *Painkiller* begins with a true story of a person and family impacted by OxyContin.[165] The final episode, "What's in a Name?," begins with the parents of 28-year-old Riley who passed from a prescribed OxyContin overdose.[166] The introduction reads:

> He became addicted to OxyContin from a back injury. He tried his hardest to get right and get straight again and get sober and he just couldn't do it. He was a wonderful kid, he had the biggest heart you ever saw and our lives will never be the same." He finishes by whispering "I can't" and cries, before being comforted by his wife.[167]

When pressure mounted on Purdue for its role in the opioid epidemic in 2007, the Sacklers entered "crisis-mode" and sought any avenue to protect

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[160] Amy Howe, *Justices Put Purdue Pharma Bankruptcy Plan on Hold*, SCOTUSBLOG (Aug. 10, 2023, 4:41 PM), perma.cc/EH2Z-7SLL [hereinafter *Justices Put Purdue Pharma Bankruptcy Plan on Hold*].

[161] Hill & Feeley, *supra* note 159.

[162] Hill & Feeley, *supra* note 159.

[163] Detrano, *supra* note 150.

[164] Larson, *supra* note 138.

[165] Morgan Cormack, *Painkiller Opening Credits Explained: Who Reads Out the Disclaimers in the Netflix Series,* RADIOTIMES (Aug. 10, 2023, 3:47 PM), perma.cc/253P-XJXD (listing the readers for episodes one through six as Christopher Trejo, Cassie, Patrick, Elizabeth, Matthew Stavron, and Riley respectively).

[166] *Id.*

[167] *Id.*

their riches earned through American death and addiction.[168] The Sacklers engaged in a "milking" program, causing Purdue to distribute 70% of its annual revenue to the family.[169] The Sacklers then funneled their voluminous distributions into offshore holding companies and trusts, effectively shielding billions of dollars from lawsuits against Purdue.[170] The Sacklers' plan "drain[ed] Purdue's total assets by 75% and [left] it in 'a significantly weakened financial' state."[171] Such transfers are patently fraudulent, and represent another item in the long list of the Sacklers evading the law and accountability for their role in the opioid epidemic.

The view advanced by the dissent purports to protect the victims' best interests, but rather, protects only the Sacklers, who seek to settle for pennies-on-the-dollar. In protecting the Sacklers, the dissent would inherently authorize future corporate directors to engage in similar deceptive practices. In considering Purdue's role in the opioid epidemic and its widespread and lasting impact, ask yourself this question: is enough, enough?[172]

B. *Disallowing Non-Consensual Third-Party Releases Promotes the Judiciary's Policy of Providing Full Redress to Tort Victims*

In the present case, the non-consensual third-party release would frustrate the victims' fundamental right to access the judicial system and the right to receive damages which fully redress their injuries. "The Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution."[173] The right has further been protected

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[168] *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 211 (2024); Money Watch, *How Purdue Pharma's Sackler Family Hid Their Cash*, CBS NEWS, perma.cc/6RHS-HCCK (last updated Aug. 30, 2019, 1:17 PM EDT).

[169] *Harrington*, 603 U.S. at 211.

[170] Money Watch, *supra* note 168.

[171] *Harrington*, 603 U.S. at 211 (quoting Purdue Pharma, L.P. v. City of Grande Prairie, 69 F.4th 45 (2d Cir. 2023)).

[172] *See* Paul Pelletier & Beth Macy, *After 'Startling Rebuke' of Multibillion-Dollar Bankruptcy Settlement, 'These Sacklers Don't Deserve a Pass – Again'*, STATNEWS (Dec. 19, 2021), https://perma.cc/QE5E-ZMPQ ("So many of these tragedies may be traced back to one family, one company, one product and one lie: members of the Sackler family, owners of Purdue Pharma, the company that makes and promoted OxyContin as a virtually non-addictive opioid painkiller.").

[173] Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir. 1998).

by Congress, which created a cause of action for its deprivation.[174] The non-consensual third-party release supported by Purdue and the dissent would "extinguish claims of opioid victims without their consent."[175]

By extinguishing the claims of victims without affording them the opportunity to refuse, the dissent treats protection of the Sacklers' blood-money as paramount to the fundamental rights of those injured. The non-consensual third-party settlement agreement would preclude victims from seeking full redress of their injuries, let alone the right to adjudicate their claims against the Sacklers.

In the context of non-consensual third-party settlement agreements, damages typically default to compensatory damages, which are "damages sufficient in amount to indemnify the injured person for the loss suffered."[176] This right to seek damages can be waived only through an "intentional relinquishment or abandonment of a known right."[177] The non-consensual release hardly permits opioid victims to relinquish their right to pursue compensation for their injuries; rather, the Sacklers intend to relinquish this right on their behalf. This result does not comport with the traditional rights provided to tort victims and rightfully was denied by the majority opinion in *Harrington*.

IV. The Current Landscape Surrounding Punishments Under the FCA, AKS, and OLM Does Not Go Far Enough and Congress Needs to Take Substantial Action to Preserve the Integrity of Deterring Abusive Practices.

Looking at the evolution of the False Claims Act over the years, specifically the AKS and OLM, while the acts themselves have been

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[174] *See, e.g.*, Christopher v. Harbury, 536 U.S. 403 (2002) (claiming deprivation of right to access court under § 1983).

[175] *Harrington*, 603 U.S. at 213.

[176] Desmond v. PNGI Charles Town Gaming, L.L.C., 630 F.3d 351, 357 (4th Cir. 2011) (quoting *Black's Law Dictionary* 445 (9th ed. 2009)).

[177] U.S. v. Olano, 507 U.S. 725, 733 (1993); U.S. v. Young, 872 F.3d 742, 747 (5th Cir. 2017); U.S. v. Philip Morris Inc., 300 F. Supp. 2d 61, 68 (D.C. Cir. 2004).

amended, the enforcement and penalties for violations have not been.[178]

A. *Prior Enforcement of the AKS and OLM Do Not Go Far Enough*

At first glance, the volume of settlements under the FCA suggests successful enforcement.[179] However, when placing these settlements alongside the risk to human life caused by the wrongdoers, the settlements offer minuscule punishment.[180] To demonstrate how miniscule this is, for Purdue alone, the $8 Billion is not only split between over 100,000 individuals, but also across numerous state and local governments impacted by their wrongful actions. However, for a company that was estimated to be worth about $35 billion by 2017, this monetary amount, without revocation of their license to continue production of other drugs or products, and without jailtime from the calculative executives in charge, how much harm would any of this cause?[181] Perhaps, most importantly, if the government is going to merely impose fines on corporations, the individuals responsible for the corporation should not be shielded for the role they played in the violation.

1. Prior Enforcement under the Anti-Kickback Statute

The AKS penalizes violations through fines, imprisonment, or disqualification from federal healthcare programs.[182] Specifically, the AKS carries a maximum of ten years unless the violation results in injury or death, which then escalates the maximum punishment to twenty years, based on

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[178] *See* Chinelo Diké-Minor, *The Untold Story of the United States' Anti-Kickback Laws*, 20 RUTGERS J. OF L. & PUB. POL'Y (2023) (discussing the evolution of the AKS but not the penalties); *False Claims Act History*, NOLAN AUERBACH & WHITE perma.cc/WLS6-GDG3 (last visited May 5, 2025) (discussing the evolution of the FCA but not the penalties); *The State of Third-Party Releases After the Purdue Pharma Decision*, HUNTON ANDREWS KURTH (June 15, 2023), perma.cc/CAH3-NBFK; Benjamin M. Zegarelli, *The Past, Present, and Future of Government Regulation of Off-Label Communications - Part 2*, MINTZ (May 12, 2017), perma.cc/5GDM-CZCK (discussing the evolution of Off-Label Marketing but not the penalties).

[179] *See Fraud Statistics – Overview*, U.S. DEP'T OF JUST. (2022), perma.cc/M5EP-DRXF (providing statistics from Health and Human Services, Department of Defense, and a variety of other entities in which the government is constantly combating fraud).

[180] *Compare id.*, *with Understanding the Opioid Overdose Epidemic*, *supra* note 2 (providing statistics in comparison with the rapid-fire spread of the opioid epidemic).

[181] VanSickle & Hoffman, *supra* note 15.

[182] Off. Inspector Gen., *Fraud & Abuse Laws*, DEP'T OF HEALTH & HUM. SERVS., perma.cc/CQ32-X45A (last visited May 5, 2025).

judicial discretion.[183] While jail time is listed as one of the penalties, cases rarely reach sentencing.[184] Rather, parties opt to settle for civil fines, which courts uphold, even in the face of egregious and knowing violations.[185]

The government's failure to uphold Congress's intent behind the AKS appeared most prevalently in the case against Amgen, Inc..[186] Amgen encouraged and authorized kickbacks to physicians who prescribed overfilled vials of Epogen and Aranesp, two drugs used to treat anemia.[187] Amgen's executives argued for a more technical definition of "kickback" under the AKS: "the legal definition of 'kickback' . . . should use a technical definition, which would virtually require the offenders to 'knowingly' assert in their reimbursement paperwork they had not received a kickback."[188]

Their argument failed to acknowledge a highly important fact: in discovery, the government found emails in which several executives discussed and provided information on the overfull vials of Epogen and the compensation they could receive by dosage.[189] These emails were flooded with spreadsheets outlining the difference in prices between properly filled and overfilled vials of Epogen.[190]

Amgen engaged in the same "overfill" practice with Aranesp, one of Amgen's best-selling medications in the early 2000s.[191] Once they were under investigation, an internal company PowerPoint entitled "Overfill reduction" was presented in numerous meetings, explaining how to decrease their profits and how to describe to physicians the change in prescription.[192] Subsequent case studies demonstrating how high doses of Aranesp "could

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[183] U.S. Att'y's Off., N.D. Okla., *Three Charged with Violating Federal Anti-Kickback Laws and Committing More Than $4.7 Million in Health Care Fraud*, U.S. DEP'T OF JUST. (Dec. 10, 2018), perma.cc/LRQ8-9RBK.

[184] *See* Allison DeLaurentis et. al, *Anti-Kickback Statute Enforcement Year in Review and Outlook for 2021*, TROUTMAN PEPPER LOCKE LLP (Feb. 1, 2021), perma.cc/49AP-UQWJ (demonstrating the stark differences between corporations who receive fines vs. jail time).

[185] *See id.*

[186] *See* Edwards, *Amgen and the Supremes*, *supra* note 158.

[187] Edwards, *Amgen and the Supremes*, *supra* note 158.

[188] Edwards, *Amgen and the Supremes*, *supra* note 158.

[189] Edwards, *Amgen and the Supremes*, *supra* note 158.

[190] Edwards, *Amgen and the Supremes*, *supra* note 158.

[191] *Amgen to Pay United States $24.9 Million to Resolve False Claims Act Allegations*, BERGER MONTAGUE (Apr. 17, 2013), perma.cc/6JMY-NSXY [hereinafter *Amgen to Pay*].

[192] Jim Edwards, *Aranesp Suit: What Did Amgen CEO Sharer Know (and Did He Read It in His Company's PowerPoint Slides)?*, CBS NEWS, perma.cc/TY9D-Y9QT (last updated Nov. 2, 2009, 10:42 AM) [hereinafter Edwards, *Aranesp Suit*].

lead to increased risk of heart attack, stroke, heart failure, and tumor growth," and lawsuits from individuals who suffered these exact side effects, demonstrate how the true intentions of Amgen were just to pocket profit.[193]

Beyond arguing for a stricter definition, executives further argued for kickbacks, stating: "just because doctors received kickbacks doesn't mean they shouldn't get paid. They did, after all, treat patients."[194] Facing all this evidence, the executives could hardly say they were unaware of the kickbacks Amgen provided.[195]

In the face of all this evidence, Amgen settled both claims which were the largest settlements awarded against a biotechnology company.[196] The settlement included a non-consensual third party release, meaning Amgen's executives—although clearly knowing of and partaking in Amgen's willful violations—faced no jail time nor personal liability.[197] In effect, these settlements and Purdue's current proposed settlement, as well as many others in the pharmaceutical industry, leave the AKS powerless with respect to punishments and enforcement.[198]

Following Amgen, Congress amended the AKS and once again stated its intent to eliminate the practice of providing kickbacks, gifts, or gratuities to those who overcharge, overprescribe, or provide a good or service on behalf of another.[199] However, outside of that restatement of its intent, Congress solely branded the definition of "remuneration," and failed to address the role non-consensual third party releases play in enforcing the AKS.[200] Thus, Congress left the door open for Purdue to once again thwart its intent by shielding the Sackler family and failed to provide guidelines to bring power back to the AKS's punishment provisions.[201]

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[193] *Amgen to Pay*, *supra* note 191.

[194] Jim Edwards, *Amgen Just Asked the Supreme Court to Legalize Kickbacks*, CBS NEWS (Sept. 29, 2011, 8:47 AM EDT), perma.cc/2CAZ-Q2U4.

[195] Edwards, *Amgen and the Supremes*, *supra* note 158.

[196] U.S. Att'y's Off., E.D. N.Y., *Eastern District of New York U.S. Attorney's Office Joins in Collections of Over $2.2 Billion in Civil and Criminal Actions and Asset Forfeiture in Fiscal Year 2013*, U.S. DEP'T OF JUST. (Jan. 10, 2014), perma.cc/6J9V-QLYA.

[197] Edwards, *Aranesp Suit*, *supra* note 192.

[198] *See* Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52 (demonstrating how no jail time was faced by any executive in the corporation).

[199] H.R. Public Law 99-634 (1986); *The Federal Anti-Kickback Statute*, *supra* note 149.

[200] *See generally The Federal Anti-Kickback Statute*, *supra* note 149.

[201] *See* Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52 (demonstrating how no jail time was faced by any executive in the corporation); *Amgen to Pay*, *supra* note 191.

When looking to the Amgen settlement, its frivolous arguments or arrogance in ignoring Anti-Kickback allegations,[202] and the proper intent Congress displays in interpreting the statute,[203] ask yourself this: did the government take their punishment far enough?

2. Prior Enforcements Under OLM Violations

While some violations can be found under the Food, Drug, and Cosmetic Act ("FDCA"), most cases surrounding OLM are tried under the FCA.[204] Under the FCA, penalties for OLM consist of up to treble damages, plus an additional fine per claim which is being charged.[205]

In encompassing OLM violations under the FCA, Congress's intent behind the FCA also applies to OLM violations.[206] In 1985, the Senate Committee on the Judiciary ("the Committee") filed a report explaining the intent behind the FCA of 1985.[207] The report details each section of the Act.[208] Of importance to OLM, violations under the FCA require a "knowledge bar" which is thoroughly defined in the Committee's report.[209] When violating the FCA, or in this case the OLM, the Committee defined knowledge as "reason to know that the claim or statement was false or fictitious."[210]

In the case against Allergan Inc., the OLM once again failed to value the protection of human lives over a settlement number.[211] Allergan participated in and authorized the OLM plans for Botox "as part of the company's strategic plans and ignored repeated violations of federal law."[212] Specifically, the executives of the corporation are said to have encouraged

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[202] Edwards, *Amgen and the Supremes*, *supra* note 158. *See generally* Edwards, *Aranesp Suit*, *supra* note 192.

[203] *The Federal Anti-Kickback Statute*, *supra* note 149.

[204] Maya P. Florence, *DOJ's Evolving Enforcement Approach to Off-Label Promotion*, SKADDEN (Apr. 27, 2021), perma.cc/8ZYE-794Y.

[205] Gail A. Van Norman, *Off-Label Use vs. Off-Label Marketing*, 8 JACC: BASIC TRANSLATIONAL SCI. 359, 365 (2023).

[206] *See* Florence, *supra* note 204.

[207] *See* S. REP. NO. 99-345, at 1 (1986).

[208] See generally *id.* at 13.

[209] *See id.* at 15.

[210] *Id.* at 10.

[211] *See* Off. Pub. Affs., *Allergan Agrees to Plead Guilty and Pay $600 Million to Resolve Allegations of Off-Label Promotion of Botox*, U.S. DEP'T OF JUST. (Sept. 1, 2010), perma.cc/P8EG-AG6T (demonstrating a fine as a slap on the wrist as compared to the punishments the company or executives could have faced for their violations) [hereinafter Off. Pub. Affs., *Allergan Agrees*].

[212] Feeley, *supra* note 158.

their sales personnel to market Botox for headaches, pain, and cerebral palsy treatments in children, which were not approved by the FDA.[213] Botox is Allergan's top prescribed medication, totaling $1.3 billion in sales annually, and is anticipated to generate another $1 billion for its advertised off-label purposes.[214] Beyond this, the CEO and Chairman of Allergan "directly benefited from the illegal Botox sales" which caused his compensation package to skyrocket.[215]

In the 2000's, a child began taking Botox at the age of six; not to prevent wrinkle lines in her forehead, but because of necessity to treat leg spasms caused by cerebral palsy.[216] In 2007, she sadly passed away from respiratory failure, according to her death certificate, but experts noted that Botox weakened the muscles that controlled her ability to breathe.[217] Following this trial, the FDA ultimately put a "black box" label warning on Botox, stating its true intended purposes and side effects.[218] The addition of the "black box" label warning demonstrates that "there is reasonable evidence of an association of a serious hazard with the drug."[219]

Allergan's attorneys stated that the harm caused in publicity and fines to the corporation was punishment enough, and that no jail time was required for the company to learn their lesson.[220] However, despite this bold declaration from their attorneys, this is not the only time Allergan was charged with violating OLM rules.[221] In 2017, Allergan entered into yet another settlement agreement for promoting various off-label uses of

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[213] Feeley, *supra* note 158.

[214] Feeley, *supra* note 158.

[215] Feeley, *supra* note 158.

[216] Lisa Girion, *Orange County Trial Will Focus on Botox's Safety in Children's Cerebral Palsy Treatments*, L.A. TIMES (Jan. 27, 2012, 12:00 AM PT), perma.cc/W3GJ-K4CD.

[217] *Id.*

[218] *Id.*

[219] Shirley Murphy & Rosemary Roberts, *"Black Box" 101: How the Food and Drug Administration Evaluates, Communicates, and Manages Drug Benefit/Risk*, 117 J. OF ALLERGY AND CLINICAL IMMUNOLOGY 34, 34 (2006).

[220] Feeley, *supra* note 158 ("'The off-label marketing practices have already caused injury to the company and will continue to cause harm by virtue of the fines it has agreed to pay in connection with those illegal sales and marketing practices,' the fund's lawyers said in the Friday complaint.").

[221] *Compare* Feeley, *supra* note 158, *with* Eric Sagonowsky, *Allergan Inks $13M Settlement in Whistleblower Marketing Suit*, FIERCE PHARMA (July 5, 2017), https://perma.cc/6Y9A-RL6U (demonstrating Allergan has been found in violation of the AKS or OLM on numerous occasions despite stating that they had learned their lesson).

prescription eye drugs while providing illegal kickbacks to physicians who enforced the prescriptions.[222] Allergan started this scheme in 2002 and illegal sales reached a peak in 2009, totaling over $523 million.[223]

However, the government again let the executives off the hook for both claims.[224] In the settlement relating to Botox, Allergan paid $600 million to resolve the criminal and civil liability charges, though no jail time was imposed on the known executives of the company.[225] Similarly, the settlement relating to the eye prescriptions reached $13 million, but once again, no jail time was imposed on the known executives due to the inclusion of a non-consensual third-party release.[226] Allergan's egregious and repetitive violations of the FCA under both the AKS and OLM, and their failure to uphold and honor Congress's intent, deserved stricter punishment.[227]

Once again, the acceptance of a settlement with a non-consensual third party release left the door open to shielding the Sackler family from personal liability or incarceration.[228] When looking at Allergan's repeat offenses and blatant disregard for the law and human lives,[229] and the proper intent Congress seeks in their protections—[230]ask yourself this question: did the government take their punishment far enough?

B. *Congress Should Disallow Non-Consensual Third-Party Releases for Cases of Irreparable Harm or Death, and Provide Guidance for Incarceration Under the FCA*

Issues involving non-consensual third-party releases have gained increased attention in the news, as they were also up for debate in a case

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[222] Sagonowsky, *supra* note 221.

[223] Sagonowsky, *supra* note 221.

[224] *See* Off. Pub. Affs, *Allergan Agrees, supra* note 211 (explaining Allergan did not have any jail time, just a fine of $600 million); Sagonowsky, *supra* note 221 (explaining Allergan settled a $13 million fine, but no jail time was enforced).

[225] Off. Pub. Affs., *Allergan Agrees*, *supra* note 211.

[226] Sagonowsky, *supra* note 221.

[227] *See* Off. Pub. Affs., *Allergan Agrees*, *supra* note 211; Sagonowsky, *supra* note 221.

[228] *See* Off. Pub. Affs., *Allergan Agrees*, *supra* note 211; Sagonowsky, *supra* note 221.

[229] *See* Off. Pub. Affs., *Allergan Agrees*, *supra* note 211; Sagonowsky, *supra* note 221; Girion, *supra* note 216.

[230] S. REP. NO. 99-345, at 2 (1986).

against the Boy Scouts of America.[231] The case of *Lujan Claimants et al. v. Boy Scouts of America et al.*, involves over 82,000 claims of sexual abuse suffered by boy scout members under the administration.[232] Similarly to the case against Purdue, the Boy Scouts' bankruptcy agreement hinged on "using a contentious mechanism that insulates a third party from future lawsuits even without requiring that party to declare bankruptcy."[233]

The public watched these cases together to predict which way the Supreme Court would lean on the meaning behind providing a non-consensual third party release.[234] Perhaps to the same level of ignorance to Purdue's "I don't know," when asked about the number of victims who lost their lives because of OxyContin, the Boy Scouts urged for this provision to be included as the number of claimants only represent a "tiny fraction" of victims involved in the deal.[235]

Following the Court's ruling in June 2024, Attorney Jason Amala, who represented the victims of Boy Scouts of America class action, commented:

> If a defendant and their insurance companies want to settle a plaintiff's claim and avoid a jury trial, they will have to pay fair value for that settlement. We applaud the Supreme Court for putting an end to the abusive practice of companies using bankruptcy to force cheap settlements with their co-defendants and their insurance companies.[236]

He continued by stating that in the past decade over 100,000 child sexual abuse survivors came forward and watched defendants and their insurers "take the easy way out by abusing our country's bankruptcy process."[237]

Non-consensual third-party releases only apply in cases where they are

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[231] Alex Wolf, *Boy Scouts Settlement Pause Marks Shift on Bankruptcy Doctrine*, BLOOMBERG LAW (Feb. 21, 2024, 1:42 PM EST), perma.cc/NA5E-NX9M.

[232] *See* Abbie VanSickle, *Supreme Court Allows $2.4 Billion Boy Scouts Sex Abuse Deal to Go Forward*, N.Y. TIMES (Feb. 22, 2024), perma.cc/MH4Q-QQGD [hereinafter VanSickle, *Supreme Court Allows $2.4 Billion Boy Scouts*].

[233] *Id.*

[234] *Id.*

[235] *See* Hill & Feeley, *supra* note 159; *see also* Vansickle, *Supreme Court Allows $2.4 Billion Boy Scouts*, *supra* note 232.

[236] *SCOTUS Ruling on Purdue Bankruptcy Plan Signals Victory for Survivors of Sexual Abuse in Bankruptcies*, PCVA ATT'YS AT LAW (June 27, 2024), perma.cc/VYK3-9VK5.

[237] *Id.* ("'They would have one defendant file for bankruptcy . . . and then demand that abuse survivors settle all of their claims against all co-defendants and insurance companies . . . We are talking about some of the most wealthy corporations in the world…and some of the most profitable insurance companies.'").

in furtherance of bankruptcy settlement.[238] However, releases in furtherance of bankruptcy settlement favor the atrocious disregard of those who lost their lives or were irreparably harmed; at some point these individuals are taking advantage of an opportunity provided to them, not trying to right the wrongs they have committed.[239]

In conjunction with disallowing non-consensual third party releases, Congress should provide better guidance on punishments under the FCA.[240] The FCA does not impose a mandatory minimum jail time in any of its violations, only a mandatory minimum in fines.[241] Similarly, the AKS imposes only maximums, as do charges under OLM.[242] In 1981, a GAO report noted, "for those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . The sad truth is that crime against the Government often *does* pay."[243]

While many amendments have been made to the FCA since its reform in 1986, the released Senate report spoke to every section or definition they felt important except one—jail time.[244] Following the 1986 reform, two sections of the FCA increased the period of imprisonment for violations involving false claims.[245]Although under the FCA, AKS, and OLM jail time is noted as a possible enforcement, it is rarely used as a form of penalty.[246]

There has been a flood of cases brought to the Supreme Court relating

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[238] *See Non-Consensual Third-Party Releases Provide an Unpleasantly Necessary Bargain*, VILLANOVA L. REV.: BLOG (Mar. 22, 2023), https://perma.cc/99ZL-ZFK7 ("'This will no longer do. Either statutory authority exists or it does not. There is no principled basis for acting on questionable authority in 'rare' or 'unique' cases.'").

[239] *See* Howe, *supra* note 97 ("If the key fact is the Sacklers' willingness to contribute to the settlement, she asked, why can't they ask for anything and say that it's necessary?").

[240] *See* Anti-Kickback Enforcement Act, 41 U.S.C. §§ 8701–8707 (2011); *The Federal Anti-Kickback Statute*, *supra* note 149. *See generally* S. REP. NO. 99-345 (1986).

[241] *See False Claims Act Penalties: A Complete Guide*, WHISTLEBLOWER L. COLLABORATIVE (Feb. 12, 2024), perma.cc/7CLD-CN7W.

[242] *See id.*; Lieberman, *supra* note 47.

[243] S. REP. NO. 99-345, at 3 (1986).

[244] *See generally id.*

[245] *Id.*

[246] *See generally Global Resolution*, *supra* note 84.

to the FCA and the various interpretations of each of its sections.[247] The 1986 Senate report aids in construing the purpose behind each section of the acts in the current court cases.[248] Yet, some of the enforcements fall short of the intent behind protecting the American public.[249]

While the dramatization of *Painkiller* may make the probability of everything that occurred with Purdue seem unrealistic, consider the real-life cases discussed prior. For example, in *Amgen Inc.*, executives "produced an Excel spreadsheet . . . that detailed how a 300 mL vial of Aranesp would normally be reimbursed by Medicare at $1,422. With the overfill, doctors would get Medicare to reimburse them at $1,661."[250] Further, in *Allergan Inc.*, the board of directors "approved so-called off-label marketing plans for Botox as part of the company's strategic plans and ignored repeated violations of federal law governing the sales and marketing of drugs."[251]

The opioid epidemic has unfortunately expanded to new avenues since the distribution of OxyContin.[252] Somewhere in the world, someone who was once addicted to OxyContin is now consuming heroin or fentanyl, but the only person facing jail time is the individual distributing the heroin or the one who has been pushed into a life of addiction.[253] As we have seen in the case of Purdue, they have already been given a pass once before in 2007 when the government provided the Sacklers with a document outlining how

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[247] Jacob, T. Elberg, *Supreme Court Maintains Focus on Defendant's Subjective Beliefs in False Claims Act Cases*, SCOTUSBLOG (June 1, 2023, 2:56 PM), perma.cc/A2WK-LLH9 (explaining a case appearing before the Supreme Court pertaining to overcharging on Medicare and Medicaid); *U.S. Supreme Court Explains Meaning of "Knowingly" Under the False Claims Act*, BRYAN CAVE LEIGHTON PAISNER (July 11, 2023), perma.cc/826S-E78Z (explaining a case appearing before the Supreme Court pertaining to the definition of the word "knowingly"); *2023 Mid-Year False Claims Act Update*, GIBSON DUNN (Aug. 2, 2023), perma.cc/RZ9G-LE6M (explaining cases coming before the Supreme Court pertaining to various sections of the False Claims Act).

[248] S. REP. NO. 99-345, at 1 ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.").

[249] Pelletier & Macy, *supra* note 172 ("So many of these tragedies may be traced back to one family, one company, one product and one lie: members of the Sackler family, owners of Purdue Pharma, the company that makes and promoted OxyContin as a virtually non-addictive opioid painkiller.").

[250] Edwards, *Amgen and the Supremes*, *supra* note 158.

[251] Feeley, *supra* note 158.

[252] *Understanding the Opioid Overdose Epidemic*, *supra* note 2.

[253] Pelletier & Macy, *supra* note 172.

Purdue should enforce their future behavior.[254] If after all they have done, they were given a pass, what is to stop the next pharmaceutical company from the same behavior? Richard Sackler openly admitted to never having read it, and the opioid epidemic from OxyContin continues.[255] Society has seen the measures the government will take to properly construe and interpret the intent behind the FCA, AKS, and OLM. Now is the time to continue forward in our progress and expand protections for the public good.[256]

CONCLUSION

One sentence was all it took to spark the initial wave of the national opioid epidemic,[257] taking countless lives and disrupting the livelihood of families across the nation.[258] How much is your life worth? A question no one should have to ask, but one the Supreme Court addressed in *Harrington v. Purdue Pharma L.P.*, when it reviewed if the Sackler family was allowed to include a non-consensual third party release in their settlement.[259]

Time and time again, when executives violated the FCA, AKS, or OLM, they hid behind a non-consensual third-party release and receive a meager punishment of fines and forfeitures.[260] Not one executive, at this point in time, has ever been found liable for the lives they *knowingly* disrupted.[261]

When considering why the debate surrounding a non-consensual third-party release matters, this release would've allowed the Sackler family to obtain protection from all present and future matters relating to opioid claims,[262] failed to hold them personally responsible for the lives of hundreds of thousands of individuals, and allow them to never face their victims. Beyond *Purdue*, this ruling matters for the 82,000 claims awaiting

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[254] Pelletier & Macy, *supra* note 172.

[255] Pelletier & Macy, *supra* note 172.

[256] *See* Pelletier & Macy, *supra* note 172.

[257] Esch, *supra* note 1.

[258] *See* Pelletier & Macy, *supra* note 172.

[259] *See* Howe, *supra* note 97 ("'[i]t is necessary to do this . . . because the Sacklers have taken the money and are not willing to give it back unless they have this condition.'").

[260] *See* Off. Pub. Affs., *Allergan Agrees*, *supra* note 211 (explaining that Allergan did not have any jail time, just a fine of $600 million); Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52 (demonstrating how no jail time was faced by any executive in the corporation).

[261] *See* Off. Pub. Affs., *Allergan Agrees*, *supra* note 211; Off. Pub. Affs., *Amgen Inc. Pleads*, *supra* note 52.

[262] VanSickle & Hoffman, *supra* note 15.

decision as they relate to the Boy Scouts of America, given this claim also pertains to the interpretation of case law surrounding non-consensual third party releases.[263]

This was no easy task for the Court to balance $8 billion worth of relief for those who suffered and not allowing the Sackler family to be shielded from personal liability.[264] While this was no easy task, when looking to the history of times this has happened before *Purdue*, how did we get here? Perhaps "A society that does not confront its crimes is condemned instead to repeat them, and to reward those who commit them."[265]

The Court made their decision; they took action to stand up to Purdue Pharma and the Sackler Family. It is now up to Congress to determine that the ruling of the Court is not enough. More needs to be done to ensure things like this do not happen again, and although the change is coming, it is not coming fast enough. Non-consensual third-party releases should not be allowed in cases of death or irreparable harm.[266] The Sackler family should never be allowed to get away with murder once, let alone twice, and while the Court has stood up to them, this change alone is not enough.[267]

It is time for the FCA, AKS, and OLM to serve as the deterrents they were made to be, and not just a mild reprimand continuously allowing history to repeat itself.[268] If not for ourselves, then for Christopher Trejo, Elizabeth, Cassie, Patrick, Matthew Stavron, Riley, and the half a million other individuals whose lives were taken by the Sackler family.[269]

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[263] *See Supreme Court Allows $2.4 Billion Boy Scouts*, *supra* note 232 ("The victims' group, in asking the court to step in, argued that if the settlement were allowed to proceed, sexual abuse victims 'will lose their right to pursue their claims independently of the bankruptcy settlement trust.'").

[264] VanSickle & Hoffman, *supra* note 15.

[265] Laura Poitras, *I've Seen How Overdose Wrecks Lives – Why Have the Sackler Family Members Behind OxyContin Avoided All Charges?*, THE GUARDIAN (Mar. 6, 2023 12:16 PM EST), perma.cc/9KZV-TVPA.

[266] *See Supreme Court Allows $2.4 Billion Boy Scouts*, *supra* note 232 ("The victims' group, in asking the court to step in, argued that if the settlement were allowed to proceed, sexual abuse victims 'will lose their right to pursue their claims independently of the bankruptcy settlement trust.'"); Hill & Feeley, *supra* note 159 (demonstrating the Sackler's ability to know how much money they profited, but not the number of lives lost from OxyContin).

[267] *See* Pelletier & Macy, *supra* note 172.

[268] *See* Poitras, *supra* note 266.

[269] *See* Cormack, *supra* note 165.

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1 Step Forward, 3 Steps Back: The Struggle Over Fair Use in Digital Sampling

*Jaclyn Andersen**

INTRODUCTION

When an ordinary person hears the word "sample," they likely think of a small taste-test of a new food or product at the local Costco.[1] However, in the last couple of decades, a "sample" has taken on an entirely different meaning in the music industry.[2] From classical composers to rap artists to popstars, musicians use sampling to, for lack of a better word, steal elements and sound bites from other artists' songs to be incorporated into a new work.[3] In the past few years alone, notable musicians such as Olivia Rodrigo and Drake have been called out for

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[1] Alex Bitter, *Costco-Style Free Samples Are Popping up at Walmart and Other Stores as Brands Try to Get You to Buy Their Stuff*, BUS. INSIDER (Oct. 16, 2023, 3:10 PM EDT), https://perma.cc/M8AB-TEUM.

[2] Richard Gilbert-Cross, *What Is a Sample?*, MUSIC GATEWAY (Mar. 17, 2023), https://perma.cc/JBD6-5QN8.

[3] Randy S. Kravis, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 232 (1993).

sampling the works of other musicians in their hit songs.[4] While sampling may explain why so many of our favorite songs sound the same, it opens the door to many questions regarding its legality within the sphere of copyright law.[5] Specifically, the music industry and courts have struggled to define the parameters of when digital sampling constitutes copyright infringement and when it is considered fair use.[6] Most cases involving instances of sampling typically result in settlement outside of court, essentially buying a license to use the sound bite, so as to avoid fronting the costs that a copyright infringement suit would bring their way.[7] However, proponents of sampling argue that the fair use defense may be used to samplers' advantage should they choose to take the case to court.[8]

Although the minimal case law that exists on digital sampling effectively requires authorization and refuses application of the substantial similarity test, recent developments in copyright law may impact how the fair use defense interacts with the existing sampling case law.[9] In May 2023, the Supreme Court of the United States ("SCOTUS") decided the controversial case of *Andy Warhol Foundation for the Visual Arts v. Goldsmith* ("*Warhol*").[10] In deciding the case, the Court set a new precedent for how the fair use defense is to be analyzed and applied in copyright infringement cases.[11] Though the Court's decision in *Warhol* is still new and has thus not been raised in relation to sampling, the analysis of the fair use factors—particularly the first factor (purpose and character of the use)—will likely have an impact on the availability of the fair use doctrine in sampling controversies going forward.[12]

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[4] Barnaby Lane & Callie Ahlgrim, *15 Smash Hits You Might Not Have Known Sampled Other Songs*, BUS. INSIDER (Apr. 11, 2023, 7:13 PM EDT), https://perma.cc/Z85G-Y8L9 (noting Drake was accused of stealing the beat from D.R.A.M's song "Cha Cha" to use in "Hotline Bling"); Fatemeh Mirjalili, *Olivia Rodrigo Has Paid Over $1.2 Million for Sampling Taylor Swift and Paramore Songs in 'Sour*,*'* THETHINGS (Sept. 2, 2021), https://perma.cc/DR38-6VVE (describing Olivia Rodrigo's use of sampling in "1 Step Forward, 3 Steps Back," "Déjà vu," and "Good 4 U").

[5] Kravis, *supra* note 3, at 234.

[6] Kravis, *supra* note 3, at 234–35; Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 736–37 (1992) [hereinafter *A New Spin*].

[7] *A New Spin*, *supra* note 6, at 728–29.

[8] *A New Spin*, *supra* note 6, at 728–29.

[9] *See* Kravis, *supra* note 3, at 235–36, 50–55; *A New Spin*, *supra* note 6, at 732–34.

[10] Andy Warhol Found. for the Visual Arts v. Goldsmith, 598 U.S. 508 (2023).

[11] *Id.* at 525–47.

[12] *See id.*; Kravis, *supra* note 3, at 234–35; *A New Spin*, *supra* note 6, at 726, 736–37.

This Note will consider the legal challenges that the *Warhol* decision creates for sampling proponents arguing fair use as a defense against infringement for lack of authorization. In considering these legal challenges, this Note will also draw comparisons between how music sampling has been treated by the courts versus how appropriation art has been treated, specifically noting how the *Warhol* decision will impact both areas of copyright law.

