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A Need for Improved Medical Treatment: Why Borrowed Eighth Amendment Standards are Not Sufficient to Protect Pretrial Detainees in Substantive Due Process Cases

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INTRODUCTION

When discussing inmates' rights issues, the focus is often on mass incarceration, sentencing discrepancies, and deprivation of felons' rights. This Article will focus on inadequate-medical treatment and insufficient medical protocols for pretrial detainees. When pretrial detainees receive subpar medical treatment, it can often be a struggle for them to receive meaningful compensation and sometimes, it may even result in permanent ailment or death. The case of Shannon Bowles, a pretrial detainee arrested for public intoxication, demonstrates the lack of justice many have suffered while under government custody.[1]

At the time of his arrest, Bowles suffered from drug withdrawal. Before police booked him, a doctor evaluated Bowles at a hospital before and instructed jail officials to return Bowles if his symptoms worsened.[2] While in custody, an advanced practice registered nurse only visited Bowles once, and he eventually developed a large, right temporal lobe mass.[3] Even though Bowles was "in drug withdrawal, was diagnosed with an infection, and had complained of nausea, diarrhea, and head pain," the licensed practical nurse on staff did not put him on the advanced practice registered nurse's patient list during his weekly visit, nor was he returned to the hospital as the doctor instructed.[4] Bowles complained of various, worsening symptoms related to drug withdrawal over the course of a week and a half and also of symptoms that presented as a sinus infection.[5] Eventually, he lost consciousness and the jail staff rushed him to a hospital where, after a CT scan, doctors discovered a large, right temporal lobe mass in his brain.[6] Bowles lost consciousness again and the doctors transferred him to another hospital, where he never regained consciousness and died after the mass herniated.[7]

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[1] Bowles v. Bourbon Cnty., No. 21-5012, 2021 WL 3028128, at *4–5 (6th Cir. July 19, 2021).

[2] *Id.* at *3.

[3] *Id.* at *3–5. Bowles only had access to licensed practical nurses otherwise. An advanced practice registered nurse can prescribe medication while a licensed practice nurse cannot. *Id.* He lacked access to a medical doctor because the jail did not have an agreement with one. The advanced practice registered nurse only visited the jail once a week. *Id.* Advanced Correctional Healthcare, a private company contracted with the jail, was responsible for providing medical care for the detainees. *Id.*

[4] *Bowles*, 2021 WL 3028128, at *2. Kelly Cox-Lynn, a licensed practical nurse, stated it was common for advanced practice registered nurse, Matthew Johnston, to not see patients on the list anyway. *Id.*

[5] *Id.* at *2–8.

[6] *Id.* at *1–5.

[7] *Id.* Bowles was determined to be brain dead and the coroner "determined that the cause of death was a 'Right Temp[o]roparietal Mass due to Chronic IV Drug Abuse.'" *Id.* at *4.

Advanced Correctional Healthcare, the company that provided the nurses for the jail, did not provide written policies on how "its employees should monitor drug withdrawal or should implement a hospital's discharge instructions."[8] The nurses who interacted with Bowles failed to use a flowsheet to monitor him or take his vital signs, among other shortcomings.[9] In the substantive due process action that followed, the Sixth Circuit held in favor of Bourbon County, reasoning that no individual entity acted with deliberate indifference to Bowles's serious medical needs.[10]

The standard for pretrial detainee,[11] inadequate medical care cases was not clear before 2015.[12] What was clear is pretrial detainees were at least guaranteed the protections that the Eighth Amendment affords to convicted prisoners: the Government cannot act with deliberate indifference to a detainee's serious medical needs.[13] In *Kingsley v. Hendrickson*, the Supreme Court held that the standard for pretrial detainee excessive-force claims is objective reasonableness.[14] Since this decision, Circuits have been split over whether to apply *Kingsley*, an excessive force case, to inadequate medical care cases, or to continue to use deliberate indifference.[15] Still, there are other Supreme Court cases that provide the proper framework for pretrial detainee, inadequate medical care cases. In *Youngberg v. Romeo*, the Supreme Court held that a professional judgment standard will be applied to cases involving involuntarily committed, mentally disabled people.[16]

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[8] *Bowles*, 2021 WL 3028128, at *9.

[9] *Id.* at *5, *8.

[10] *Id.* at *8.

[11] Pretrial detainees are defendants being held on criminal charges because the established bail could not be posted or because pretrial release was denied. *Detention*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[12] *See* Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 70 (1st Cir. 2016). The First Circuit acknowledged that "Fourteenth Amendment substantive due process requires the government to provide medical care" but also noted that the boundaries of this duty were muddy. *Id.* at 74.

[13] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45 (1983) (citing Youngberg v. Romeo, 457 U.S. 307, 312 n.11 (1982)) (declining to define the obligations the government owes to pretrial detainees who need medical care).

[14] Kingsley v. Hendrickson, 576 U.S. 389 (2015); Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017) (explaining that objective reasonableness in inadequate medical care cases requires the detainee to show that the prison or detention center official "acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety").

[15] *See* Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018); Miranda v. Cnty. of Lake, 900 F.3d 335, 350–53 (7th Cir. 2018); Gordon v. Cnty. of Orange, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (extending *Kingsley* to inadequate medical care cases); *see also Miranda-Rivera*, 813 F.3d at 64; Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 (5th Cir. 2017); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020); Dang v. Sheriff, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (declining to extend *Kingsley* to inadequate medical care cases).

[16] Youngberg v. Romeo, 457 U.S. 307, 320–23 (1982). The professional-judgment standard dictates that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.*; Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 339 (4th Cir. 2021) (quoting *Youngberg*, 457 U.S. at 323).

This Article will argue that the professional-judgment standard is the correct standard to apply to pretrial detainee, inadequate medical care cases, and that this standard is how the objective-reasonableness standard manifests in such cases. Part II discusses the background and history of medical-care standards under the Fourth, Eighth, and Fourteenth Amendments. It also discusses the *Kingsley* and *Youngberg* opinions. Part III analyzes the arguments for and against expanding the *Kingsley* reasoning to inadequate medical care cases, as well as examining the professional-judgment standard. Part IV argues that objective reasonableness, applied as a professional-judgment standard, accomplishes the goal of encouraging detention centers to be proactive in instituting policies and protocols that provide better treatment for detainees. Part V concludes that a professional-judgment standard offers a better solution for detainees than deliberate indifference and is how objective reasonableness should apply to medical care cases.