In Part I, this Note will discuss what digital sampling is, the history of copyright law and the fair use doctrine, and where the courts currently stand as far as the legality of sampling. Part II will underline the importance of copyright law and the fair use defense as they pertain to digital sampling in an ever-growing music industry. Part III will provide a brief discussion of the facts, procedural history, and SCOTUS' analysis in *Warhol*, specifically as it pertains to the fair use defense. In Part IV, this Note will analyze the impact that the *Warhol* case will have on the applicability of the fair use defense to possible copyright infringement suits involving claims of unlicensed digital sampling. Finally, Part V will discuss how digital sampling in music has been treated differently from misappropriation art, the comparative impact that *Warhol* will have on both subcategories of copyright law, and the gaps in *Warhol* that will allow samplers an avenue to set a new standard of applying the fair use defense that is unique to the music industry.

I. Background

A. *What is Digital Sampling?*

Digital sampling is defined in a number of ways.[13] The 2003 Ninth Circuit case of *Newton v. Diamond* defined digital sampling as "the incorporation of short segments of prior sound recordings into new recordings."[14] U.S. legal sources have expanded upon that definition to provide greater detail, defining digital sampling as "a technique of taking a recorded passage from an already existing or recorded musical, spoken or other work and then adding it into a new recording."[15] Although digital sampling has taken a different meaning as a result of advancements in technology in the 1960s and 70s, the use of sampling in music can be traced

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[13] *See* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003); *Digital Sampling*, U.S. LEGAL, https://perma.cc/JK4Q-EBMR (last visited Sept. 26, 2025).

[14] 388 F.3d at 1192.

[15] *Digital Sampling*, *supra* note 13.

back even further to less advanced technology and methods.[16] The early 20th century was known for the jazz music it produced, which often centered around the use of improvisation.[17] These jazz musicians often sampled pieces of other musicians' solos in their own performances out of respect and admiration for their fellow musicians.[18] This early form of sampling was popular with both musicians and listeners alike.[19] The invention of tape recorders was also an instrumental step in the rise of sampling.[20] Tape recorders allowed composers to pre-record sound bites which they manipulated in a variety of ways to repurpose the piece of music.[21] From this, the 1960s saw the invention and mass-production of a keyboard-esque device that allowed users to trigger tape-loops of pre-recorded instruments and sounds, thus opening the door for the wide-use of sampling by musicians.[22]

Hip-hop artists and DJs were some of the most common users of sampling.[23] In hip-hop music, "break beats were most commonly sampled and looped because they provided a momentous base for rapping and for dancing."[24] This practice has since spread into other genres of music.[25] It is common for artists to "create hybrid songs by merging their original work with samples from another source" to obtain access to a certain sound or style without having to bear the expense it might take to organically produce the same sound.[26] Another reason why artists tend to sample from other musicians is because they want to create an association with the work they are sampling from, in an attempt to gain more recognition or popularity for

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[16] *A New Spin*, *supra* note 6, at 726–27; Joe On, *A Brief History of Sampling*, THOMANN (July 1, 2018), https://perma.cc/QHC8-F3FA.

[17] On, *supra* note 16.

[18] On, *supra* note 16.

[19] On, *supra* note 16.

[20] On, *supra* note 16.

[21] On, *supra* note 16.

[22] On, *supra* note 16 (describing the Chamberlin—later known as the Mellotron—"an electro-mechanical keyboard which triggered tape-loops of many different pre-recorded instruments.").

[23] *See* On, *supra* note 16.

[24] On, *supra* note 16.

[25] *See* On, *supra* note 16.

[26] *A New Spin*, *supra* note 6, at 727.

their own work.[27] For example, Olivia Rodrigo sought to do this when she sampled Taylor Swift's "New Year's Day" when composing her track, "1 Step Forward, 3 Steps Back."[28] Early in her career, Rodrigo frequently mentioned the influence and inspiration that Swift had on her and her music.[29] Thus, it is easy to understand Rodrigo's motivation behind sampling from Swift. Not only was she able to reinvent a similar note pattern and chord progression to make the song her own, but she was also able to capitalize on the recognition that came with being associated with Swift.[30]

Though Rodrigo and other musicians have sometimes been upfront about their sampling, and the fact that they were authorized by the original artist to do so, musicians often do not get authorization for their sampling efforts beforehand.[31] Rodrigo can be used as an example of this scenario as well.[32] Following her release of "Good 4 U" in 2021, listeners immediately noted the similarities between Rodrigo's song and Paramore's 2007 song "Misery Business."[33] After being criticized for how similar the two songs sounded, Rodrigo retroactively added Paramore writers, Hayley Williams and Joshua Farro, as co-writers on the song.[34] This negotiated licensing system has become the predominant way of both avoiding copyright infringement litigation and ensuring that artists have some federal copyright protection for their work and can be compensated accordingly.[35] However, questions remain among scholars as to whether this is the correct system to follow, or whether sampling may be protected under copyright's fair use doctrine.[36]

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[27] *A New Spin*, *supra* note 6, at 727.

[28] Elizabeth Logan, *Yes, Olivia Rodrigo Samples Taylor Swift on Her New Album*, GLAMOUR (May 21, 2021), https://perma.cc/4FBQ-4PZ6.

[29] *Id.*; Jem Aswad, *Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4 U,'* VARIETY (Aug. 25, 2021, 7:38 AM PT), https://perma.cc/V26C-6AMU (explaining that Swift was listed as a co-writer on "1 Step Forward, 3 Steps Back").

[30] *See A New Spin*, *supra* note 6, at 727; Logan, *supra* note 28.

[31] *A New Spin*, *supra* note 6, at 727–28; Aswad, *supra* note 29 ("Retroactively-added songwriting credits have become increasingly common in recent years, as intellectual property lawsuits involving music have become more forensic and yet less predictable.").

[32] Aswad, *supra* note 29.

[33] Aswad, *supra* note 29.

[34] Aswad, *supra* note 29.

[35] *A New Spin*, *supra* note 6, at 726–27.

[36] *See* Kravis, *supra* note 3, at 253.

B. *The History of Copyright Law and Music*

To understand how sampling fits into copyright law, it is critical to understand what copyright law is and the protections it awards to music.[37] Article I of the United States Constitution grants Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[38] Since the ratification of the Constitution in 1787, Congress has consistently reaffirmed this commitment to the protection of authors' and inventors' right to their works.[39] In 1790, Congress established the first federal copyright law, which granted protection to authors of maps, charts, and books.[40] In 1831, the first general revision of the Copyright Act of 1790 (the "1790 Act") granted protection to printed musical compositions.[41] These initial protections to musical works were affirmed and expanded upon in 1909, when the 1790 Act underwent its first major revision, (the "1909 Act"), and again in 1976 when the current Copyright Act was enacted (the "1976 Act" or "Copyright Act").[42]

The 1909 Act provided significant changes to bring protection of music in line with technological advancements; mirroring the technological advancements that were occurring in the digital sampling sphere of the music industry.[43] Because the recording of music was not possible in 1831, the focus of the 1831 amendment to the 1790 Act was on the written notion, transcription, or score of the musical work.[44] Consequently, to prove infringement under the 1831 amendment, a musician would have to show nearly identical written representations of their song and that of another musician; thus, infringement focused more on the visual representation of

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[37] *See infra* Part I(B).

[38] U.S. CONST. art. I, § 8, cl. 8.

[39] *See generally id.*; *Overview: Creation of the Copyright Office*, U.S. COPYRIGHT OFF., https://perma.cc/YB8F-STGV (last visited Sept. 26, 2025) (detailing timeline of copyright protection legislation in the United States).

[40] Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124, 124.

[41] LARRY WAYTE, PAY FOR PLAY: HOW THE MUSIC INDUSTRY WORKS, WHERE THE MONEY GOES, AND WHY 213 (2023).

[42] *See generally* Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (repealed 1976); 17 U.S.C. § 102 (1990).

[43] Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436–38 (repealed 1870).

[44] *See* Brandon P. Evans, Note, *Let Me Get My Glasses, I Can't Hear You: Sheet Music, Copyright, and Led Zeppelin*, 24 VAND. J. ENT. & TECH. L. 157, 161 (2021).

the work as opposed to the aural aspect which most people correlate with music.[45] In an attempt to harmonize this with the technological advancements that were occurring, the 1909 Act created a performance right to compositions that would allow the composer to receive royalties for the value of their work.[46] However, copyright protection under the 1909 Act relied on the successful registration of a composition by depositing a written notation of the work with the Library of Congress.[47]

The 1976 Act established numerous changes to the old regime.[48] Two notable changes include: (1) the elimination of the publication, and consequently deposit copy requirement in order to gain copyright protection—however, to register a copyright formally, publication is still needed—and (2) the addition of sound recordings as recognized forms of publication.[49] In addition, the 1976 Act clearly includes "musical works, including any accompanying words" as a copyrightable subject matter,[50] and grants authors of the works the rights to copy, prepare derivative works, distribute, public performance and public display, and moral rights.[51] This recognition of sound recordings as protectable works opened the door to questions concerning how copyright law would treat the sampling of sound recording bites.[52] Likely due in part to these concerns, the Music Modernization Act was enacted in October 2018 in an attempt to bring recordings and distribution of recordings into the 21st century, particularly as it relates to the distribution of royalties.[53] The Act established "a blanket licensing system for digital music providers to make and distribute digital phonorecord deliveries."[54] Viewed in conjunction with the 1976 Act's

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[45] *Id.*

[46] Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 36 Stat. 1075.

[47] *Id.* at 1082.

[48] Copyright Act of 1976, 17 U.S.C. § 102 (2018).

[49] *Id.* §§ 101–02 (requiring all works be "fixed in a tangible medium of expression").

[50] *Id.* § 102(a)(2).

[51] *Id.* § 106.

[52] *See generally* Kravis, *supra* note 3 (explaining the copyright implications of digital sampling).

[53] *See generally* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018).

[54] *The Music Modernization Act*, U.S. COPYRIGHT OFF., https://perma.cc/UGC5-TMU8 (last visited Sept. 26, 2025) [hereinafter *MMA*].

requirements and protections, the blanket licensing system[55] and the rise in digital sampling creates a complex scenario for the music industry.[56]

C. *The Fair Use Doctrine*

The fair use doctrine is a crucial element of the 1976 Act and could play a major role in the protection of digital sampling.[57] This doctrine can be traced back to the 1841 case of *Folsom v. Marsh*.[58] In finding that the defendant's use of the copyrighted material was not fair use, the Court laid out the following principles that make up the modern day fair use doctrine: "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[59] Congress worked this defense into the Act of 1976.[60] Section 107 of the Copyright Act of 1976 provides:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted

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[55] *What Is a Blanket License?*, SONGTRUST, https://perma.cc/FFD7-LUZS (last visited Sept. 26, 2025) (defining a blanket license as a grant of authority to outside entities to access a rightsholder's entire catalog of music in exchange for a single fee payment).

[56] 17 U.S.C. § 102; Kravis, *supra* note 3, at 235–36, 250–55; *MMA*, *supra* note 54.

[57] Kravis, *supra* note 3, at 235–36, 250–55.

[58] *See generally* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (laying the foundation for the fair use doctrine in a case about who owns the copyright to President George Washington's official papers which were used in a separate publication).

[59] *Id.* at 348.

[60] 17 U.S.C. § 107.

work.[61]

In effect, the fair use doctrine attempts to balance the copyright holder's rights against the rights of others by allowing some sorts of activity to escape infringement.[62] Courts consider the four factors in Section 107 of the Copyright Act when determining whether a copyright infringer may prevail under the fair use defense.[63]

In 1990, Judge Pierre Leval published a piece in the Harvard Law Review, commenting that the fair use defense turns primarily on the transformative nature of the challenged use.[64] Following this publication, courts seemed to follow Judge Leval's commentary and applied a sort of transformative use test in place of the first factor.[65] This is particularly clear in the 1994 Supreme Court case of *Campbell v. Acuff-Rose Music, Inc*.[66] In this case, Acuff-Rose Music accused 2 Live Crew of infringing on their copyright to "Oh Pretty Woman" when they released "Pretty Woman."[67] 2 Live Crew responded, arguing that their song was a parody[68] of "Oh Pretty Woman," and thus constituted fair use under the Copyright Act.[69] Although the Supreme Court analyzed all of the fair use factors, it focused primarily on whether 2 Live Crew had made sufficient transformative use of the original work to constitute a fair use.[70] Ultimately, the Supreme Court held that the Appellate Court erred in finding that this was not a fair use.[71] The *Acuff-Rose* case was the prevailing interpretation of applying the fair use doctrine until 2023, when the Supreme Court released its decision in the *Warhol* case.[72] The ever-changing definition of "transformative use" is central to the application

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[61] *Id.*

[62] 1 PETER S. MENELL, ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2023, at 801–02 (2023).

[63] *See* 17 U.S.C. § 107.

[64] Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

[65] MENELL, *supra* note 62, at 810–11.

[66] *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[67] *Id.* at 571–73.

[68] *Id.* at 580 (defining a parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule").

[69] *Id.* at 573–74.

[70] *Id.* at 578–83.

[71] *Id.* at 594.

[72] *See generally* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).

of the fair use defense to digital sampling due in part to the Court's long standing struggle to define it.[73]

D. *Digital Sampling in the Courts*

When Congress enacted the Copyright Act, the vast majority of digital sampling technology did not yet exist.[74] As a result, it was unclear how exactly copyright law would apply to digital sampling.[75] The issue of sampling remained largely untouched by the courts until December 1991 when the United States District Court for the Southern District of New York decided the case of *Grand Upright Music Ltd. v. Warner Bros. Records, Inc*.[76] In this matter, Grand Upright brought a copyright infringement suit against Warner Brothers alleging that Biz Markie's album contained a song that stole words and music from one of Gilbert O'Sullivan's songs (to which they owned the copyright).[77] Prior to releasing the song, the defendants had attempted to obtain a license to use the material from O'Sullivan's song, but no agreement was reached.[78] Although the bulk of this case centered around who the actual owner of the copyright was, the Court also concluded that the sampling of O'Sullivan's song constituted copyright infringement.[79] Because no licensing agreement to use the elements of O'Sullivan's song was ever reached, the defendants were found to have infringed upon the copyright of the original song.[80] Scholars attribute importance to this decision for two reasons: the Southern District of N.Y. handles a substantial amount of music copyright-related cases, and this decision constitutes binding authority on all Southern District of N.Y. cases, which would likely touch on future digital sampling matters.[81]

Two other copyright cases may influence the courts' consideration of

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[73] *See generally Warhol*, 598 U.S. at 508; *Campbell*, 510 U.S. at 569.

[74] Kravis, *supra* note 3, at 260.

[75] Kravis, *supra* note 3, at 260–61.

[76] Kravis, *supra* note 3, at 260–62.

[77] Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

[78] *Id.* at 184.

[79] *Id.* at 183–85.

[80] *Id.*

[81] Kravis, *supra* note 3, at 236.

digital sampling.[82] The first was the 1974 Central District of California case *United States v. Taxe*, which related to the 1971 Sound Recording Amendment to the Copyright Act.[83] The alleged copyright infringement in this case centered around the defendant's re-recording of copyrighted songs, although changed slightly by speeding up, slowing down, or adding other modifications to the sound.[84] The Court concluded that "these changes were insubstantial to the human ear and were intended to be so," therefore, constituting copyright infringement.[85] The jury instructions were the crucial element of this case, requiring a finding that "there be a re-recording of 'more than a trivial part of the copyrighted record,' and that the final product be 'recognizable' as the same performance as recorded in the original."[86] Though seeming to weigh in favor of non-infringement, based on this instruction alone, the jury found that the Defendant's modifications to the song were enough to constitute infringement.[87] The second case was the 2005 case of *Bridgeport Music, Inc. v. Dimension Films*, where the Court attempted to lay out a bright-line rule for future courts to follow with regard to digital sampling.[88] The Court in *Bridgeport Music* argued that, "it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium."[89] Essentially, the Court attempted to establish the bright-line rule that it is the exclusive right of the owner of the copyright to sample from themselves or prepare derivative works.[90] Despite how these three cases seemingly to apply to the concept of digital sampling, the lack of further case law and the failure to mention any defenses, such as the fair use defense, allows for ample discussion of the impact this could have on the music industry.

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[82] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005); United States v. Taxe, 380 F. Supp. 1010 (C.D. Cal. 1974).

[83] 380 F. Supp. at 1012.

[84] *Id.* at 1013.

[85] *Id.*

[86] *Id.* at 1014–15.

[87] *Id.* at 1013–15.

[88] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005).

[89] *Id.*

[90] *Id.* at 800–01.

II. Importance

A. *The Prevalence of Digital Sampling in the Music Industry*

Though digital sampling only seemed to emerge as a method of music composition in the 1970s and 1980s, it has quickly taken on a life of its own, raising deeper questions regarding its legality in copyright law.[91] Not only can this increase in sampling be directly heard by listening to songs on the radio, it is backed up by statistics.[92] In 2022, approximately one in every five hits (songs that charted on the Billboard Hot 100 Hits)—or 17 percent of all 2022 hits—contained samples from previous songs.[93] That constitutes a 31 percent increase in sampling compared to the previous three years.[94] Not only is the amount of sampling rapidly increasing each year, but musicians are starting to sample from older music.[95] Furthermore, sampling has spread in popularity from different genres of music[96] while working its way into other areas of pop culture.[97]

This increase in sampling may be due in part to the rise of social media, such as Instagram and TikTok, where people are encouraged to post short videos or sound clips which are then available on the internet.[98] The role that TikTok, in particular, has played in the increased prevalence of sampling is especially important because it has a greater impact on ordinary people.[99] While musicians and record labels are familiar with the concept of licensing their works to be sampled by other artists, ordinary people are significantly less likely to have the bargaining power to sufficiently negotiate a licensing agreement for a sound recording they post online that a popular musician wants to use.[100] As a result, these big record labels are likely to abuse their

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[91] *See A New Spin*, *supra* note 6, at 726–27; *The State of Sampling: Sampling in 2022*, TRACKLIB (Dec. 13, 2022), https://perma.cc/JU6Z-DRC8 [hereinafter Tracklib].

[92] Tracklib, *supra* note 91.

[93] Tracklib, *supra* note 91.

[94] Tracklib, *supra* note 91.

[95] Tracklib, *supra* note 91 (noting the 2000s is the most sampled-from decade).

[96] Tracklib, *supra* note 91 (highlighting that R&B has dethroned "hip-hop as the most sampled genre").

[97] Tracklib, *supra* note 91 (explaining how sampling played a part in the FIFA World Cup).

[98] *See, e.g.*, Tracklib, *supra* note 91 (referencing a Canadian couple whose "live jam" went viral and was sampled by Jack Harlow and Drake).

[99] Tracklib, *supra* note 91.

[100] *See A New Spin*, *supra* note 6, at 726–27.

bargaining power and infringe on the copyright protection that should be awarded to the ordinary person who created the sound recording.[101] Consequently, this raises the important question of whether these actions by record labels would be classified as fair use.[102] If their actions were classified as fair use, who is to say that the fair use defense cannot be expanded upon even further to apply to more equal bargaining situations.

B. *Challenges Inherent in Music Composition*

Expansion of the fair use defense into the realm of digital sampling would be a beneficial development to combat some of the challenges that are inherent in music composition itself.[103] Musicians are constantly drawing influence from existing songs and other artists.[104] Coupled with the limitations inherent in music—there are only twelve notes in the musical alphabet and over 100,000 new songs being added to streaming services each day—this influence increases the likelihood that a work sounds similar to a previous song.[105] Amidst the "Thinking Out Loud" lawsuit, Ed Sheeran commented on social media, "'[t]here's only so many notes and very few chords used in pop music. Coincidence is bound to happen if 60,000 songs are being released every day on Spotify…and there's only 12 notes that are available.'"[106] Given the high production rate at which music is created and the fact that there are so few notes in the musical alphabet, the likelihood of sampling increases substantially.[107] Without the fair use defense, creativity

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[101] *See* Justin Grome, *Common Challenges in the Music Industry – And How to Deal with Them*, FORBES (Dec. 28, 2023, 7:45 AM EST), https://perma.cc/36FT-CL3G.

[102] *See id.*

[103] *See A New Spin*, *supra* note 6; *How to Compose Music*, ART OF COMPOSING, https://perma.cc/FPG4-BN78 (last visited Sept. 26, 2025).

[104] Courtney E. Smith, *Copyright Infringement Through the Years*, SONGTRUST, https://perma.cc/2BU2-A22K (last updated June 22, 2022); *see* Brittany Spanos, *Olivia Rodrigo Adds Taylor Swift, St. Vincent, Jack Antonoff Co-Writes to 'Déjà Vu'*, ROLLING STONE (July 9, 2021), https://perma.cc/ZDT4-ENE4 (quoting Olivia Rodrigo on the influence of Taylor Swift in her music, "It's one of my favorite songs ever. I love like the yelly vocals in it, like the harmonized yells that [Swift] does, I think they're like super electric and moving, so I wanted to do something like that.").

[105] Smith, *supra* note 104; Becky Buckle, *120,000 New Tracks Released on Streaming Services Every Day, Report Finds*, MIXMAG (May 30, 2023), https://perma.cc/LKN3-DGHP.

[106] Smith, *supra* note 104.

[107] *See* Smith, *supra* note 104.

in the music industry may be severely impeded.[108] This would go against the goals the framers of the Constitution had in mind when they included the intellectual property clause.[109]

III. *Andy Warhol Foundation for the Visual Arts v. Goldsmith*

A. *The Facts and Procedural History*

Andy Warhol Foundation for the Visual Arts v. Goldsmith centers around Lynn Goldsmith ("Goldsmith"), a photographer known for her photographs of rock-and-roll musicians, and the Andy Warhol Foundation for the Visual Arts ("AWF"), a foundation created in the name of well-known artist Andy Warhol ("Warhol"), with the purpose of preserving his legacy and advancing the visual arts field.[110] In 1984, one of Goldsmith's photographs of the musician Prince was licensed by Vanity Fair for a "one time" only use as an artist reference.[111] Vanity Fair hired Warhol to create an artist's rendition of the photograph which would accompany an article that was set to be published in the magazine.[112] In doing so, Warhol not only created the silkscreen for the magazine, but also created fifteen additional derivative works based on the photograph for his own personal use.[113] Goldsmith was compensated for the "one time" use license of her photograph and credited as the source of the magazine's photograph of Warhol's silkscreen.[114] However, Goldsmith was unaware of, uncredited, and unpaid for Warhol's fifteen other uses of her work.[115] This unlicensed use of her work came to a head in 2016 when she discovered one of these additional Warhol works,

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[108] *See, e.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023); Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018); Williams v. Bridgeport Music, Inc., No. LA CV13-06004, 2015 U.S. Dist. LEXIS 97262, at *15–18 (C.D. Cal. Dec. 2, 2015); John Quagliariello, *Blurring the Lines: The Impact of* Williams v. Gaye *on Music Composition*, 10 HARV. J. OF SPORTS & ENT. L. 133, 141 (Winter 2019).

[109] *See* U.S. CONST. art. I, § 8, cl. 8. *See, e.g.*, *What Is the Purpose of Copyright Law*, COPYRIGHT ALLIANCE https://perma.cc/RWK5-EPQT (last visited Sept. 26, 2025) (explaining that the Framers intended the intellectual property clause of the Constitution to promote and protect the rights of authors in order to "promote the progress of science and useful arts").

[110] *Warhol*, 598 U.S. at 514–15; *Mission*, THE ANDY WARHOL FOUND. FOR THE VISUAL ARTS https://perma.cc/G3AN-JAFJ (last visited Sept. 26, 2025).

[111] *Warhol*, 598 U.S. at 515.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

"Orange Prince," was being used on the cover of Condé Nast magazine.[116] Although Condé Nast paid AWF $10,000 to use Orange Prince, Goldsmith did not receive a penny nor a source credit for her photograph having been used as an artist reference.[117] When Goldsmith contacted AWF about her concerns that it had infringed upon the copyright of her original photograph, AWF responded by initiating a suit against her seeking "declaratory judgment of noninfringement or . . . fair use."[118]

The District Court considered Goldsmith's counterclaim for infringement and AWF's defense of fair use and ultimately granted summary judgment for AWF, holding that AWF and Warhol's Prince Series constituted fair use of Goldsmith's photograph.[119] In so holding, the Court analyzed all four fair use factors.[120] With respect to the first factor, the Court found that the works were "transformative" because they "have a different character, give Goldsmith's photograph a new expression, and employ new aesthetics with creative and communicative results distinct from Goldsmith's" when viewed "side-by-side."[121] Having found that Warhol's work was transformative, the Court effectively disregarded any weight the second factor had in favor of Goldsmith.[122] In addition, the Court found that the third factor also favored AWF because "Warhol removed nearly all the photograph's protectible elements in creating the Prince Series."[123] Finally, the Court found in favor of AWF with respect to the fourth factor, arguing that Warhol's work does not constitute a market substitute for Goldsmith's photograph and thus there would have been no potential harm to Goldsmith.[124]

In stark contrast to the District Court's findings that all fair use factors favored AWF, the Second Circuit Court of Appeals held that all four factors

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[116] *Id.* at 518–19 (explaining that Warhol's "Prince Series had passed to the Andy Warhol Foundation for the Visual Arts, Inc." who had licensed Orange Prince to Condé Nast).

[117] *Warhol*, 598 U.S. at 519–20.

[118] *Id.* at 522.

[119] *Id.*

[120] *Id.* at 523.

[121] *Id.* (arguing that the differences between the works made the Prince Series "immediately recognizable as a 'Warhol' rather than as a photograph of Prince").

[122] *Id.*

[123] *Warhol*, 598 U.S. at 523.

[124] *Id.*

favored Goldsmith, thus reversing the lower court's holding.[125] The Appellate Court's reversal relied heavily on its analysis of the first factor.[126] In particular, the Court rejected the District Court's idea that "any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative."[127] Rather, the Court held that in order to satisfy the first factor, the secondary artist must do more than simply impose their own artistic style on someone else's work.[128] Because that is essentially what Warhol had done in turning Goldsmith's photo into Orange Prince, the Court found that the first factor weighed in favor of Goldsmith.[129] In following this, the Court also found that the other three factors weighed in favor of Goldsmith; therefore, AWF was not entitled to protection under the fair use defense.[130]

B. *The Supreme Court's Analysis and Holding*

In reviewing the lower court's decision, the Supreme Court only considered the Appellate Court's accuracy in analyzing the first factor (the purpose and character of use).[131] Before getting into the meat of the case, the Supreme Court seemed to dispel AWF and the District Court's contention that transformativeness of appearance alone was sufficient to satisfy the first factor.[132] Instead, the Supreme Court focused on the precise use of each work.[133] Because both Warhol's and Goldsmith's works were being used to

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[125] *Id.*

[126] *Id.* at 523–24.

[127] *Id.* at 523.

[128] *Id.*

[129] *Warhol*, 598 U.S. at 523 ("[T]he overarching purpose and function of the two works at issue … is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person." (quoting Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 32 (2d Cir. 2021)).

[130] *Id.* at 524 (citations omitted) ("[T]he creative and unpublished nature of Goldsmith's photograph favored her; the amount and substantiality of the portion taken (here, "the 'essence'" of the photograph) was not reasonable in relation to the purpose of the use; and that AWF's commercial licensing encroached on Goldsmith's protected market to license her photograph 'to publications for editorial purposes and to other artists to create derivative works.'").

[131] *Id.* at 525.

[132] *Id.* ("Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor.").

[133] *Id.* at 526.

"depict Prince in magazine stories about Prince," the uses shared the same purpose.[134] Thus, the Supreme Court held that with regard to the first factor, "[a] use that has a further purpose or different character is said to be 'transformative.'"[135] The Supreme Court noted that this "transformative use" must go beyond what would constitute a derivative work.[136] However, the Supreme Court failed to draw a distinct line as to how far beyond a derivative work a transformative work must go.[137]

In applying this interpretation of the first factor to the facts at hand, the Supreme Court found that Goldsmith had introduced sufficient evidence to prove that her use and purpose of the original work was common both to her and the photography industry.[138] Likewise, Goldsmith and Warhol were using their portraits of Prince in substantially similar manners—both of which were of a commercial nature.[139] Therefore, the Supreme Court found that the first fair use factor weighed in Goldsmith's favor.[140] AWF's argument that Warhol added new meaning to Goldsmith's photograph was insufficient to turn the tides in favor of fair use.[141] The Supreme Court held that the new meaning added to a secondary work should only be considered to the extent necessary to ascertain whether there are any differences between the purpose of the use of the secondary work and the original work.[142] Under the facts of this case, the Supreme Court found that any new meaning that Warhol may have added was insufficient to distinguish the purpose of the work from that of the original work.[143] Consequently, the Supreme Court affirmed the Court of Appeals, finding that the first fair use factor favored Goldsmith.[144]

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[134] *Id.*

[135] *Warhol*, 598 U.S. at 529.

[136] *Id.*

[137] *See id.*

[138] *Id.* at 534–35 (noting that Goldsmith had licensed her work to others and to Warhol in the past to create stylized derivatives).

[139] *Id.* at 537–38.

[140] *Id.*

[141] *Warhol*, 598 U.S. at 541 (finding that this additional expression and meaning "does not in itself dispense with the need for licensing").

[142] *Id.* at 545.

[143] *Id.* at 545–46.

[144] *Id.* at 551.

ANALYSIS

IV. Digital Sampling and the Fair Use Defense

A. *Alleged Infringing Samplers Would Prevail Under the Fair Use Defense Pre-*Warhol

Prior to the Supreme Court's decision in *Warhol*, the first fair use factor (the purpose and character of the use) was interpreted based on Judge Leval's concept of transformativeness.[145] Leval's concept of transformative use asked whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[146] Scholars have noted transformativeness cannot be properly weighed without taking into consideration other factors, such as the similarity between the two works.[147] Under this broader interpretation of factor one, digital sampling would likely be considered fair use.[148] The very definition of digital sampling supports this analysis of factor one.[149] Because digital sampling is defined as the incorporation of short segments of existing songs into new songs thereby adding new expression and creating a new meaning, digital sampling would be considered transformative.[150] Unlike performing a cover song or directly copying a song, digital sampling is centered around the idea of borrowing ideas from another musician and transforming it to make an entirely new song based on the sampling musician's expression of the idea.[151] Not only does this satisfy Judge Leval's concept of transformative use, but it also falls squarely into the purpose and premise of copyright law as a whole.[152]

Digital sampling faces the greatest challenge of proving fair use under

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[145] *See supra* Part I(C).

[146] Leval, *supra* note 64, at 1111.

[147] Matthew Sag, *Article: God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TECH. L. REV. 381, 388 (2005).

[148] *See* Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 577 (1992); Leval, *supra* note 64, at 1111; Sag, *supra* note 147, at 388.

[149] *See* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003); *Digital Sampling*, *supra* note 13.

[150] *Newton*, 388 F.3d at 1192; *Digital Sampling*, *supra* note 13.

[151] *See* Hampel, *supra* note 148, at 576–77.

[152] U.S. CONST. art. I, § 8, cl. 8 (noting the purpose of promoting the useful arts); *see* Leval, *supra* note 64, at 1111.

the second factor (nature of the copyrighted work).[153] Courts have traditionally held that the more creative an original work is, the harder it is for the secondary work to be considered fair use.[154] This is because the Copyright Act is intended to protect the artist's expression of an idea, which typically centers around their creativity.[155] Because songs are considered to be a very creative form of expression as opposed to merely factual, it would be difficult for a secondary song that samples from the original to be considered fair use.[156] However, even if this factor weighs against a finding of fair use, the sampler may still prevail.[157] The fair use doctrine is a balancing test as opposed to a conjunctive test that requires all four factors to weigh for or against fair use.[158] Therefore, the sampler could still prevail if they are able to prove that the other factors are more important and weigh in favor of fair use.[159]

The third factor (amount and substantiality of the work used) also supports digital sampling in a pre-*Warhol* world.[160] Proponents of the fair use defense for musicians accused of sampling argue that because sampling typically involves the copying of small, insubstantial amounts of a song, musicians should be protected by the fair use doctrine.[161] This argument is supported by the Court's analysis of the fair use doctrine in *Campbell v. Acuff-Rose*.[162] In *Campbell*, the Court focused on whether 2 Live Crew had made sufficient transformative use of the original work.[163] Included in this determination of "sufficient transformative use" was the question of whether or not the secondary work stole the heart of the original song.[164] When applied to the world of digital sampling, musicians could borrow a

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[153] Hampel, *supra* note 148, at 578.

[154] Sag, *supra* note 147, at 388.

[155] *See Copyright Basics*, UNIV. OF MINN. LIBRS., https://perma.cc/U6SK-XWBS (last visited Sept. 26, 2025).

[156] Hampel, *supra* note 148, at 578.

[157] *See Fair Use*, COLUM. UNIV. LIBRS., https://perma.cc/N8RA-FT9Y (last visited Sept. 28, 2025).

[158] *Id.*

[159] *See id.*; Hampel, *supra* note 148, at 578.

[160] *See generally* Hampel, *supra* note 148, at 578.

[161] Kravis, *supra* note 3, at 253.

[162] *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[163] *See id.* at 569–94.

[164] *Id.* at 587.

few lyrics or a few notes from another artist without having to seek a license from the original owner.[165] Because the amount of the original work used is so small, and therefore does not constitute the heart of the song, the third fair use factor would weigh in the favor of the sampler.[166] Based on this interpretation of the fair use defense, a sampling that makes use of a small portion of another musician's work would likely be able to invoke the fair use defense.[167]

With respect to the fourth fair use factor (effect upon original artist's market), whether or not this factor weighs in favor of the sampler depends upon the facts of each particular instance.[168] Although musicians accused of sampling may not always prevail under the current fair use defense, under the pre-*Warhol* interpretation, there is a significantly higher likelihood that a sampler may be able to effectively invoke the fair use defense.[169] For instance, although Olivia Rodrigo may be less likely to establish that she has not attempted to compete in the same market as Taylor Swift, an accusation of unlicensed sampling of David Bowie and Queen's *Under Pressure* by Vanilla Ice in *Ice, Ice Baby* has a higher chance of success.[170] Because Taylor Swift and Olivia Rodrigo share very similar music styles and thus tend to appeal to the same category of listeners, there is a greater likelihood that Swift's market for her music may be harmed by Rodrigo sampling her work.[171] On the contrary, Bowie, Queen and Vanilla Ice have significantly less in common.[172] Not only did Bowie and Queen release music in different decades than Vanilla Ice, but they also released music in two different genres.[173] Thus, even if Vanilla Ice tried to feed off of Bowie and Queen's popularity in sampling seven notes from *Under Pressure*, "someone who wanted to hear *Under Pressure*…would not be satisfied by hearing Vanilla Ice's *Ice, Ice Baby*,"

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[165] *See, e.g.*, Hampel, *supra* note 148, at 578 (noting De La Soul's use of four words from a James Brown song and "five whistled notes from Otis Redding").

[166] Hampel, *supra* note 148, at 578; *see Campbell*, 510 U.S. at 586–87.

[167] *See Campbell*, 510 U.S. at 587; Kravis, *supra* note 3, at 253.

[168] *See* Hampel, *supra* note 148, at 578–79.

[169] *See* Hampel, *supra* note 148, at 578–79.

[170] Hampel, *supra* note 148, at 579; *see* Mirjalili, *supra* note 4.

[171] *See* Spanos, *supra* note 104.

[172] Hampel, *supra* note 148, at 579.

[173] *Vanilla Ice*, ENCYCLOPEDIA.COM, https://perma.cc/5XD3-ZUAM (last updated May 9, 2018) (coining Vanilla Ice as a rap singer); *Queen*, ENCYCLOPEDIA BRITANNICA, https://perma.cc/9GPD-TJL7 (last updated Sept. 22, 2025) (recognizing Queen's music style as being a "fusion of heavy metal, glam rock, and camp theatrics").

as the songs are two very different styles.[174] Therefore, even though the favorability of the fourth factor is very fact specific, it is not impossible for the facts to weigh in favor of fair use by the sampler.[175]

B. Warhol*'s Narrowing of Fair Use Factor One Poses New Challenges for Samplers*

Although the Court's decision in *Warhol* may seem to align with the Court's precedent regarding the fair use doctrine, in reality, its analysis of the first fair use factor drastically changed the game. While digital sampling may have had a strong likelihood of prevailing under the pre-*Warhol* interpretation of the fair use defense, the post-*Warhol* court system raises new concerns for samplers.[176] As opposed to the *Campbell* view of transformation—referring to transformativeness as it pertains to similarity of the works—the Court in *Warhol* looked at whether the *use* of the new work was transformative.[177] The Court's new interpretation of the fair use defense effectively stated that secondary works created for a purpose "highly similar" to that of the original work do not constitute fair use.[178] This in turn makes it significantly more difficult for digital samplers to prove fair use.[179] All music typically shares the same general purposes: serving as a source of entertainment and means of self-expression.[180] Therefore, even if a musician were to borrow bits and pieces of another musician's song and create a completely different sounding song out of it, the first fair use factor would weigh against the sampler because the purpose of music has not changed.[181] Though the Court did not specifically define what constitutes a "highly similar" purpose, it clearly alluded to things that were not different

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[174] Hampel, *supra* note 148, at 579.