I. HISTORY & BACKGROUND

Civilians, except minors and those lacking the ability to care for themselves, seek and obtain their own medical treatment. This responsibility shifts when the government assumes custody over a person. The government can exercise custody over a person in three main ways: arrestee, pretrial detainee, and prisoner.[17] The standard of medical care owed by the government changes in each of these three scenarios. The Fourth Amendment protects arrestees whose cases are governed by objective reasonableness.[18] Deliberate indifference applies to prisoners protected by the Eighth Amendment.[19] Either the Fifth Amendment (federal) or the Fourteenth Amendment (state) protects pretrial detainees,[20] and depending on the circuit, objective reasonableness or deliberate indifference governs their standard of care.[21] Section A briefly discusses the constitutional rights of those in government custody. Section B discusses the Supreme Court's decision in *Kingsley v. Hendrickson* and its impact on the legal standard for conditions of confinement and inadequate medical care claims for pretrial detainees. Section C overviews the circuit split that arose after the *Kingsley* decision in inadequate medical care jurisprudence. Section D discusses the Supreme Court's decision in *Youngberg v. Romeo* to adopt a professional-judgment standard for medical treatment for involuntarily committed detainees.

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[17] *See* Kendall Huennekens, *Long Over-Due Process: Proposing a New Standard for Pretrial Detainees' Length of Confinement Claims*, 71 Duke L.J. 1647, 1668 (2022).

[18] Graham v. Connor, 490 U.S. 386, 388 (1989).

[19] *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 33 (1993).

[20] *See* Huennekens, *supra* note 17, at 1668. *See, e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015).

[21] *See Youngberg*, 457 U.S. at 320–23; *Doe 4*, 985 F.3d at 343.

A. *Constitutional Rights of Inmates*

Inmates fall into two categories, and each type of inmate has different rights under the Constitution. The Eighth Amendment provides that prisoners cannot face "cruel and unusual punishment."[22] On the other hand, the Due Process Clause protects pretrial detainees who may only be detained to "ensure [their] presence at trial."[23] Those charged but not convicted are pretrial detainees, except when a court releases them on bail.[24] Pretrial detainees are different from prisoners because pretrial detainees are presumed to be innocent and *cannot* be punished at all.[25] Thus, the Constitution guarantees pretrial detainees at least the same level of care as convicted prisoners.[26] Before a person becomes a detainee, however, they are an arrestee protected by the Fourth Amendment.[27]

1. *Fourth Amendment Rights of Arrestees*

The Fourth Amendment protects citizens "against unreasonable searches and seizures."[28] An objective-reasonableness standard applies to claims against law enforcement officials using excessive force during an arrest, investigatory stop, or any other seizure.[29] Officials seize a person when they restrain that person's freedom of movement so that they are not free to leave.[30] Seizures are generally "reasonable" only when there is probable cause that the individual has committed a crime.[31]

The Fourth Amendment not only protects an individual during an arrest, but also in different phases throughout pretrial detention.[32] The Supreme Court explained that a person objecting to the reasonableness of their detention could find relief under the Fourth Amendment.[33] Indeed, it remains a Fourth Amendment claim when a person's detention is later found to be unreasonable—perhaps because new facts extinguished the probable cause for their arrest—their claim does not convert to one under the Due Process Clause.[34] "Legal process [does] not expunge [a person's] Fourth Amendment claim because the process he receive[s] fail[s] to establish what

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[22] U.S. CONST. amend. VIII.

[23] Bell v. Wolfish, 441 U.S. 520, 536–37 (1979); *see also* Gerstein v. Pugh, 420 U.S. 103, 113–15 (1975).

[24] *Bell*, 441 U.S. at 523.

[25] U.S. CONST. amend. XIV, § 1; *Kingsley*, 576 U.S. at 400; *Bell*, 441 U.S. at 535 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

[26] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

[27] Graham v. Connor, 490 U.S. 386, 388–89.

[28] U.S. CONST. amend. IV.

[29] *Graham*, 490 U.S. at 388.

[30] Manuel v. City of Joliet, 580 U.S. 357, 364 (2017) (quoting Brendlin v. California, 551 U.S. 249, 254 (2007)).

[31] *Id.* (quoting Bailey v. United States, 568 U.S. 186, 192 (2013)).

[32] *Id.* at 363–64. There is also a circuit split about when an arrestee becomes a detainee. *See infra* note 152 and accompanying text.

[33] *Id.* at 366.

[34] *Id.* at 364.

that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime."[35] The Fourth Amendment, and objective reasonableness, governs throughout pretrial detention for claims relating to the reasonableness of their detention.

2. *Eighth Amendment Rights of Convicted Prisoners*

The Eighth Amendment bars "cruel and unusual punishments."[36] The Supreme Court has not only interpreted the Eighth Amendment to prohibit barbarous punishments like torture but also to embody "'idealistic concepts of dignity, civilized standards, humanity, and decency.'"[37] The Supreme Court held that prisons must provide inmates with humane conditions of confinement, medical care, and protection from serious harm at the hands of others.[38] Eighth Amendment inadequate medical care and conditions of confinement cases use a deliberate-indifference standard.[39]

The government has an obligation to provide medical care for those it incarcerates because an inmate relies on prison authorities to treat their medical needs.[40] The Supreme Court recognized that a failure to meet this obligation could result in death, or, in less serious cases, pain and suffering serving no penological purpose.[41] The Court then concluded "that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment."[42] This standard applies to all prison staff and not just prison doctors.[43] The Court noted, however, that mere negligence, or medical malpractice, does not rise to a constitutional violation just because the victim is a prisoner.[44] The indifference must "offend 'evolving standards of decency.'"[45]

The Court affirmed the deliberate-indifference standard in *Wilson v. Seiter* and rejected a "malicious[] and sadistic[]" standard for prison condition cases.[46] The Supreme Court ruled that if the harm done is not "formally meted out as punishment by the statute or sentencing judge, some mental element must be attributed to the inflicting officer" before the

[35] *Id.* at 368–69.

[36] U.S. CONST. amend. VIII. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (incorporating the Eighth Amendment to the States through the Fourteenth Amendment).

[37] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F. 2d 571, 579 (8th Cir. 1968)).

[38] *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 32–33 (1993); *Estelle*, 429 U.S. at 103–04; Farmer v. Brennan, 511 U.S. 825, 833–34 (1994); *see also* Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

[39] *Estelle*, 429 U.S. at 104–05 (quoting Gregg v. Georgia, 428 U.S. 153, 182–83 (1976)).

[40] *Id.* at 103.

[41] *Id.*

[42] *Id.* at 104 (quoting *Gregg*, 428 U.S. at 182-83).

[43] *Id.*

[44] *Id.* at 106.

[45] *Estelle*, 429 U.S. at 106.