[175] *See* Hampel, *supra* note 148, at 578–79.

[176] *See supra* Part IV(A); Peter J. Karol, *After Warhol*, ARTFORUM (June 5, 2023, 9:20 AM), https://perma.cc/4DFU-2BCL (arguing that *Warhol* created a "broadly applicable, transformative fair use test . . . that should concern even those artists who have little interest in licensing their creations"). *See generally* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

[177] Judy Jennison & Lisa T. Oratz, *Sign 'O' the Times: The Supreme Court Rules on* Warhol v. Goldsmith, PERKINS COIE LLP (July 6, 2023), https://perma.cc/SYP5-NVMD.

[178] *Warhol*, 598 U.S. at 528; Karol, *supra* note 176.

[179] *See Warhol*, 598 U.S. at 528; Karol, *supra* note 176.

[180] Doug Thomas, *Music Is Everywhere Different Forms of Music in Our Modern World*, INTERLUDE (Aug. 31, 2020), https://perma.cc/6E2H-SNPS.

[181] *See Warhol*, 598 U.S. at 528; Thomas, *supra* note 180.

purposes.[182] Things like aesthetics, stylistic changes, and the addition of new expression or meaning do not constitute transformative purposes under the *Warhol* interpretation.[183] Thus, courts would likely find digital sampling does no more than attempt to add new meaning and stylistic changes to an already copyrighted song.[184] As a result, these changes would not constitute a transformation of use from the earlier work.[185]

In addition, while earlier courts viewed the fair use factors to be more of a totality of the circumstances analysis, the Court's decision in *Warhol* seems to set forth the idea that a single factor may be dispositive.[186] In light of the Court's decision, scholars have noted that the Court's reasoning "elevates the first factor of fair use, purpose of the use (and specifically, how the uses compete against each other commercially), above all else."[187] Unfortunately, the newfound dispositive nature of the first factor may prove fatal for digital sampling. Because sampling is less likely to satisfy the Court's interpretation of transformative use for the reasons previously mentioned, without being able to fall back on the balancing of the other factors, a defense of fair use would likely fail. Furthermore, even if a court were to choose to weigh the four factors, now that sampling is less likely to weigh in favor of fair use under *Warhol*'s factor one standard, in conjunction with the fact that factor two has always leaned against fair use, the ultimate balancing of the factors would be more likely to strike down the fair use defense.[188] However, because digital sampling and music are a unique creative field, they should not be subject to this restrictive application of the fair use defense. A number of gaps in the *Warhol* holding should be utilized by samplers in litigation in order to invoke the fair use defense. In turn, the court should explicitly distinguish digital sampling and the fair use defense from non-music related uses of the fair use defense.

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[182] *Warhol*, 598 U.S. at 540–41; Karol, *supra* note 176.

[183] 598 U.S. at 541; Karol, *supra* note 176.

[184] *See Warhol*, 598 U.S. at 541.

[185] *Id.*; Karol, *supra* note 176.

[186] Crews, *supra* note 157.

[187] Bella Wetherington, *From Art Museums to the Supreme Court: How Does the Decision in* Warhol v. Goldsmith *Go Beyond Art?*, LIBR. FUTURES (Sept. 12, 2023), https://perma.cc/R9DU-FDTU.

[188] *See Warhol*, 598 U.S. at 541; Hampel, *supra* note 148, at 569; Karol, *supra* note 176.

V. Implications for Digital Sampling in a Post-*Warhol* Era

A. *The Treatment of Digital Sampling vs. Appropriation Art*

Andy Warhol's name used to be known particularly in connection with the genre of art known as "appropriation art."[189] Appropriation art is defined as "the practice of artists using pre-existing objects or images in their art with little transformation of the original."[190] Based on their definitions alone, digital sampling and appropriation art sound like they perform a very similar function.[191] However, appropriation art and digital sampling—though similar in concept and function—have received drastically different treatment by the courts.[192] If one were to guess which art form has been awarded protection under the fair use defense based on their definitions alone, they would likely lean towards sampling.[193] This is because the definition of appropriation art specifically notes that the secondary work makes "little transformation" of the original work, thereby seemingly contradicting the premise of the fair use doctrine and demonstrating the need for a music-specific standard.[194] Nevertheless, this has not been the case.[195] While courts have allowed artists under the fair use doctrine to sample whole photographs—with very little new work added to it—and call it appropriation art,[196] they have been disproportionally harsher to sampling in music.[197] When it comes to digital sampling in music, courts tell musicians "thou shalt not steal" and "get a license or do not sample."[198] This sanctioning of appropriation art and condemnation of digital sampling may

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[189] *See* Karol, *supra* note 176.

[190] *Appropriation*, TATE, https://perma.cc/B25L-R87B (last visited Sept. 28, 2025).

[191] *Compare id.*, *with Digital Sampling*, *supra* note 13.

[192] Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371, 371–72 (2019).

[193] *See generally Appropriation*, *supra* note 190; *Digital Sampling*, *supra* note 13.

[194] *See Appropriation*, *supra* note 190.

[195] Eckhause, *supra* note 192, at 371–72.

[196] *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006); Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 806 (9th Cir. 2003).

[197] Eckhause, *supra* note 192, at 372.

[198] Eckhause, *supra* note 192, at 371–72.

be brought onto a level playing field by *Warhol*.[199]

In response to *Warhol*, legal scholars commented that "[t]he lasting irony, then, may be that Warhol—an artist synonymous with appropriation—may now be the name lawyers cite most to attack that very practice."[200] In the same way that musicians invoking the fair use defense will have to prove the transformative nature of their use of the original work, appropriation artists will have to do the same.[201] Appropriation artists will no longer be able to rely strictly on the transformativeness standard from *Campbell*.[202] Even though appropriation art may have stronger arguments under the other fair use factors, the emphasis and importance that the *Warhol* Court placed on the first factor alone may prove dispositive in appropriation art cases as well as digital sampling.[203] Thus, the *Warhol* decision has the potential to bring these two creative fields onto a more level playing field.[204] More importantly, appealing to the gaps in the *Warhol* holding would actually give sampling litigants a leg up and allow them to be more likely to prevail under a fair use defense.[205]

B. *Gaps in Copyright Law and* Warhol*, and What That Means for Sampling*

Due to the recency of the *Warhol* decision, there are numerous potential gaps in the Court's reasoning that have yet to be parsed out.[206] While an initial analysis of the Court's decision may seem as though the fair use defense would not apply to digital sampling, these gaps are helpful to the protection of sampling and the potential availability of the fair use defense.[207] Holes in the *Warhol* decision that would be useful to the case of fair use for digital sampling include: (1) questions regarding what exactly constitutes copyrightable subject matter, and (2) a potential undermining of

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[199] *See generally* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 508 (2023); Eckhause, *supra* note 192, at 371–72.

[200] Karol, *supra* note 176.

[201] *See generally Warhol*, 598 U.S. at 508–51.

[202] Kyle Jahner, *Warhol Fair Use Ruling Reframes Appropriation Art Legal Fights*, BLOOMBERG L. (May 30, 2023, 5:05 AM EDT), https://perma.cc/5PAL-SST7.

[203] *See* 598 U.S. at 541; Karol, *supra* note 176; Wetherington, *supra* note 187.

[204] Karol, *supra* note 176.

[205] *See generally* 598 U.S. at 508–52.

[206] *See generally id.*

[207] *See supra* Part IV(B).

the entire purpose of copyright law.[208]

The first gap that opens the door for fair use defense of digital sampling is the discrepancy regarding what constitutes copyrightable material.[209] In comparing Warhol's use of Goldsmith's photograph to Warhol's earlier use of the Campbell's soup logo in a painting, the majority in the *Warhol* case noted that "[i]t is the very nature of Campbell's copyrighted logo – well known to the public, designed to be reproduced, and a symbol of an everyday item for mass consumptions—that enables the commentary."[210] The Court's statement raises questions that may be especially applicable to the music industry.[211] In noting that the "nature of Campbell's copyrighted logo" was the key to allowing fair use in that case, the Court seems to draw particular emphasis on determining what exactly the copyrightable material in question is.[212] While this important distinction does not impact the *Warhol* case too deeply, it plays a more important role when related to music.

The question of what actually constitutes the copyrightable part of a musical composition was of particular importance in the 2015 case of *Williams v. Bridgeport Music, Inc.* and the appeal in 2018 (*Williams v. Gaye*).[213] During the litigation, the parties raised the question of what part of the song was protected by copyright law.[214] In particular, the parties pointed to the fact that the theme and groove of a song are not protectable.[215] Ultimately, the Court affirmed the jury verdict and allowed copyright infringement suits to consider evidence of groove.[216] This case set a dangerous precedent that has not been strictly followed by ensuing courts, thus making it difficult to determine what exactly constitutes copyrightable content in music

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[208] *See* 598 U.S. at 540, 549.

[209] *See id.* at 540.

[210] *Id.*

[211] *See id.*

[212] *Id.*

[213] *See generally* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018); Williams v. Bridgeport Music Inc., No. LA CV13-06004, 2015 U.S. Dist. LEXIS 97262 (C.D. Cal. Dec. 2, 2015).

[214] Williams v. Bridgeport Music, Inc., No. LA CV13-06004, 2015 U.S. Dist. LEXIS 97262, at *16 (C.D. Cal. Dec. 2, 2015).

[215] *Id.* at *16–18.

[216] *Id. See generally Gaye*, 895 F.3d at 1106–38.

compositions.[217]

This issue of copyrightable subject matter is further complicated by discrepancies and inconsistencies between the 1976 Act and the 1909 Act.[218] In order to obtain registration of a valid copyright under the 1909 Act, an author or composer needed to deposit a copy of the work with the Library of Congress.[219] Additionally, sound recordings were not subject to protection under the 1909 Act; "a song was only considered published after the commercial release of sheet music," as a written notation serving as the deposit copy of the work.[220] In contrast, the 1976 Act eliminated the publication requirement and the deposit copy requirement.[221] This has created conflict amongst the analytical requirements for courts, specifically when works recorded both before and after 1978 are involved.[222] As explained in *Williams v. Gaye*, when interpreting compositions under the 1909 Act, courts are limited to review of "the four corners of the sheet music deposited with the United States Copyright Office."[223] In practice, this meant that under the 1909 Act, material not contained in the deposit copy was not considered to be protectable by copyright law.[224]

Furthermore, inherent biases that underlay the deposit copy requirement may increase the likelihood of compositional elements being lost along the way when it comes to earning copyright protection.[225] Because many musicians could not read or write traditional sheet music, they would compose their songs by ear, record them, and then pass them along to another individual who would transcribe the songs in order to create the

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[217] Quagliariello, *supra* note 108, at 138 ("Never before had a copyright infringement been determined simply because the 'groove' of two songs sounded similar."). *See generally* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020); *Gaye*, 895 F.3d at 1106–38; Griffin v. Sheeran, No. 17 Civ. 5521, 2020 U.S. Dist. LEXIS 52908 (S.D.N.Y Mar. 24, 2020).

[218] *See generally* Copyright Act of 1909, Pub. L. No. 60–349, ch. 320, 36 Stat. 1075; Copyright Act of 1976, 17 U.S.C. § 102 (2018).

[219] Copyright Act of 1909, Pub. L. No. 60–349, ch. 320, 36 Stat. 1075, 1082.

[220] Evans, *supra* note 44, at 162.

[221] 17 U.S.C. §§ 101–102; Evans, *supra* note 44, at 163 (stating that courts have held that "compositional elements can be contained solely in the sound recording and not in sheet music, especially when the sheet music is created after the song is recorded").

[222] *See generally Skidmore*, 952 F.3d at 1051–79; *Gaye*, 895 F.3d at 1106–38; *Griffin*, 2020 U.S. Dist. LEXIS at *1–3.

[223] 895 F.3d at 1121.

[224] *See id.* at 1121–27.

[225] Evans, *supra* note 44, at 169–70.

deposit copy required by the 1909 Act.[226] This was notably the case in *Williams v. Gaye*, where Marvin Gaye passed along transcription responsibility to another individual on his team since he could not read or write music.[227] Inevitably, many critical stylistic and compositional elements that make the song unique may be lost along the way during the transcription process.[228] By placing emphasis on the written notation of a work, the deposit copy is limiting the jury's attention to the elements of the song that are most easily expressed through written notation, while also directing their attention away from the more nuanced elements of a song that a listener would typically only hear by listening to a sound recording.[229]

These cases raise the following questions: Is it the organization of music notes, the tempo at which they are played, or the groove they tend to create that makes a song copyrightable?[230] Or, is it the culmination of all of those things with the lyrics and performance elements of the musician that make a song copyrightable?[231] This is an important distinction to consider before determining any claim for fair use.[232] It is the stylistic, nuanced, and expressive elements of a composition that are often considered the most worthy of copyright protection.[233] If those elements are found to not be protected as a result of a court's copyright act interpretation, then there is less material for a secondary work to potentially infringe upon when

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[226] Evans, *supra* note 44, at 169–70 (citing Selle v. Gibb, 741 F. 2d 896, 899 (7th Cir. 1984)); *see* Sophia Alexandra Hall, *10 Legendary Musicians Who Never Learned to Read Music*, CLASSIC FM, https://perma.cc/Q3LF-8E6F (last updated Oct. 9, 2021, 11:50 AM) (noting musicians like Jimi Hendrix, Bob Dylan, Aretha Franklin, and The Beatles cannot read or write music).

[227] 895 F.3d at 1116.

[228] Evans, *supra* note 44, at 170–71.

[229] *See* Robert Brauneis, *Musical Work Copyright for the Era of Digital Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 9 (2014) (quoting Michael Chanan who wrote, "[w]estern notation deals poorly with certain aspects of musical expression, like dynamics, attack, and timbre, which cannot be calculated in the same way and given fixed values: their values are relative. . . . They do not disappear from performance, of course, but notation demotes them . . . .").

[230] *See Gaye*, 895 F.3d at 1138; Evans, *supra* note 44, at 169–71; *What Musicians Should Know About Copyright*, U.S. COPYRIGHT OFF., https://perma.cc/8P3X-5YMM (last visited Sept. 28, 2025) [hereinafter *What Musicians Should Know*].

[231] *See* Evans, *supra* note 44, at 169–71; *see also What Musicians Should Know*, *supra* note 230.

[232] *See* Quagliariello, *supra* note 108, at 138. *See generally Skidmore*, 952 F.3d at 1057–79; *Gaye*, 895 F.3d at 1106–38; Griffin v. Sheeran, No. 17 Civ. 5521, 2020 U.S. Dist. LEXIS 52908, at *2–3 (S.D.N.Y Mar. 24, 2020).

[233] *See* Evans, *supra* note 44, at 169–71.

sampling.[234] Thus, if certain elements of a musical composition are deemed to not be copyrightable, this opens the door for a greater possibility of fair use being found—or even the possibility of the digital sampling being considered non-infringing use altogether.[235] Therefore, in order for digital samplers to prevail under the fair use defense, it is critical that they continue to push back against the *Williams v. Gaye* Court's holding and advocate for greater protection of the individualized elements that make a composition unique.[236] By emphasizing that these more minute details constitute the copyrightable subject matter, digital samplers will be able to borrow the more generic elements of a composition.[237] Because these generic and standardized elements of the song would not be considered copyrightable, the sampler could transform them by adding their own individualized touch and thereby making the work copyrightable.[238]

The *Warhol* decision created yet another gap, as the majority seemed to prioritize the commercial and economic rationales for licensing in restricting the application of the fair use defense.[239] In particular, they note, "it will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work."[240] The Court's declaration severely diminishes one of the key reasonings underpinning copyright law as a whole—the promotion and protection of creativity.[241] Instead, the Court definitively prioritized the economic side of copyright law.[242] Although it

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[234] *See* Quagliariello, *supra* note 108, at 138; Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 539–40 (2023). *See generally Gaye*, 895 F.3d at 1106–38.

[235] *See Warhol*, 598 U.S. 508, 539–40 (2023).

[236] *See, e.g.*, Gray v. Hudson, 28 F.4th 87, 102 (9th Cir. 2022) (quoting Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003)) (holding "insofar as it combines musical building blocks in the same way that the Dark Horse ostinato does, the Joyful Noise ostinato lacks 'the quantum of originality needed to merit copyright protection.'"); *Skidmore*, 952 F.3d at 1051–79; *Griffin*, 2020 U.S. Dist. LEXIS 52908 at *1–4.

[237] *See, e.g.*, *Gray*, 28 F.4th at 92–103; *Skidmore*, 952 F.3d at 1056–80; *Griffin*, 2020 U.S. Dist. LEXIS 52908 at *1–4.

[238] *See* Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003) (holding that the combination of unprotectable elements can be combined to constitute copyrightable subject matter).

[239] 598 U.S. at 530–50.

[240] *Id.* at 549.

[241] U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[242] *See Warhol*, 598 U.S. 508 at 549.

may not "impoverish" the AWF to pay for a license in this scenario, the same may not be true for aspiring artists and musicians.[243] In response to the 2018 *Williams v. Gaye* case, legal scholars acknowledged that this broad holding all but forces new musicians to enter into licensing agreements with established musicians to avoid the prospective cost of litigation.[244] The *Williams* decisions coupled with the *Warhol* case's foreclosure of the fair use defense severely restricts musicians' options when it comes to acting on the influence of other musicians.[245] The high costs of litigation and licensing fees—while not even guaranteeing protection from legal liability—discourages artists from entering the music industry.[246] If artists are discouraged from entering the music industry and creating new musical works, the Copyright Act's purpose loses all meaning.[247] Without artists and musicians creating new works, there will be no reason to protect this field of creativity.[248] Thus, this contradiction opens a door for striking down the *Warhol* decision as violative of the Constitution.[249]

Furthermore, the Court noted how Goldsmith's previous practice of licensing her work to others is indicative of the purpose and character of the use.[250] While this analysis may make sense in Goldsmith's and Warhol's cases, it could be twisted in a way that severely hurts musicians—and the music industry as a whole—when it comes to sampling.[251] In response to the Court's holding, scholars noted that "while this can be taken as a win for photographers like Goldsmith who rely on the licensing money their images bring in, the decision runs the risk of harming fair use by focusing too much on the commercial nature of the case."[252] Under *Warhol*, a court could argue that just because Olivia Rodrigo licensed Taylor Swift's work to sample it in one song, she should always seek a license from another musician when she

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[243] *Id.*; Grome, *supra* note 101 (describing high costs of recording, production, promotion, touring, and the challenge of earning a sustainable income).

[244] Quagliariello, *supra* note 108, at 141.

[245] *See generally Warhol*, 598 U.S. 508 at 549–50; Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018); Williams v. Bridgeport Music, Inc., No. LA CV13-06004, 2015 U.S. Dist. LEXIS 97262, at *16–17 (C.D. Cal. July 14, 2015); Quagliariello, *supra* note 108, at 141.

[246] Quagliariello, *supra* note 108, at 141.

[247] *See* U.S. CONST. art. I, § 8, cl. 8; Quagliariello, *supra* note 108, at 141.

[248] *See* U.S. CONST. art. I, § 8, cl. 8; Quagliariello, *supra* note 108, at 141.

[249] *See generally* U.S. CONST. art. I, § 8, cl. 8; *Warhol*, 598 U.S. at 508–51.

[250] *Warhol*, 598 U.S. at 532.

[251] *See id.* at 532–33.

[252] Wetherington, *supra* note 187.

writes a song that may draw influence from a different musician's song.[253] Lower courts may take *Warhol*'s emphasis on commercial licensing to mean that a work could be classified as a fair use until it is licensed.[254] However, musicians should not lose their right to a fair use defense simply because they attempted to preserve their protection from liability by seeking a license to sample from another work. Therefore, the Court's emphasis on the commercial nature of works and licensing effectively discourages musicians from spawning creativity, and in exchange, promotes a risk-averse licensing practice in direct conflict with the goal of the Constitution.[255]

Going forward, musicians accused of digital sampling should challenge *Warhol*'s understanding of the fair use defense as it pertains to the music industry on the grounds that it violates the Constitution and the purpose of the Copyright Act. Without the fair use defense, musicians are severely restricted in what they are allowed to create and how they are allowed to do it.[256] Because of the limitations inherent in music composition, musicians are restricted, as there are only so many different ways that you can arrange twelve notes.[257] Imposing further limitations on this, such as the financial burden of licensing anything that might sound remotely similar, goes against the basis underpinning the Constitution and the Copyright Act. Therefore, challenging the current understanding of the fair use defense will open up a door that allows digital samplers to promote creativity and avoid high licensing costs on the grounds that their sampling is fair use.

CONCLUSION

Advancements in technology and streaming are making digital sampling an ever-growing aspect of the music industry. Because of the limitations inherent in music composition and licensing agreements, claims of infringement will accrue, as digital sampling becomes more common. Although the fair use doctrine may have had the potential to defeat infringement suits over sampling pre-*Warhol*, the Court's decision in *Warhol*

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[253] *See* 598 U.S. 508 at 547–48; Mirjalili, *supra* note 4 (describing Olivia Rodrigo's use of sampling in "1 step forward, 3 steps back," "Déjà Vu," and "Good 4 U").

[254] Wetherington, *supra* note 187.

[255] *See* Karol, *supra* note 176; Wetherington, *supra* note 187.

[256] *See generally Warhol*, 598 U.S. 508 at 549–50; Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018); Williams v. Bridgeport Music, Inc., No. LA CV13-06004, 2015 U.S. Dist. LEXIS 97262, at *16–18 (C.D. Cal. July 14, 2015); Quagliariello, *supra* note 108, at 141.

[257] Smith, *supra* note 104.

all but eliminated any possibility of prevailing under fair use. This foreclosure of the fair use defense will crush the music industry—a market ripe with creativity and new forms of expression. To prevent a regime entirely centered around expensive licensing agreements, it is imperative that the music industry continue to poke holes in the gaps left by the *Warhol* Court. By exploiting both the discrepancies in copyright law's analysis of copyrightable material and the potential constitutional violation, musicians accused of sampling will be able to prevail under a fair use defense.

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Child Soldiers in America–A Proposed Standard to Prevent and Remediate Juvenile Gang Affiliation in the United States

*Kathryn Bassey**

INTRODUCTION

Do you know where the word "infantry" comes from? It means "child soldier." They are just children.

--BLOOD DIAMOND, at 1:21:37-1:21:42 (Warner Bros. Pictures 2006)

The forced criminality of youths by adults is a horrific reality throughout the world.[1] Some children are forced to steal for their parents or guardians,[2] some are coerced into committing gang-related

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[1] Katherine Kaufka Walts et al., *Perpetrators or Victims? The U.S. Response to the Forced Criminality of Children*, ABA: COMM. ARTICLES (Aug. 8, 2023), https://perma.cc/UG7H-6XY5.

[2] *See, e.g.*, Dolores Chang, *Children as Young as 8 Are Ransacking NYC Businesses after Being Taught to Steal by 'THEIR PARENTS' in Modern-Day Oliver Twist*, THE DAILY MAIL, https://perma.cc/D6PU-ECV7 (last updated Sept. 10, 2023, 3:52 EDT); David Giuliani, *Kids Help Parents in Oak Brook Theft: Cops*, PATCH, https://perma.cc/3U4Q-9QRF (last updated Nov. 29, 2023, 4:09 PM CT).

murders,[3] and others are forced to participate in armed conflicts.[4] Despite their varying circumstances, all of these children have one thing in common: they are *victims* of exploitation.[5]

Consider Trei's story: at just thirteen years old he was indoctrinated into the Gangster Disciples, a prolific criminal gang, by his best friend's father.[6] While driving him home one day, the father handed Trei a revolver, pointed at a group of people across the street, and ordered Trei to shoot at them.[7] Trei claimed at the time he believed "it was them or me," and after following the order he was officially affiliated with the gang.[8] Trei was eventually sentenced to a youth correctional facility for two armed robberies and a stabbing when he was just seventeen.[9] He said in an interview that participating in the gang lifestyle is "almost just like an instinct...you get a gun in your hand, you shoot."[10]

Now consider Lionel's story: Lionel became a child soldier in the Central African Republic at age eleven after an armed group had slaughtered his community and family.[11] Lionel volunteered to become a soldier out of fear for his safety: "I didn't want to do it…but the opposition had killed my family, and I had to join to protect myself."[12] Lionel was made an ammunition bearer and committed unimaginable acts of violence during his time in the armed group.[13]

Trei's and Lionel's stories have several commonalities—both were coerced into becoming members of violent groups, forced to commit egregious acts of violence, and suffered extreme emotional damage.[14]

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[3] *See, e.g.*, Katelyn Newberg, *Teens Charged with Murder, Tied to Gang Related Fatal Shooting*, L.V. REV. J. (Dec. 29, 2023, 5:25 PM), https://perma.cc/LJE4-Q9RG.

[4] *Child Recruitment and Use*, THE UNITED NATIONS: OFF. OF THE SPEC. REPRESENTATIVE OF THE SEC'Y-GEN. FOR CHILD. AND ARMED CONFLICT, https://perma.cc/U3JS-YWXV (last visited Aug. 16, 2025).

[5] Walts et al., *supra* note 1.

[6] Emily Green, *Youths and the Gang Life: Their Stories, in Their Words*, STREET ROOTS (May 5, 2016), https://perma.cc/2VYC-NSSL.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Deborah Wolfe, *Child Soldier: Lionel's Story*, WORLD VISION (July 4, 2025), https://perma.cc/WN8Z-2BAA.

[12] *Id.*

[13] *Id.*

[14] *Compare* Green, *supra* note 6, *with* Wolfe, *supra* note 11.

Despite these similarities, only one of these stories qualifies as an egregious violation of human rights: Lionel is considered a "child soldier" under international human rights law, exploited to commit acts of violence; Trei is viewed as a juvenile delinquent under the United States justice system, who voluntarily chose a life of crime. The consequences of this distinction are striking and evident of the United States' resistance to conform to international legal standards on children's human rights. Charging a child like Trei as a juvenile delinquent, rather than treating him as a victim, eradicates many opportunities for rehabilitation and subjects him to criminal prosecution and subsequent liability for actions he was forced to commit by his recruiter, or better phrased, his *trafficker*.

It has already been suggested that juvenile gang members [hereinafter, "JGMs"] are victims of trafficking.[15] This Note acknowledges and agrees with this argument and expands the discourse to discuss *why* the United States fails to recognize this status and proposes modifications to the juvenile justice system and the legal system's perception of children's human rights. Part I investigates and compares the differences between international and U.S. measures for addressing and protecting against child exploitation and juvenile delinquency. Part II demonstrates how this difference affects JGMs, and why that is a pressing issue in our society. Part III argues that JGMs should be regarded as trafficking victims, supported by an analysis on the compatibility with international standards of determining child soldier status and recognition of comparisons in other scholarly works of recruitment methods, exploitation practices, and harms suffered.[16] Part IV identifies the specific areas of inadequacy in the U.S. legal system in regard to handling of the recruitment and exploitation of JGMs. Finally, Part V postures several recommendations for the United States, calling for the adoption of international child trafficking standards to formally recognize JGMS as victims of trafficking, and the application of that position in the U.S. juvenile justice system.

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[15] *See generally* Cristina M. Rizen, *Are Juvenile Gang Members Victims of Labor Trafficking?*, CHILD.'S LEGAL RTS. J., Jan. 1, 2015, at 163 (arguing that JGMs should not be held liable for their delinquent acts due to their exploitation by their gangs, and subsequently the juvenile justice system should be modified); Walts et al., *supra* note 1 (arguing that JGMs should be treated as victims of human trafficking).

[16] *Cf.* Rizen, *supra* note 15, at 170–72 (analogizing JGMs to child soldiers through the perspective of international labor organization and child labor trafficking).

I. Background

A. *Defining "Child"*

The definition of a "child" is relatively universal: according to the United Nations, a "child" is "a person below the age of 18, unless the relevant laws recognize an earlier age of majority."[17] Similarly in the United States, a child is generally defined as a person "below legal age or the age of majority."[18] Although there is no universal age that is seen as a "cut-off" for child-status, all children are considered to lack a legal personality, or more specifically lack recognition "as an independent person before the law."[19]

Unlike adults, who enforce their own rights, children rely on parents, relatives, and government agencies to protect and assert their rights on their behalf.[20] For example, an adult has the legal right to be free from harm done by others, whereas a child has that same right, but only if it's asserted by a proxy adult on their behalf; children's rights, and the adherence thereof, are contingent on an adult's willingness to uphold and protect them.[21] Hence, children need a higher legal standard of protection than adults due to their particular vulnerability, at least under general international standards.[22]

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[17] *Global Issues: Children*, UNITED NATIONS, https://perma.cc/JT37-MVHS (last visited Aug. 16, 2025).

[18] *Child*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/LC2F-TMCU (last reviewed Nov. 2021). *But see Age Matrix*, INTERSTATE COMM'N FOR JUVS., https://perma.cc/XC73-ZQC8 (last updated Aug. 13, 2025) (demonstrating varying ages of majority amongst states).

[19] *The Practical Guide to Humanitarian Law: Children*, MEDECINS SANS FRONTIERES, https://perma.cc/Y54K-L23V (last visited Aug. 16, 2025).

[20] *Id.*

[21] James G. Dwyer, *Equality Between Adults and Children: Its Meaning, Implications, and Opposition*, MICH. ST. L. REV. 1007, 1009 (2013).

[22] Audrey Cunningham, Note, *The United States and Its Obligations Under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography to Combat Child Exploitation in the Digital World*, 50 GA. J. INT'L & COMP. L. 670, 676 (2022).

B. *The International Framework*

1. The Exploitation of Children: International Trends in Law and Advocacy

The "exploitation" of children lacks a definitive meaning.[23] Standing alone, "exploitation" means to utilize someone or something for personal gain or profit.[24] The "illegal exploitation of a person" is the core of human trafficking.[25] Human trafficking is internationally defined as

> [t]he recruitment, transportation, transfer, [harboring] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of exploitation*. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced [labor] or services, slavery or practices similar to slavery, servitude or the removal of organs.[26]

For all forms of human trafficking, there must be an act, a means, and a purpose.[27] The act refers to the method of obtaining a person, typically through recruitment or receipt; the means refers to the use of force, threats, fraud, or deception to make a person do an often illegal or harmful act; and the purpose of *all* forms of trafficking is exploitation, meaning it is done for the, usually financial, gain of someone else.[28] Any evidence of initial consent from the victim to the labor or sexual acts through which they are being exploited with is irrelevant: "the trafficker's exploitative scheme is what

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[23] *Compare, e.g.*, *Child Exploitation*, SAFEGUARDING NETWORK, (Feb. 2025), https://perma.cc/3KQC-Q9FH (defining child exploitation as "when someone uses a child for financial gain, sexual gratification, [labor] or personal advantage"), *with, e.g.*, *Child Exploitation*, DEP'T OF HOMELAND SEC., https://perma.cc/7K6Z-5JNB (last updated Feb. 8, 2025).

[24] *Exploitation*, DICTIONARY.COM, https://perma.cc/77VT-JV4W (last visited Aug. 16, 2025).

[25] *Human Trafficking*, FED. BUREAU OF INVESTIGATION, https://perma.cc/CTW3-D38E (last visited Aug. 16, 2025).

[26] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter The Palermo Protocol] (emphasis added).

[27] *The Fight Against Child Trafficking*, SAVE THE CHILD., https://perma.cc/EW37-UMRY (last visited Aug. 16, 2025).

[28] *Id.*

matters, not a victim's prior consent or ability to meaningfully consent thereafter."[29] However, with the exploitation of children there is one key difference: the means element does not need to be proven in order to establish an act of human trafficking, meaning child trafficking only requires proof of recruitment for the purposes of exploitation.[30]

Child trafficking is egregiously prevalent throughout the world, with approximately twenty-seven percent "of all human trafficking victims worldwide" being children.[31] Children are exploited in various ways, such as prostitution, forced marriage, domestic slavery, and labor.[32] However, other forms of child trafficking are overshadowed by the sensationalism around child sex trafficking, particularly in the United States.[33] This is regardless of the fact that the majority of children who are trafficked are exploited for labor purposes.[34]

Two forms of child labor trafficking that have become more prevalent throughout the world are the use of child soldiers and the forced criminality of children.[35] International law defines a child soldier as

> Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies, or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.[36]

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[29] Off. to Monitor and Combat Trafficking in Pers., *2024 Trafficking in Persons Report*, U.S. DEP'T OF ST., https://perma.cc/S9B4-RUYV (last visited Aug. 18, 2025).

[30] V. DIGIDIKI ET AL., FROM EVIDENCE TO ACTION: TWENTY YEARS OF IOM CHILD TRAFFICKING DATA TO INFORM POLICY AND PROGRAMMING 3 (International Organization for Migration 2023), https://perma.cc/3T5T-FCQD.

[31] *The Fight Against Child Trafficking*, *supra* note 27.

[32] *Child Trafficking*, NSPCC, https://perma.cc/K3AJ-6QA2 (last visited Aug. 16, 2025).

[33] Aidan White, *Media and Trafficking in Human Beings*, COUNCIL OF THE BALTIC SEA STS. (Sept. 2019), https://perma.cc/LJ7D-NK5U; *Child Labor Trafficking is Ensnaring US- and Foreign-Born, Study Finds*, NYU (Apr. 18, 2024), https://perma.cc/LQ4F-BN8P ("Child labor trafficking remains a 'largely hidden' phenomenon that imperils economically and socially vulnerable youth in the US, encompassing 58% of youth who are from other countries and 42% who are American citizens…").

[34] *The Fight Against Child Trafficking*, *supra* note 27.

[35] *County Lines and Child Criminal Exploitation*, THE CHILD.'S SOC'Y, https://perma.cc/763K-ARYL (last visited Aug. 16, 2025); *see* Rizen, *supra* note 15 at 165. *See generally* AMNESTY INT'L, CHILD SOLDIERS: ONE OF THE WORST ABUSES OF CHILD LABOUR (1999) (Illustrating strong condemnation of the use of child soldiers).

[36] UNICEF, THE PARIS PRINCIPLES 7 (2007), https://perma.cc/J67W-5XWK.

"Child soldier" refers to children that are recruited or forced to join armed militia groups, to serve as "fighters…scouts, cooks, porters, guards, messengers," and more.[37] Between 2005 and 2022, upwards of 105,000 children have been trafficked as child soldiers around the world, and they are subjected to experiencing horrific scenes and acts of violence.[38] Regardless of their role and participation in violence, however, child soldiers are considered trafficking victims under international human rights standards.[39] Consequently, there is a strong international condemnation of utilizing children in warfare due to its severity.[40]

Similarly, there has been an increase in the prevalence and awareness of the forced criminality of children.[41] Particularly in the United Kingdom, the manipulation of children to be participants in drug trafficking schemes is an extremely prevalent issue: ninety percent of English police forces report dealing with such activity amongst children primarily between the ages fourteen to seventeen.[42]

The international legal community has addressed the issue of child trafficking, and the rights of victims thereof, in multiple instruments, including but not limited to: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Standards on Child Labor, the Convention on the Rights of the Child and its accompanying protocols, and most notably the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, a supplement treaty of the Convention against Transnational

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[37] *Children Recruited by Armed Forces or Armed Groups,* UNICEF, https://perma.cc/KYW3-X375 (last updated Dec. 22, 2021).

[38] *Id.*

[39] *See Child Recruitment and Use*, *supra* note 4.

[40] *See, e.g.*, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002) [hereinafter OPCAC] (international legislation condemning and working to prevent child soldier trafficking); *Time to Think Again About Child Soldiers*, WARCHILD, https://perma.cc/N9FQ-4B9K (last visited Aug. 16, 2025) (organization that advocates and supports victims of child soldier recruitment).

[41] *See generally* RACE IN EUROPE, TRAFFICKING FOR FORCED CRIMINAL ACTIVITIES AND BEGGING IN EUROPE 5–9 (2014), https://perma.cc/3VW2-5NW4 (describing different instances of child criminal exploitation in different European countries); Walts et al., *supra* note 1 (discussing the forced criminality of children in the United States).

[42] *What is County Lines?* THE CHILD.'S SOC'Y, https://perma.cc/LB4N-76BR (last visited Aug. 16, 2025).

Organized Crime [hereinafter the Palmero Protocol].[43] The Palermo Protocol is an international instrument adopted by the United Nations that proffers the first universally recognized definition of human trafficking.[44] By ratifying, state parties take on the affirmative duty "to prevent and combat trafficking in persons, paying particular attention to women and children; [to] protect and assist the victims of such trafficking, with full respect for their human rights; and [to] promote cooperation among State Parties in order to meet those objectives."[45] The Palermo Protocol has prompted the implementation of legislation to effectively prevent human and child trafficking, legally protect victims, and prosecute traffickers.[46]

In recognition of the growing trends of human trafficking, both internationally and domestically, the United States signed the Palermo Protocol in December 2000;[47] in adherence to its obligations, the United States promptly adopted federal legislation on human trafficking, specifically the Trafficking Victims Protection Act [hereinafter TVPA].[48] Throughout the last twenty years, the United States has made several reauthorizations of the TVPA to further strengthen its protections and prosecution measures to combat human trafficking, often in response to growing trends in exploitation.[49] For example, in 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act was enacted to increase data collection and accountability measures of countries that

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[43] V. DIGIDIKI ET AL., *supra* note 30, at 3–4. *See generally* The Palermo Protocol, *supra* note 26, at pmbl. (discussing the motivations and implications of States' ratification of the Palermo Protocol).

[44] *The Protocol*, UNITED NATIONS OFF. OF DRUGS AND CRIME, https://perma.cc/8AY7-H3QE (last visited Aug. 16, 2025).

[45] The Palermo Protocol, *supra* note 26, at art. 2.

[46] Jean Baderschneider, *The Palermo Protocol and the Next Twenty Years of the Global Fight Against Modern Slavery*, COUNCIL ON FOREIGN REL. (Dec. 15, 2020, 1:15 PM EST), https://perma.cc/YHY9-8RKS.

[47] *See generally* The Palermo Protocol, *supra* note 26, at pmbl. (discussing the motivations and implications of States' ratification of the Palermo Protocol); *Status of a Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UNITED NATIONS TREATY COLLECTION, https://perma.cc/NE9P-3KLH (last updated Aug. 16, 2025, 9:16:03 EDT) (listing ratification status of the Palermo Protocol by country name).

[48] *Human Trafficking Key Legislation*, U.S. DEP'T OF JUST., https://perma.cc/7WTE-Y9NZ (last updated Aug. 23, 2023).

[49] *Id.*; Emma Ecker, *Successes and Failures of the 2022 Trafficking Victims Protection Act Reauthorization*, FREEDOM NETWORK USA (Jan. 12, 2023), https://perma.cc/5HZH-WNJL [hereinafter *Successes and Failures*].

participate in trafficking.[50] However, in the last few years, Congress has failed to pass fully bipartisan reauthorizations, resulting in many crucial support mechanisms and prosecutorial initiatives not being codified.[51] The effectiveness of past reauthorizations has also been called into question, particularly as to whether the lack of bipartisan unanimity in prioritizing combating the domestic prevalence of human trafficking is inhibiting the execution of the provisions of the TVPA.[52]

The most recent authorization called for, among several things, the improvement and economic support of child welfare programs.[53] Congress recently approved the Abolish Trafficking Reauthorization Act of 2022 as part of the bundle of bills that were reviewed for the reauthorization of the TVPA, which permits the Secretary of Health and Human Services to provide grants to "develop, improve, or expand programs that assist with child welfare programs that assist with identifying and responding to human trafficking…[and] requires the state to develop and implement a specialized protocol for responding when victims are exploited by a third-party (i.e., not familial) trafficker."[54] In addition, the Trafficking Victims Prevention and Protection Reauthorization Act of 2022 [hereinafter TVPRA] approved grants to juvenile justice programs to engage in collecting data on and supporting "dual status" juveniles, referring to children that come in contact with both the welfare and juvenile justice systems.[55] It is unclear whether this was intended to refer to the assistance of all juveniles, but it is

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[50] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. 7101 § 108 (amended 2022); *Human Trafficking Key Legislation*, *supra* note 48.

[51] *See, e.g.*, *Successes and Failures*, *supra* note 49 (stating the acceptance of the 2022 TVPRA only included two bills out of the four proposed).

[52] *See* Christian Lee Gonzalez Rivera, *The Plight of "Unreasonable" Trafficking Victims: Replacing the Trafficking Victims Protection Act's Reasonable Person Standard for Coercion with a Genuine Belief Standard*, WOMEN'S RTS. L. REP., Aug. 10, 2019, at 272, 282 n.42 ("...[T]he congressional prioritization of sex trafficking over labor and other forms of human trafficking could be due, for example, to the known lack of research about labor trafficking involving minors and the greater amount of literature on sex trafficking…in my opinion, however, it is more likely based on a fixation over sexual crimes being worse than nonsexual crimes."); Emma Waters, *U.S. Is a Top Destination for Child Sex Trafficking, and it's Happening in Your Community*, THE HERITAGE FOUND. (July 27, 2023), https://perma.cc/3XR5-BZ2G.

[53] Sidney McCoy, *Fact Sheet: Trafficking Victims Protection Reauthorization Acts*, SHAREDHOPE INT'L, https://perma.cc/FUB6-SCVK (last updated Feb. 1, 2023).

[54] *Id.*

[55] *Id.*

implied that it is to assist "young victims who are *vulnerable* to trafficking."[56] Any child that is determined to be trafficked will be "considered a victim of child abuse and neglect."[57] Through this act, the United States implicitly acknowledges the high risk of trafficking with juvenile delinquents.[58]

2. The International Community's Stance on Children's Human Rights

As with all aspects of comparative law, it is incredibly difficult to draw direct comparisons between differing legal systems, particularly given the complexity of the United States' system of legislation.[59] However, there are specific and widely accepted norms that the United States' legal system unequivocally lacks in contrast to the international community—distinctly, the human rights of children.

While the rights of children vary greatly amongst nations, the international legal community has pioneered extremely successful treaties in recent years that embrace the belief that children are entitled to the same rights as adults, with added special protections.[60] The Convention on the Rights of the Child [hereinafter CRC], established by the United Nations in the late 1980s, is the most widely recognized, respected, and comprehensive treaty in regards to the protection and recognition of children's universal and inalienable rights.[61] The CRC pioneered the notion that children have individual and inherent rights separate from their parents and in addition to those bestowed by their home country.[62] Under the CRC, children are to receive special protections to protect them from violations of their rights and account for their particular vulnerability, and all legal and judicial decisions

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[56] Trafficking Victims Prevention and Protection Reauthorization Act of 2022, Pub. L. No. 117-348, Title I Subtitle A, 136 Stat. 6211, 6212 (2023).

[57] *Id.* § 133.

[58] *See id.* § 429A.

[59] Clare Ryan, *Are Children's Rights Enough?* 72 AM. U. L. REV. 2075, 2095 (2023).

[60] *See generally* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC]; Laura Lundy, *Children's Rights from an International Perspective*, *in* 7 STOCKHOLM STUDIES IN CHILD LAW AND CHILDREN'S RIGHTS: THE RIGHTS OF THE CHILD 3 (Rebecca Adami et al. eds., 2023).

[61] CRC, *supra* note 60; *History of Child Rights*, UNITED NATIONS CHILD.'S EMERGENCY FUND, https://perma.cc/RCW2-V7FS (last visited Aug. 16, 2025); Nahal Zamani, *20 Years of Neglecting Children's Rights*, ACLU (Nov. 17, 2009), https://perma.cc/8U7U-TKJB.

[62] *Convention on the Rights of the Child*, UNITED NATIONS CHILD.'S EMERGENCY FUND, https://perma.cc/YCL5-VWW7 (last visited Aug. 16, 2025).

pertaining to children should reflect this notion.[63]

Additionally, the CRC shifted the focus of children's rights from issues limited to their care and protection to a comprehensive list of affirmative rights of the "whole child."[64] These affirmative rights can be broken down into four categories: survival, development, protection, and participation.[65] Ratifying countries have implemented the CRC's rights and protections in a variety of different legal areas affecting children directly and indirectly, including "custody, family relations, alternative care, healthcare, criminal justice, disabl[ity], and survival."[66]

The CRC has come closer than any other international treaty to gaining universal ratification for the protection of children, with only the United States and Somalia withholding its adoption.[67] Despite government officials and children's rights advocates actively contributing to and promoting the recognition of the CRC, and polling suggesting that, on a bipartisan level, four out of five U.S. citizens are in favor of ratifying the CRC, the United States remains the only member state of the United Nations that withholds its ratification,[68] primarily, citing concerns of compatibility with its laws regarding family and privacy rights.[69] While it has been deemed understandable why Somalia, a country that has lacked a sufficient government system for the past two decades, has failed to ratify the CRC, the United States' lack of interest in joining the international community's enthusiasm to adhere to a comprehensive set of principles for children's rights has received massive criticism, both internationally and internally.[70] International legal scholars have suggested, however, that given the nearly

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[63] Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 163 (1998).

[64] John J. Garman, *International Law and Children's Human Rights: International, Constitutional, and Political Conflicts Blocking Passage of the Convention on the Rights of the Child*, 41 VAL. U. L. REV. 659, 674 (2007).

[65] *Id.*

[66] Dina Imam Supaat, *Establishing the Best Interests of the Child Rule as an International Custom*, 5 INT'L J. OF BUS., ECON. & L. 109, 113–14 (2014).

[67] Todres, *supra* note 63, at 166–67; *Convention on the Rights of the Child*, *supra* note 62.

[68] *How Do US States Measure Up on Child Rights?*, HUM. RTS. WATCH, https://perma.cc/B78B-54N5 (last updated Sept. 7, 2023).

[69] LUISA BLANCHFIELD, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (Congressional Research Service 2015).

[70] Zamani, *supra* note 61 (quoting former President Obama, stating "[i]t's embarrassing to find ourselves in the company of Somalia, a lawless land. I will review [the CRC] and other treaties and ensure that the United States resumes its global leadership in human rights.").

universal ratification of the CRC and its principles related to children's rights, it has become customary law and is nonetheless binding on the non-ratifying states.[71]

Furthermore, the United States' perspective on the rights of children is categorically different from the international consensus; while it has been held by the United States Supreme Court that children have the same enumerated rights as adults, although limited, the United States legal system continues to prioritize the wishes of parents over the rights of children in multiple facets.[72] At no point in history has the United States developed or enforced a comprehensive approach to children's rights.[73] The legal framework for abused and exploited children has been, and continues to be, "subordinated to political, national, and adult self-interest."[74]

Among the biggest issues with the lack of comprehensive and uniform standards for children's rights is the inconsistent approaches among states.[75] The modern position of the U.S. government is that the states have the predominant authority to govern "family" issues, including children's rights and juvenile justice.[76] Comparatively, other international collectives, such as the European Union, allocate a significant amount of power to the collectives themselves, rather than member states, to determine pressing substantive family law matters, promoting a more uniform approach to children's rights.[77] Despite varying methodology in the United States, every state's policy towards children's rights is drastically subpar in comparison to the progressive international community.[78] For example, in the majority of states, corporal punishment, life sentences, and lack of working regulations

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[71] Supaat, *supra* note 66, at 109–10.

[72] John J. Garman, *International Law and Children's Human Rights: International, Constitutional, and Political Conflicts Blocking Passage of the Convention on the Rights of the Child*, 41 VAL. U. L. REV. 659, 659 (2006) (citing In re Gault, 387 U.S. 1, 13 (1967)). *But see* Troxel v. Granite, 530 U.S. 57, 65 (2000) (holding parents have a fundamental right to choose how to rear their children).

[73] Ruth Lawrence-Karski, *Legal Rights of the Child: The United States and the United Nations Convention on the Rights of the Child*, 4 INT'L J. OF CHILD.'S RTS., 19, 19 (1996).

[74] Kathleen Kufeldt, *Listening to Children: An Essential for Justice*, 1 INT'L J. OF CHILD.'S RTS. 155, 155 (1993).

[75] *US States Fail to Protect Children's Rights*, HUM. RTS. WATCH (Sept. 13, 2022, 12:01 AM EDT), https://perma.cc/K67A-ZCCV; *see also No US State Meets Child Rights Standards*, HUM. RTS. WATCH (Sep. 7, 2023, 12:01 AM EDT), https://perma.cc/3A8W-M54F (updating data).

[76] Ryan, *supra* note 59, at 2095–96.

[77] Ryan, *supra* note 59, at 2096–98.

[78] *US States Fail to Protect Children's Rights*, *supra* note 75.

are permitted.[79] These are all prohibited under the international framework.[80] Conversely, the approach to adult constitutional rights in the United States is seen as fundamental and "foundational," whereas children's rights are seen as contingent upon the wishes of their wiser, adult parents.[81]

This is not to say that the United States legal system does not care about the rights of children, or protecting children from exploitation: there are numerous laws that have been passed, both federally and within states, that were created with the goal of protecting children from multiple forms of exploitation, including sexual abuse, child marriage, medical neglect, and religious liberty.[82] Additionally, while the United States has withheld its ratification of the CRC, it has ratified other treaties concerning the protection of children from exploitation and trafficking, including the CRC's Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography.[83] Despite this, legal analysts have concluded that the United States' standards on the legal treatment of children overall are "alarming" in comparison to the standards upheld by ratifying nations of the CRC.[84]

C. *The Current Framework and Issues of the United States' Juvenile Justice System*

In general, to meet the definition of a juvenile delinquent an individual must be under the age of eighteen and commit an act that would be

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[79] *US States Fail to Protect Children's Rights*, *supra* note 75.

[80] Jo Becker & Callie King-Guffey, *The U.S. Neglects Basic Human Rights for Children*, THE PROGRESSIVE MAGAZINE (Sept. 21, 2022, 4:22 PM), https://perma.cc/TA2P-HQ4Y; *US States Fail to Protect Children's Rights*, *supra* note 75.

[81] Ryan, *supra* note 59, at 2124.

[82] *See generally* Tara Kibler, *Unpacking the History of American and International Child Rights*, HEINONLINE BLOG (Aug. 11, 2020), https://perma.cc/ZT4K-JPJN (discussing the development of children's rights in the US and internationally over the last few centuries); *Current Laws for Child Protection*, CHILDUSA, https://perma.cc/X3C7-S7PF (click link, scroll to interactive map and click on each state to see relevant legislation; scroll down and click on federal to see relevant legislation) (last visited Aug. 16, 2025).

[83] *See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, UNITED NATIONS TREATY COLLECTION, https://perma.cc/4XHB-R2BE (last updated Aug. 17, 2025, 3:16:05 EDT); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, UNITED NATIONS TREATY COLLECTION, https://perma.cc/FJ37-Z2KG (last updated Aug. 17, 2025, 3:16:05 EDT).

[84] *How Do US States Measure Up on Child Rights?*, *supra* note 68.

considered a crime if committed by an adult.[85] Juvenile delinquents are subject to the juvenile justice system, which is an amalgamation of state and local court procedures charged with handling the criminal matters of individuals under the age of majority in that jurisdiction.[86] Although the term is generally assumed to be synonymous with the juvenile court, juvenile justice refers to several institutions, such as detention and rehabilitation facilities, that work together to address juveniles in contact with the legal system.[87]

The characteristic that distinguishes the juvenile justice system from the adult system is its purported purpose of rehabilitation.[88] The adult system utilizes punishment as a means to achieve community safety and deter potential future wrongdoers.[89] While the juvenile justice system also prioritizes deterrence, it emphasizes rehabilitation rather than punishment, focusing instead on attempting to alleviate the circumstances in a juvenile's life that contributed to their delinquency.[90] Juvenile courts are often described as handling "children in need of assistance" rather than delinquent individuals.[91] However, the prioritization of rehabilitation has not been upheld consistently throughout the years.[92]

Out of fear that violent crimes committed by juvenile offenders would continue to escalate and become unmanageable, the U.S. government reformed the juvenile justice system to "get tough" on youth crime in the 1980s and 90s.[93] This resulted in a modification of the juvenile courts "from nominally rehabilitative welfare agencies into scaled-down, second-class

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[85] 18 U.S.C. § 5031.

[86] *What is Juvenile Justice?*, THE ANNIE E. CASEY FOUND., https://perma.cc/N93Y-WFHW (last updated Apr. 8, 2024).

[87] Nat'l Rsch. Couns. & Inst. of Med., JUVENILE CRIME, JUVENILE JUSTICE 156 (Joan McCord et al. eds., 2001).

[88] *What is Juvenile Justice?*, *supra* note 86.

[89] *See What is Juvenile Justice?*, *supra* note 86.

[90] *See What is Juvenile Justice?*, *supra* note 86; *Juvenile Justice*, YOUTH.GOV, https://perma.cc/9C9N-3LGD (last visited Aug. 16, 2025).

[91] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 87, at 154.

[92] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 87, at 154–55. *See generally* MARCY MISTRETT & MARIANA ESPINOZA, THE SENT'G PROJ., YOUTH IN ADULT COURTS, JAILS, AND PRISONS (2021), https://perma.cc/N9HA-MEBT (arguing that although the number of juveniles being prosecuted in adult court has gone down, the juvenile justice system continues to lack rehabilitation measures).

[93] Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966 (1995).

criminal courts for young people."[94] Standards shifted in the early 2000s to return to evidence-based rehabilitation methods after the implementation of harsh incarceration punishments proved ineffective in deterring juveniles from committing crimes.[95] Despite these efforts to remediate past systemic issues, rehabilitation is still not the national priority when handling juvenile defendants.[96]

Furthermore, the focus of rehabilitation over punishment varies amongst jurisdictions because juvenile justice standards are under a state's discretion.[97] Almost all states have, at some point, modified their juvenile justice procedures and depleted rehabilitative protections to allow for juveniles to be tried in the same capacity and manner as adults.[98] This illustrates a national priority to eradicate the juvenile justice system and "erase any distinction between young offenders and adult criminals."[99] This is especially true with JGMs, who seemed to be forgotten in the initiatives to afford juvenile criminal defendants more rehabilitative resources.[100] Overall, the original goals of the juvenile system are fading from existence, and calls for harsh punishment have detrimentally misguided its rehabilitative goals.[101]

II. Relevancy

Even from an international perspective, the juvenile justice system has

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[94] *Id*.

[95] JOSH ROVER, THE SENT'G PROJ., YOUTH JUSTICE: LESSONS FROM THE LAST 50 YEARS 1–2 (2023), https://perma.cc/5ZTP-XYWL.

[96] *See, e.g.*, Elyse Wyatt, Note, *Manipulating Parents, Exploiting Children: The Need for Government Oversight of Private Youth Facilities*, 33 B.U. PUB. INT. L.J. 103, 114 (2024) ("Louisiana earned a reputation in the 1990s for operating one of the country's worst juvenile justice systems. The state continues to be known as the 'lockup capital of the world,' and 'relies heavily on solitary confinement' for both adult and juvenile inmates.").

[97] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 87, at 155.

[98] *ACLU Fact Sheet on the Juvenile Justice System*, AM. C.L. UNION (July 5, 1996), https://perma.cc/7UQE-GQFL.

[99] *Id.*

[100] *See* Minsoo Kwon, *Trying and Sentencing Youth as Adults: Key Takeaways from Recent Petrie-Flom Center Event*, HARV. L. PETRIE-FLOM CTR. (Apr. 19, 2023), https://perma.cc/BGB9-T86R (discussing popular points when advocating for juvenile justice rehabilitation, failing to mention impact of gang affiliation).

[101] *See* Doris Morgan Rueda, *A Netflix Drama Shines a Light on the Contradictions of 'Juvenile Justice,'* THE WASH. POST (Feb. 16, 2023, 6:00 AM EST), https://perma.cc/228S-EKBB.

been labeled the "'unwanted child' of the 'children's right movement.'"[102] While the United States is not the only country in the world that has failed to create an effective and appropriate system, it has arguably one of the worst.[103] This is directly caused by the United States' resistance to afford children the rights the international community deems fundamental, resulting in the current framework of the United States' juvenile justice system being entirely inappropriate in its understanding and treatment of juveniles.[104] JGMs in particular have been recognized as "complex, lethal, and resistant" *problems* in the United States, rather than *victims* of exploitation.[105] Despite several calls for a new strategy that prioritizes preventative measures, intervention strategies for JGMs, and suppression mechanisms for JGM recruiters, no comprehensive and effective strategy has been implemented federally.[106]

This results in a distorted understanding of what JGMS truly are—*children*, not hardened criminals.[107] Due to a lack of updated statistics on juvenile gang affiliation, the public incorrectly assumes that JGMs are

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[102] BRUCE ABRAMSON, *Juvenile Justice: The 'Unwanted Child'- Why the Potential of the Convention on the Rights of the Child is not being Realized, and What we can do about it*, *in* JUVENILE LAW VIOLATORS, HUMAN RIGHTS, AND THE DEVELOPMENT OF NEW JUVENILE JUSTICE SYSTEMS 15, 15 (Eric L. Jensen & Jørgen Jepsen eds., 2006).

[103] *Id.* at 21 (stating that until recently, the United States' practice of executing juveniles for egregious crimes qualified as a "per se [violation] of international law" and was an egregious deviation from international standards on the treatment of children); BART LUBOW, *A Silent Sea Change - The Deinstitutionalization Trend in Juvenile Justice*, *in* A NEW JUVENILE JUSTICE SYSTEM-TOTAL REFORM FOR A BROKEN SYSTEM 47, 47–49 (Nancy E. Dowe ed., 2015) (stating that despite notions that our incarceration rates of juveniles have declined significantly, the United States still maintains an juvenile incarceration rate between five and thirty five times greater than any other developed democratic country in the world).

[104] *See, e.g.*, Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, THE SENT'G PROJECT (Mar. 1, 2023), https://perma.cc/WX9H-32F2.

[105] Nat'l Gang Ctr., *Frequently Asked Questions About Gangs*, U.S. DEP'T OF JUST., https://perma.cc/VTE5-WQVP (last visited Aug. 17, 2025); *see Models and Forms of Exploitation*, SUTTON HOUSE ACAD., https://perma.cc/B9QQ-KY6N (last visited Aug. 17, 2025) ("Children who want to be affiliated to the gang…may have to perform sexual acts on gang members…take part in criminal activity as part of an initiation process…[or] may be exploited because of their lower status in the gang.").

[106] Nat'l Gang Ctr., *supra* note 105; *see* MARK R. FONDACARO, *Why Should We Treat Juvenile Offenders Differently than Adults? It's Not Because the Pie Isn't Fully Baked!*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 129, 129–36 (Nancy E. Dowd ed., 2015).

[107] *See* JOSHUA ROVNER, THE SENT'G PROJECT, YOUTH JUSTICE BY THE NUMBERS 1 (Aug. 14, 2024), https://perma.cc/AXP7-WJLJ; ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 82 (2008).

exponentially committing crimes and becoming increasingly violent, and prosecutors capitalize on this belief to get convictions.[108] The public does not want to work to help JGMs rehabilitate and reintegrate back into society or recognize them as victims of exploitation, essentially casting them out as criminals to be dealt with by the adult justice system that they will inevitably reach.[109]

Furthermore, the JGMs that are affected by these trends of recruitment are *young*—youth gang affiliation and violence spikes in ages fourteen and fifteen.[110] The rise in social media gives street gangs unmonitored and unlimited access to promote gang affiliation and recruit youths.[111] And despite a lack of statistics, recent trends have shown an emphasis on adult criminal gangs recruiting young children.[112] Gang involvement has detrimental and irreversible impacts on the children, their families, and society as a whole, which can be prevented through the strict enforcement of current laws for states and judiciaries to follow.[113]

With all the global discourse over the culpability of child soldiers and children who are forced to do criminal acts, the appropriate legal protection, and the possibility of effective preventative measures, there is one major question that remains unsolved—who is (and should be) responsible for

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[108] *See* Nick Papantonis & Sarah Wilson, *'It Just Makes Us Worse': Former Gang Member Describes Revolving Door of Juvenile Justice System*, WFTV (Mar. 24, 2023, 6:25 PM EDT), https://perma.cc/2B3M-AVU3.

[109] *See, e.g.*, Tommy Witherspoon & Jasmine Lotts, *'Babies with Guns': Prosecutors Hope Conviction of Teen Gang Member Sends Strong Message*, KWTX (Mar. 23, 2023, 7:15 PM EDT), https://perma.cc/T2GM-YC5F.

[110] Patricia K. Kerig et al., *America's Child Soldiers: Toward a Research Agenda for Studying Gang-Involved Youth in the United States*, 22 J. OF AGGRESSION, MALTREATMENT & TRAUMA 773, 774 (2013).

[111] *See, e.g.*, Chelsea Donovan, *NC Gangs Use Social Media, Pretending to be 'Public Interest Groups,' to Lure Kids*, WRAL NEWS, https://perma.cc/LCZ2-GUXS (last updated Mar. 2, 2023 3:35 PM); Molly Oak, *Georgia Authorities Sound Alarm About Gangs Recruiting for Younger and Younger Members*, 11ALIVE, https://perma.cc/MM96-RGDF (last updated May 24, 2023, 5:49 PM EDT).

[112] *Gangs and Children*, AMER. ACAD. OF CHILD & ADOLESCENT PSYCH. (Sept. 2017), https://perma.cc/A4U3-9TF5.

[113] ADVISORY SERVS. ON INT'L HUMANITARIAN L., INT'L COMM. OF THE RED CROSS, *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups in* THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW A MANUAL ANNEX XVI, 370 (2011), https://perma.cc/Q7KJ-9RXE.

protecting these children?[114] To properly remediate the growing issue of juvenile gang affiliation and recruitment, we must first understand who JGMs truly are, and how our current juvenile justice system detrimentally compounds their exploitation.[115] Rather than evaluating each child by the actions they have taken and treating them as the primary transgressors, we should be utilizing the widely-accepted international standards to make an informed decision about how to best help them overcome their exploitation and avoid future harm to themselves and others.[116] To do this, we should draw inspiration from international mechanisms that assist child soldiers rather than treat JGMs as pseudo-adult criminal offenders.[117] By doing this, not only will the United States be moving closer toward joining the international consensus on children's rights, but also respecting the dignity of JGMs and promoting their healthy development.[118]

ARGUMENT

III. JGMs Should be Regarded as Victims of Exploitation Because they Meet the Recognized and Accepted Definition of Child Soldiers and Children Subjected to Forced Criminality

As previously mentioned, international law defines children as individuals "under the age of majority in their country, usually eighteen years old."[119] This definition aligns with the United States' criterion for who qualifies as a JGM, and therefore entitles JGMs to the application of the legal standards and mechanisms proposed.[120]

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[114] *See* Jill Stauffer, *Law, Politics, the Age of Responsibility, and the Problem of Child Soldiers*, 16 LAW, CULTURE & HUMANS. 42, 52 (2016).

[115] *See* Stephen T. Day, *Comparative Analysis of Juvenile Justice Between the United States and Spanish-Speaking Countries*, UNT DALLAS L. REV. ON THE CUSP, Spring 2023, at 1, https://perma.cc/4L69-9MEC (arguing that the U.S. juvenile system lacks statutory safeguards, despite being a party to the ICCPR, in comparison to international systems).

[116] *See* Miriam Abaya, *Fact Sheet: The "Best Interests of the Child" Standard*, FIRST FOCUS ON CHILD. (Aug. 2, 2022), https://perma.cc/33FJ-HK4E (demonstrating the standard's considerations of the child's view, safety, well-being, and identity, in addition to family unity).

[117] *See* CLAIRE JOHNSON ET AL., NAT'L INST. OF JUST., PROSECUTING GANGS: A NATIONAL ASSESSMENT 2 (1995), https://perma.cc/5G32-3PMS.

[118] ABRAMSON, *supra* 102, at 26.

[119] *Children's Human Rights*, AMNESTY INT'L, https://perma.cc/XU3Y-KS67 (last visited Aug. 17, 2025); *Global Issues: Children*, supra note 17.

[120] *Compare* 18 U.S.C. § 5031, *with Children's Human Rights*, *supra* note 119.

A. *Both JGMs and Child Soldiers are "Recruited"*

JGMs and child soldiers are both recruited from impoverished areas with high levels of violence.[121] From a child's perspective, neighborhoods with heavy gang activity are no less dangerous, frightening or tumultuous than active conflict zones.[122] Child soldiers are forced to join armed groups in several different ways, including "abduct[ion], threat[s], coerc[ion], or manipulat[ion]."[123] Many children "voluntarily" join armed groups to escape poverty and earn money to send back to their families to survive in times of conflict or to protect themselves from harm.[124] JGMs join gangs for similar reasons, such as peer pressure or coercion, a belief that joining would ensure protection of themselves and their families, familial connections, or a need to feel like they belong.[125] Crucially, JGMs often voluntarily join gangs for protection and are forced to commit illegal acts in order to prove their commitment to the older gang members.[126]

B. *Both JGMs and Child Soldiers are Recruited by "Armed Groups"*

To qualify as an armed group under international law, the group must: "(1) [be] under a responsible command, (2) exercise such control over a part of its territory as to (3) enable them to carry out sustained and concerted military operations."[127] Additionally, the operations carried out by armed groups must be against the acting government of the State.[128] Admittedly, gangs do not typically target the government with violence, and therefore

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[121] Rizen, *supra* note 15, at 171.

[122] Rizen, *supra* note 15, at 171.

[123] *Children Recruited by Armed Forces or Armed Groups*, *supra* note 37.

[124] *Children Recruited by Armed Forces or Armed Groups*, *supra* note 37.

[125] Kerig et al., *supra* note 110, at 775; Rizen, *supra* note 15, at 171; *Gangs and Children*, *supra* note 112.

[126] Giuseppe A. Finelli, Note, *Slash, Shoot, Kill: Gang Recruitment of Children and the Penalties Gangs Face*, FAM. CT. REV., Apr. 2019, at 243, 246–47; *Models and Forms of Exploitation*, *supra* note 105 ("Children who want to be affiliated to the gang or accepted by the gang may have to perform sexual acts on gang members or take part in criminal activity as part of an initiation process.").

[127] *The Practical Guide to Humanitarian Law*, MEDECINS SANS FRONTIERES, https://perma.cc/T4E3-2472 (last visited Aug. 17, 2025) (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1.1, Aug. 6, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978)).

[128] Jennifer M. Hazen, *Understanding Gangs as Armed Groups*, 92 INT'L REV. RED CROSS 369, 377–78 (2010), https://perma.cc/8KJP-VR8N.

do not squarely fit under the international definition of armed group..[129] Despite this, many scholars have argued that criminal gangs *should* be treated by the justice system as armed groups and have advocated for an expansion of the legal definition due to the striking similarity in all other facets.[130] American scholars have even suggested that "gangs are the new form of insurgency against the state."[131] The purpose of this Note is not to encourage the international community to consider gangs in the United States as armed groups, but rather for the United States to recognize the growing severity and violence of these gangs—*akin* to what qualifies as armed groups internationally.[132] Even though gangs in the United States may not fit the exact definition of armed groups under international law, this does not mean that the United States should not adopt legislation that would *treat* criminal gangs as armed groups—doing so would help to remediate their common identification as a threat to stability.[133]

Like armed groups, most gangs in the United States have some level of hierarchical organization.[134] The level of organization depends on the sophistication of the gang:[135] in less sophisticated gangs, there is a limited hierarchical structure, with an individual deciding and directing the crime to be committed and those that commit it;[136] more sophisticated gangs use a ranking system similar to the one used by the U.S. Armed Forces, and operate with a "paramilitary style of leadership."[137] Controlling a specific area is inherent in all criminal gangs in the United States; even neighborhood-based gangs claim territories and incite violence against other

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[129] *Id.* at 386.

[130] *See, e.g.*, *id.* at 369.

[131] Olivia Bangerter, *Territorial Gangs and Their Consequences for Humanitarian Players*, 92 INT'L REV. RED CROSS 387, 388 (2010).

[132] *See Criminal Resource Manual 1-499, 103. Gang Statistics*, DEP'T OF JUST. ARCHIVES, https://perma.cc/BH84-C6J4 (last visited Aug. 17, 2025) [hereinafter *Gang Statistics*] (emphasizing the increasing violence, organization, and criminal activity of gangs in the United States).

[133] Hazen, *supra* note 128, at 369.

[134] Nat'l Gang Ctr., *supra* note 105.

[135] *See* Nat'l Gang Ctr., *supra* note 105.

[136] *See* SafeState, *Gang Mentality and Behavior*, TARRANT CARES, https://perma.cc/N9UK-V6N4 (last visited Aug. 17, 2025).

[137] *Id.*

gangs that attempt to impose on their territory.[138] Gangs also use violence to incite fear, promote respect, and eliminate threats to their organization.[139] The types and severity of violence used by gangs in the United States are akin to those used by armed groups.[140]

C. *Both JGMs and Child Soldiers are "Exploited" for the Benefit of These Armed Groups*

Children are highly susceptible to pressure from adults[141] due to their underdeveloped sense of self and autonomy.[142] Stressful and traumatic conditions hinder a child's ability to advocate for themselves, making them particularly vulnerable.[143] Child soldier recruiters exploit children's inability to advocate and they utilize their youth and inexperience strategically to elicit a desire to join.[144] Such recruiters may also target children because states are more reluctant to prosecute children.[145] Gangs recruit children for similar reasons: police are far less likely to use deadly force against a juvenile, and the penalties juveniles face are much less severe than what adults face for the same crime, resulting in juveniles often carrying out the more violent and dangerous crimes.[146] Further, international standards do not withhold qualification of child soldier status based on the role the child

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[138] *Gangs and Your Child*, NAT'L CRIME PREVENTION COUNCIL, https://perma.cc/2Y2P-8Y56 (last visited Apr. 9, 2025). *See generally* Nat'l Drug Intel. Ctr., *Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas*, U.S. DEP'T OF JUST. (Apr. 2008), https://perma.cc/T3VG-2VQ9 (describing the growing trend of violence between gangs).

[139] Hazen, *supra* note 128, at 384.

[140] Hazen, *supra* note 128, at 384.

[141] Finelli, *supra* note 126, at 246.

[142] CHILD SOLDIERS INT'L, WHY 18 MATTERS: A RIGHTS-BASED ANALYSIS OF CHILD RECRUITMENT (2018), https://perma.cc/RV9L-MD37.

[143] *Id.*

[144] *Child Soldiers: The Tragic End of Childhood for Boys and Girls in Conflict*, SAVE THE CHILD., https://perma.cc/28W4-45Q9 (last visited Aug. 17, 2025).

[145] *See* Noëlle Quénivet, *Does and Should International Law Prohibit the Prosecution of Children for War Crimes?*, 28 EUROPEAN J. INT'L L. 433, 443 (2017); *but see* Godfrey M. Muisla, *Challenges in Establishing the Accountability of Child Soldiers for Human Rights Violations: Restorative Justice as an Option*, 5 AFR. HUM. RTS. L. J. 321, 326–29 (2005) (discussing the disagreement regarding the prosecution of child soldiers in international human rights courts).

[146] CATHERINE MILTON ET AL., ANALYSIS OF SHOOTING INCIDENTS IN READINGS ON POLICE USE OF DEADLY FORCE 42, 46 (James J. Fyfe ed., 1982) ("The data presented…suggest that existing department sanctions against the shooting of juveniles…are being observed."); *Gang Recruitment Increasing with Younger Kids*, BUSINESSWIRE (Jan. 18, 2024, 10:37 AM EST), https://perma.cc/B3S4-R6NU.

played while they served in an armed group,[147] and similarly there are no specific qualifications for juvenile gang-affiliation, so long as they participate in some form of illegal activity and violent offenses in the name of a gang.[148]

D. *Both JGMs and Child Soldiers Suffer Severe Social and Psychological Consequences Because of Their Exploitation*

Like child soldiers, JGMs suffer severe psychological consequences from participating in violent crimes and conflict: both are at a high risk of exposure to trauma, likelihood of death from the activities they participate in, and possible subjection to physical or sexual abuse.[149] JGMs tend to suffer from behavioral issues, anxiety, and antisocial personality disorders, among other acute mental health problems, as a result of their gang affiliation.[150] The exposure to extreme violence has also been shown to cause severe psychological problems such as "depression, conduct disorders and post-traumatic stress disorder."[151] Consequently, due to the lack of appropriate care for these issues and several other factors, both JGMs and child soldiers are at higher risk for recidivism.[152]

IV. The United States' Current Framework Does Not Adequately Protect and Rehabilitate JGMs

A. *The United States Does Not Prioritize the Rehabilitation of JGMs*

The diminished capacity and culpability of juvenile criminal defendants

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[147] *Child Recruitment and Use*, *supra* note 4; Ah-Jung Lee, *Understanding and Addressing the Phenomenon of 'Child Soldiers': The Gap Between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People's Military Recruitment* 8 (Refugee Stud. Ctr., Working Paper No. 52, Jan. 2009), https://perma.cc/XEL3-GDQ9.

[148] JAMES C. HOWELL, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, OJJDP FACT SHEET: YOUTH GANGS 1 (1997), https://perma.cc/G9BG-33MU.

[149] Kerig et al., *supra* note 110, at 775.

[150] Alastair Macfarlane, *Gangs and Adolescent Mental Health: A Narrative Review*, 12 J. OF CHILD & ADOLESCENT TRAUMA 411, 414 (2018).

[151] KAREN HUGHES ET AL., THE MENTAL HEALTH NEEDS OF GANG-AFFILIATED YOUNG PEOPLE 4 (2015), https://perma.cc/MBJ3-77BM.