[46] Wilson v. Seiter, 501 U.S. 294, 302–03 (1991).

conduct is considered deliberately indifferent.[47] There must be an inquiry into the prison official's state of mind. Only the unnecessary and wanton infliction of pain, not inadvertence or error in good faith, violates the Eighth Amendment in prisoner conditions of confinement cases—unintentional acts or omissions cannot be cruel and unusual punishment.[48] The Court then concluded that *Estelle's* deliberate-indifference standard is the appropriate standard for medical-conditions cases because the responsibilities of prison officials for medical conditions are not materially different from their responsibilities with nonmedical conditions.[49] "Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates."[50]

3. *Due Process Protections for Detainees*

The Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."[51] To deprive a civilian of their liberty without convicting them, there must be a judicial determination of probable cause for their arrest to satisfy the due process requirement of the Fourteenth Amendment and justify their detention.[52]

The government detains pretrial inmates as a "regulatory measure" to ensure their presence at trial. So long as the "conditions and restrictions do not amount to punishment," the government can justifiably restrict a detainee's constitutional right to liberty.[53] To determine whether a governmental action is punitive or regulatory, a court must consider several factors: (1) whether there is "an expressed intent to punish on the part of detention facility officials;"[54] (2) whether a "condition is not reasonably related to a legitimate [government] goal;"[55] and (3) whether the governmental purpose justifies the imposed condition.[56] The detention of a pretrial detainee is justified by probable cause, an objective standard,[57] but

[47] *Id.* at 300.

[48] *Id.* at 297–99 (citing *Estelle*, 429 U.S. at 104); *see also* Whitley v. Albers, 475 U.S. 312, 319 (1986).

[49] *Wilson*, 501 U.S. at 303.

[50] *Id.*

[51] U.S. CONST. amend. XIV, § 1.

[52] *Bell*, 441 U.S. at 535–37 (noting other proceedings such as a bail hearing).

[53] *Id.* at 536–37 (distinguishing between punitive measures after conviction and regulatory measurers before conviction); "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535 (first citing Ingraham v. Wright, 430 U.S. 651, 671–72 n.40 (1977); then citing Kennedy v. Mendoza-Martinez, 372 U.S.144, 165–67 (1963); and then citing Wong Wing v. United States, 163 U.S. 228, 237 (1896)).

[54] *Bell*, 441 U.S. at 584.

[55] *Id.* at 539.

[56] *Id.* at 561.

[57] *Id.* at 535–37.

the standard for the conditions of the detention (be it medical care or otherwise) is not as clear.[58]

B. Kingsley v. Hendrickson

Since *Bell v. Wolfish*, a case decided in 1979, until *Kingsley v. Hendrickson*, decided in 2015, the Supreme Court had not significantly changed pretrial detainee jurisprudence. In *Bell*, the Court held that "[a]bsent a showing of an expressed intent to punish, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[59] Realizing that this standard does not neatly apply to excessive-force cases, the Court took up the question in *Kingsley v. Hendrickson*. Before 2015, pretrial detainees bringing excessive-force claims were judged differently depending on which circuit the case was tried in.[60] Some circuits, borrowing reasoning from Eighth Amendment jurisprudence, required a subjective analysis, while others used an objective standard.[61]

The Supreme Court held that the standard for detainee-excessive-force claims is objective reasonableness in *Kingsley v. Hendrickson*.[62] The Supreme Court reasoned that because excessive-force cases are unique due to the nature of using force—an affirmative act necessarily done with intent—subjective intent was unnecessary to prove.[63] Kingsley was arrested on a drug charge and detained in a Wisconsin County jail.[64] Kingsley alleged that, during his detention, officers used excessive force against him when he refused to remove a paper covering a light fixture in his cell.[65] Kingsley brought an excessive-force claim and argued that the proper standard should be objective reasonableness.[66]

The Supreme Court agreed, reasoning that an objective-reasonableness standard (1) complied with precedent;[67] (2) was a workable standard;[68] and (3) "adequately protects an officer who acts in good faith."[69] Underpinning

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[58] *See generally Bowles*, 2021 WL 3028128, at *7 (quoting Richmond v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018)).

[59] *Bell*, 441 U.S. at 538–39.

[60] *See* Kingsley v. Hendrickson, 576 U.S. 389, 395 (2015). Many circuits relied on Eighth Amendment jurisprudence to guide their reasoning under the Fourteenth Amendment for excessive force claims. *Id.* at 400–02 (citing Johnson v. Glick, 481 F.2d 1028, 1030 (2d Cir. 1973)).

[61] *Id.* at 395.

[62] *Id.* at 402.

[63] *Id.* at 396, 400–03. Still, the Court required that the defendant in excessive force cases possess a purposeful or knowing state of mind; however, it concluded that this would be inherently satisfied if the act itself was a deliberate one. *Id.* at 396.

[64] *Id.* at 392.

[65] *Kingsley*, 576 U.S. at 392.

[66] *Id.* at 396–97.

[67] *Id.* at 397 ("We have said that 'the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.'") (quoting Graham v. Connor, 490 U.S. 386, 395 n.10 (1989)).

[68] *Id.* at 399.

[69] *Id.*

this decision, the Court routinely referenced *Graham v. Connor*, a Fourth Amendment case, to explain the objective-reasonableness standard.[70] The Court highlighted that pretrial detainees could prevail on substantive due process claims only by providing objective evidence that a governmental action was not "rationally related" to a legitimate government objective.[71] The Court noted that several circuits use jury instructions consistent with objective reasonableness and that many facilities train officers as if their conduct is subject to objective reasonableness.[72] The Court also acknowledged that had Kingsley been released on bail, his claim would arise under the Fourth Amendment where the standard is objective.[73] Finally, the Court stated that "judging the reasonableness of the force used from the perspective and with the knowledge of the defendant officer is an appropriate part of the analysis."[74] Although the Court has not opined on the competing standards in inadequate medical care cases,[75] the decision in *Kingsley* is relevant because it sets forth the idea that objective reasonableness is the appropriate standard for pretrial detainee, substantive due process claims. Thus, circuits have since used *Kingsley* to guide their inadequate medical care cases.

C. *The Circuit Split*

Since *Kingsley*, a circuit split arose over whether the proper standard for inadequate-medical-treatment claims should be deliberate indifference or objective reasonableness. The Second, Seventh, and Ninth Circuits have applied an objective-reasonableness standard to inadequate-medical-treatment claims, extending the *Kingsley* reasoning to more than just excessive-force claims.[76] On the other hand, the First, Fifth, Eighth, Tenth, and Eleventh Circuits have continued to use the deliberate-indifference standard, reasoning that *Kingsley* applied to excessive force claims and did not extend to deliberate-indifference, inadequate medical treatment claims.[77] The Third, Fourth, and Sixth Circuits have not resolved the issue, concluding

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[70] *Id.* at 397–401 (citing *Graham*, 490 U.S. at 395 n.10, 396–97).

[71] *Kingsley*, 576 U.S. at 389 (citing *Bell*, 441 U.S. at 541–43).

[72] *Id.* at 390.

[73] *Id.* at 399.

[74] *Id.* at 390.

[75] At the time of writing this Article, the Supreme Court most recently denied certiorari on this issue in *Scott County. v. Brawner* on October 3, 2022. Brawner v. Scott Cnty., 14 F.4th 585 (6th Cir. 2021), *cert. denied sub nom.* Scott Cnty. v. Brawner, 143 S. Ct. 84 (2022). The Court reaffirmed its position to not take up the question in February 2024. Crandel v. Hall, 75 F.4th 537 (5th Cir. 2023), *cert. denied*, 2024 WL 674720.

[76] *See* Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018); Miranda v. Cnty. of Lake, 900 F.3d 335, 352 (7th Cir. 2018); Gordon v. Cnty. of Orange, 888 F.3d 1118, 1120, 1124–25 (9th Cir. 2018).

[77] *See* Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 64 (1st Cir. 2016); Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 (5th Cir. 2017); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020); Dang v. Sheriff, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

that the outcome in their cases would be the same under either standard.[78] The Sixth Circuit "'recognize[d] that this shift in Fourteenth Amendment deliberate indifference jurisprudence' as a result of *Kingsley* 'calls into serious doubt whether [the pretrial detainee] need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them.'"[79] Still, the Sixth Circuit declined to address this issue, stating it "found it unnecessary to answer the question each time we have confronted the issue" because the "same result would obtain under either the subjective test dictated by *Farmer* or by a purely objective test derived from *Kingsley*."[80] The Third and Fourth Circuits held similarly that the outcome would be the same under either standard.[81]

D. Youngberg v. Romeo

The professional-judgment standard from *Youngberg v. Romeo* can help clarify this ever-changing area of law and govern future Fourteenth Amendment, inadequate medical care claims. This case is from 1982, yet it provides the proper framework for pretrial detainee, inadequate medical care claims today. The Supreme Court has already viewed this case as a medical-care case.[82] Even if that were not true, central to *Youngberg* is a mentally ill detainee and various congressional acts, such as the Americans with Disabilities Act, include physical and mental impairments under the same definition.[83] This shift reflects contemporaneous views and understanding of mental health—our legal standards should as well.

The issue in *Youngberg v. Romeo* was whether an involuntarily committed, mentally retarded[84] detainee has substantive rights under the Due Process Clause of the Fourteenth Amendment to safe conditions of confinement, freedom from restraints, and habilitation.[85] The Pennhurst State School and Hospital admitted Romeo because his mother was unable to take care of him after his father's death.[86] While committed, Romeo

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[78] *See* Bowles v. Bourbon Cnty., No. 21-5012, 2021 WL 3028128, at *7–8 (6th Cir. July 19, 2021) (quoting Griffith v. Franklin Cnty., 975 F.3d 554, 570 (6th Cir. 2020)); Moore v. Luffey, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); Mays v. Sprinkle, 992 F.3d 295, 301 (4th Cir. 2021).

[79] *Bowles*, 2021 WL 3028128, at *7 (quoting Richmond v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018)).

[80] *Id.* at *7 (quoting *Griffith*, 975 F.3d at 570).

[81] *Moore*, 767 F. App'x at 340 n.2; *Mays*, 992 F.3d at 301.

[82] *See, e.g.*, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45 (1983) ("We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require *medical* attention.") (emphasis added) (citing *Youngberg*, 457 U.S. at 312 n.11).

[83] Today the Americans with Disabilities Act describes disability as an individual (1) with "a physical or mental impairment that substantially limits one or more major life activities of such individual;" (2) with "a record of such impairment;" or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102.

[84] It's worth noting that, at the time, mental retardation was not considered a mental illness. *Youngberg*, 457 U.S. at 309 n.1; *but see* 42 U.S.C. § 12102. For the purposes of this Article, mentally ill will be used henceforth for all mental impairments.

[85] *Youngberg*, 457 U.S. at 309.

[86] *Id.* at 309–10.

purportedly suffered injuries from at least sixty-three incidents and his mother filed a complaint that alleged "Pennhurst's director and two supervisors . . . knew, or should have known, that Romeo was suffering injuries and that they failed to institute appropriate preventive procedures, thus violating his rights under the Eighth and Fourteenth Amendments."[87] At trial, the court instructed the jury that only if they found the defendants "deliberately indifferent" to Romeo's serious medical needs could they find his Eighth and Fourteenth Amendment rights violated.[88] The jury returned a verdict for the defendants and the Third Circuit, sitting en banc, reversed.[89]

The Supreme Court reasoned that professional judgment "reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed."[90] The Court reasoned that it is not appropriate for the judiciary to discern which specific professionally acceptable choice a jail official should make and that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[91] Although the *Youngberg* Court focused on involuntary commitment, rehabilitation, and restraints, it also viewed these issues as both treatment and conditions of confinement.[92] Contrasting *Estelle v. Gamble*, an Eighth Amendment case that holds deliberate indifference is the standard for prisoners, the *Youngberg* Court held that professional judgment is the standard for involuntarily committed, mentally ill detainees.[93]

The Fourth Circuit expanded on *Youngberg* and held that a professional-judgment standard is the appropriate standard for juvenile mental healthcare cases.[94] In *Doe 4 v. Shenandoah Valley Juvenile Center*, the appellants were all unaccompanied alien children placed in the custody of the Shenandoah Valley Juvenile Center.[95] The unaccompanied alien children filed a class action complaint alleging that the Center "engaged in unlawful patterns of conduct through: (1) excessive use of force, physical restraints, and solitary confinement; (2) failing to provide a constitutionally

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[87] *Id.* at 310.

[88] *Id.* at 312.

[89] *Id.* The Third Circuit suggested a confusing standard that changed based on how close the condition was to a punishment. The Third Circuit reasoned that various standards should control: (1) restraints, which raise a presumption of punishment, require a "compelling necessity"; (2) failure to provide for a resident's safety requires a "substantial necessity"; and (3) that defendants are liable only if the treatment is not "acceptable in the light of present medical or other scientific knowledge." *Id.* at 313 (internal quotations omitted) (quoting Romeo v. Youngberg, 644 F.2d 147, 154 (3d Cir. 1980)). Chief Judge Seitz, in his concurrence, provided a much clearer and workable standard. Chief Judge Seitz reasoned that the "Constitution 'only requires that the courts make certain that professional judgment in fact was exercised.'" Youngberg v. Romeo, 457 U.S. 307, 314 (1982) (quoting *Romeo*, 644 F.2d at 178 (Seitz, C.J., concurring)).

[90] *Id.* at 321.

[91] *Id.* at 321–22.

[92] *Id.*

[93] *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)) (comparing Eighth Amendment medical care standards directly to persons who are involuntarily committed and protected by the Due Process Clause of the Fourteenth Amendment).

[94] Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 329 (4th Cir. 2021).