[152] ELIZABETH SEIGLE ET AL., CORE PRINCIPLES FOR REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 14 (2014), https://perma.cc/3VUL-R25D; *see, e.g.*, SKYE WHEELER, "WE CAN DIE TOO" RECRUITMENT AND USE OF CHILD SOLDIERS IN SOUTH SUDAN 61 (2015), https://perma.cc/5HR5-SP2C.

is identifiable.[153] Physically, the brains of juveniles are not developed enough to make informed and rational decisions, control impulses, and determine the effects of their actions.[154] This is not to say that adolescents are not capable of understanding the consequences of their actions, but rather that their ability to make informed decisions is gravely deficient in comparison to the fully developed brains of adults.[155] In fact, the minds of juveniles have been likened to the minds of adults with prefrontal cortex damage, whose diminished capacity to make rational decisions is commonly recognized and accommodated for.[156]

In theory, requiring juvenile defendants to suffer the same punishments as adults, while simultaneously lacking the level of maturity of adults, violates the principle of proportionality.[157] However, even in the wake of juvenile justice reform, lawmakers have done little to address whether the diminished capacity of juvenile defendants contributes to their level of criminal responsibility.[158] Juveniles are *presumed* competent to stand trial, regardless of this known diminished capacity or any consideration of mental health.[159] While the Supreme Court has produced a few decisions recognizing juveniles' inherent and biological immaturity, such recognition is narrow:[160] in *Roper v. Simmons*, the Supreme Court has held that offenders under the age of 18 were ineligible for the death penalty; *Graham v. Florida* held they were ineligible for life without parole for non-capital crimes; and *Miller v. Alabama* held that they were ineligible for life without parole for

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[153] Timothy W. Johnson, *Prohibiting Young Adult Life Without Parole: Examining Diminished Capacity And Diminished Culpability*, 47 THE HARBINGER 83, 86 (2023), https://perma.cc/A3B2-X7GY; *see* Parham v. J.R., 442 U.S. 584, 602–03 (1979) ("[A] child lacks . . . maturity, experience, and capacity for judgment . . . in making life's difficult decisions . . . Most children, even in adolescence, simply are not able to make sound judgments . . .").

[154] Johnson, *supra* note 153, at 86.

[155] SCOTT & STEINBERG, *supra* note 107, at 14.

[156] SCOTT & STEINBERG, *supra* note 107, at 135 ("In our analysis of the issue, adolescents were grouped with mentally impaired persons."); Johnson, *supra* note 153, at 86.

[157] Roper v. Simmons, 543 U.S. 551, 571 (2005) ("The case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); SCOTT & STEINBERG, *supra* note 107, at 118 (quoting *Simmons*, 543 U.S. at 571).

[158] SCOTT & STEINBERG, *supra* note 107, at 120, 123.

[159] DAVID R. KATNER, *Delinquency, Due Process, and Mental Health, in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 104, 104 (Nancy E. Dowd ed., 2015).

[160] FONDACARO, *supra* note 106, at 129.

capital crimes when no individualized assessment is provided.[161] Despite this apparent push for the protection of juveniles, these cases were limited to the circumstances that were presented.[162] In many aspects, the United States is still seen as one of the harshest criminal systems in regards to the prosecution of juveniles, and the majority of protections that it seemingly affords do not apply to the more "violent" offenders, including JGMs.[163]

While the United States' juvenile justice system was designed with juvenile's diminished capacity and need for rehabilitation and reintegration in mind, this sentiment is not reflected in the execution of justice regarding JGMs.[164] Juveniles do not have an established constitutional right to be tried in a juvenile court, and all states have laws that either mandate or permit the transfer of JGMs to adult court.[165] Many of the protections afforded to juveniles do not apply to those who commit "violent" crimes.[166] For example, youth protections, if available, do not apply to JGMs, as they have been shown to commit far more "violent" crimes than non-gang affiliated youth.[167] JGMs under fourteen can be prosecuted in adult court despite not reaching the level of competency that is required for adults to stand trial.[168] Children as young as *eight* have been tried and sentenced in adult court, and JGMs as young as *thirteen* have been sentenced to life in prison without the opportunity for parole.[169]

JGMs who are not sentenced as an adult are often housed in detention

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[161] FONDACARO, *supra* note 106, at 129; *see* Miller v. Alabama, 567 U.S. 460, 471 (2012) (relying on "common sense…science and social science," holding "children are constitutionally different from adults for purposes of sentencing" due to their immaturity, lacking sense of responsibility, vulnerability, and premature sense of character); Graham v. Florida, 560 U.S. 48, 73 (2010) (holding it is impossible, even for psychologists, to determine if juveniles committed offenses because of their "transient immaturity," or "irreparable corruption"); Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding juveniles "lack of maturity and underdeveloped sense of responsibility" can lead to uninformed and reckless decisions, which should not result in a punishment of death).

[162] *Miller*, 567 U.S. at 467; *see Our Work: Children in Adult Prison*, EQUAL JUST. WORKS, https://perma.cc/KHJ6-UBWA (last visited Aug. 17, 2025).

[163] *See Our Work: Children in Adult Prison*, *supra* note 162.

[164] Eric Schweitzer & Annie Davidian, *Rehabilitation vs. Incarceration: What Works Best for Juvenile Offenders in California?*, SCHWEITZER & DAVIDIAN (July 25, 2023), https://perma.cc/363W-3D3E.

[165] Kwon, *supra* note 100.

[166] *Our Work: Children in Adult Prison*, *supra* note 162.

[167] *Gang Statistics*, *supra* note 132.

[168] *Our Work: Children in Adult Prison*, *supra* note 162.

[169] *Our Work: Children in Adult Prison*, *supra* note 162.

facilities that are strikingly similar to adult prisons, where they are stripped of their autonomy and privacy as if they were adult criminals.[170] Above all, there is virtually *no* protection from, or even consideration of, the adults who coerce JGMs to commit violent crimes.[171] Although the U.S. justice system recognizes coercion as a mitigating factor in crimes committed by adults, there is no such consideration with the prosecution of JGMs.[172] Mitigation is conditioned on the evaluation of what a "reasonable person"—or more accurately, a "reasonable *adult*"— would do, not on what a juvenile with the diminished capacity level of a deficient adult would do.[173]

The United States currently has a framework for the treatment and rehabilitation of trafficking victims, but its application to JGM rehabilitation would be inadequate in comparison to international standards.[174] Although the ultimate goal for the rehabilitation of trafficking victims is reintegration back into society, there are little to no studies that examine the effectiveness of these implementation methods.[175] While a JGM is afforded judicial validation, it is conditional on them proving beyond a reasonable doubt that they were coerced—the United States' human trafficking laws mirror the international standard that children need not prove coercion in order to be afforded victim status only in regards to child sex trafficking, *not* labor trafficking.[176] Further, if a JGM is able to prove they were coerced, they are only entitled to the federal remedies and protection measures, such as community medical, legal, food and shelter aid, state-funded assistance, and temporary residence status, if they consent to "assist[ing] in every reasonable way in the investigation and prosecution of the trafficking case,"

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[170] *Youth in the Justice System: An Overview*, JUV. L. CTR., https://perma.cc/A2HV-EWB5 (last visited Aug. 17, 2025).

[171] *See* Walts et al., *supra* note 1; *see also* LUBOW, *supra* note 103, at 53–55 ("[O]ver the past 40 years, 80 percent of the states have operated juvenile institutions whose conditions were so violent, restrictive, and bereft of basic services that either a federal court intervened or a major scandal erupted.").

[172] SCOTT & STEINBERG, *supra* note 107, at 134.

[173] SCOTT & STEINBERG, *supra* note 107, at 135–36 (emphasis added).

[174] *See generally* DEP'T OF HEALTH AND HUM. SERVS., SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING: A RESOURCE FOR SOCIAL SERVICE PROVIDERS (2012), https://perma.cc/WG4A-X6LF (demonstrating that any federal service that can be provided for trafficking victims is conditioned on precertification of trafficking victim status by the government).

[175] Rachel Shigekane, *Rehabilitation and Community Integration of Trafficking Survivors in the United States*, 29 HUM. RTS. Q. 112, 112 (2007).

[176] *Compare* Walts et al., *supra* note 1, *with* The Palermo Protocol, *supra* note 26, art. 3.

potentially putting themselves in dangerous situations with their affiliated gangs.[177]

B. *The United States' Legal System Lacks The Required Initiative to Prosecute JGM Recruiters and Protect JGMs as Trafficking Victims*

While there are no federal regulations assigning criminal liability to JGM recruiters, some states have specific statutes that criminalize the recruitment of JGMs, however the laws have very narrow applications and do not carry harsh punishments.[178] Additionally, any laws that seemingly provide for the possibility of prosecuting JGM recruiters often pose constitutional challenges.[179] An attempt to prohibit gang affiliation can violate the First Amendment rights to freedom of speech and association.[180] Therefore, gang members just talking to minors, or recruiting them without threats or force, cannot be criminally prosecuted under the aforementioned laws.[181] As a result, many states have not enacted legislation prohibiting the recruitment of juveniles into gangs because of the difficulties of enacting appropriate and clear legislation.[182]

For any legislation criminalizing the gang recruitment of minors to be valid, it must be substantially clear what behavior it criminalizes.[183] A law cannot prohibit recruitment of minors into a gang without defining exactly what "recruitment," "minors," and "gang" mean.[184] Moreover, recruitment has become especially difficult to adequately define with advancing technology, as gang members have adopted sophisticated methods of inducing minors to *want* to join gangs without even talking directly to

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[177] DEP'T OF HEALTH & HUM. SERVS., *supra* note 174, at 1–8; *Why Victims and Survivors of Human Trafficking May Choose Not to Report*, CANADIAN CTR. TO END HUM. TRAFFICKING (Nov. 18, 2020), https://perma.cc/P8QY-9428.

[178] *Contributing to the Delinquency of a Minor*, FINDLAW, https://perma.cc/EC9U-8MHC (last reviewed Aug. 30, 2023); *see, e.g.*, CAL. PENAL CODE § 272 (Deering, Lexis Advance through the 2024 Regular Session ch. 1) (providing that maximum punishment of $2,500 and up to one year in prison); FLA. STAT. ANN. § 827.04 (LexisNexis 2023) (providing that maximum punishment of $1,000 and one year in prison).

[179] Memorandum from Sandra Norman-Eady, Senior Att'y, Gangs, (Jan. 11, 1994), https://perma.cc/HF2W-YUH7.

[180] *Id.*

[181] CRIMINAL LAW ch. 12.2 (Univ. of Minn. Librs. Publ'g 2015) (e-book).

[182] Memorandum from Sandra Norman-Eady, *supra* note 179.

[183] Memorandum from Sandra Norman-Eady, *supra* note 179.

[184] Memorandum from Sandra Norman-Eady, *supra* note 179.

them.[185] The biggest flaw with the aforementioned laws is that they are framed incorrectly: the laws are composed from the perspective of common criminal law, rather than trafficking law.[186] Despite everything that is known about juvenile development and the predatory nature of gang members recruiting JGMs, the U.S. legal system fails to recognize the issue for what it is—human trafficking—and to enact statutes and punishments that are proportional to the actual crime committed.[187]

C. *The International Framework is Far More Appropriate and Proportional*

1. International Standards on the Treatment of Child Soldiers and Juvenile Offenders is Appropriate in Regard to Their Development and Capacity for Criminal Culpability

It is very clear that the standards adhered to by the United States do not comply with international standards in regards to the treatment of JGMs.[188] To effectively place blame on the competent, capable, and culpable individuals who recruit JGMs into gangs, the United States should look to the international framework on the prosecution of child soldier recruiters.[189] The international community not only recognizes, but emphasizes the vulnerability and lack of culpability of juveniles.[190] For example, the United Nations advocates for the non-punishment of juveniles that are exploited and trafficked by adults that commit crimes in order to

> [Safeguard] the rights of victims, to ensure they are provided immediate access to necessary support and services and avoid subjecting them to further trauma of victimization; [encourage] victims to report crimes committed against them and participate as witnesses in trials against traffickers without fear of being censured themselves; [maintain] the interests of justice by ensuring that victims are not punished for conduct that they would not have otherwise committed but for their victimization;

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[185] WXIA Staff, *Gangs Using Social Media to Recruit New Members*, 11ALIVE, https://perma.cc/3JAR-LWDY (last updated Sept. 1, 2018, 10:42 PM EDT).

[186] *See* Walts et al., *supra* note 1.

[187] *See* Walts et al., *supra* note 1.

[188] Walts et al., *supra* note 1.

[189] *See generally* Walts et al., *supra* note 1 (arguing the lack of U.S. mechanisms for prosecuting criminals who exploit children to commit crimes and drawing comparisons to international standards and frameworks).

[190] ABRAMSON, *supra* note 102, at 19; Walts et al., *supra* note 1; *see* OPCAC, *supra* note 40, at 236.

> and [ensure] that victims are not punished for the conduct of traffickers.[191]

Further, the International Criminal Court does not prosecute any individual under the age of eighteen, even for war crimes.[192] There have been no reports of individuals who have been prosecuted in any international court for acts they committed as child soldiers.[193] Similarly, the Special Court for Sierra Leone, despite having the capacity to prosecute people over the age of fifteen, instead refers child soldiers to Sierra Leone's Truth and Reconciliation Commission for rehabilitation.[194] Although there are arguments that child soldiers should be prosecuted for their actions in a court of law, these opinions have not been reflected within the international community.[195] Rather than punishment, the international community collectively focuses on rehabilitation,[196] emphasizing a recognition of the extreme harm to the physical and psychological wellbeing of former child soldiers and the need to promote the inclusion, care, and understanding of former victims.[197]

2. Implementing International Standards on the Prosecution of Child Soldier Recruiters into the U.S. Legal System Would Effectively Permit Holding Traffickers Liable

The Palermo Protocol requires ratifying countries to criminalize intentional acts in furtherance of, or constituting, trafficking, including the recruitment of child soldiers.[198] Specifically in regards to child soldier trafficking, parties to the Rome Statute of the ICC promise to "investigate

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[191] Walts et al., *supra* note 1; *See* INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERS., NON-PUNISHMENT OF VICTIMS OF TRAFFICKING (2020), https://perma.cc/H9RB-Z3MQ.

[192] *See Treatment of Former Child Soldiers Accused of Crimes*, HUM. RTS. WATCH (June 2007), https://perma.cc/8ZGW-GZPM.

[193] *Id.*

[194] *Id.*

[195] *See, e.g.*, Megan Nobert, *Children At War: The Criminal Responsibility of Child Soldiers,* 3 PACE INT'L L. REV. ONLINE COMPANION 1, 1 (2011) (arguing that prosecuting child soldiers decreases recruiter incentives to utilize children); *Analysis: Should Child Soldiers be Prosecuted for their Crimes?*, RELIEFWEB (Oct. 6, 2011), https://perma.cc/34QZ-FZRC (arguing that although child soldiers should be held accountable, prosecution should be a last resort).

[196] *See* GLOB. COAL. FOR REINTIGRATION OF CHILD SOLDIERS, REFRAMING CHILD REINTEGRATION: FROM HUMANITARIAN ACTION TO DEVELOPMENT, PREVENTION, AND PEACEBUILDING AND BEYOND 8 (2020), https://perma.cc/DSW6-882L.

[197] *Id.*

[198] The Palermo Protocol, *supra* note 26, at Art. V.

and prosecute individuals accused of…crimes against humanity and war crimes, including the enlistment and conscription of child soldiers under the age of 15, as well as using them to participate actively in hostilities."[199] Several other mechanisms, including the CRC, the African Charter on the Rights and Welfare of the Child, the Convention on the Worst Forms of Child Labor, and international customary law qualify the recruitment of children into armed groups as a crime.[200]

The use of child soldiers is universally condemned by States and organizations.[201] Overall, the international consensus is to uphold the principle that "all children have the right to be protected from recruitment and use by armed forces and groups."[202] Unlike with the United States' challenges with identifying and charging JGM recruiters as gang affiliates, implementation of this international framework would remove such barriers on labeling and prosecuting a JGM recruiter as a human trafficker.[203]

V. Recommendations for the United States

Above everything, the most effective and beneficial action to generally promote the welfare of children, and subsequently the prosecution of recruiters and protection of JGMs, would be to join the international consensus on the rights of children, particularly the CRC.[204] Ratifying the CRC would fill the gaps in the U.S. legal system that permit the pitfalls in the juvenile justice system and the lack of recognition and resources to ameliorate the exploitation of JGMs and put the U.S. in the international discourse of children's rights advocates.[205] However, this Note recognizes the implications of ratifying the CRC and the opposition's view that ratification would impact the United States' position on privacy and family

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[199] *The ICC Agrees: Children, Not Soldiers*, COAL. FOR THE INT'L CRIM. CT. (Feb. 15, 2017), https://perma.cc/N6P3-FAEF.

[200] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 482–88 (2005), https://perma.cc/8CYZ-P53F.

[201] *Id.* at 483 (citing examples in Burundi, the Democratic Republic of the Congo, Liberia, Myanmar, and Uganda).

[202] GLOB. COAL. FOR REINTEGRATION OF CHILD SOLDIERS, *supra* note 196, at 3.

[203] *See* Heather J. Clawson & Nicole Dutch, *Identifying Victims of Human Trafficking: Inherent Challenges and Promising Strategies from the Field*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION: REPS. (Jan. 19, 2008), https://perma.cc/B5XD-PNRN (explaining that the biggest barriers to prosecuting human traffickers comes from victims' resistance to participate).

[204] *See* ABRAMSON, *supra* note 102, at 32.

[205] Zamani, *supra* note 61.

rights.[206] Alternatively, the United States can, and should, take inspiration from the international framework on the prevention of juvenile defendants and advocate for the improvement of the juvenile justice system through a human rights lens.[207]

A. *The United States Should Recognize the Recruitment of JGMs as a Form of Human Trafficking*

Given that JGMs are analogous to child soldiers, and subsequently victims of human trafficking, they should be afforded the same protections as trafficking victims.[208] The United States should modify the TVPRA to understand the recruitment of JGMs and subsequent "forced criminality" as trafficking;[209] should abolish the requirement that juvenile victims must proffer convincing evidence that they were coerced in order to achieve victim status; and modify the TVPRA to reflect international standards of non-punishment of trafficking victims and increase compliance with juvenile justice rehabilitation efforts.[210]

B. *The United States Should Modify the Treatment of JGMs in the Juvenile Justice System to Reflect their Victim Status and Adopt International Standards of Rehabilitation*

The Supreme Court already accepts the scientific and psychological differences between adults and juveniles, and this sentiment needs to be reflected in the administration and execution of the juvenile justice system as it is in the international community.[211] Juveniles should not be treated in the same legal capacity as adults, and this should be incorporated in the justice system's understanding of the culpability of JGMs.[212] Rather than disregard the transitional mental development between adolescence and adulthood that affects, if not controls, the decision-making of JGMs, the

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[206] BLANCHFIELD, *supra* note 69 ("Congressional opponents of U.S. ratification [of the CRC] argue that the treaty would undermine U.S. sovereignty, particularly in policy areas traditionally addressed by the states–including education and juvenile justice.").

[207] *Cf.* ABRAMSON, *supra* note 102, at 32–33 (arguing the benefits of adhering to the principles of the CRC).

[208] *Supra* Part IV.

[209] Walts et al., *supra* note 1.

[210] INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERS., *supra* note 191; Walts et al., *supra* note 1.

[211] FONDACARO, *supra* note 106, at 132.

[212] SCOTT & STEINBERG, *supra* note 107, at 61.

United States should adopt the non-punishment principle of international law and enhance its juvenile justice framework to further promote rehabilitation, rather than punishment, of JGMs.[213]

Furthermore, choosing rehabilitation over punishment would widen JGMs' access to resources and programs that utilize a public health, rather than a legal response, which has proven to be far more effective in preventing and reducing recidivism rates of JGMs.[214] Choosing to rehabilitate rather than prosecute and detain juveniles in adult detention centers complies with the "bedrock" principles of international law and prevents JGMs from being put into an environment that lacks proper education and counseling resources and is high-risk for physical and sexual abuse.[215] Above all, raising the minimum age of prosecution would prevent JGMs from the "trauma and arrest of police involvement."[216]

The United States should emphasize a JGM's inherent vulnerability and subsequent lack of culpability.[217] The United States can do this, without necessarily abandoning all of its current principles, by modifying its methods to appropriately address every consideration in the interest of the child.[218] A majority of this suggested implementation would fall on the discretion of the prosecutor, who should be held to uphold the inherent and fundamental rights of the child while advocating for the equal treatment for JGMs.[219] Most importantly, the adherence to international standards would assist in promoting the autonomy and recognition of juveniles, in general, as

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[213] *See* SCOTT & STEINBERG, *supra* note 107, at 61.

[214] Judy Cashmore, *5 Reasons Why the Age of Criminal Responsibility Should be Raised*, U. OF SYDNEY (July 28, 2020), https://perma.cc/GN33-DCDN; Schweitzer & Davidian, *supra* note 164.

[215] ABRAMSON, *supra* note 102, at 21 ("[T]he failure to separate minors from adults in detention, which is a bedrock requirement of international law, is the result of a policy decision to not make the investments necessary for a humane penal system."); *Youths Tried as Adults*, JUVENILE LAW CENTER, https://perma.cc/PVG8-RXL9 (last visited Aug. 17, 2025).

[216] *Raising the Minimum Age for Prosecuting Children*, NAT'L YOUTH JUST. NETWORK, https://perma.cc/TXK4-5DTE (last visited Aug. 17, 2025).

[217] *See generally* Jade Yeban, *Focusing on the "Best Interests" of the Child*, FINDLAW, https://perma.cc/3S52-64UC (last reviewed Oct. 10, 2024) (describing the standard used in family court matters as adhering to the best physical, emotional, and psychological needs of the child).

[218] *See* JOSÉ LUIS DE LA CUESTA, *The New Spanish Penal System on Delinquency*, *in* JUVENILE LAW VIOLATORS, HUMAN RIGHTS, AND THE DEVELOPMENT OF NEW JUVENILE JUSTICE SYSTEMS 99, 101 (Eric L. Jensen & Jørgen Jepsen eds., 2006).

[219] *See id.* at 99–101.

members of American society.[220] Utilizing international standards on the treatment of children would help to combat the "invisibility of children in government decision-making, [change] social norms that permit cruelty, abuse and exploitation, and [get] adults to value the opinions of kids and to pay more attention to their feelings," as it has with other countries that have adopted international principles on the handling of children in the legal system.[221]

There is an argument that by decreasing the criminal culpability of JGMs, they will appear more attractive for the recruitment and exploitation by gang recruiters due to the leniency the justice system will have on them.[222] However, the emphasis should be on the interests of the children rather than the mental process of the perpetrators, because the benefits of adhering to international standards vastly outweighs this risk.[223] Furthermore, this is not to say that all JGMs should not receive punishment for their criminal actions, but there should, at a minimum, be consideration given for the mitigating factors that contributed to their criminal behavior, and an emphasis on rehabilitation rather than deterrence through incarceration in adult detention centers.[224]

C. *The United States Should Establish a Prosecutorial Initiative to View JGM Recruiters as Traffickers and Create Proportional Punishments*

The United States should prosecute JGM recruiters under the TVPRA,[225] because the actions of JGM recruiters meet the requirements of trafficking under the law: JGM recruiters recruit young children, either through coercion, force, or threat of force to themselves or their families, and exploit them by having them commit crimes—this squarely fits the acts, means, and purpose required under the TVPRA, and there is no substantive reason not to treat it as so.[226] In order to effectively prosecute recruiters, the United

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[220] ABRAMSON, *supra* note 102, at 18.

[221] ABRAMSON, *supra* note 102, at 18.

[222] *Gangs and Your Child*, *supra* note 138.

[223] *See* Yolisha Singh, *Old Enough to Offend but Not to Buy a Hamster: The Argument for Raising the Minimum Age of Criminal Responsibility*, 30 PSYCHIATRY, PSYCH. AND L. 51, 51, https://perma.cc/WW5C-8GG6; Schweitzer & Davidian, *supra* note 164; Cashmore, *supra* note 214; *Youths Tried as Adults*, *supra* note 215.

[224] *See* DE LA CUESTA, *supra* note 218, at 100–01.

[225] *See* OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERS., U.S. DEP'T OF STATE, UNDERSTANDING HUMAN TRAFFICKING 1 (2023), https://perma.cc/SJ7B-K8L4.

[226] *Id.*

States should implement protection measures for JGMs that participate in the prosecution, in addition to rehabilitation measures.[227]

Alternatively, the United States should, at a minimum, criminalize the recruitment and exploitation of children within the context of juvenile gang recruitment in order to change the national focus from preventing *children* from joining gangs to preventing *gang members* from preying on vulnerable children.[228] Although it is not the only thing that the United States should do, it would also be beneficial to make the recruitment of JGMs an aggravating factor in separate criminal prosecutions of gang members.[229] This could be an effective method to circumvent the constitutional issues of proving gang affiliation in criminal trials, providing hard evidence of involvement rather than circumstantial evidence and speculation of association.[230]

CONCLUSION

To echo the words of the CRC, all people, including juveniles, JGMs, and child soldiers, are members of the "human family" and are entitled to certain inalienable rights, regardless of where they are in this world.[231] The United States has the preliminary tools for providing JGMs with adequate victim representation, but needs to do more. Utilizing the international mechanisms as tools to increase the efficacy of its representation of JGMs demonstrates its commitment to upholding inherent and fundamental rights of *all* citizens, young and old, and improving the lives of JGMs by pushing them towards rehabilitation and recovery, rather than incarceration and recidivism.[232] Overall, the battle for the recognition of human rights principles in any legal mechanism is always reliant on the advocacy of the people.[233] The American society must step in as the parents, guardians, and

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[227] *See* Clawson & Dutch, *supra* note 203.

[228] *See generally* Nancy Ritter et al., *Changing Course: Keeping Kids Out of Gangs*, NAT'L INST. OF JUST. J. 16 (Mar. 2014), https://perma.cc/FE6K-CJMC (demonstrating the national effort to prevent children from joining gangs).

[229] *Gang Affiliation Charges: Understanding Federal Laws*, LAW OFF. OF FRANK FERNANDEZ (Nov. 9, 2023), https://perma.cc/G7Z7-5YZV.

[230] *See* Memorandum from Sandra Norman-Eady, *supra* note 179.

[231] CRC, *supra* note 60, at pmbl.

[232] *See* CRC, *supra* note 60, at pmbl.

[233] ABRAMSON, *supra* note 102, at 18 ("The human rights movement is very much a battle for the hearts and minds of society, which means that it is a struggle over values, attitudes, and beliefs.").

advocates of the human rights of JGMs and fervently promote their accurate representation—only then will JGMs truly be recognized and respected as the children they are.

Panic or Homophobia?: How Massachusetts's Failure to Outlaw the LGBTQ+ Panic Defense Protects Those Who Inflict Violence Against LGBTQ+ Individuals

*Madison Buckley**

INTRODUCTION

On June 13, 1996, Francis Sullivan was out at a bar with his friend Wendy Pizzolo when they met Derek Glacken and John Conte.[1] After last call, Conte invited the group to continue the night at his home in Taunton, Massachusetts, to which they all agreed.[2] When the group arrived at the home, Conte suggested that Sullivan and Glacken go for a walk so that he could have time alone with Pizzolo.[3] After a while, Conte went outside to search for the others when he came across a frantic Glacken who was covered in blood and hiding in the bushes.[4] Glacken told Conte, "'I just killed him,' and 'You've got to help me,'" and started to return to the house.[5] Once inside, Conte phoned a mutual friend to speak to Glacken, who told the friend that Sullivan had made sexual advances towards him and

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[1] Commonwealth v. Glacken, 883 N.E.2d 1228, 1230 (Mass. 2008).

[2] *Id.*

[3] *Id.* at 1230–31.

[4] *Id* at 1231.

[5] *Id.*

that he stabbed Sullivan in response.[6] Local police received calls from Conte's neighbors reporting screams around 1:30 AM on June 14, 1996, and arrived at the scene at 2:10 AM.[7] Upon arrival, officers witnessed a graphic scene: Sullivan's body was discovered in the middle of the road with at least 30 stab wounds to his heart, lungs, and liver.[8] At trial, Glacken and his lawyer argued that his stabbing of Sullivan was a direct result of Sullivan's alleged sexual advances towards Glacken.[9] Their defense rested on the argument that Glacken was triggered by the advances, that he could not help his response, and that he was acting in self-defense.[10] The trial court jury rejected this notion of self-defense and convicted Glacken of first-degree murder by reason of "extreme atrocity or cruelty."[11]

In this case, and in many others like it, the defense attempted to blame the violence that the victim suffered on his LGBTQ+ identity.[12] In *Glacken*, the defense was not successful in presenting this argument; however, perpetrators of violent crime against LGBTQ+ individuals have been successful in presenting this dangerous defense.[13] For example, in 2015 Daniel Spencer was murdered by his neighbor, James Miller, who asserted that he was acting in self-defense after rejecting a sexual advance from Spencer.[14] Miller was initially charged with first-degree murder but was later sentenced to ten years of probation, 100 hours of community service, and six months in a local jail.[15]

Throughout the United States, and throughout history, the strategy of blaming a defendant's violence against a member of the LGBTQ+ community on said victim's identity or sexual orientation is known as the

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[6] *Id.*

[7] *Glacken*, 883 N.E.2d at 1231.

[8] *Id*.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1230.

[12] *See generally* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008) [hereinafter Lee, *The Gay Panic Defense*].

[13] *Compare Glacken*, 883 N.E.2d at 1230–31, *with* Curtis M. Wong, *Texas Man Who Killed Neighbor Uses "Gay Panic" Defense and Avoids Murder Charge*, HUFFPOST, https://perma.cc/S9UB-JS9H (last updated Apr. 27, 2018) (explaining the case of James Miller who murdered Daniel Spencer and used a gay panic defense to have his sentence reduced significantly).

[14] *See* Wong, *supra* note 13.

[15] Wong, *supra* note 13.

LGBTQ+ panic defense.[16] This defense may also be called a gay or trans panic defense.[17] Panic defenses are rooted in homophobic and transphobic notions that allow, and even encourage, the jury to consider how the victim's sexuality, sexual orientation, or gender identity may justify violence perpetrated against them.[18] Constitutionally speaking, an impartial jury is required to determine trials, but allowing the jurors to bring in their own prejudices and biases against LGBTQ+ victims to justify crimes violates this tenet.[19] In recognition of this violation, several states have passed legislation banning the use of LGBTQ+ panic defenses within their borders.[20] In Massachusetts, legislation was proposed in 2021 that would have barred the use of LGBTQ+ panic defenses; however, that legislation was sent to study and has not been refiled in the four years since.[21]

Massachusetts is often considered a safe space for LGBTQ+ individuals to live and travel.[22] As the first state to legalize same-sex marriage in *Goodridge v. Department of Public Health* in 2004,[23] and as the second state to pass a non-discrimination law based on sexual orientation, it would follow that Massachusetts is focused on protecting the rights and safety of those within the LGBTQ+ community.[24] However, the state is failing to protect LGBTQ+ citizens by refusing to outlaw the LGBTQ+ panic defense.[25] This

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[16] *See LGBTQ+ "Panic" Defense*, THE LGBTQ+ BAR, https://perma.cc/8R87-LZZ5 (last visited Apr. 4, 2025).

[17] *See, e.g.*, Mallory et al., *Banning the Use of Gay and Trans Panic Defenses*, UCLA WILLIAMS INSTITUTE (Apr. 2021), https://perma.cc/TXJ3-VRU7; *Gay/Trans Panic Defense Bans*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/2429-CJ26 (last visited Apr. 4, 2025).

[18] *The LGBTQ+ "Panic" Defense – Educational Guide*, THE LGBTQ+ BAR, https://perma.cc/3KSK-Z9BZ (last visited Apr. 4, 2025) [hereinafter *Panic Defense Educational Guide*].

[19] *Impartial Jury*, JUSTIA, perma.cc/FWX8-LKQJ (last visited Apr. 4, 2025) (explaining that the right to an impartial jury is not only guaranteed by the Sixth Amendment, but that it is also guaranteed by the Fourteenth Amendment's Due Process and Equal Protection Clauses).

[20] LGBTQ+ "Panic" Defense, *supra* note 16.

[21] S. 956, 192d Gen. Court (Mass. 2021), perma.cc/JV5Q-SW2Z (showing that in March of 2021 the bill was referred to the Committee on The Judiciary).

[22] *See* Lisa Keen, *Mass. Ranks Sixth for LGBT-Friendly Laws, Study Says*, BOSTON GLOBE (May 29, 2015 1:39 AM); *Know Your LGBTQ Rights, Massachusetts!*, GLAD LAW (June 2020), perma.cc/Y8PR-BRHR.

[23] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

[24] *See* Keen, *supra* note 22; *Massachusetts' Equity Profile*, MOVEMENT ADVANCEMENT PROJECT, perma.cc/5J38-ACNR (last visited Apr. 4, 2025).

[25] *See Gay/Trans Panic Defense Bans*, MOVEMENT ADVANCEMENT PROJECT, perma.cc/CEQ3-RP73 (last updated Feb. 6, 2025).

defense perpetuates harmful stereotypes against those in the queer community and allows those who commit violent crimes against LGBTQ+ individuals to weaponize their victim's sexuality and gender identity.[26] As such, this Note will argue that Massachusetts should enact state legislation disallowing the use of any kind of LGBTQ+ panic defense within the state legal system thus enhancing the protections for LGBTQ+ victims and protecting the Constitutional guarantee of trial by impartial jury.

Part I of this Note explores existing law governing the use of the LGBTQ+ panic defense and the main strategies for presenting a panic defense. Part II of this Note addresses the vital need for banning the LGBTQ+ panic defense in the Massachusetts system and how doing so is relevant to violence against LGBTQ+ victims. In Part III, this Note explains that failing to ban the use of LGBTQ+ panic defenses within the state of Massachusetts is a violation of the Constitutional guarantee of trial by impartial jury. Part IV of this Note argues that Massachusetts has a duty to enact legislation banning the use of LGBTQ+ panic defenses in trials throughout the state. In Part V, this Note addresses the counterarguments by Professor Cynthia Lee.

I. Background

A. *History of the LGBTQ+ Panic Defense*

1. Evolution from Psychological Diagnosis to Legal Strategy

The history of the panic defense does not begin in a courtroom.[27] Instead, it begins in the 1920s, when psychiatrist Edward Kempf introduced the concept of "homosexual panic."[28] Kempf's theory introduced the idea that the panic induced a reaction of hatred and the potential of violence.[29] Throughout the mid-twentieth century, this theory evolved and became more widely recognized within psychology as capable of inducing a state of "temporary manic insanity."[30] This theory was based on the criminalization

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[26] Devan Patel, *The Indefensible "Gay Panic Defense"*, 46 J. LEGIS. 100, 119 (2019); Omar Russo, *How to Get Away with Murder: The "Gay Panic" Defense*, 35 TOURO L. REV. 811, 812 (2019).

[27] See Matthew T. Helmers, *Death and Discourse: The History of Arguing Against the Homosexual Panic Defense*, 13 LAW, CULTURE & HUMAN. 285, 287–89 (2017); David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778, 795 (2013).

[28] Perkiss, *supra* note 27, at 795.

[29] Perkiss, *supra* note 27, at 795.

[30] Perkiss, *supra* note 27, at 795 (explaining the development of LGBTQ+ panic defenses from their inception in the psychology and medical fields to their use in criminal cases).

of homosexual activity and wide-spread homophobia that was present throughout the entire twentieth century and early into the twenty-first.[31] The idea of a panic defense as it was first introduced rested on the defendant's mental state, rather than the overtly sexual or allegedly violent actions of the victim.[32] As the field of psychology evolved, the concept of homosexuality as a mental illness was denounced and the focus of "homosexual panic" shifted from the defendant to the sexual orientation, sexuality, or gender identity of the victim.[33] The concept of "homosexual panic" grew to encompass reactions to non-violent homosexual advances towards heterosexual men and would soon be transformed into a legal defense used to defend perpetrators of violence against LGBTQ+ individuals.[34]

The LGBTQ+ panic defense was first employed as a legal defense in the mid 1960s in a California courtroom in *People v. Rodriguez*.[35] In 1965, Joseph Rodriguez stood trial for first-degree murder after beating his neighbor to death using a tree branch after the neighbor caught him urinating in an alleyway near their homes.[36] The facts of this case were contested,[37] but at trial Rodriguez testified that the neighbor grabbed him from behind as he was urinating and that he thought the neighbor was trying to sexually assault him.[38] Rodriguez's counsel then called Dr. Tweed to the stand who testified that the "defendant did not know the nature and quality of his act at the time of the attack and was acting as a result of an acute homosexual panic."[39]

While the jury did not accept Rodriguez's insanity defense, they did return a guilty verdict for second-degree murder which carries a lesser

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[31] Helmers, *supra* note 27, at 285; Patel, *supra* note 26, at 116–18 (explaining the relation between homophobia, criminalization of homosexual activity, and social perceptions of homosexuality in the late 1990s into the early 2000s).

[32] Patel, *supra* note 26, at 119; Perkiss, *supra* note 27, at 795.