[95] *Id.*

adequate level of care for plaintiffs' serious mental health needs; and (3) discrimination on the basis of race and national origin."[96] The children argued for *Youngberg*'s professional-judgment standard because they believed it would lead to safe and sanitary conditions and that special concern should be taken for children who are more vulnerable than other types of detainees.[97] The Fourth Circuit, drawing similarities between involuntarily committed, mentally ill detainees and unaccompanied alien children, agreed. It held that a professional-judgment standard would apply to unaccompanied alien children's cases.[98]

II. ANALYSIS

Inadequate medical care cases have not been a source of clarity in the ever-changing area of substantive due process law. There is confusion about whether courts should use typical Eighth Amendment approaches or use Fourth Amendment cases for guidance. The scarcity of Supreme Court precedent on pretrial detainee medical care under the due process clause forces courts to rely on cases about excessive force. The lack of clarity on whether mental health care invokes the same legal standards as physical health care adds even more confusion. Moreover, there are three separate standards courts use to deal with inadequate medical care claims brought by detainees: (1) objective reasonableness; (2) deliberate indifference; and (3) professional judgment. Clarification is needed to produce a simple, workable standard for pretrial detainees bringing inadequate medical care claims.

The objective-reasonableness standard derived from *Kingsley* is the minority approach to inadequate medical care claims under the due process clause. In the excessive force context, it requires that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[99] For conditions of confinement or inadequate medical care claims, a pretrial detainee must satisfy one of two prongs: (1) that the official "acted intentionally to impose the alleged condition, or [(2)] recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety."[100]

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[96] *Id.* at 334.

[97] *Id.* at 339–40; *see also* Youngberg v. Romeo, 457 U.S. 307, 307 (1982).

[98] *Doe 4*, 985 F.3d at 329. The professional-judgment standard imposes liability only when the decision by the professional is "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 342 (quoting *Youngberg*, 457 U.S. at 323) (internal quotation marks omitted).

[99] Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015).

[100] Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017). The Ninth and Seventh Circuits have applied similar, predominantly objective standards to inadequate medical care claims. The Ninth Circuit "interpreted *Kingsley* to require an intentional decision by the officer with respect to the challenged condition, but only objective recklessness for the officer's failure to mitigate the risk." Abby Dockum, Kingsley*, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in § 1983 Conditions of confinement Claims*, 53 ARIZ. ST. L.J. 707, 731 (2021) (citing Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc)). The Seventh Circuit "required

The deliberate-indifference test is the majority approach. It has two components—objective and subjective. The "objective component requires the plaintiff to show that the medical need at issue is 'sufficiently serious.'"[101] The medical need must be so serious that even a layperson could identify it.[102] The subjective component requires that a prison "official knows of and disregards an excessive risk to inmate health or safety."[103]

The professional-judgment standard imposes liability "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[104] Courts have sparingly used this standard.[105]

A. *Objective Reasonableness v. Deliberate Indifference*

The tension between the dueling standards of objective reasonableness and deliberate indifference arose from *Kingsley*. The objective-reasonableness standard better reflects pretrial detainees' Fourteenth Amendment rights because they cannot be punished at all and are thus different from prisoners.[106] The objective-reasonableness standard follows Supreme Court precedent[107] and it is workable because it can apply to excessive-force, conditions of confinement, failure-to-protect, and medical-needs claims.[108]

Pretrial detainees and prisoners are distinct from each other. The government can punish prisoners because they have gone through the entire conviction process, and the Eighth Amendment bars only punishments that are cruel and unusual.[109] On the other hand, the Fourteenth Amendment protects pretrial detainees from *any* punishment because they maintain a

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plaintiffs to show that a defendant was at least reckless in considering the consequences of an objectively unreasonable action." *Id.* at 731 (citing Miranda v. Cnty. of Lake, 900 F.3d 335, 353–54 (7th Cir. 2018)); *see also* Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

[101] Richmond v. Huq, 885 F.3d 928, 938 (6th Cir. 2018) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)).

[102] *Id.* at 938 (quoting *Farmer*, 511 U.S. at 834).

[103] *Farmer*, 511 U.S. at 837.

[104] *Youngberg*, 457 U.S. at 323.

[105] *See, e.g.*, Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 342–44 (4th Cir. 2021).

[106] Dockum, *supra* note 100, at 739–40 (citing Kingsley v. Hendrickson, 576 U.S. 389, 398–401 (2015)).

[107] Dockum, *supra* note 100, at 742 (citing Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017)). The Court has stated that recklessly failing to act with reasonable care to mitigate unreasonable conditions can also satisfy the state-of-mind element. Dockum, *supra* note 100, at 742 (citing *Darnell*, 849 F.3d at 35). Thus, the objective reasonableness standard allows courts to infer intent when an officer's actions or omissions do not comport with what a reasonable officer would have done under the same conditions. Dockum, *supra* note 100, at 742–43.

[108] Dockum, *supra* note 100, at 743–44.

[109] U.S. CONST. amend. VIII; Dockum, *supra* note 100, at 712 (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)).

presumption of innocence.[110] This is important distinction is what makes pretrial detainees more akin to arrestees than prisoners. The Supreme Court has held that when there has not been formal adjudication of guilt, the Eighth Amendment has no application to a detainee's required medical care.[111] The Court explicitly stated that detainees' "due process rights . . . are at least as great as the Eighth Amendment protections available to . . . convicted prisoner[s]" but found it unnecessary to define what additional due process obligations they are owed.[112] While the Eighth Amendment may not have any application to a detainee's required medical care, the Supreme Court's failure to define a standard has led to lower courts applying Eighth Amendment standards to cases arising under the due process clause.[113]

Conversely, while courts have acknowledged that *Kingsley* creates a cloud over all pretrial detainee cases, the Supreme Court did not explicitly intend for it to govern inadequate medical care cases.[114] "[T]he Supreme Court previously rejected a request to adopt a 'purely objective test for deliberate indifference.'"[115] Criticism of objective reasonableness often compares the standard to medical malpractice, reasoning that objective reasonableness makes inadequate medical care cases under the Fourteenth Amendment basically tort law no better than a simple negligence standard.[116] This reasoning is underpinned by *Estelle*, an Eighth Amendment case, where the Court stated, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner."[117] Under the Fourteenth Amendment, Justice Scalia's dissent in *Kingsley* reasoned that the "Due Process Clause is not a font of tort law to be superimposed upon" and states that the "majority overlooks this in its tender-hearted desire to tortify the Fourteenth Amendment."[118]

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[110] *Bell*, 441 U.S. at 538–39, 539 n.20 (explaining, in a non-exhaustive list, that punishment can be shown in three ways: (1) punitiveness can be shown by an officer's expressed intent to punish; (2) if a condition is not "reasonably related" to a government's legitimate goal, courts can infer an intent to punish; and (3) absent intent to punish, the government's goal must still be able to justify the punishment). A legitimate government goal is not expressly defined but it can be shown in at least two ways: managing the detention center (giving deference to administrators) and ensuring the detainee's presence at trial. *Id.* at 540 n.23. Still, pretrial detainees are deprived of some rights, like liberty, for regulatory purposes. *Id.* at 523, 537.

[111] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

[112] *Id.*

[113] *See* Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018); Miranda v. Cnty. of Lake, 900 F.3d 335, 352 (7th Cir. 2018); Gordon v. Cnty. of Orange, 888 F.3d 1118, 1120, 1124–25 (9th Cir. 2018).

[114] Bowles v. Bourbon Cnty., No. 21-5012, 2021 WL 3028128, at *7–8 (6th Cir. July 19, 2021) (quoting Richmond v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018)); Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 70 (1st Cir. 2016).

[115] Strain v. Regalado, 977 F.3d 984, 992 (10th Cir. 2020) (quoting Farmer v. Brennan, 511 U.S. 825, 839 (1994)).

[116] *Id.* at 993 (quoting Kingsley v. Hendrickson, 576 U.S. 389, 408 (Scalia, J. dissenting)).

[117] Estelle v. Gamble, 429 U.S. 97, 106 (1976).

[118] *Kingsley*, 576 U.S. at 408 (Scalia, J. dissenting) (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

B. *The Professional-Judgment Standard*

A professional-judgment standard should govern inadequate medical care claims because it: (1) provides a backdrop of professional standards for courts to use and better assesses whether care was reasonable, and it is not for courts to decide which specific professionally acceptable choice a jail official should make; (2) is a workable standard that is already used in medical-care cases;[119] and (3) is closer to medical-malpractice standards used across the United States while not being a simple negligence standard.[120] Courts would defer to professional standards to determine whether care was adequate. Although mere departures from a professional's judgment are not enough to show a constitutional violation, under this approach courts must still evaluate the treatment provided under a relevant standard of professional judgment.[121]

Youngberg v. Romeo should be viewed as a medical care case, and thus govern inadequate medical-care cases for pretrial detainees. The professional-judgment standard is already used under Fourteenth Amendment, substantive due process claims for involuntarily committed individuals.[122] Although *Youngberg* deals with mental ailments, there is a growing trend where courts have stopped distinguishing between mental and

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[119] *See* Youngberg v. Romeo, 457 U.S. 307, 307 (1982).

[120] *Compare* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 339 (4th Cir. 2021) (quoting *Youngberg*, 457 U.S. at 320–23) (explaining professional-judgment standard imposes liability "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Further, although courts must express deference to a professional's judgment and mere departures are not enough to show a constitutional violation, courts must still evaluate the treatment provided under a relevant standard of professional judgment.) *with* 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 285 (2023) (explaining that "[t]hree elements are essential to establish a medical malpractice claim: (1) the physician's duty to his or her patient; (2) the physician's breach of that duty through the failure to exercise the requisite degree of skill and care; and (3) an injury proximately caused by the physician's failure.").

[121] *Doe 4*, 985 F.3d at 342–44. For example, in *Doe 4*, the court examines two Fourth Circuit cases about treatment of a transgender prisoner. *Id.* (first citing De'lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003); and then citing De'lonta v. Johnson, 708 F.3d 520 (4th Cir. 2013)). In the first case, the prisoner was denied the use of hormone treatment because it was against the facility's policies, but the court determined that this denial was not related to the judgment of a professional with respect to the individual's specific needs. *Id.* at 343–44. The *De'lonta* court ultimately did not decide the case on the merits but did refuse to "dismiss the prisoner's claims as a matter of law simply because the prison provided some form of treatment." *Id.* at 344 (citing *De'lonta*, 330 F.3d at 635). In the second example, this same prisoner challenged the adequacy of her care but this time for a right to consultation for sex reassignment surgery. The Fourth Circuit relied on a "triadic treatment sequence" from the "Benjamin Standards of Care . . . published by the World Professional Association for Transgender Health." *De'lonta*, 708 F.3d at 522–23. The sequence is (1) hormone therapy; (2) real-life experience living as a member of the opposite sex; and (3) sex reassignment surgery. *Id.* at 523. The Fourth Circuit held that although De'lonta received some treatment, "it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *Id.* at 526. The Fourth Circuit conceded that a detainee does not have a constitutional right to choose the treatment they receive but that a detention center must still provide adequate treatment addressing the detainee's serious medical need. *Id.* "To apply *Youngberg* to a claim of inadequate medical care . . . a court must do more than determine that some treatment has been provided—it must determine whether the treatment provided is adequate to address a person's needs under a relevant standard of professional judgment." *Doe 4*, 985 F.3d at 344.

[122] *Youngberg*, 457 U.S. at 307–09.

physical ailments.[123] Finally, the Supreme Court and various circuit courts have already viewed *Youngberg* as a medical-care case and the professional-judgment standard neatly applies to all detainee medical-care cases.[124] Thus, the professional-judgment standard is the most workable standard for medical-care cases because it derives from a tangential medical-care case.[125] The professional-judgment standard should logically be extended to physical and mental ailments for all detainees.

A professional-judgment standard is like medical malpractice standards across the United States. It imposes liability when there is a substantial deviation from "accepted professional judgment, practice, or standards."[126] In general, a medical provider is liable for malpractice when the plaintiff shows "(1) the standard of care in the medical community by which the physician's treatment was measured, (2) that the physician deviated from the standard of care, and (3) that the resulting injury was proximately caused by the deviation from the standard of care."[127] Both professional judgment and medical malpractice require an accepted standard of care in the medical community, and then that the medical-care professional deviates from that standard of care. The key distinction that prevents professional judgment from becoming "merely" tort law is that the professional-judgment standard requires a *substantial* deviation from professional standards to merit a constitutional violation, while medical malpractice does not require as much.

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[123] Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977); *see also* Torraco v. Maloney, 923 F.2d 231, 234–36 (1st Cir. 1991); Inmates of Allegheny Cnty. Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979); Partridge v. Two Unknown Police Officers of Hous., 791 F.2d 1182, 1187 (5th Cir. 1986); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006); Ramos v. Lamm, 639 F.2d 559, 574–75 (10th Cir. 1980); Laaman v. Helgemoe, 437 F. Supp. 269, 313 (D.N.H. 1977). The Fourth Circuit has also adopted the professional-judgment standard from *Youngberg* for mental health treatment for unaccompanied alien children. *See Doe 4*, 985 F.3d at 342 ("[A] facility caring for an unaccompanied child fails to provide a constitutionally adequate level of mental health care if it substantially departs from accepted professional standards."). The Fourth Circuit further extended this standard for UACs because (1) they are not admitted because they committed a crime; (2) they are placed in juvenile detention centers for safety and care; (3) they are subject to mental health evaluations; (4) individuals are guaranteed adequate care regardless of the nature of the facility they are subjected to; (5) they are released subject to consideration for their risk of harm; and (6) UACs are children. *Id.* at 339–42. Although the court highlighted the fact that UACs are children, the standard derives from a case dealing with adults, and the reasoning employed can be similarly applied to pretrial detainees.