[33] Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, BEHAV. SCI. (BASEL) (Dec. 4, 2015), https://perma.cc/24HY-59U5; Perkiss, *supra* note 27, at 797.

[34] Helmers, *supra* note 27, at 286–89; Perkiss, *supra* note 27, at 795–97.

[35] *See* People v. Rodriguez, 64 Cal. Rptr. 253, 255 (Ct. App. 1967).

[36] *Id.* at 255.

[37] *Id.* at 255–56 (explaining the state's evidence presented a different sequence of events in which the elderly neighbor was returning to his home after throwing garbage in the alley when Rodriguez attacked him from behind with a tree limb).

[38] *Id.* at 255.

[39] *Id.*

sentence than first-degree murder.[40] This case represented a shift in the use of "homosexual panic" and would grow into a legal defense that essentially uses a defendant's homophobia or transphobia to defend his violent or murderous actions against a member of the LGBTQ+ community.[41] The success of this defense strategy relies on outdated, homophobic, and transphobic concepts that gay and trans individuals are dangerous and that violence against them is justified in certain situations.[42]

2. Effectiveness Throughout Historical Case Law

It is estimated that some form of an LGTBQ+, gay, or trans panic defense has been used in over 100 cases throughout the United States.[43] The exact number of cases it has been used in is impossible to pinpoint; given that not all decisions are published, there is no systematic tracking mechanism being used anywhere in the country to keep track of cases where this defense is used, and cases of this nature may likely go unnoticed.[44] One way that LGBTQ+ panic defenses are researched and identified is by searching through criminal appeals cases.[45] This creates an obstacle in identifying successful uses of the defense given that "acquittals are not appealed."[46]

Despite issues in identifying how often the defense has been employed, one study suggests that charges were lowered in about one-third of murder cases when a defendant presented an LGBTQ+ panic defense.[47] This means that in a majority of the cases, the defendant was found guilty even if the sentence was reduced.[48] However, though they are rare, acquittals on the

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[40] Perkiss, *supra* note 27, at 796.

[41] *See* Perkiss, *supra* note 27, at 795–97; Russo, *supra* note 26, at 812–14.

[42] LGBTQ+ "Panic" Defense, *supra* note 16.

[43] W. Carsten Andresen, Research Note, *Comparing the Gay and Trans Panic Defenses*, 32 WOMEN & CRIM. JUST. 219, 220 (2021) [hereinafter Andresen, *Research Note*].

[44] *See id.* at 226–31 (explaining that the author gathered information on various gay and trans murder victims through the use of open-source data, criminal appeals, and news sources).

[45] *Id.* at 226–27.

[46] *Id.* at 231 (citing DANIEL PINELLO, GAY RIGHTS AND AMERICAN LAW 164 (2003)).

[47] W. Carsten Andresen, *I Track Murder Cases That Use the 'Gay Panic Defense,' a Controversial Practice Banned in 9 States*, THE CONVERSATION (Jan. 29, 2020, 8:21 AM EST), perma.cc/6VH2-CLP7.

[48] *Id.*

basis of an LGBTQ+ defense have occurred.[49]

Since the introduction of the defense with the *Rodriguez* case in 1967, successful use of the defense has encouraged defense attorneys to present it.[50] In 1995, a defense attorney in Denton, Texas argued that Joshua Abbott was not guilty for stabbing David Morrison "so many times that the medical examiner quit counting" because gay panic set in when Morrison attempted to kiss Abbott.[51] In this case, the jury returned a not guilty verdict and Abbott was successfully acquitted.[52] Following this trial, the defense attorney was quoted saying "I couldn't believe that this worked. This guy had a criminal history. I thought for sure he's going to go away."[53] It is impossible to know exactly how many defendants have presented this defense and had their sentence reduced, or who have even been acquitted, but the effectiveness of the defense rests on how successful the defense attorney may be in presenting it.[54]

B. *How the Defense is Used*

It is important to note that no jurisdiction has a formally recognized LGBTQ+ panic defense codified in their penal codes.[55] This means that LGBTQ+ panic defenses are presented alongside recognized criminal defenses, namely insanity, diminished capacity, provocation, and self-defense.[56] It is more common for defense attorneys to present a panic defense alongside provocation or self-defense arguments, though insanity and diminished capacity arguments are made.[57]

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[49] *See generally, e.g.*, *Ep. 129: Panic Defense*, CRIMINAL (Dec. 16, 2019), perma.cc/L4XS-L2NY (discussing the case of Ahmed Dabarran, a Georgia Assistant District Attorney, who was bludgeoned to death by Roderiqus Reshad Reed who was later acquitted of all charges after presenting an LGBTQ+ panic defense).

[50] *See id.*

[51] *Id.* (discussing the LGBTQ+ panic defense); Chris McNary, *DA's Burden: Sympathy for a Killer*, THE DALL. MORNING NEWS (Nov. 11, 2007, 2:16 PM CST), perma.cc/HFH6-VMJE.

[52] McNary, *supra* note 51.

[53] *Ep. 129: Panic Defense*, *supra* note 49.

[54] Andresen, *supra* note 43, at 219–20.

[55] *See* Patel, *supra* note 26, at 119–121; Russo, *supra* note 26, at 816.

[56] Russo, *supra* note 26, at 816 (explaining that panic defenses are "hidden beneath the surface and used in conjunction with recognized legal defenses").

[57] Andresen, *supra* note 43, at 230.

1. Insanity or Diminished Capacity

Under the Model Penal Code, a person is entitled to a defense of insanity or diminished capacity when, at the time of the act, that person lacked the mental capacity to understand the criminality of their conduct or to conform their conduct with the requirements of law.[58] When using an insanity argument alongside an LGBTQ+ panic defense, a defendant argues that the victim's gender identity or sexual orientation was so distressing that it triggered insanity or a mental breakdown in the defendant, meaning that they could not be held responsible for their actions.[59] Alternatively, in some jurisdictions, the defendant has the option to present diminished capacity for their actions, which suggests that the defendant could not have formed the requisite *mens rea*, otherwise known as intent, for the crime charged.[60] In Massachusetts, this concept is called the lack of criminal responsibility and is the result of either the defendant's mental disease or defect at the time of the offense or, in the absence of a disease or defect, the defendant's inability to appreciate the criminal wrongfulness of their acts.[61] Accordingly, under a diminished capacity and LGBTQ+ panic defense, a defendant argues that the victim's LGBTQ+ identity caused a lapse in the defendant's capacity to understand their actions and eliminates the possibility for the premeditation required in a first-degree murder charge.[62] If a defendant claims insanity, they may have their sentence eliminated by the jury, as insanity is considered a "complete defense."[63] On the other hand, if the defense presents a diminished capacity argument, a "partial defense," the sentence could be lowered to that of a lesser offense.[64]

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[58] MODEL PENAL CODE § 4.01 (AM. L. INST. 1962).

[59] *Panic Defense Educational Guide*, *supra* note 18.

[60] Perkiss, *supra* note 27, at 797; *see also Mens Rea*, LEGAL INFO. INST., https://perma.cc/537Z-LEMU (last visited Apr. 4, 2024) (defining *mens rea* as criminal intent or the "state of mind statutorily required in order to convict a particular defendant of a particular crime").

[61] MASS. CRIM. MODEL JURY INSTR. § 9.200 (2022).

[62] *See* Russo, *supra* note 26, at 817–818.

[63] CYNTHIA LEE, MURDER AND THE REASONABLE MAN, at 73–74 (2003) [hereinafter LEE, MURDER AND THE REASONABLE MAN]; Patel, *supra* note 26, at 120 (suggesting that insanity is a complete defense to murder or a criminal charge because it presumes that any actions by the defendant were the result of a "diseased mind").

[64] LEE, MURDER AND THE REASONABLE MAN, *supra* note 63, at 74 (explaining that diminished capacity when presented against a murder charge can result in that charge being reduced to manslaughter).

2. Provocation

When defendants present a provocation defense, they are asserting that the victim provoked them into a "heat of passion," leading the defendant to commit whatever act is in question.[65] A successful provocation defense leads the jury to believe that the defendant should not be held criminally responsible because their action or reaction was reasonable, as the defendant was adequately provoked by the victim.[66] Provocation is a "mitigating defense," meaning that it will not exculpate the defendant, but can be used to reduce a charge or sentence when successfully argued.[67]

One use of a provocation defense alongside an LGBTQ+ panic defense is for the defendant to suggest that, through non-violent advances of a sexual or suggestive nature, the LGBTQ+ victim "stirred the defendant into a heat of passion" or caused immense emotional disturbance in the defendant.[68] Another way LGBTQ+ panic defenses are used with provocation arguments in cases involving transgender victims is for the defense to argue that, upon discovering the victim was trans, the defendant was so shocked, alarmed, or offended, "that the fatal violence is a natural outcome, an involuntary reflexive action to a specific stimulus."[69]

An important factor of this defense rests on the "reasonableness" of the defendant's response to the provocation that is determined subjectively by the jury.[70] In order for a panic defense to be used with a provocation defense, the jury must be led to believe that in response to discovering the victim's LGBTQ+ identity, or upon a non-violent sexual or suggestive advance by the victim, the defendant's actions represented "an understandable loss of self-control among reasonable persons."[71]

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[65] Patel, *supra* note 26, at 107.

[66] Patel, *supra* note 26, at 122 (explaining that "when such a homicide is adequately provoked, it must have been 'committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse'"); *Panic Defense Educational Guide*, *supra* note 18.

[67] *See* Perkiss, *supra* note 27, at 797–98.

[68] Patel, *supra* note 26, at 123.

[69] Andresen, *Research Note*, *supra* note 43, at 222–23; *e.g.*, *Panic Defense Educational Guide*, *supra* note 18.

[70] LEE, MURDER AND THE REASONABLE MAN, *supra* note 63, at 81; Patel, *supra* note 26, at 122.

[71] Patel, *supra* note 26, at 124.

3. Self-Defense

The final "recognized" defense that is used alongside an LGBTQ+ panic defense is self-defense.[72] A claim of self-defense is a "justification for the use of deadly force, which completely mitigates a charge of murder."[73] Proving self-defense requires the defense to establish that the defendant reasonably believed they needed to exercise deadly force to protect against an "imminent threat of death or serious bodily injury."[74] When used alongside an LGBTQ+ panic defense, the defense suggests that upon the discovery of the victim's LGBTQ+ identity or following an advance by the victim, the defendant believed they were in imminent danger of bodily harm, which resulted in their use of deadly force against the victim.[75]

A successful self-defense argument requires proof that the defendant reasonably believed they were in immediate danger and the force used was proportional to the alleged actions of the victim.[76] To support the reasonableness of their belief of imminent danger, defendants will sometimes suggest that their victim was sexually predatory or that their identity is inherently threatening.[77] As with a provocation defense, using a panic defense alongside a self-defense claim requires the jury to consider whether the defendant's actions were a reasonable reaction to the discovery of the victim's LGBTQ+ identity or in response to the actions of the victim.[78] The various defense strategies that have been used alongside LGBTQ+ panic defenses have varying levels of success, and the use of this strategy is outlawed in only 19 states and jurisdictions.[79]

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[72] *Panic Defense Educational Guide*, supra note 18.

[73] Patel, *supra* note 26, at 110 (citing Brown v. United States, 256 U.S. 335, 344 (1921)).

[74] Lee, *The Gay Panic Defense*, *supra* note 12, at 518.

[75] Lee, *The Gay Panic Defense*, *supra* note 12, at 517–18; Patel, *supra* note 26, at 110.

[76] Andresen, *Research Note*, *supra* note 43, at 224.

[77] *See Panic Defense Educational Guide*, *supra* note 18; *see, e.g.*, Andresen, *Research Note*, *supra* note 43, at 225 (discussing the case of Stephen Bright who stood trial for the murder of Kenneth Brewer; Bright alleged that Brewer was trying to assault him and successfully had his charges reduced to third-degree murder and was sentenced to time-served and community service).

[78] Lee, *The Gay Panic Defense*, *supra* note 12, at 517–18.

[79] *Panic Defense Educational Guide*, *supra* note 18.

C. *Legality of the Defense within the United States*

1. Bans on the Defense

According to the LGBTQ+ Bar Association, the use of LGBTQ+ panic defenses is banned in eighteen states and the District of Columbia.[80] Some jurisdictions, namely Washington D.C. and New Hampshire, amended their penal codes to contain specific bans on the use of defenses that allow the defendant to mitigate or justify their actions based on the victim's sexual orientation, gender identity, or gender expression.[81] Other jurisdictions, such as Oregon, added restrictions to their definitions of applicable charges such as manslaughter, first-degree murder, and second-degree murder that prevent the use of discovery, knowledge, or perception of a victim's LGBTQ+ identity as a mitigating factor.[82] Of the states that have yet to ban the defense, thirteen have introduced legislation to outlaw its use.[83] According to the LGBTQ+ Bar, five of these proposed legislative changes are pending, while nine of them have failed, one of which occurred in Massachusetts in 2021.[84]

2. Failed 2021 Massachusetts Legislation

In January of 2021, a bill was introduced to the Massachusetts Senate that would have prohibited the use of LGBTQ+ panic defenses in Massachusetts courts.[85] Senate Bill S. 956 proposed to amend Chapter 265 of the Massachusetts General Laws to disallow the use of an LGBTQ+ panic defense as an insanity claim, as a provocation claim, and as a self-defense claim.[86] Specifically, the Bill would have required jurors to be instructed that any "evidence of the defendant's discovery of the victim's actual or perceived sex, sexual orientation, gender, gender identity, gender expression or sex assigned at birth" shall be disregarded in determining the

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[80] *Panic Defense Educational Guide*, *supra* note 18; *Gay/TransPanic Defense Bans*, *supra* note 17.

[81] *See, e.g.*, D.C. CODE §23-115 (2021); N.H. REV. STAT. ANN. §630:2 (2023).

[82] *See, e.g.*, OR. REV. STAT. §163.135 (2021); OR. REV. STAT. §161.215 (2021).

[83] *LGBTQ+ "Panic" Defense Legislation Map*, THE LGBTQ+ BAR, https://perma.cc/CU6J-VWCT (last visited Apr. 5, 2025).

[84] *Id.* (displaying that as of March 2024, legislation is pending in Arizona, Michigan, Minnesota, and Wisconsin and has failed in Arkansas, Florida, Iowa, Montana, Georgia, Massachusetts, Nebraska, North Carolina, and Texas).

[85] *Id.*

[86] S. 956, 192d Leg. (Mass. 2021), https://perma.cc/QM3G-YGBP.

verdict.[87] The Bill was introduced to the 192nd session and was heard in March of 2021. Following the hearing, the Bill was referred to the Committee on the Judiciary, and no action has been taken in the years since.[88]

3. Proposed Federal Ban

Throughout the past decade, there have been several efforts to pass a federal ban on the use of LGBTQ+ panic defenses within the American legal system.[89] Much like the failed legislation in Massachusetts, there was a Bill introduced to the Senate in April of 2021 that sought to prohibit a federal criminal defendant from presenting a panic defense.[90] This bill, entitled Gay and Trans Panic Defense Prohibition Act of 2021, was referred to the Committee on the Judiciary after being read twice.[91] On July 12, 2023, Massachusetts Senator Edward Markey introduced a bill entitled LGBTQ+ Panic Defense Prohibition Act of 2023 that has also been referred to the Senate Judiciary Committee as of July 2023.[92] Though no action has been taken by the Committee, if enacted, this bill would amend Title 18 of the United States Code by adding a section at the end prohibiting the use of "panic defenses based on sexual orientation or gender identity or expression."[93]

D. *A Note on Due Process*

The Fifth and Fourteenth Amendments to the United States Constitution share language guaranteeing that no person shall be "deprived of life, liberty, or property without due process of law."[94] This language is known as the Due Process Clause and requires that the United States government

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[87] *Id.*

[88] *LGBTQ+ "Panic" Defense Legislation Map*, *supra* note 83 (stating "the bill died in committee").

[89] *See, e.g.*, Gay and Trans Panic Defense Prohibition Act of 2021, S. 1137, 117th Cong. (2021), https://perma.cc/KUR7-HD6S [hereinafter S. 1137, 117th Cong.]; Gay and Trans Panic Defense Prohibition Act of 2019, S. 1721, 116th Cong. (2019), https://perma.cc/8FLN-WB3H.

[90] *See* S. 1137, 117th Cong., *supra* note 89.

[91] Library of Cong., S.1137 - Gay and Trans Panic Defense Prohibition Act of 2021, Cong. Actions, https://perma.cc/J2JS-BKXP (last visited Apr. 6, 2025).

[92] Library of Cong., *S.2279 - LGBTQ+ Panic Defense Prohibition Act of 2023*, Cong., https://perma.cc/B5NL-NVM3 (last visited Apr. 6, 2025).

[93] *See* S. 2279, 118th Cong. § 3 (2023), https://perma.cc/98DC-8YLE.

[94] *Due Process*, LEGAL INFO. INST., https://perma.cc/P7GY-GZYL (last visited Apr. 6, 2025).

follow fair procedures and act within the law.[95] The Supreme Court has interpreted the Due Process Clause to guarantee "procedural due process" and "substantive due process."[96] Procedural due process—as guaranteed by the Due Process Clause—requires "government actors [to] follow certain procedures before they may deprive a person of a protected life, liberty, or property interest."[97] Substantive due process protects individuals' "fundamental rights from governmental interference"; such fundamental rights include the right to privacy, parental rights regarding their children, and the right to marry.[98]

To establish a due process claim, an individual must show that the violation of their rights was a result of state or government action.[99] For substantive due process claims, the court will determine which level of scrutiny applies to evaluate whether the state action is a permissible deprivation of the claimant's rights.[100] Where "fundamental" interests are at issue, the court will apply intensified or strict scrutiny which requires the government or state actor to show that "the infringement is necessary to further a compelling [government] interest."[101] If the interest at issue is not fundamental, the court will apply a "rationality review" which requires that the deprivation result from furthering a "valid government purpose" to be constitutional.[102] Where procedural due process is at issue, the claimant must establish that the state deprived them of "life, liberty, or property without adequate procedures."[103]

II. Massachusetts's Duty to Protect LGBTQ+ Individuals

Within the United States, LGBTQ+ individuals are subjected to higher

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[95] *Id.*

[96] *Id.*

[97] Library of Cong., *Amdt14.S1.3 Due Process Generally*, CONST. ANN., https://perma.cc/KW5Y-QT4H (last visited Apr. 6, 2025); *Due Process*, *supra* note 94.

[98] *Amdt14.S1.3 Due Process Generally*, *supra* note 97.

[99] Russell W. Galloway Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 626 (1992).

[100] *Id.* at 627.

[101] *Id.*

[102] *Id.* at 627–28.

[103] Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 871–72 (2000).

levels of violence than cisgender, heterosexual individuals.[104] According to the Department of Justice, lesbian or gay individuals are victimized more than twice as often as heterosexual individuals, and transgender individuals are victimized at a rate that is two and a half times higher than cisgender persons.[105] Another study by the Williams Institute at the UCLA School of Law estimated that LGBTQ+ persons were over four times more likely to experience "serious violence."[106] Many LGBTQ+ individuals who experience violence do not report the incidents to law enforcement, meaning that the aforementioned statistics are likely underestimated.[107]

In addition to experiencing higher rates of hate crimes or similarly related violence, studies suggest that LGBTQ+ victims are more likely to be killed in "brutal" ways.[108] LGBTQ+ violent crime victims may face barriers to justice due to discrimination or harassment by law enforcement officials and healthcare providers, and the allowance of panic defenses furthers these potential barriers to justice.[109]

The use of LGBTQ+ panic defenses allows LGBTQ+ violent crime victims to be re-victimized by allowing their assailants or murderers to claim that the victim was "deserving" of the violence they suffered.[110] Further, the use of such defenses encourages the jury to consider that LGBTQ+ victims are less deserving of justice than their non-LGBTQ+ counterparts, simply because of their LGBTQ+ identity.[111] It is Massachusetts's duty to protect its LGBTQ+ citizens and individuals within the state from this egregious violation of a victim's dignity, personhood, and constitutional rights.[112] Recent data suggests that anti-LGBTQ+ violence and hate crime rates reached record highs in 2023; it is vital that Massachusetts takes a step

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[104] JENNIFER L. TRUMAN & RACHEL E. MORGAN, VIOLENT VICTIMIZATION BY SEXUAL ORIENTATION AND GENDER IDENTITY, 2017–2020, at 1 (2022), https://perma.cc/N5KW-44ZU.

[105] *Id.*

[106] *Gay and Trans Panic Defenses Continue to be Used in Court Cases in Many US States*, UCLA WILLIAMS INST. (Apr. 20, 2021), https://perma.cc/YSG2-QLEW.

[107] TRUMAN & MORGAN, *supra* note 104, at 1, 8.

[108] Andresen, *Research Note*, *supra* note 43, at 225, 233 (explaining that LGBTQ+ victims are more likely to experience brutality such as bodily mutilation or multiple stab wounds).

[109] *See* Mallory et al., *supra* note 17, at 21–22.

[110] *See* Russo, *supra* note 26, at 837.

[111] *See* Mallory et al., *supra* note 17, at 21–22.

[112] *See generally*, Patel, *supra* note 26; Nakota G. Wood, *The Gay Panic Defense: A Rainbow of Reasons Calling for Abolishment and Protections in Tennessee*, 32 TUL. J.L. & SEXUALITY 111 (2023).

towards protecting LGBTQ+ people by banning the use of panic defenses.[113]

ANALYSIS

III. Allowing LGBTQ+ Panic Defenses to be Used Violates the Constitutional Tenet of Trial by Impartial Jury

A. *Voir Dire May Not Be Adequate to Eliminate Biases Against LGBTQ+ Victims*

The Sixth Amendment guarantees the right to trial by an impartial jury.[114] This right is fundamental to the administration of justice not only within Massachusetts but throughout the American judicial system.[115] During the process known as voir dire, lawyers and judges ask a series of questions to assess potential jurors' ability to be fair and impartial during trial.[116] Those conducting the voir dire are empowered to remove jurors if prejudices or biases may prevent the juror from meeting their duty to remain impartial and fair.[117] For example, if the case being tried involved alleged police misconduct and questions revealed that a prospective juror harbored antipathy towards law enforcement, that juror would likely be dismissed during voir dire.[118] Put simply, the process of voir dire is meant to prevent jurors' outside biases or prejudices from wrongfully influencing the outcome of the trial.[119] However, it is not always possible to eliminate jurors' homophobic or transphobic prejudices through the process of voir dire.[120]

In *Pena-Rodriguez v. Colorado*, the Court held that pre-trial protections

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[113] *See* Delphine Luneau, *FBI's Annual Crime Report — Amid State of Emergency, Anti-LGBTQ+ Hate Crimes Hit Staggering Record Highs*, HUM. RTS. CAMPAIGN (Oct. 16, 2023), https://perma.cc/85QJ-E55U.

[114] *See* Alice M. Padawer-Singer et al., *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386, 386 (1974).

[115] *See* Aldridge v. United States, 283 U.S. 308, 310 (1931) (describing impartial juries as rooted in "the essential demands of fairness").

[116] *Impartial and Representative Juries*, STRENGTHENING THE SIXTH, https://perma.cc/4UR9-6E39 (last visited Mar. 16, 2025).

[117] *Id.*

[118] *See* Chan Tov McNamarah, *Sexuality on Trial: Expanding Pena-Rodriguez to Combat Juror Queerphobia*, 17 DUKEMINIER AWARDS: BEST SEXUAL ORIENTATION & GENDER IDENTITY L. REV. 393, 417 (2018).

[119] *See* Padawer-Singer et al., *supra* note 114, at 386.

[120] *See* McNamarah, *supra* note 118, at 420.

against biases—including voir dire—may not be sufficient to guarantee an impartial jury, as it was revealed after trial that one jury member made racially biased statements about Pena-Rodriguez during deliberations.[121] The *Pena-Rodriguez* holding set a precedent allowing the defendant to inquire about racial biases during the outset of a trial—however, this precedent does not specifically extend to biases and prejudices against LGBTQ+ individuals.[122] Moreover, voir dire examinations to eliminate juror biases are not constitutionally guaranteed and whether one is conducted is entirely within the discretion of the court.[123] When courts do permit voir dire for potential homophobic or transphobic prejudices, the effectiveness cannot be guaranteed.[124] Jurors may be unaware of implicit biases that they hold against LGBTQ+ individuals, or may simply be unwilling to admit to harboring such biases.[125] As such, it is not sufficient to rely on the voir dire process for eliminating jurors' prejudices or biases against LGBTQ+ individuals.[126] Massachusetts must instead prohibit the presentation of panic defenses to protect the trial from being wrongfully impacted by a biased or prejudiced jury.[127]

B. *Panic Defenses and Misleading Stereotypes About LGBTQ+ Victims*

The success of LGBTQ+ panic defenses hinges upon the jury's willingness to accept that the victim's sexual orientation or gender identity excuses or mitigates the defendant's actions against them.[128] This means that the defense must rely on homophobic and transphobic notions that LGBTQ+ victims are somehow deserving of the violence perpetrated against them.[129] As noted, panic defenses are utilized alongside recognized criminal defenses such as provocation or self-defense, both of which require analysis of the

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[121] Pena-Rodriguez v. Colorado, 580 U.S. 206, 223–25 (2017).

[122] *See id.* at 225–28; McNamarah, *supra* note 118, at 416–17.

[123] McNamarah, *supra* note 118, at 421.

[124] McNamarah, *supra* note 118, at 416–19.

[125] McNamarah, *supra* note 118, at 422.

[126] McNamarah, *supra* note 118, at 422–23.

[127] *See generally* McNamarah, *supra* note 118; AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES RESOLUTION 113A, at 10, (2013), https://perma.cc/43WP-FK2F [hereinafter ABA RESOLUTION 113A].

[128] Lee, *The Gay Panic Defense*, *supra* note 12, at 475–76; ABA RESOLUTION 113A, *supra* note 127.

[129] *See* ABA RESOLUTION 113A, *supra* note 127, at 2, 4.

reasonableness of the defendant's actions.[130]

It is problematic when recognized criminal defenses are used alongside LGBTQ+ panic defenses because the jury is required to believe that the defendant's actions were reasonable under the circumstances of an alleged non-violent homosexual advance or upon the discovery of the victim's sexuality or gender identity.[131] This welcomes jurors to consider their own biases against LGBTQ+ individuals in determining the guilt of the defendant and may lead them to accept harmful stereotypes about LGBTQ+ individuals.[132]

One of the main stereotypes involved in the presentation of LGBTQ+ panic defenses is that LGBTQ+ individuals are sexually predatory—therefore, their non-violent sexual advances are "more dangerous" than a similar advance by a non-LGBTQ+ individual.[133] A panic defense leads the jury to believe that the defendant's violent reaction was reasonable in response to a non-violent sexual advance by an LGBTQ+ individual or upon discovering the victim's LGBTQ+ identity.[134]

The determination of reasonableness in this instance depends on the jury's willingness to believe that the defendant's actions were justified not because of the non-violent sexual advance, but because of the victim's LGBTQ+ identity.[135] Permitting the use of LGBTQ+ panic defenses is a "judicial institutionalization of homophobia" and transphobia, as it introduces dangerous stereotypes and encourages jurors to adhere to prejudicial justifications for violence.[136] As such, the use of panic defenses should be disallowed within the state of Massachusetts to prevent the introduction of prejudices and biases against LGBTQ+ victims and to uphold the guarantee of an impartial jury.

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[130] *See* Lee, *The Gay Panic Defense*, *supra* note 12, at 489–517; Russo, *supra* note 26, at 816.

[131] *See* Lee, *The Gay Panic Defense*, *supra* note 12, at 476, 512–13; ABA RESOLUTION 113A, *supra* note 127, at 2, 4.

[132] *See* McNamarah, *supra* note 118, at 406–08 (noting that panic defenses rely on "negative stereotypes that infuse the trial with [homophobic or transphobic] bias").

[133] *See* Lee, *The Gay Panic Defense*, *supra* note 12, at 476, 512–13.

[134] *See* Lee, *The Gay Panic Defense*, *supra* note 12, at 505; ABA RESOLUTION 113A, *supra* note 127, at 7–8.

[135] *See* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 135–36 (1992); Lee, *The Gay Panic Defense*, *supra* note 12, at 476; ABA RESOLUTION 113A, *supra* note 127, at 8–9.

[136] Mison, *supra* note 135, at 136; *see* ABA RESOLUTION 113A, *supra* note 127.

IV. Massachusetts Has a Duty to Enact Legislation to Protect Citizens' Lives and Victims' Dignities

A. *Victims' Rights to Respect, Dignity, and Due Process*

1. Massachusetts's Policy Promotes Equitable and Respectful Treatment of Victims

In 2004, the Crime Victims' Rights Act granted victims of federal crimes ten enumerated rights, including the right to be treated fairly with respect to the victim's dignity and privacy throughout the proceedings.[137] Some have interpreted this Act to confer to victims a right to due process of law, like that of criminal defendants standing trial.[138] This Act, however, is only applicable to those whose case is being tried in a federal court or who were victims of federal crimes.[139] Several states have adopted a law known as Marsy's Law, which entitles victims of crimes in that state to constitutional protection similar to that of a defendant; Massachusetts is not one of those states.[140]

While the Massachusetts legislature has implemented a Victim's Bill of Rights, the enumerated rights do not include any provision guaranteeing victims a right to due process of law, or to being treated with dignity and respect.[141] Victims of crime within Massachusetts must rely on state and court policies that are intended to promote a just and fair system for all involved.[142] Under these policies, everyone within the justice system is

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[137] Crime Victims' Rights Act, 18 U.S.C. § 3771, https://perma.cc/5RJG-CFYD.

[138] *See Victims' Rights During Significant Stages of the Criminal Justice Process*, NAT'L CRIME VICTIM L. INST. – LEWIS & CLARK L. SCH. (June 2021), https://perma.cc/SM9Y-GA4F.

[139] *About Victims' Rights*, VICTIMLAW, https://perma.cc/WVC6-G53C (last visited Feb. 27, 2025).

[140] *See About Marsy's Law*, MARSY'S LAW, perma.cc/L4GP-AJ5T (last visited Feb. 27, 2024) (noting that Marsy's Law has been adopted in "Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, and Wisconsin" and is pending in Idaho and Tennessee).

[141] *See* MASS. ANN. LAWS ch. 258B, § 3 (LexisNexis 2024).

[142] *See, e.g.*, JEFFREY A. LOCKE & JOHN A. BELLO, STRATEGIC PLAN 2023–2025, at 5 (2022), https://perma.cc/5XGC-R2PQ; Admin. Off. of the Trial Ct. & Sup. Jud. Ct. of Mass., WITHIN OUR REACH: GENDER, RACIAL, AND ETHNIC EQUALITY IN THE COURTS (2004), https://perma.cc/2KZN-3QKQ [hereinafter WITHIN OUR REACH].

entitled to be treated with dignity, respect, and fairness.[143] In order to deliver the respect that is due to victims of crime within Massachusetts, the state has a duty to protect LGBTQ+ victims from the violation of their dignity that results from the use of LGBTQ+ panic defenses.

2. LGBTQ+ Citizens of Massachusetts are Entitled to the Same Rights of Protection, Respect, and Dignity as Non-LGBTQ+ Citizens

Under the Fourteenth Amendment of the United States Constitution, no state may deny its citizens equal protection of the law.[144] While there are many suspect classes that are afforded different levels of "protection" under this clause, this amendment generally prohibits the state from enacting legislation or practices that favor or disfavor members of various classes.[145] As such, Massachusetts is required to protect LGBTQ+ victims of crime to the same degree that it does for all other victims.

For the Fourteenth Amendment to apply, the policy or practice must constitute "state action," meaning that the differential or favorable treatment must be attributable to governmental action.[146] The judicial branch of the state government is responsible for regulating the trial courts, appellate courts, and the Massachusetts Supreme Judicial Court ("SJC"), and there is no question that action by a branch of the state government is state action.[147] By failing to pass the legislation that would outlaw the use of panic defenses, the state continues to enable defendants to weaponize victims' gender identity or sexuality to suggest that they are more deserving of the violence perpetrated against them, thus enabling active discrimination within

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[143] JEFFREY A. LOCKE & JOHN A. BELLO, DIVERSITY REPORT FISCAL YEAR 2022 (2022), https://perma.cc/A6N4-GBNM [hereinafter DIVERSITY REPORT]. *See generally*, Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43 (2016) (explaining that there are varying definitions and applications of "dignity" rights in different states and contexts).

[144] U.S. CONST. amend. XIV, § 1.

[145] Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 123 (1989).

[146] *Id.*

[147] *See Executive Office of the Trial Court*, MASS.GOV, https://perma.cc/Q6HU-CBN4 (last visited Feb. 27, 2025) (explaining that the Executive Office of the Trial Court is responsible for overseeing the judicial process and facilitating communication for leadership of the court); Galloway, *supra* note 145, at 127–28.

courtrooms.[148] The Massachusetts legislature has a duty to pass a law banning the use of LGBTQ+ panic defenses to provide LGBTQ+ victims an equal opportunity for justice that is not undermined due to their sexual orientation or gender identity.[149]

B. *Legislation and Massachusetts's Dedication to Protecting All Citizens Equally*

1. The Massachusetts Judicial System's Mission to Eliminate Biases and Promote Diversity, Equity, and Inclusion in the Administration of Justice

In recent years, the SJC has encouraged those involved in the state justice system to act with respect, fairness, and courtesy for others.[150] According to the Boston Bar Association, "[t]he Massachusetts Trial Court has embarked on an intentional journey to address issues related to diversity, equity, and inclusion."[151] These efforts were largely started in response to outcry against racial discrimination and biases that permeate the Massachusetts court system (as noted in a September 2020 Harvard report which highlighted the depth of systemic racism within the Massachusetts system).[152] However, efforts by the SJC and trial court far precede the publication of the 2020 Harvard report, as evidenced by the SJC's 2004 document outlining a commitment to treating everyone within the court system with dignity and respect at all times.[153] The Courts came together to prohibit any behavior constituting bias or prejudice on the basis of "race, gender, religion, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status," noting that such behavior is destructive to the justice system.[154] However, the Courts' efforts to eliminate bias and promote equitable justice for all, including LGBTQ+ individuals, have grown throughout the years.[155]

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[148] Russo, *supra* note 26, at 813–15.

[149] *See* Russo, *supra* note 26, at 815.

[150] *See* WITHIN OUR REACH, *supra* note 142.

[151] Paula M. Carey, *Going Beyond Equality and Striving Toward Equity: Addressing Systemic Racism and Bias in the Courts*, 66 BOS. BAR J., no. 2, DEI Special 2022, at 26, 26–28, perma.cc/9CBX-RSTN.

[152] *See generally* ELIZABETH TSAI BISHOP, ET AL., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL JUSTICE SYSTEM (2020), perma.cc/3WR8-DYF4.

[153] *See generally* WITHIN OUR REACH, *supra* note 142.

[154] WITHIN OUR REACH, *supra* note 142.

[155] *See* LOCKE & BELLO, *supra* note 142; DIVERSITY REPORT, *supra* note 143, at 2, 5.

In the time since the beginning of the concerted effort to combat biases within the state justice system, the Massachusetts Trial Court has established the Trial Court Office of Diversity, Equity and Inclusion ("ODEI").[156] The ODEI publishes an annual "Diversity Report" in which they outline the trial court's missions and efforts to increase equity within the Massachusetts legal system.[157] As noted in the report, the Massachusetts Trial Court is dedicated to promoting "equal access to justice for all in a safe and dignified environment" and to embedding equity and access in the Massachusetts justice system.[158] The Court also explains that eliminating biases from every level of the justice system not only improves the community's trust in the system but that it also improves the quality of the court's services overall.[159]

The Massachusetts court system has also outlined plans to increase equitable access to justice for all individuals beyond their mission statement, attempting to expand upon the efforts of the ODEI.[160] The Trial Court's Strategic Plan for 2023 through 2025 is a collaborative plan developed by leaders from the various state courts and other organizations within the state justice system.[161] According to this plan, the Massachusetts justice system is dedicated to eradicating discrimination and delivering quality justice to all, as indicated by their slogan "One Mission: Justice with Dignity and Speed."[162] This Strategic Plan represents the court system's dedication to improving existing practices and continuing past efforts to address and eliminate discrimination into future years.[163]

When reviewing the SJC and trial court mission statements, the Diversity Report, and the Trial Court Strategic Plan collectively, it becomes clear that the Massachusetts judicial system is dedicated to promoting equity and fairness to all in the administration of justice.[164] The state legislature

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[156] Carey, *supra* note 151, at 27; *Trial Court Office of Diversity, Equity & Inclusion*, MASS, https://perma.cc/3AY3-W7AV (last visited Apr. 7, 2025).

[157] *Trial Court Office of Diversity, Equity & Inclusion*, *supra* note 156.

[158] DIVERSITY REPORT, *supra* note 143, at 4.

[159] DIVERSITY REPORT, *supra* note 143, at 2.