[124] *See, e.g.*, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45 (1983) ("We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require *medical* attention.") (emphasis added) (citing *Youngberg*, 457 U.S. at 312 n.11); *Doe 4*, 985 F.3d at 339.

[125] *See Youngberg*, 457 U.S. at 320–23; *see also Doe 4*, 985 F.3d at 329.

[126] *Doe 4*, 985 F.3d at 323, 339 (quoting *Youngberg*, 457 U.S. at 320–23).

[127] 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 285 (2023). *See* Day v. Johnson, 255 P.3d 1064 (Colo. 2011); Bruscato v. O'Brien, 705 S.E.2d 275 (Ga. Ct. App. 2010), *aff'd*, 715 S.E.2d 120 (Ga. 2011); Martinez v. Park, 959 N.E.2d 259 (Ind. Ct. App. 2011); Smith v. Hines, 261 P.3d 1129 (Okla. 2011); Breland v. Rich, 69 So. 3d 803, 820 (Ala. 2011); Dallaire v. Hsu, 23 A.3d 792 (Conn. App. 2011); Johnson v. Ingalls Mem'l Hosp., 931 N.E.2d 835 (Ill. App. Ct. 2010); Johnson v. Morehouse Gen. Hosp., 63 So. 3d 87, 96 (La. 2011); Dickhoff *ex rel.* Dickhoff v. Green, 811 N.W.2d 109 (Minn. Ct. App. 2012), *aff'd*, 836 N.W.2d 321 (Minn. 2013); Estate of Willson v. Addison, 258 P.3d 410 (Mont. 2011); Scott v. Khan, 790 N.W.2d 9 (Neb. Ct. App. 2010), *review denied*, (Dec. 22, 2010); Healy v. Finz & Finz, P.C., 82 A.D.3d 704 (N.Y. App. Div. 2011); Cousart v. Charlotte-Mecklenburg Hosp. Auth., 704 S.E.2d 540 (N.C. Ct. App. 2011); Eskelson *ex rel.* Eskelson v. Davis Hosp. & Med. Ctr., 242 P.3d 762 (Utah 2010).

Adopting a professional judgment standard accomplishes two goals. First, detention centers would be held to similar professional standards as hospitals, clinics, and other healthcare facilities.[128] Second, since detention centers are held to similar standards, it serves the purpose of encouraging them, and the medical-care companies that contract with them, to implement proper medical protocols in the first place to avoid liability to inadequate medical care claims.

III. SOLUTION

In *Griffith v. Franklin County*, a pretrial detainee, arrested for robbery and assault, claimed that he received inadequate-medical treatment during his detention.[129] During his intake, he was nauseous and admitted to smoking marijuana and taking Xanax earlier in the day.[130] He was placed in a detox cell to be monitored for forty-eight hours as a moderate suicide risk.[131] The detainee complained about vomiting and diarrhea for a few days and was given Imodium and Mylanta as treatment.[132] Despite complaining of worsening symptoms, medical staff did not elevate his treatment because they did not believe it to be serious, even though the staff never sought to identify the source of the symptoms.[133] Once the detainee's forty-eight-hour suicide-monitoring period was up, he was transferred to general population.[134] Despite warnings from the detainee's cell mates, prison staff did not take his medical care seriously until he had a seizure that caused him to smack his head against his metal bunk.[135] He was evaluated but eventually sent back to his cell before the medical staff assessed why he had a seizure.[136] The detainee had another seizure and this time medical staff took him to an emergency room where he suffered another seizure and was then airlifted to a different hospital where he received treatment.[137] Doctors diagnosed him with acute renal failure, seizure disorder, posterior reversible encephalopathy syndrome, hypomagnesemia, and anion gap metabolic acidosis.[138] The detainee recovered from that incident but still experienced

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[128] It is worth reminding that private medical care companies voluntarily take on the duty to provide medical care for pretrial detainees when they contract with detention centers.

[129] Griffith v. Franklin Cnty., 975 F.3d 554, 560 (6th Cir. 2020).

[130] *Id.*

[131] *Id.* at 560–61.

[132] *Id.* at 562.

[133] *Id.* at 562–63.

[134] *Id.* at 563.

[135] *Griffith*, 975 F.3d at 564.

[136] *Id.*

[137] *Id.* at 564–65.

[138] *Id.*; *see also* MAYO CLINIC, *Acute Kidney Failure*, https://www.mayoclinic.org/diseases-conditions/kidney-failure/symptoms-causes/syc-20369048 (last visited Feb. 9, 2024) (explaining acute renal failure "occurs when your kidneys suddenly become unable to filer waste products from your blood" and it requires intensive treatment or it can be fatal); CLEVELAND CLINIC, *Metabolic Acidosis*, https://my.clevelandclinic.org/health/diseases/24492-metabolic-acidosis (last visited Feb. 9, 2024) (explaining that anion gap metabolic acidosis "is a condition in which acids build up in your body" and "occurs when your body produces too much acid, or your kidneys don't remove enough acids from your blood" and "[s]evere cases . . . can cause death").

headaches, sleep deprivation, and an increased vulnerability to kidney failure.[139] The Sixth Circuit found that despite shortcomings in medical treatment, no individual was deliberately indifferent to the detainee's serious medical needs.[140]

This case further demonstrates the difficulty in meeting the deliberate-indifference standard and receiving just compensation for subpar medical treatment. Trying to prove that one individual was deliberately indifferent—that the medical provider knows that the detainee has a serious medical condition and essentially says, "I don't care"—is often futile. Many cases have similarly fallen through the cracks.[141] Deliberate indifference to a prisoner's serious medical needs constitutes unnecessary and wanton infliction of pain, or cruel and unusual punishment under the Eighth Amendment.[142] Deliberate indifference is the proper standard for prisoners because prisoners can be punished; they just cannot be cruelly and unusually punished. Pretrial detainees should be entitled to an easier-to-meet judicial standard than deliberate indifference because, unlike prisoners, they cannot be punished at all. Therefore, the standard of care afforded to pretrial detainees should be akin to the standard of care of arrestees or a civilian who seeks their own treatment. Further, even though objective reasonableness is an easier-to-meet standard than deliberate indifference, it does not explicitly account for any professional standards. An objective-reasonableness standard, applied through the lens of a professional's judgment, should apply to inadequate medical care cases. This is because (1) objective reasonableness is the standard that governs whether a detention is reasonable under the Fourth Amendment;[143] (2) other substantive due process claims, like excessive force, are now governed by objective reasonableness instead of deliberate indifference—a standard borrowed from Eighth Amendment

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[139] *Griffith*, 975 F.3d at 565.