[160] *See* LOCKE & BELLO, *supra* note 142.

[161] LOCKE & BELLO, *supra* note 142, at 1–4 (describing the process for and who is involved in writing the strategic plan, and listing the leadership team members according to which court they are associated with).

[162] LOCKE & BELLO, *supra* note 142, at 5–6.

[163] *See* LOCKE & BELLO, *supra* note 142, at 5–6.

[164] *See* DIVERSITY REPORT, *supra* note 143, at 4; LOCKE & BELLO, *supra* note 142, at 5–6; *Trial Court Office of Diversity, Equity & Inclusion*, *supra* note 156.

must prohibit the use of LGBTQ+ panic defenses within the Massachusetts judicial system to assist the justice system in reaching that goal.[165]

2. LGBTQ+ Panic Defenses and Confidence in the Legal System

It is undeniable that the justice system relies on public trust and confidence to function.[166] In recent years, however, there has been a remarkably low level of confidence in the U.S. justice system and government.[167] The recent decline in public trust and confidence in the judicial system has created concern regarding the system's ability to remain a legitimate and effective institution.[168] The decline in public trust is likely attributable to the continued impacts of systemic racism within the system,[169] and judicial entities and legal professionals have a duty to improve public trust to rebuild confidence in a just and effective system.[170] Moreover, court systems owe it to individuals within the judicial system to create an institution that is deserving of that trust and free from implicit biases and discrimination.[171]

As noted in the Strategic Plan, one of the trial court's goals is to ensure that the justice system inspires public trust and confidence.[172] Some suggest that improving confidence levels and rehabilitating trust in the system starts with juries and "empower[ing] people to play a central role in juries and the administration of justice."[173] Another suggestion requires judicial

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[165] *See* Russo, *supra* note 26, at 837 ("[t]o prohibit the defense would be a proactive effort by state legislators …").

[166] *See generally* American Bar Association, *How to Confront Bias in the Criminal Justice System*, ABA (Dec. 2019), https://perma.cc/RT6C-KDKV; *Public Trust and Confidence,* NAT'L ASS'N FOR CT. MGMT., https://perma.cc/VUV2-A3FN (last visited Apr. 7, 2025).

[167] *See* American Bar Association, *supra* note 166; Carol Funk, *Public Confidence and the Courts: Pillars of the Rule of Law*, ABA (Feb. 17, 2023), https://perma.cc/P5NQ-DT5L.

[168] Valerie Hans et al., *Fixing the Public's Confidence in the Courts Starts with Juries*, BLOOMBERG L. (Dec. 21, 2022, 4:00 AM EST), https://perma.cc/S675-ATA9.

[169] *See generally id.*; William D. Eggars et al., *Rebuilding Trust in Government*, DELOITTE (Mar. 9, 2021), perma.cc/YP7K-X76L.

[170] Judy Perry Martinez, *How Lawyers and Judges Can Help Rebuild Public Trust and Confidence in Our Justice System*, ABA (Aug. 9, 2018, 6:00 AM CDT), perma.cc/GEG4-BKKV; Funk, *supra* note 167.

[171] *Public Trust and Confidence*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., perma.cc/AXB8-FY7E (last visited Apr.7, 2025); *see* Carey, *supra* note 151.

[172] LOCKE & BELLO, *supra* note 142, at 5–6.

[173] Hans et al., *supra* note 168.

transparency, both in the administration of justice and in the court policies themselves, since courts could regain public trust by increasing awareness surrounding their policies and procedures.[174] A final suggestion encourages court systems to treat all parties involved in the judicial process, including the victims, their families, defendants, and attorneys alike, with dignity and respect.[175]

Prohibiting the use of LGBTQ+ panic defenses within Massachusetts would enhance public trust and confidence in the system because it would reflect the trial court's dedication to ridding the system of biases and discrimination.[176] In accordance with these suggestions and the trial court's goal, Massachusetts has a duty to ban the use of discriminatory and disrespectful strategies, including LGBTQ+ panic defenses.

3. Massachusetts Precedent Established in Commonwealth v. Doucette

In February 1979, William Doucette Jr. drove to a motel with Ronald Landry in Malden, Massachusetts.[177] While at the motel, under the influence of barbiturates and alcohol, Landry and Doucette began to engage in sexual activity, at which time Doucette stabbed and killed Landry.[178] After leaving Landry's body in the motel room, Doucette ran and told numerous different stories regarding what happened that night.[179]

At trial, the pathologist who conducted the autopsy on Landry's body noted that Landry was stabbed multiple times with considerable force and his throat was "slashed from the midline front almost to the left ear."[180] Doucette alleged that the attack was in response to an "attempted homosexual attack" by Landry.[181] Despite Doucette's assertion, the jury

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[174] *See* Funk, *supra* note 167.

[175] Public Trust and Confidence, *supra* note 166.

[176] LOCKE & BELLO, *supra* note 142, at 5–6; *Public Trust and Confidence*, *supra* note 166.

[177] Commonwealth v. Doucette, 462 N.E.2d 1084, 1089 (Mass. 1984); ABA RESOLUTION 113A, *supra* note 127, at 10.

[178] *Doucette*, 462 N.E.2d at 1089–90; ABA RESOLUTION 113A, *supra* note 117, at 10.

[179] *Doucette*, 462 N.E.2d at 1089–90 (explaining that Doucette first told a gas station attendant that he stabbed the victim because Landry had "beaten up his girlfriend's brother" and slit Landry's throat when he began to call for help, then later told police that he was covered in blood after taking a knife away from a pimp who was propositioning his friend at a bar).

[180] *Id.* at 1089.

[181] *Id.*

ultimately convicted him of first-degree murder, and he was sentenced to a life term in a Massachusetts correctional facility.[182] Doucette then appealed the decision, arguing that he was entitled to either a reversal of the guilty verdict, a new trial, or a reduced sentence because his lawyer failed to raise an insanity defense based on his "homosexual panic."[183]

On appeal, the SJC rejected Doucette's presentation of "homosexual panic" alongside an insanity defense.[184] The Court explained that any "homosexual panic" simply described Doucette's version of events and that there is no express mental disorder that would have entitled him to an insanity defense.[185] As such, the Court affirmed the guilty verdict and rejected the suggestion that Doucette's guilt should have been mitigated by an LGBTQ+ panic defense.[186] This case established a precedent in Massachusetts that prevents defendants from presenting a panic defense without referring to a specific mental disorder (not including "homosexual panic") that enables defendants to claim insanity.[187] This case represents the SJC's early refusal to acknowledge the legitimacy of LGBTQ+ panic defenses when used as a basis for an insanity defense.[188] Therefore, passing legislation to prevent the use of LGBTQ+ panic defenses within the Massachusetts judicial system would align with early SJC precedent.

C. *Failure to Adequately Address the Issue by Allowing Bill to Die in Committee*

1. The American Bar Association's Call to Action

In 2013, the American Bar Association ("ABA") called upon state, local, territorial, tribal, and federal governments alike to "take legislative action to curtail the availability and effectiveness of the 'gay panic' and 'trans panic'

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[182] *Id.* at 1088.

[183] *Id.* at 1088–89, 97; ABA RESOLUTION 113A, *supra* note 127, at 10.

[184] *Doucette*, 462 N.E.2d at 1097.

[185] *Id.*

[186] *Id.*

[187] *Compare id.* at 1097, *with* Commonwealth v. Shelley, 409 N.E.2d 732, 735 (Mass. 1980) (differentiating between the presentation of "homosexual panic" alone as the justification for an insanity defense as presented in *Doucette* from the combination of documented borderline personality disorder alongside "homosexual panic" as the basis of the insanity defense as presented in *Shelley*).

[188] *See*, *e.g.*, Doucette, 462 N.E.2d at 1097; ABA RESOLUTION 113A, *supra* note 117.

defenses."[189] In a joint resolution, the ABA described various ways that the presentation of these defenses is harmful to LGBTQ+ individuals and the administration of justice.[190] The ABA explained that some courts have issued categorical limits on the use of panic defenses, whether through judicial restraints or restrictions on the use of insanity or provocation defenses based on gay or trans panic.[191] However, the ABA expressed that categorical bans within courts are not enough and that legislatures should enact legislation expressly prohibiting the use of panic defenses.[192]

Specifically, the ABA recommends legislation asserting that "neither non-violent sexual advances nor the discovery of a person's gender identity can be adequate provocation for murder."[193] The ABA is a well-respected and long-standing organization that governs the conduct of lawyers and the education of law students.[194] As such, it is in the best interest of the Massachusetts legislature to abide by the recommendations made by this entity and to enact legislation to disallow the use of LGBTQ+ panic defenses within the state.[195]

2. Committees' Failure to Take Action is an Injustice

The initial bill to outlaw the use of LGBTQ+ panic defenses within the Massachusetts trial court system, titled An Act Protecting LGBTQ Victims, was introduced to the Massachusetts Senate in early 2021.[196] In late February 2021, the Bill was "referred to the Committee on the Judiciary."[197] Later, in November of 2021, the Bill was heard during a joint session of the Massachusetts Senate and House of Representatives.[198] After the hearing, the Bill was then referred to the Joint Committee on Rules and accompanied a

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[189] ABA RESOLUTION 113A, *supra* note 127, at 1–3.

[190] ABA RESOLUTION 113A, *supra* note 127, at 9–12.

[191] ABA RESOLUTION 113A, *supra* note 127, at 9–12.

[192] *See* ABA RESOLUTION 113A, *supra* note 127, at 9–12.

[193] ABA RESOLUTION 113A, *supra* note 127, at 1.

[194] *See* Libby Meadows, *The American Bar Association and Its Influence on the Legal Profession, and Beyond*, INSIDE COMPLIANCE (Nov. 22, 2019), https://perma.cc/HA7F-5EVK (describing the impact that the ABA has on the conduct of lawyers, education of law students, and its influence on American politics).

[195] *See id.*; ABA RESOLUTION 113A, *supra* note 127.

[196] *See* S. 956, 192nd Leg. (Mass. 2021), https://perma.cc/JTX5-F345.

[197] *Id.*

[198] *Id.*

study order alongside many other bills.[199] Study orders authorize committees to investigate and research matters contained in bills, and the committee is ultimately meant to compose a narrative report containing the findings and any further actions taken.[200]

There are two potential results when reporting on study order: either the Committee issues a favorable report on the bill or decides that the bill "ought not to pass."[201] A bill can only move forward if it is granted a favorable report.[202] Despite the study order for the Act Protecting LGBTQ Victims, no action was taken nor was any narrative report published as of early 2023; thus, the Bill has "died."[203] Allowing this Bill to die does not adequately address the need to ban LGBTQ+ panic defenses from use within the Massachusetts court system, and the committees receiving the Bill are failing to meet their duty to take action.

V. Addressing Professor Cynthia Lee's Counterargument

A. *Impact of Ban on Defendant's Due Process Right to Present a Defense in Whichever Manner They Desire*

The right to due process entitles criminal defendants to present a meaningful and complete defense in a manner of their choosing.[204] The U.S. Supreme Court has upheld this right as fundamental and foundational within the criminal justice system,[205] though the Court has utilized a specific legal framework for evaluating different defenses.[206] When evaluating a

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[199] *Id.*

[200] *See generally* THE LEGISLATIVE PROCESS (Commonwealth of Mass. Pub. Emp. Pet. Admin. Comm'n 2002), https://perma.cc/87EE-L5EW.

[201] *Id.* at 5–6.

[202] *See id.* at 5–6.

[203] *See Bill Text: MA S956 | 2021-2022 | 192nd General Court | Introduced*, LEGISCAN, https://perma.cc/3XFT-5DZF (last visited Feb. 27 2025); *Glossary of Legislative Terms*, NAT'L CONF. OF ST. LEGS., https://perma.cc/E4H8-96M6 (last visited Feb. 27, 2025) (explaining that bills "die[] in committee" when they are not returned by the committee to the house or senate for further action).

[204] *See* Barry Kamins, *The Right to Present a Complete Defense*, N.Y. L.J. (Aug. 1, 2022 at 12:00 PM) perma.cc/359S-YPBL.

[205] Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

[206] JORDAN BLAIR WOODS, ET AL., MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSE 2–3 (2016), perma.cc/JD8A-7E4X.

defense, the Court looks to the history and breadth of its use and policy justifications for the use of the defense to determine whether it can be considered a "fundamental principle," such that it cannot be disallowed.[207] If the defendant is presenting a defense that is relatively new, is not widely used, or is unsupported by public policy, the Court will likely find that disallowing its use does not violate the defendant's right to due process.[208]

Cynthia Lee, a George Washington University Law School professor, asserts that completely barring the use of gay and trans panic defenses is a violation of a defendant's right to present a complete defense.[209] She suggests that disallowing the use of panic defenses would not be effective in eliminating the possibility of sexual orientation bias swaying the jury or proceeding and instead, suggests that trials explicitly acknowledge sexual orientation biases and their impact throughout the proceedings.[210] However, disallowing the use of panic defenses would not violate a defendant's due process rights because they are not deeply rooted in the justice system, nor are they supported by public policy.[211]

LGBTQ+ panic defenses are relatively new legal defenses, given that they were introduced in the latter half of the 1900s,[212] and they are not widespread enough to constitute a fundamental principle.[213] Panic defenses have been used in over one hundred cases nationwide since the 1960s—though, as noted, they are neither codified nor recognized legal defenses and must be used in conjunction with another defense.[214]

Given that no states have formally recognized LGBTQ+ panic defenses in their penal codes, and that the use of panic defenses began recently, no court would likely find that they are "deeply rooted" in the nation's

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[207] *Id.* at 18–19.

[208] *See id.* at 18–20; *see, e.g.*, Montana v. Egelhoff, 518 U.S. 37, 43, 51 (1996).

[209] Lee, *The Gay Panic Defense*, *supra* note 12, at 557–59 (arguing that due process entitles defendants to present a gay or trans panic defense and that it is the judge's or jury's responsibility to determine the validity of the claim).

[210] Lee, *The Gay Panic Defense*, *supra* note 12, at 559.

[211] *See Egelhoff*, 518 U.S. at 43, 51; WOODS, ET AL., *supra* note 206, at 18–20.

[212] *See generally* People v. Stoltz, 196 Cal. App. 2d 258, 261–263 (1961) (representing the earliest recorded use of a gay or trans panic defense).

[213] *See generally* WOODS, ET AL., *supra* note 206, at 19–20 (explaining that "fundamental principles of justice" are established upon a showing that, at the time of the Fourteenth Amendment's implementation, the principle was deeply rooted in the nation's tradition or conscience).

[214] *See generally* WOODS, ET AL., *supra* note 206, at 1–3.

history.[215] The use of LGBTQ+ panic defenses is also wholly unsupported by public policy, especially in Massachusetts.[216] The Massachusetts judicial system has historically disallowed discriminatory practices and continues to implement new strategies for promoting equity for all, regardless of characteristics like age, race, sexual orientation, gender identity, and more.[217] Based on the trial court and SJC's joint efforts to eliminate discrimination from every level of the Massachusetts judicial system, it is clear that the continued use of LGBTQ+ panic defenses is not supported by public policy.[218] In short, a court would likely find that the panic defense is not a fundamental principle, and thus, outlawing its use is not a violation of a defendant's due process right to present a complete defense.[219]

CONCLUSION

LGBTQ+ panic defenses allow criminal defendants to weaponize their victim's sexuality or gender identity to justify the violence used against them. Defendants do so by claiming that the victim's LGBTQ+ identity was so affronting or alarming that it created a state of "panic" within them, leading the defendant to respond with violence. As noted, there is no legal recognition of panic defenses independently; rather, they are used in conjunction with well-known criminal defenses including insanity, diminished capacity, self-defense, or provocation.[220] The use of LGBTQ+ panic defenses is unacceptable, as it allows criminal defendants to violate their victim's dignity and introduce homophobic and transphobic notions that LGBTQ+ victims are less deserving of justice simply due to their identities.

In recent years, Massachusetts legislators have introduced bills to the state Senate and House of Representatives that would outlaw the use of LGBTQ+ panic defenses within the state legal system.[221] Outlawing the use of panic defenses would not only align with the state justice system's goal, but would also help to improve public trust in the system and protect the

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[215] WOODS, ET AL., *supra* note 206, at 19–20.

[216] *See* WOODS, ET AL., *supra* note 206, at 19–20; LOCKE & BELLO, *supra* note 142, at 1–4.

[217] *See* LOCKE & BELLO, *supra* note 142, at 1–4; DIVERSITY REPORT, *supra* note 143.

[218] *See* LOCKE & BELLO, *supra* note 142, at 1–4; WITHIN OUR REACH, *supra* note 142.

[219] Montana v. Egelhoff, 518 U.S. 37, 43, 51 (1996); WOODS, ET AL., *supra* note 206, at 18.

[220] *See* Russo, *supra* note 26, at 818.

[221] *See* S. 956, 192nd Leg. (Mass. 2021), https://perma.cc/Z5GF-62XD; *LGBTQ+ "Panic" Defense Legislation Map*, *supra* note 83.

constitutional rights of LGBTQ+ individuals within Massachusetts. Despite this, the state legislature has allowed the bills to die in committee, thus denying LGBTQ+ individuals the protection they deserve.

In closing, the responsibility to ban the use of LGBTQ+ panic defenses lies with Massachusetts lawmakers. It is their duty to protect LGBTQ+ victims' dignity, personhood, and constitutional rights by outlawing the future use of LGBTQ+ panic defenses within the Massachusetts court system.

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Must Be Something in the Water: Lessons from European Countries on PFAS Regulation

*Taylor Perrodin**

INTRODUCTION

Did you know that your favorite makeup, food, household products, and even the paper you write on are contaminating your drinking water?[1] Would it shock you to know that the United States is leaps and bounds behind other countries in regulating this issue at the expense of the safety of Americans and the environment?[2] Water is the most abundant, utilized, and taken-for-granted natural resource on Earth.[3] Unfortunately, water pollution is a major problem today, with 40% of U.S. waterways having poor water quality linked to contamination from Per- and Polyfluoroalkyl Substances ("PFAS").[4] In fact, an estimated two hundred million Americans are exposed to PFAS every time they turn on their tap water.[5] PFAS compounds are man-made chemicals with carbon and fluorine

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1 *See* memyselfandirony, *What's Up With News Everywhere About PFAS, aka "Forever Chemicals," Being Everywhere, ie, In Our Water, Soil, Air, Food, and In All of Us?*, REDDIT (Mar. 8, 2023, 2:16:59 PM EST), perma.cc/8NET-L9UV.

2 *See id.*

3 Scott Minos, *Water – Our Most Precious Resource*, ENERGY (Aug. 3, 2022), perma.cc/9JTG-2JWU.

4 *Id.*

5 Jeffrey Kluger, *The Challenge of Removing Toxic PFAS 'Forever Chemicals' from Drinking Water*, TIME (Mar. 15, 2023, 2:10 PM EDT), perma.cc/28SF-RZLQ.

bases that are used in protective coatings for packaging, waterproof fabrics, and firefighter foam, affecting nearly every aspect of life.[6] If every glass of water, piece of clothing, and cooking pot are contaminated with PFAS, you are exposing yourself to an increased risk of cancer, reduced immune responses, and high cholesterol on a daily basis.[7] Although numerous PFAS toxins are found in consumer products, lack of testing and federal regulation allow them to go unnoticed for many years, and they are still highly used today.[8]

This Note analyzes the effectiveness of the current regulatory schemes around the world that combat negative health effects caused by exposure to PFAS. Part I provides an overview of what PFAS are, how they are used, and what regulations are currently in place. Part II highlights the negative effects of PFAS exposure, and why their regulation is important. Part III analyzes how the United States can improve its regulatory framework to better combat the issues of PFAS contamination, specifically considering whether the country can adopt the methods of abatement currently implemented by the European Union ("EU"). Finally, this Note will argue that the best course of action for the United States is to follow leading European countries toward becoming more environmentally friendly. Many EU countries are leaders in environmental policy and regulation and have made tremendous strides in solving other issues pertaining to coastal land loss and air pollution.[9] Based on the different methods of action in place around the world, and the progress the United States has made in regulating PFAS use, there is not one course of action that will solve all issues presented by PFAS contamination.[10]

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[6] Alaska Public Media, *Explained: What are PFAS Compounds and How Can They Affect Human Health?*, YOUTUBE (Oct. 18, 2019), perma.cc/C3Y6-6PS3.

[7] *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, U.S. ENV'T PROT. AGENCY, perma.cc/9625-Z7A6 (last updated Nov. 26, 2024).

[8] Cadee Wambolt, *Exposure to Toxic Chemicals in Consumer Products in the United States*, BALLARD BRIEF (Jan. 2021), perma.cc/E2RN-V4UW.

[9] *E.g.*, *European Union: The EU Accelerates Electricity Transition in the Wake of Crisis*, EMBER, perma.cc/CP3U-BQY8 (last updated Jan. 26, 2025); Orange Flag, *The Dutch Land Reclamation: The Most Incredible Infrastructure Project in History*, YOUTUBE (Apr. 13, 2020), perma.cc/99JG-NCPS; Jennifer Laidlaw, *How the EU Aims to Transform its Energy Mix and Boost Investment in Renewables*, S&P GLOB. (Aug. 26, 2022, 7:00), perma.cc/M77X-CLBW.

[10] *See* Blake Langenbach & Mark Wilson, *Per- and Polyfluoroalkyl Substances (PFAS): Significance and Considerations within the Regulatory Framework of the U.S.A*, INT'L J. ENV'T RSCH. PUB. HEALTH, Oct. 23, 2021, at 5.

I. Background

A. *PFAS Use Worldwide*

PFAS are a group of synthetic chemicals that have been used in many everyday products such as non-stick cookware and packaging, stain and water-resistant materials, and cosmetic products since the 1950s.[11] Over time, PFAS can leak into the soil, water, and air, causing human exposure and negative health effects.[12] Due to the unique properties of PFAS, they do not degrade as quickly as other chemicals, prolonging exposure and increasing the likelihood of negative effects on humans, animals, and the environment.[13] These "forever chemicals" are popular because they provide the perfect level of surface tension for liquids, help liquids mix and spread, make things slippery, and serve non-consumer functions such as use in firefighter foam.[14] Furthermore, PFAS are used in various industries, including aerospace, biotech, construction, electronics, energy, food production, mining, nuclear, pharmaceuticals, textile production, metal, wood, and photography.[15] Their everyday products and business operations usages cause widespread leakage and worldwide contamination problems.[16] This high level of usage releases PFAS at each stage of their lifecycle, and likely accounts for recorded findings of them everywhere the products travel—from production facility to landfill.[17]

PFAS have been detected all over the world, including in the snow on Mount Everest.[18] In the United States alone, PFAS were found to have contaminated 8,865 communities with a higher concentration of contaminated drinking water near military facilities on the East.[19] Drinking

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[11] *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, NAT'L INST. ENV'T HEALTH SCIS., perma.cc/PBY5-AVTA (last reviewed Jan. 6, 2025).

[12] *PFAS Explained*, U.S. ENV'T PROT. AGENCY, perma.cc/DF3C-XCT4 (last updated Oct. 3, 2024).

[13] *See Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, *supra* note 11.

[14] *Why are PFAS Used in Our Products?*, PFAS FREE, perma.cc/SL2U-BUPA (last visited Feb. 11, 2025); Juliane Glüge et al., *An Overview of the Uses of Per- and Polyfluoroalkyl Substances (PFAS)*, 22 ENV'T SCI. PROCESSES & IMPACTS, 2345, 2350 (2020).

[15] Glüge et al., *supra* note 14, at 2349.

[16] Fidra, *Forever chemicals, PFAS, Get Everywhere!*, YOUTUBE (Jan. 31, 2020), perma.cc/Y2Q9-6FGR.

[17] *What are PFAS?*, PFAS FREE, perma.cc/845Z-DQH8 (last visited Feb. 11, 2025).

[18] *Cross-Cutting Story 3: PFAS,* EUR. ENV'T AGENCY, perma.cc/5RVZ-FQF2 (last modified Mar. 13, 2023).

[19] *PFAS Contamination in the U.S.*, ENV'T WORKING GRP., (Nov. 20, 2024), perma.cc/59EP-

water and food are the most frequent sources of exposure, with non-stick household products and clothing contributing the most to water contamination.[20] European countries such as France, Sweden, Germany, Austria, and the Netherlands have reported contamination of surface water, groundwater, rainwater, soil, animals, and eggs.[21] This contamination is caused by pollution from PFAS manufacturing and production plants, and is mainly from one type of PFAS, perfluorooctane sulfonic acid ("PFOS"), which is now banned in many countries.[22] In Nordic countries, the highest concentration of PFAS use was reported in the plastic and rubber, electronics, and coatings/paintings industries.[23] Firefighting training also contributes to a significant portion of PFAS contamination in the United States and Europe, with an increase in contaminated water supplies in communities near training facilities.[24] Due to the many sources of PFAS, it would be difficult to enforce an outright ban on their use, but headway in their regulation has been made through various methods.[25]

A recent lawsuit against YouTuber Logan Paul's PRIME energy drink has brought significant attention to the dangers of PFAS exposure and the lack of regulations.[26] The drink is marketed—mostly to young people and overworked university students—as a healthy, "perfect boost for every endeavor…designed to 'refresh, replenish, and refuel."[27] However, independent third-party testing discovered significant levels of eight types of PFAS in the grape-flavored energy drink.[28] The lawsuit alleges that

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6WZP; *see* Erick Burgueño Salas, *Toxic PFAS Found in U.S. Drinking Water 2023, By Location*, STATISTA (Sept. 23, 2024), perma.cc/AY8L-JXJG.

[20] Elsie M. Sunderland et al., *A Review of the Pathways of Human Exposure to Poly- and Perfluoroalkyl Substances (PFASs) and Present Understanding of Health Effects*, 29 J. EXPOSURE SCI. ENV'T EPIDEMIOLOGY, 131, 131 (2019).

[21] EUR. ENV'T AGENCY, *supra* note 18.

[22] *Cross-Cutting Story 3: PFAS*, *supra* note 18.

[23] Glüge et al., *supra* note 14, at 2352.

[24] *Cross-Cutting Story 3: PFAS*, *supra* note 18; *PFAS-Containing Firefighting Foams*, CLEAN WATER ACTION, perma.cc/ZZU6-3JFS (last visited Feb. 11, 2025).

[25] *See infra* pp. 6–13.

[26] *See e.g.*, Environment by Impact (@environment), INSTAGRAM (Apr. 25, 2024), perma.cc/C4Q2-D4XF; @Perfectionlumiere, *Logan Paul's Prime Hydration is Being Sued Because it Contains 3x the Safe Amount of Forever Chemicals to Have in a Lifetime*, REDDIT, perma.cc/G7JP-APNE (last visited Mar. 24, 2025); Beatrice the Anti-Plastic Lady (@antiplasticlady), TIKTOK (Apr. 22, 2024), perma.cc/N5N2-646R.

[27] Brian Eckert, *PFAS in Prime Hydration Grape Sports Drink Draws Milberg Lawsuit*, MILBERG (Aug. 7, 2023), perma.cc/727C-3SE2.

[28] *Id.* (indicating that the results showed the presence of Perfluoro-1-butanesulfonic acid

PRIME highlights ingredients such as coconut water, B vitamins, electrolytes, and antioxidants on its product labeling to persuade customers that the drink is good for them, and that the plaintiffs would not have purchased the drink if the label mentioned the existence of PFAS.[29] Thus, the plaintiffs assert that PRIME engaged in product misrepresentation to mislead consumers, causing economic harm for which they seek damages and an injunction to enjoin PRIME from continuing its deceptive advertising.[30] PRIME moved to dismiss the case for lack of alleging a cognizable injury, and failure to present facts that prove a "concrete and imminent threat of future harm."[31] This is a bold statement considering the prevalent research surrounding the adverse effects of PFAS and the lack of a method to remove them from the body.[32] Numerous chemical manufacturers and fire safety products are similarly facing water contamination lawsuits brought by individuals with cancer, past firefighters, and local water authorities, with evidence presented that has heightened concerns about the long-term risks of PFAS exposure.[33]

B. *United States PFAS Regulation*

The U.S. Environmental Protection Agency ("EPA") has addressed PFAS through its lackluster PFAS Action Plan and Council on PFAS.[34] The EPA put eight regulatory processes in place through the Action Plan to address the contamination issue.[35] These processes exist within many of the notable environmental acts already in place, such as the Clean Air Act ("CAA"), Safe Drinking Water Act ("SDWA"), Toxic Substances Control Act ("TSCA"), and Resource Conservation and Restoration Act ("RCRA").[36]

(PFBS), Perfluoro-n-decanoic acids (PFDA), Perfluoro-n-dodecanoic acid (PFDoA), Perfluoro-n-heptanoic acid (PFHpA), Perfluoro-noctanoic acid (PFOA), Perfluoro-n-tetradecanoic acid (PFTeDA), Perfluoro-n-undecanoic acid (PFUdA), and Perfluorooctanesulfonic acid (PFOS)).

[29] *Id.*; Class Action Compl. at 7–8, *Castillo v. Prime Hydration*, LLC, No. 1 3:23-cv-03885-AMO (N.D. Cal. Aug. 2, 2023).

[30] Class Action Compl., *supra* note 29, at 3.

[31] Jay L. Halpern et al., *Prime Time for Prime Hydration: YouTubers Clash with PFAS Regulations*, THE NAT'L L. REV., May 23, 2024, at 2, perma.cc/V3DL-G2BS.

[32] Eckert, *supra* note 27.

[33] Irvin Jackson, *Prime Energy Sports Drink Class Action Lawsuit Filed Over Caffeine Levels, PFAS Exposure*, ABOUTLAWSUITS (May 9, 2024), perma.cc/52DN-8XU8.

[34] Langenbach & Wilson, *supra* note 10, at 1.

[35] Langenbach & Wilson, *supra* note 10, at 2.

[36] Langenbach & Wilson, *supra* note 10, at 5 (explaining that the CAA does not include reference concentrations for inhalation exposure nor standard analytical methods for detecting

However, none of these regulations impose standards or limitations that industries *must* comply with, but rather simply consist of *recommendations* and requirements for sampling and reporting.[37] On March 14, 2023, the EPA announced *proposed* maximum levels for six types of PFAS, but no final rule has been promulgated.[38]

There are thousands of types of PFAS, with perfluorooctanoic acid ("PFOA") and PFOS being the two most commonly studied,[39] and the U.S. framework successfully phased out the *manufacturing* of these.[40] However, they are still found in the United States in imported foreign-produced goods.[41] In 2021, current EPA Administrator, Michael S. Regan established the Council on PFAS and tasked it with creating "PFAS 2021–2025—Safeguarding America's Waters, Air, and Land," a multi-year strategy to deliver "health protections to the general public" by better understanding and reducing the use of PFAS.[42] Notably, on May 8, 2024, the EPA designated PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[43] This designation triggered release reporting requirements under CERCLA for facilities emitting these substances "at or above the reportable quantity (RQ) within a 24-hour period."[44] This designation is a major step in PFAS regulation because the EPA has now officially declared PFOA and PFOS "present a substantial danger to the public health or welfare or the environment when released . . . ."[45] As a result, response authority is streamlined, an avenue for liability of responsible parties is available, and

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PFAS in the air; SDWA does not set maximum contamination levels, but just sets a health advisory level; TSCA requires the reporting of PFAS usage to the EPA; RCRA set a remediation goal, recommendations for screening of PFO and PFOS, and has unfinished cleanup guidelines).

[37] Langenbach & Wilson, *supra* note 10, at 5.

[38] *Per- and Polyfluoroalkyl Substances (PFAS)*, U.S. ENV'T PROT. AGENCY, perma.cc/QN9A-RDB4 (last updated Feb. 19, 2025).

[39] *PFAS and Your Health,* ATSDR (Nov. 12, 2024), perma.cc/Y2N9-DH3J.

[40] *PFOS/PFOA Frequently Asked Questions*, A.F. PUBLICAFFAIRS (July 2020), perma.cc/MX5B-XETU.

[41] *Id.*

[42] Langenbach & Wilson, *supra* note 10, at 5.

[43] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (May 8, 2024) (further codified at 40 C.F.R. 302.6(a)).

[44] *Id.* at 39131.

[45] *Id.*

CERCLA can compel cleanup either by action or payment.[46]

In addition to the EPA framework, President Joseph Biden Jr.'s American Jobs Plan included an $111 billion investment to improve water infrastructure over ten years.[47] This includes $10 billion for PFAS monitoring and remediation in small drinking water and household systems.[48] It also directs Congress to invest $45 billion into improvement funds and $56 billion into upgrading and modernizing the U.S. drinking, waste, and stormwater systems.[49] The plan is ambitious, because it seeks to "eliminate all lead pipes and service lines in . . . drinking water systems . . ." and the Biden administration was hopeful this would create hundreds of thousands of jobs and benefit the U.S. economy.[50] Many countries have imposed limits on the level of PFAS that can be detected in water, but Maine is the only place in the world that has set upper limits for the "beneficial use of solid wastes," which in turn may leak into water sources.[51]

In March 2023, the EPA proposed maximum contaminant levels for PFOA and PFOS in drinking water at four nanograms per liter.[52] Surface water PFAS levels are regulated in Alaska, Colorado, Minnesota, Oregon, and Wisconsin; Michigan has recommended levels of PFOA and PFOS for drinking and non-drinking water; and Wisconsin is working to establish groundwater standards.[53] All of these limits are associated with the exposure level that would raise public health concerns.[54] While the United States has made significant efforts to combat PFAS contamination, the current framework lacks consistent, hard limits for many PFAS compounds—hindering any substantial headway in reducing contamination.[55]

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[46] *Id.*

[47] *Infrastructure Plan Includes $111B for Water: President Biden's American Jobs Plan Seeks to Modernize Aging Drinking Water, Stormwater, and Wastewater Systems in the U.S.*, WATERWORLD (Apr. 1, 2021), perma.cc/J52J-XVJV.

[48] *Id.*

[49] *Id.*

[50] *The White House Fact Sheet: The American Jobs Plan*, IBTTA (Mar. 31, 2021), perma.cc/3RJ7-WG7L.

[51] Hilary Hall et al., *PFAS in Biosolids: A Review of International Regulations*, 5 J. AUSTL. WATER ASS'N (2000), perma.cc/G7Z9-FFKN (detailing that Maine's screening levels for PFAS are set at the lowest level of exposure possible based on likely exposure at the beneficial use site).

[52] Sze Yee Wee & Ahmad Zaharin Aris, *Revisiting the "Forever Chemicals," PFOA and PFOS Exposure in Drinking Water*, NPJ CLEAN WATER, (Aug. 21, 2023), at 1, 8.

[53] *Id.*

[54] *Id.*

[55] *See generally* Langenbach & Wilson, *supra* note 10.

In April 2023, Congress introduced the Forever Chemical Regulation and Accountability Act (FCRAA).[56] The Act would amend the TSCA to require manufacturers of any PFAS to submit a report detailing the use of all PFAS chemicals to the EPA administrator within three years, and set the ten-year framework for a complete phaseout of the manufacture and production of all non-essential PFAS and their emissions.[57] Both bills result from the passage of similar bans in Minnesota, California, and Maine and at the time of this writing have been referred to environmentally focused committees.[58] Their congressional enactment requires time, oversight, and reporting periods before the complete ban is enforced.[59] During that time, manufacturers should begin identifying the materials that contain PFAS, and possible alternatives to replace them, so they are prepared when the state and national phaseouts begin.[60]

C. *PFAS Regulation in European Countries*

While PFAS regulation varies by country, the EU has the most stringent regulatory framework.[61] In 2020, the European Food Safety Authority (EFSA) established a tolerable weekly intake (TWI) of 4.4 nanograms per kilogram of body weight for four types of PFAS.[62] Currently, the use of aqueous film-forming foam (AFFF) in firefighting materials,[63] PFOS, PFOA, and perfluorohexane sulfonic acid (PFHxS) are banned in the EU.[64] On February 7, 2023, the European Chemicals Agency (ECHA) published a proposed ban on the U.S. sale and import of about ten thousand types of PFAS.[65] The Agency has assessed two options for the restriction of PFAS: "[a] full ban with no derogations and a transition period of eighteen months

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[56] *See generally* Forever Chemical Regulation and Accountability Act, S. 4187, 118th Cong. (2024); Forever Chemical Regulation and Accountability Act, H.R. 8074, 118th Cong. (2024).

[57] S. 4187 § 102.

[58] *US Congress Bans Non-Essential PFAS, AKA 'Forever Chemicals,'* INT'L ENVIRO GUARD (June 28, 2024), perma.cc/5AW6-WBUJ.

[59] *Id.*

[60] *Id.*

[61] *PFAS Regulation Around the World*, ANTEA GRP. (May 2, 2023), perma.cc/W22D-DHHB.

[62] Directorate-Gen. for Env't, *Health and Environmental Impacts Prompt a Call for Strict Ruling on Ubiquitous 'Forever Chemicals,'* EUR. COMM'N (Oct. 19, 2023), perma.cc/XGC5-5VNP.

[63] *PFAS Regulation Around the World*, *supra* note 61.

[64] *Per and Poly-Fluorinated Chemicals (PFAS): Countries Resources on PFAS: European Union*, OECD, perma.cc/DU3Z-B9WG (last visited Mar. 26, 2025).

[65] *Details of Proposed European PFAS Ban Released*, NAT'L INST. FOR PUB. HEALTH AND THE ENV'T (Feb. 7, 2023, 1:23 PM), perma.cc/9M2Y-ZU78.

(RO1), and [RO2] a full ban with use-specific time-limited derogations (eighteen-month transition period and either a five-or twelve-year derogation period)."[66] While the proposals are not enforceable regulations, considering an outright and immediate ban shows how seriously the EU takes PFAS contamination.[67] ECHA also implemented regulation titled Registration, Evaluation, Authorisation, and Restriction of Chemicals ("REACH"), which requires manufacturers and importers to "gather information on the properties of their chemical substances and to register that information in a central database."[68] This requirement applies to any chemical for which a company's usage exceeds one metric ton per year.[69] The risks associated with the substance and the company's management of each substance must be identified in the database.[70]

The Stockholm Convention on Persistent Organic Pollutants has restricted the use of four types of PFAS.[71] This convention is an agreement between member companies under which all members take the necessary measures to eliminate the production, use, and import of chemicals that pose a threat to human health.[72] Several European countries and Australia have also set PFAS limits in soils, which ensures they can control the amount of PFAS in groundwater and runoff, thus further decreasing exposure overall.[73] In 2022, the European Commission adopted a proposal to include some PFAS on their list of priority substances in surface and groundwater; and if adopted, would require members to attempt to reduce the emissions of listed PFAS.[74] In 2019, the European Parliament and Council agreed on amendments to the Drinking Water Directive, including a limit of 0.5 micrograms of PFAS per liter.[75] The amount of regulation in these countries

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[66] European Chemicals Agency, Annex XV Restriction Report: Proposal for a Restriction 3 (2023).

[67] *See id.*

[68] Directorate-Gen. for Env't, *REACH Regulation*, EUR. COMM'N, perma.cc/PXE2-LXD2 (last visited Mar. 24, 2025).

[69] *Id.*

[70] *Id.*

[71] Stockholm Convention on Persistent Organic Pollutants (POPS) – Texts and Annexes Annex A, May 22, 2021, United Nations Environment Programme (UNEP) (rev. ed. 2019).

[72] *See id.* at 7.

[73] *See* Damien Terrence Moodie et al., *PFAS in Biosolids: A Review of International Regulations*, 5 WATER E-JOURNAL 1, 1 (Mar. 3, 2020), https://perma.cc/NKF9-9B9A (detailing that Maine's screening levels for PFAS are set at the lowest level of exposure possible based on likely exposure at the beneficial use site).

[74] *European Union*, *supra* note 64.

[75] *European Union*, *supra* note 64.

surpasses that of the United States, and there are valuable lessons that can be learned from their trials and errors.[76]

II. Importance

PFAS chemicals do not break down easily in the environment, causing repeated and prolonged exposure to humans, animals, and the environment.[77] Additionally, PFAS contamination has become an important issue for the EPA and Congress in recent years with numerous bills, regulations, and guidance materials proposed to combat the issue; but, there is still no rigid, federal regulatory framework in place.[78]

A. *Adverse Health Effects*

Numerous studies have shown that PFAS exposure causes adverse health effects.[79] In the 1970s, occupational studies detected PFAS in the blood of people exposed to PFAS in the workplace; twenty years later, PFAS was also found in the blood of the general population.[80] While much is still unknown about the effects of PFAS exposure, some known implications are "negative effects on fetal development, learning and behavior in children, adult fertility, hormonal balance, and/or liver function."[81] The majority of studies support the finding of a relationship between exposure to PFAS and elevated concentration of PFAS in blood that results in negative health outcomes.[82] Less commonly studied implications of PFAS exposure include cancer, diabetes, and cardiovascular and respiratory complications.[83] There are thousands of types of PFAS, and exposure can involve a mixture of substances, making it hard to determine the harm of individual PFAS or how

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[76] *See generally* Langenbach & Wilson, *supra* note 10, at 5.

[77] *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, *supra* note 11.

[78] *See Key EPA Actions to Address PFAS*, U.S. ENV'T PROT. AGENCY, perma.cc/CRZ7-6MG6 (last updated Jan. 24, 2025).

[79] *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY (NOV. 12. 2024), perma.cc/7R27-HUKP.

[80] Robert C. Buck et al., *Perfluoroalkyl and Polyfluoroalkyl Substances in the Environment: Terminology, Classification, and Origins*, 7 INTEGRATED ENV'T ASSESSMENT AND MGMT. 513, 514 (2011).

[81] Erin M. Bell et al., *Exposure, Health Effects, Sensing, and Remediation of the Emerging PFAS Contaminants – Scientific Challenges and Potential Research Directions*, 780 SCI. TOTAL ENV'T 1, 4 (2021).

[82] MARTYN KIRK ET AL., AUSTL. NAT'L U., THE PFAS HEALTH STUDY: SYSTEMATIC LITERATURE REVIEW 12 (2018).

[83] *Id.* at 135.

this cocktail effect increases negative health effects.[84]

The level of exposure to PFAS depends on many factors surrounding an individual's daily life, including their occupation, community of residence and the amount of time spent there, proximity to a PFAS facility, and the level of contamination in their household drinking water.[85] For example, firefighters face significant exposure risks from using firefighting foam and personal protective equipment.[86] Another example of elevated exposure is Generation X individuals in North Carolina who have drunk, and continue to drink, water contaminated by wastewater discharge. [87] In the United States, studies estimate that exposure to PFAS cost Americans anywhere from $5.5 billion to $63 billion in health costs annually.[88] Further action is necessary to lower the allowable levels of PFAS in all products and water sources to ensure the health of Americans and preserve access to safe drinking water.[89]

B. *Difficult to Remove from the Environment*

PFAS molecules consisting of linked carbon and fluorine atoms are one of the strongest chemical bonds, allowing them to outlive the products that contain them as well as their consumers.[90] While they do not degrade, they do move around by flowing through water streams into rivers and seas, ultimately circulating into oceanic currents.[91] This means that people who do not live in or near areas that manufacture, produce or use PFAS may still be exposed at high levels.[92] The difficulties associated with treating and removing PFAS using water treatment processes exacerbate this issue.[93] The very properties that make PFAS attractive ingredients are the reason they

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[84] *See* GRETTA GOLDENMAN ET AL., NORDIC COUNCIL OF MINISTERS, THE COST OF INACTION: A SOCIOECONOMIC ANALYSIS OF ENVIRONMENTAL AND HEALTH IMPACTS LINKED TO EXPOSURE TO PFAS 39 (2019).

[85] *Id.* (discussing various studies on the effects of PFAS).

[86] Nur-Us-Shafa Mazumder et al., *Firefighters' Exposure to Per-and Polyfluoroalkyl Substances (PFAS) as an Occupational Hazard: A Review*, WILSON COLL. TEXTILES N. C. ST. U., Mar. 23, 2023, at 7, 12.

[87] *GenX Investigation*, N. C. ENV'T QUALITY, perma.cc/8KR3-KYD6 (last visited Mar. 24, 2025).

[88] *Daily Exposure to 'Forever Chemicals' Costs United States Billions in Health Costs*, NYU LANGONE HEALTH (July 26, 2022), perma.cc/T9HE-EM2N.

[89] *Id.*

[90] *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS), supra* note 11.

[91] *What are PFAS*, *supra* note 17.

[92] *See What are PFAS*, *supra* note 17.

[93] *See What are PFAS*, *supra* note 17.

are hard to remove.[94] PFAS are extremely soluble and dissolve well in water, rendering traditional water treatment technologies unable to cure the contamination problem.[95]

Irrigation practices and fertilizers allow PFAS to spread into the soil, "leading to the uptake of PFAS by plants, including crops, and organisms like earthworms, with varying uptake … in different plant species."[96] However, the majority of PFOA and PFOS are released into surface water, commonly used for drinking water, and the rest of the chemicals are released into the soil.[97] PFAS also migrate from packing materials into food and drink products, bolstering the risk of consumption.[98] Most existing treatment processes have proven ineffective in removing the chemicals, with sewage treatment plants having PFAS in inflows, outflows, and sludge.[99] These issues pose a higher concern in areas near factories that manufacture or have manufactured PFAS, as well as airports, firefighter training facilities, and military bases, where PFAS can most quickly contaminate soil and groundwater.[100] While traditional water treatment processes are not effective in removing PFAS, reverse osmosis, anion exchange, and granular activated carbon have proven to be effective, and thus should be further explored and expanded upon.[101]

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[94] *Reducing PFAS in Drinking Water with Treatment Technologies*, U.S. ENV'T PROT. AGENCY, perma.cc/4WKQ-D476 (last updated Aug. 5, 2024).

[95] *Id.*

[96] Wee & Aris, *supra* note 52, at 5.

[97] Wee & Aris, *supra* note 52, at 5.

[98] Wee & Aris, *supra* note 52, at 5.

[99] Wee & Aris, *supra* note 52, at 5.

[100] *Per — and Polyfluoroalkyl Substances (PFAS)*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., perma.cc/5AN2-AE8H (last updated May 2, 2024).

[101] Wee & Aris, *supra* note 52, at 8; *Reducing PFAS in Drinking Water with Treatment Technologies*, *supra* note 94; *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS): Technologies for Reducing PFAS in Drinking Water*, U.S. ENV'T PROT. AGENCY, perma.cc/TX9Q-UKKR (last visited Feb. 10, 2025).

ANALYSIS

III. The United States Should Learn from Other Countries and Implement a Federal Regulatory Framework to Manage PFAS Contamination in Drinking Water

A. *Benefits of a National Framework*

While small steps in the right direction have been useful, and state actors are an integral part of combating PFAS contamination and a federal framework is necessary to accomplish effective reductions and protect public health.[102] Everyone in the United States, or at least a vast majority, must be on board with combating PFAS contamination for powerful progress to be made. Environmental regulation is negatively affected by the collective action problem: everyone would be better off by reducing environmental harms, but many fail to do so because it may be inconsistent with individual interests.[103] Federal regulations are a proven solution to the collective action problem because all contaminators must comply with limits on production and emissions, and technology-driven regulations, enhancing market competition and ultimately driving down the cost.[104]

The current patchwork of state and local regulations imposes burdens on industry players who wish to sell their products nationwide.[105] These companies are in favor of a uniform, national set of standards to improve the overall flow of commerce and reduce uncertainty surrounding expectations and liability.[106] Every time a new minuscule recommendation or reporting regulation is passed, news outlets and other media platforms grasp the public's attention with misleading titles and buzzwords.[107] For example, the use of "non-GMO" advertisements seemed to skyrocket after genetically modified organism ("GMO") products gained traction in the farming industry.[108] These noncomprehensive measures can falsely lead people to

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[102] *See* Langenbach & Wilson, *supra* note 10, at 1.

[103] *See* Kristina Raulo Enger, Essay, *Overcoming the Environmental Collective Action Problem*, 10 ESSEX STUDENT J., 2019, at 5–6.

[104] *See id*. at 7.

[105] Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 263 (2010).

[106] *See id*.

[107] *See* Anna-Katharina Jung et al., *Click me…! The Influence of Clickbait on User Engagement in Social Media and the Role of Digital Nudging*, PLOS ONE (June 29, 2022), perma.cc/4YGH-4CHA.

[108] *See generally*, Casey J. Nelson, Note, *A First Amendment Failure: Surrendering to Science Misinformation for Bioengineered Foods*, 95 U. COLO. L. REV. 752 (2024).

believe that meaningful legislation is in place–allowing the issue to fall lower on the totem pole of priorities to them.[109] Industry groups should meet and inform their supporters of available information surrounding their use of PFAS, allowing the public to have input on what PFAS they want to be phased out and to eliminate misconceptions surrounding PFAS.[110] Furthermore, the ultimate goal of climate activism is to implement an international regulatory framework, which seems far-fetched based on the current science, but national regulation is a positive step in that direction.[111] Thus, while implementing an effective national framework will provide environmental benefits, it is also an important step in reaching the global climate change goal.[112]

B. *Barriers to Implementing Regulation that can be Overcome*

1. Technology & Cost Limitations

There are hundreds of thousands of PFAS types, but the majority of monitoring data is only available for a handful of types.[113] As discussed above, once these chemicals enter the environment they are present for a long time, making their removal extremely costly with consumers typically footing the bill for the increase in total costs.[114] With inflation on the rise in recent years, and the overall cost of living already being burdensome, an increase in consumer spending would likely be strongly opposed. Since PFAS are utilized in the production of so many products used in daily life, an outright and immediate ban on their use is impractical and could impose substantial burdens on producers to comply.[115] PFAS are an integral ingredient in the production of many twenty-first-century technology products such as phones and laptops, so their complete ban could result in extreme difficulty finding adequate substitutes for these chemicals.[116] PFAS are also widely used in providing cleaner energy sources, so their ban would

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[109] Brewster, *supra* note 105, at 266.

[110] *See* Brewster, *supra* note 105, at 267.

[111] *See* Brewster, *supra* note 105, at 277.

[112] Brewster, *supra* note 105, at 279

[113] Suzanne E. Fenton et al., *Per- and Polyfluoroalkyl Substance Toxicity and Human Health Review: Current State of Knowledge and Strategies for Informing Future Research*, 40 ENV'T TOXICOLOGY & CHEMISTRY 606, 607 (2020).

[114] *See Cross-Cutting Story 3: PFAS*, *supra* note 18.

[115] Glüge et al., *supra* note 14, at 2345.

[116] *See* Emil Panzaru, *A Looming PFAS Ban Threatens Europe's Economic and Energy Security*, THE PARLIAMENT (Dec. 20, 2022), perma.cc/E6ZD-THJP.

directly interfere with the global initiative to combat climate change.[117] It would be hard to convince the public that an outright ban is the best next step if the long-term goals served by the ban would be curbed.

Instead, the EPA has explored and proposed PFAS removal methods which include activated carbon, high-pressure membranes, and ion exchange resin treatments.[118] While all of these have proven highly effective, with activated carbon and ion exchange reaching 100% removal and high-pressure membranes reaching 90% removal, studies have estimated they will cost $3.2 billion to $5.7 billion annually.[119] Differences in effects on human exposure also vary based on the level and duration of exposure, which depend on numerous other factors such as a person's occupation, place of residence, age, and dietary choices; thus further complicating the methods of detection and appropriate removal regulations.[120]

Furthermore, PFAS are used in almost every industry imaginable.[121] While there are viable alternatives for dental floss coating, food packaging, cosmetics, and firefighting foam, not every product has a readily available alternative.[122] The PFAS that are essential to ensuring public health and welfare have no suitable alternatives.[123] For example, "flame-resistant clothing for workers in the oil and gas industry ha[ave] no current substitutes and [are] critical for the safety of the workers."[124] There are also no alternatives for PFAS used in certain medical treatment processes and

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[117] *See id.*

[118] *Reducing PFAS in Drinking Water with Treatment Technologies*, *supra* note 94 (explaining that activated carbon treatment involves using highly porous carbon materials to absorb PFAS "at the interface between liquid and solid phases"; ion exchange resins are made of hydrocarbons with positive charges that successfully remove negatively charged PFAS molecules); *Membrane Separation*, U.S. ENV'T PROT. AGENCY, perma.cc/3XHL-34Z6 (last visited Feb. 12, 2025) (explaining that membrane treatment involves water flowing through a semi-permeable membrane barrier until all dissolved contaminants are on one side of the barrier and clean water is on the other).

[119] Michael Bartlett, *Estimated Cost of PFAS Cleanup from Drinking Water Systems*, ENV'T LITIG. GRP. (Jul. 26, 2023), perma.cc/W8SU-22VG.

[120] *How to Prevent PFAS Exposure*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY (Nov. 12, 2024), perma.cc/8SU7-HMT2.

[121] William S. Dean et al., *A Framework for Regulation of New and Existing PFAS by EPA*, J. SCI. POL'Y & GOVERNANCE, Apr. 2020.

[122] Cheryl Hogue, *How to Say Goodbye to PFAS*, 97 CHEM. & ENG'G NEWS (Nov. 20, 2019), perma.cc/PHL7-N59G.

[123] William S. Dean et al., *supra* note 121.

[124] *Phasing Out PFAS: 'Nonessential,' 'Substitutable,' and 'Essential'*, UNIV. R.I. SUPERFUND RSCH. PROGRAM, perma.cc/9EHP-48T8 (last visited Mar. 24, 2025).

instruments, and an outright ban on these would threaten the availability of adequate healthcare services.[125] Again, it would be hard to convince the public that PFAS use should be banned to protect human health if such a ban would halt progression in the healthcare industry.

While it is uncontested that some PFAS are harmful to human health, a blanket ban on their use that does not consider which types and levels are safe could stall the global shift towards clean energy alternatives.[126] For instance, fluorogases, a type of PFAS currently used in every electric car and increasingly used to replace gas boilers, and their alternatives have much less potential to reduce emissions.[127] PFAS has contributed many solar energy options to the market, and an outright ban in the EU would be detrimental to the goal of reaching net-zero emissions.[128] With all these barriers in mind, scholars have suggested a system of grouping and phasing out PFAS based on their essential uses and available alternatives, which will be further discussed in the next section of this Note.[129]

2. Environmental Issues are Being Politicized

One of the common challenges to passing any environmental regulation is the political divide on the importance of climate change, and whether there is a present need to act on these issues.[130] This divide has been an issue since the early 2000s[131] and is increasing now that executive power has shifted to the notoriously anti-climate change President, Donald Trump.[132] President Trump's second presidential victory is likely one of the worst

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[125] William S. Dean et al., *supra* note 121.

[126] *See* Dave Keating, *Health vs Climate? How an EU Chemical Ban Could Hinder the Energy Transition*, ENERGY MONITOR (June 15, 2023), perma.cc/RWV5-6ARN.

[127] *Id.*

[128] Abby Muricho Onencan, *Embodied GHGs in the Built Environment: Navigating the Ripple Effect of EU PFAS Regulation*, ERASMUS UNIV. ROTTERDAM (Jan. 12, 2024), perma.cc/ZG4U-N7YH.

[129] *E.g.*, William S. Dean et al., *supra* note 120; Ian T. Cousins et al., *The Concept of Essential Use for Determining When Uses of PFASs Can be Phased Out*, 21 ENV'T SCI. PROCESSES & IMPACTS 1803, 1811 (2019).

[130] *See generally* Cary Funk & Brian Kennedy, *The Politics of Climate*, PEW RSCH. CTR. (Oct. 4, 2016), perma.cc/8H2U-3GX2; CARY FUNK & BRIAN KENNEDY, THE POLITICS OF CLIMATE (2016), perma.cc/CD9K-JC4S.

[131] ANDREAS KARELAS, CLIMATE COURAGE: HOW TACKLING CLIMATE CHANGE CAN BUILD COMMUNITY, TRANSFORM THE ECONOMY, AND BRIDGE THE POLITICAL DIVIDE IN AMERICA, 4 (Beacon Press 2020).

[132] David Ljunggren, *Trump Win in 2024 Could Harm Fight Against Climate Change - Canada PM*, REUTERS (Dec. 22, 2023, 2:48 PM EST), perma.cc/TJ3K-J3K6.

losses to the environment due to his strong opposition to environmental regulations. Politics and corporate influence can cloud judgments on federal action, but "it is crucial to act on breakthrough scientific research and form health-protective policies [rather] than compromise human health."[133] However, there are still people in positions of power who deny the scientific conclusions surrounding the deteriorating planet, and seem to prefer to line their own pockets from endorsements rather than tackle this pressing issue. Many lawmakers are reaching old age and will not be affected by the adverse effects of environmental degradation, so they and their similarly situated supporters do not believe it is their problem to solve. It is a no-brainer that saving the planet today so that it can be enjoyed for centuries to come is more important than political and economic disagreements.[134] Still, these types of opposition have caused much debate around environmental regulations, and the driver behind this political divide is the fossil fuel industry.[135] Many people believe climate change is real, but action is only worth taking when the adverse effects impact their individual lives.[136]

One way to combat this issue is to cultivate a public opinion that PFAS contamination and other negative environmental impacts are largely important issues that affect everyone, encouraging people to favor higher levels of regulation surrounding these issues.[137] A large part of the solution is forming interest groups who collaborate and compromise to satisfy each other's goals and then communicate those goals to their supporters.[138] In fact, this has already been proven helpful with religious and high-level government groups recently naming climate change as a top priority.[139] If people have a small community or leader they respect who is discussing climatic issues, they are more likely to listen and engage in combating the issues.[140] Involving the public at large and getting legislators to act is necessary because the mounds of science and data alone were insufficient to invoke the regulatory changes necessary to combat environmental issues on

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[133] Langenbach & Wilson, *supra* note 10, at 7.

[134] *See* Langenbach & Wilson, *supra* note 10, at 13.

[135] *See* Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS (Sept. 23, 2019), perma.cc/7MKL-P3Q7; KARELAS, *supra* note 131, at 4.

[136] *See* Kamarck, *supra* note 135.

[137] Brewster, *supra* note 105, at 265.

[138] Brewster, *supra* note 105, at 265.

[139] KARELAS, *supra* note 131, at 5.

[140] *Communicating on Climate Change*, UNITED NATIONS, perma.cc/8WSF-GQ3Y (last visited Jul. 4, 2025).

their own.[141]

IV. Factors that Should be Considered in Implementing a Federal Regulatory Framework

A. *Environmental Justice*

Environmental justice ("EJ") is the principle that all people, regardless of race, income, or national origin, are entitled to a clean environment, and it is a growing consideration in the processes of approving large-scale construction projects and enacting environmental policies and regulations.[142] EJ is important because environmental injustice has derived from "patterns of racism and inequality that have existed in the United States since its founding and continue to influence every facet of our society."[143] As such, environmental injustice is not an environmental or climatic issue, but rather a human rights issue that will persist as climate change continues to exacerbate its effects.[144] The most notable environmental injustices in the United States include: the Flint, Michigan water crisis that resulted in low-income and minority communities relying on contaminated drinking water; and Louisiana's "Cancer Alley," "an 85-mile stretch of land . . . contain[ing] more than 200 oil refineries and chemical plants" and housing "predominantly lower-income and Black residents."[145] While these are two standout instances, they showcase how detrimental the practice of environmental injustice is to the health and welfare of minorities and low-income communities across the nation.[146] Today, majority white and wealthy

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[141] KARELAS, *supra* note 131, at xv.

[142] *See e.g,* Revitalizing Our Nation's Commitment to Environmental Justice for All, Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023); *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, perma.cc/GXU7-EJTB (last updated Nov. 5, 2024); Environmental Justice Working Group, *Community Guide to Environmental Justice and NEPA Methods*, ENERGY (March 2019), perma.cc/7UNZ-E3QM.

[143] Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Aug. 22, 2023), perma.cc/NPD7-6XDP.

[144] *Why Environmental Justice Is So Important,* CLEAN CHOICE ENERGY (June 11, 2024), perma.cc/D4B3-HFZ3.

[145] *Id.*

[146] *See id.* ("Communities that are more than 80% non-white are twice as likely to be located near oil and gas disposal wells . . . 79% of incinerators in the U.S. are located in low-income communities and/or communities of color. Black Americans are 30% more likely to have asthma than white Americans . . . White Americans have a "pollution advantage"—they experience 17% less air pollution than they cause. Meanwhile, Hispanic and Black Americans have a "pollution burden," as they experience 63% and 56% more air pollution than they cause,

communities are where more infrastructure and housing investments are made, environmental laws are properly enforced, and polluters are held accountable for their emissions.[147] On the other hand, the most marginalized communities are more likely candidates for highway construction, waste storage, industrial warehouses, and natural resource destruction.[148] To make matters worse, the communities most affected typically experience multiple threats at once, increasing the associated health risks and making them even more vulnerable to further harm.[149] These communities face poverty, poor education systems, crime, drugs, and risk to their health due to poor protection from environmental harm.[150] Meanwhile, the wealthy, white communities are allowed to prosper in these aspects; making the rich richer and the poor poorer.[151]

The EJ movement traces back to the Warren County, North Carolina Protests of the 1970s.[152] State officials decided to store 6,000 dump trucks of toxic soil in "rural, poor, and overwhelmingly Black Warren County" despite residents' concerns about the toxins leaching into their drinking water.[153] Over 500 people were arrested for participating in marches and protests for six weeks, and although the residents ultimately lost, their activism inspired many of the first leaders of the EJ movement.[154]

EJ is an integral aspect of implementing environmental policies and regulations, and should be heavily considered when setting limits on PFAS in drinking water.[155] To better understand the effects of PFAS on disproportionately impacted communities, more studies should be done on how PFAS are spread and distributed through air, water, and soil, and EJ experts should be consulted in the development of research studies and policy.[156] Conducting thorough research on PFAS effects in EJ communities

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respectively.").

[147] Skelton & Miller, *supra* note 143.

[148] Skelton & Miller, *supra* note 143.

[149] Skelton & Miller, *supra* note 143.

[150] Michael Marmot, et al., *Fair Society, Healthy Lives*, INST. OF HEALTH EQUITY, 76, 76 (Feb. 2010) perma.cc/8JCY-CX8U.

[151] *Id.* at 79.

[152] Skelton & Miller, *supra* note 143.

[153] Skelton & Miller, *supra* note 143.

[154] Skelton & Miller, *supra* note 143.

[155] *See* Letter from Nat'l Env't Just. Advisory Council, to Michael S. Regan, Adm'r, U.S. Env't Prot. Agency, Per- and Polyfluoroalkyl Substances (PFAS) Letter of Recommendations 1–2 (Dec. 1, 2022), perma.cc/88AB-6QGF.

[156] *Id.* at 2.

will result in regulations to restrict PFAS in the most necessary communities, while prioritizing remediation efforts.[157] The ultimate EJ framework should therefore be precautionary rather than reactionary, and "shift the burden of proof to polluters/dischargers who do harm, discriminate, or who do not give equal protection to racial and ethnic minorities, and other 'protected' classes."[158]

It is worth noting that the United States is considering EJ and making strides to remedy the devastating effects of redlining, economic disinvestment, lead poisoning, industrial pollution, and unemployment in EJ communities.[159] In January 2021, President Biden issued Executive Order 14008 which implemented the Justice40 Initiative.[160] The initiative stated a goal that 40% of benefits from climate change, clean energy, and energy efficiency be provided to disadvantaged communities.[161] To assist agencies in this major and first-of-its-kind initiative, the White House issued implementation guidance for the transformation of their programs and additional guidance on how to use the Climate and Economic Justice Screening Tool ("CEJST").[162] Currently, sixteen agencies are in compliance with the initiative.[163] The initiative does a wonderful job of calling attention to the fact that not all communities feel climate crises equally, but because all goals cannot be met within a single presidential term, cooperation and prioritization are essential on a national level.[164] All people must understand that environmental injustice is real, and the history of the health in communities surrounding industrialization should be taken into consideration to meet EJ goals.

B. *Cost-Benefit Analysis*

Environmental harms and benefits are uniquely hard to quantify

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[157] *Id.* at 3.

[158] Robert D. Bullard, *Environmental Justice in the 21st Century*, 49 ENV'T JUST. RES. CTR. 151, 154 (2001).

[159] *Id.* at 153, 166.

[160] Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg. 7168 (Feb. 1, 2021), perma.cc/TM8P-F9H8.

[161] *Id.*

[162] *Justice40 A Whole-Of-Government Initiative*, WHITEHOUSE ARCHIVES, perma.cc/367Z-HNRY (last visited Feb. 10, 2025) (defining CEJST as "a mapping tool that helps identify disadvantaged communities").

[163] Carla Walker & Julia Jeanty, *2 Years of Justice40: Integrating Environmental Justice into U.S. Climate Policy*, WORLD RES. INST. (Jan. 24, 2023), perma.cc/3Z7Z-E239.

[164] *See id.*

because the land, air, and water cannot speak for themselves, and many of the benefits of environmental action are not immediately recognizable.[165] This is part of why it is difficult to get all Americans on board with proactive climate regulation—they need to see it to believe it.[166] Typically, experts study health impacts by comparing an exposed group with an unexposed group and controlling for other factors that could affect the result.[167] In addition to the blanket uniqueness of environmental impacts, "the persistence of PFAS and their ability to travel long distances" complicate the issue of determining who should be in the exposed and unexposed groups.[168] Due to this, it may be impossible to detect a truly unaffected group and conduct an efficient study.[169] However, as noted earlier, PFAS contamination has resulted in tens of billions of dollars in health-related costs for the United States, and these results should not be discounted because the findings are not concrete.[170] There are also indirect social costs including lost wages and years of life, "reduced quality of life, increased stress, anxiety, and depression."[171] Unlike health costs, these are more readily identifiable, but no study has analyzed these social costs as a result of the health effects, and both are necessary to conduct a proper cost-benefit analysis.[172]

Cost-benefit analyses are difficult for environmental issues because the public is asking scientists to place a value on human life, now and in the future, to determine the best course of action, which results in backlash from the public.[173] Furthermore, actors in the PFAS industry continue to highlight the $2 billion benefits PFAS use brings to the fluoropolymer sector, making it hard to convince the public that these chemicals can be phased out of the economy.[174] However, these cost-benefit analyses became a major

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[165] *See* Nicola Ulibarri et al., *Barriers and Opportunities to Incorporating Environmental Justice in the National Environmental Policy Act*, 97 ENV'T IMPACT ASSESSMENT REV. 1, 6 (2022).

[166] *See* Giancarlo Pasquini et al., *Why Some Americans Do Not See Urgency on Climate Change*, PEW RSCH. CTR. (Aug. 9, 2023), perma.cc/PWE5-U3MA.

[167] GOLDENMAN ET AL., *supra* note 84, at 35–36.

[168] GOLDENMAN ET AL., *supra* note 84, at 36.

[169] GOLDENMAN ET AL., *supra* note 84, at 36.

[170] *See Daily Exposure to 'Forever Chemicals' Costs United States Billions in Health Costs*, *supra* note 88.

[171] Alissa Cordner et al., *The True Cost of PFAS and the Benefits of Acting Now*, 55 ENV'T SCI. TECH. 9630, 9632 (2021).

[172] *Id.*

[173] *See* DAVID PEARCE ET AL., COST-BENEFIT ANALYSIS AND THE ENVIRONMENT: RECENT DEVELOPMENTS 23 (2006) [hereinafter *Executive Summary*].

[174] *See* Cordner et al., *supra* note 171, at 9630.

consideration in the implementation of public policy and investments, and it is the most comprehensive approach currently available to quantify costs and benefits.[175] If a study showed how, during a PFAS phase-out, health issues decrease and the economy remains stable, more people would support adopting a phase-out plan and eventually removing all PFAS.

There are currently three technologies that demonstrate the ability to remove PFAS from water: activated carbon, anion exchange, and high-pressure membrane filtration.[176] The level of removal efficiency will depend on the type of PFAS being removed, but each method demonstrates a 95% removal efficiency.[177] The EPA indicated that activated carbon filtration can remove 99% of PFOA and PFOS, with removal rates of other PFAS varying from 77% to 99%.[178] Membrane filtration has demonstrated removal levels above 99% for PFOA and PFOS with other removal levels typically being above 98%.[179] Small-scale carbon filters that can serve a household cost about $2,000, and large-scale ones with a capacity of 40 cubic feet cost about $20,500.[180] It is estimated that completely removing PFAS from U.S. drinking water supplies could cost more than $3.2 billion annually.[181] While the cost of removing PFAS is high, it is minuscule when compared to the extreme and everlasting health and environmental risks associated with continual contamination.[182] It is important for the EPA to better inform the general public of the negative impacts of PFAS and how they can be effectively removed from drinking water systems to get the entire nation on board with a complete, gradual phase-out.[183]

A worthwhile solution to the problems presented by a cost-benefit analysis and a complete ban on all PFAS is to adopt the "essential-use concept" of the Montreal Protocol that effectively phased out the use of

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[175] *Executive Summary*, *supra* note 173, at 16, 27.

[176] *See Per- and Polyfluoroalkyl Substances (PFAS)*, AM. WATER WORKS ASS'N 1 (Aug. 12, 2019), perma.cc/67ZP-JJFR.

[177] *Id.* at 2.

[178] *Id.*

[179] *Id.*

[180] *GAC Carbon Commercial Water Filter System*, FILTERWATER.COM, perma.cc/E58V-97FL (last visited Mar. 24, 2025).

[181] Michael Scaturo, *PFAS Proposal Would Cost Companies $1B; Lacks Limits and Cleanup Requirement*, WUSF NPR (July 16, 2023, 05:00 AM EDT), perma.cc/GV2G-EXXJ.

[182] *Coalition Report—Correcting PFAS Myths: Misperceptions Risk Higher Clean-Up Costs for Water Ratepayers*, NAT'L ASS'N OF CLEAN WATER AGENCIES 3, perma.cc/VNS5-WUW6 (last visited Mar. 24, 2025).

[183] *See generally id.*

ozone-depleting chlorofluorocarbons not deemed essential.[184] Under this protocol, for a use to be essential, it must be "necessary for health, safety or . . . critical for the functioning of society," and there cannot be any "technically and economically feasible alternatives."[185] This leads to three categories: nonessential, substitutable, and essential.[186] Nonessential uses are those "not necessary for the betterment of society in terms of health, safety, and functioning" and would be the first to be phased out.[187] Substitutable uses are those that "fulfill important functions but . . . there are alternatives available that . . . provide the necessary technical function and performance."[188] Essential uses are those for which there are no current alternatives "that provide the necessary technical function and performance."[189] These uses include the production of surgical gowns to repel liquids and certain medical devices.[190] Key elements to consider when placing PFAS into categories include their technical function, the necessity of that function for health, safety, or the functioning of society, and the availability of safer alternatives.[191] This criterion and phase-out process would create market incentives to develop PFAS alternatives at the lowest cost possible, thus alleviating the financial burden on taxpayers and the risk of market failure that comes with a complete ban.[192] Also, it is much more plausible that people will support a phase-out that has been proven successful and has substantial parameters in place to assure uniformity rather than a mix of studies that are hard for the general public to understand. Since many states have already implemented a phaseout plan for non-essential PFAS, including the essential-use criteria seems like a logical and worthwhile step towards uniformity and protecting people across the nation.[193]

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[184] *See generally* Cousins et al., *supra* note 129, at 1803–04 (exploring the use of the essential use concept to set PFAS phase-out standards); Romain Figuière et al., *The Essential-Use Concept: A Valuable Tool to Guide Decision-Making on Applications for Authorisation Under REACH?*, 35 ENV'T SCIS. EUR. 2 (2023) (exploring the application of the essential use concept under REACH after the European Commission announced considering doing so).

[185] Cousins et al., *supra* note 129, at 1804.

[186] Cousins et al., *supra* note 129, at 1804–05.

[187] Cousins et al., *supra* note 129, at 1804.

[188] Cousins et al., *supra* note 129, at 1804.

[189] Cousins et al., *supra* note 128, at 1805.

[190] *See* Cousins et al., *supra* note 129, at 1805.

[191] Figuière et al., *supra* note 184, at 4.

[192] Cousins et al., *supra* note 129, at 1805.

[193] *US Congress Bans Non-Essential PFAS, AKA 'Forever Chemicals,' supra* note 58.

CONCLUSION

Federal action to combat the problems posed by PFAS contamination has been slow and lackluster, and corporations have taken advantage of mandates that simply limit one chemical by switching to another PFAS.[194] The United States needs to implement a federal regulatory framework to phase out and limit the use of PFAS for the betterment of public health. The Montreal Protocol's essential-use concept is the best currently available and studied solution, and it would fit seamlessly into the framework of CERCLA now that PFOA and PFOS are considered 'hazardous materials'.

The problem of PFAS contamination is not unique to the United States, as it is the result of product production and leakage everywhere, but if other countries can make successful strides in their reduction, then the United States can too. Based on available data, it is strongly suggested that the United States strengthen its current laws by including PFAS as a contaminant under the SDWA, setting guidelines for remediation under RCRA, and publishing air inhalation data effects under CAA.[195] One of the suggestions from experts has been carried out—PFAS designation under CERCLA—so it is important to continue following expert recommendations by implementing these other safeguards under the law using the essential-use criteria. It is critical that the public is informed of the products that contain PFAS and their negative impacts on human health and the environment. Clearly, more needs to be learned about PFAS and how to ultimately rid the world of them, and progress has been stalled by limited funding and availability of analytical standards. It is time the United States stopped ignoring environmental issues and lived up to the expectation of being a leader in science and technology by protecting the people and environment from the atrocious effects of environmental harms like PFAS before reliance on them for such commonly used products destroys the planet.[196]

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194 Langenbach & Wilson, *supra* note 10, at 7.

195 Langenbach & Wilson, *supra* note 10, at 7.

196 *See* LEAVE THE WORLD BEHIND, at 1:49:49–1:50:15 (Higher Ground Productions 2023).