[140] *Id.* at 570.

[141] *See, e.g.*, Bowles v. Bourbon Cnty., No. 21-5012, 2021 WL 3028128, at *5 (6th Cir. 2018); Estelle v. Gamble, 429 U.S. 97, 104 (1976); Richmond v. Huq, 885 F.3d 928, 938 (6th Cir. 2018); Farmer v. Brennan, 511 U.S. 825, 834 (1994); Kingsley v. Hendrickson, 576 U.S. 389, 389 (2015); Wilson v. Seiter, 501 U.S. 294, 303 (1991); Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017); Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016); Miranda v. Cnty. of Lake, 900 F.3d 335, 353–54 (7th Cir. 2018); Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018); Gordon v. Cnty. of Orange, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018); Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 70 (1st Cir. 2016); Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 (5th Cir. 2017); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018); Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020); Dang v. Sheriff, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); Berry v. Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990); Goka v. Bobbitt, 862 F.2d 646, 651 (7th Cir. 1988); Young v. Quinlan, 960 F.2d 351, 360–61 (3d Cir. 1992); Redman v. Cnty. of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991); Moore v. Luffey, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); Mays v. Sprinkle, 992 F.3d 295, 301 (4th Cir. 2021); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977); *see also* Torraco v. Maloney, 923 F.2d 231, 234–36 (1st Cir. 1991); Inmates of Allegheny Cnty. Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979); Partridge v. Two Unknown Police Officers of City of Hous, 791 F.2d 1182, 1187 (5th Cir. 1986); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977); De'lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003); De'lonta v. Johnson, 708 F.3d 520 (4th Cir. 2013).

[142] *Estelle*, 429 U.S. at 104–05.

[143] Manuel v. City of Joliet, 580 U.S. 357, 379 (2017).

jurisprudence;[144] and (3) *Youngberg* should be viewed as an inadequate medical care case.[145]

Arrestees and pretrial detainees have a lot in common and the legal standards that govern their cases should reflect their similarities. The Fourth Amendment provides relief when a detention is found to be unreasonable.[146] This happens when probable cause is extinguished perhaps because the arrest stemmed from falsified evidence.[147] The Fourth Amendment also governs someone who is charged and then released on bail, while those who are not released remain protected by the Due Process Clause as it relates to the conditions of their detention.[148] There is also a circuit split on when an arrestee becomes a detainee, further blurring the lines between the Fourth Amendment and the Due Process clause in this area.[149] This distinction between an unconstitutional seizure and unconstitutional conditions of that seizure may not be so significant as this area of law develops over the coming decades. Recent Supreme Court decisions suggest that objective reasonableness, as laid out under Fourth Amendment jurisprudence, is the trend that will govern more future detention cases that have typically been governed by substantive due process under the Fourteenth Amendment.[150]

As *Kingsley* shows, the Supreme Court is moving away from the deliberate indifference standard in favor of objective reasonableness for some substantive due process claims. The Court reasoned that objective reasonableness complies with precedent, is workable, and still protects the officer who acts in good faith.[151] Circuits have recognized this shift in

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[144] *Kingsley*, 576 U.S. 389; *see also Estelle*, 429 U.S. at 104–05 (internal quotation marks omitted).

[145] *See Youngberg*, 457 U.S. 307.

[146] *Manuel*, 580 U.S., at 363–68.

[147] *Id.* at 364–70.

[148] *Kingsley*, 576 U.S. at 399. Under the Due Process clause, the standard remains in flux: either objective reasonableness or deliberate indifference applies depending on the circuit the litigant finds themselves in. *See Bruno*, 727 F. App'x at 720 (extending *Kingsley* to inadequate medical care cases); Miranda v. Cnty. of Lake, 900 F.3d 335, 350–53 (7th Cir. 2018); *Gordon*, 888 F.3d at 1120, 1122–25; *see also Miranda-Rivera*, 813 F.3d 64 (declining to extend *Kingsley* to inadequate medical care cases); *Alderson*, 848 F.3d at 419; *Whitney*, 887 F.3d at 860 n.4; *Strain*, 977 F.3d at 989; *Dang*, 871 F.3d at 1279 n.2.

[149] *See generally* Irene M. Baker, Comment, Wilson v. Spain*: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 ST. JOHN'S L. REV. 449 (2001); Diana E. Cole, Comment, *The Antithetical Definition of Personal Seizure: Filling the Supreme Court Gap in Analyzing Section 1983 Excessive-Force Claims Arising After Arrest and Before Pretrial Detention*, 59 CATH. UNIV. L. REV. 493 (2010); Megan Shuba Glowacki, Comment, *The Fourth or Fourteenth? Untangling Constitutional Rights in Pretrial Detention Excessive Force Claims*, 78 UNIV. CIN. L. REV. 1159 (2009); Erica Haber, Note, *Demystifying a Legal Twilight Zone: Resolving the Circuit Court Split on When Seizure Ends and Pretrial Detention Begins in § 1983 Excessive Force Cases*, 19 N.Y.L. SCH. J. HUM. RTS. 939 (2003); Mitchell W. Karsch, Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 835-40 (1990); Eamonn O'Hagan, Note, *Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. REV. 1357 (2003); Tiffany Ritchie, Comment, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Protection Is Afforded a Pretrial Detainee?*, 27 S. ILL. UNIV. L.J. 613 (2003); Jeffrey Sturgeon, Comment, *A Constitutional Right to Reasonable Treatment: Excessive Force and the Plight of Warrantless Arrestees*, 77 TEMP. L. REV. 125, 134–40 (2004).

[150] *Compare* Graham v. Connor, 490 U.S. 386, 388 (1989) *with Manuel*, 580 U.S. at 379.

[151] *Kingsley*, 576 U.S. at 399.

deliberate indifference jurisprudence under the Fourteenth Amendment, and have extended the *Kingsley* reasoning from excessive force cases to inadequate medical care cases.[152] This shift away from deliberate indifference, and towards objective reasonableness, should be viewed as a shift away from Eighth Amendment standards and towards Fourth Amendment standards for substantive due process cases under the Fourteenth Amendment.

Youngberg v. Romeo should be viewed as an inadequate medical care case because mental health is contemporaneously understood as a serious medical need. Although many courts have not explicitly held that there is no distinction between mental and physical health, they have observed this diminishing distinction.[153] "The responsibility to provide medical care includes care for a person's mental health: 'We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.'"[154] There is also no significant distinction between involuntarily committed mentally ill inmates and pretrial detainees—both groups are presumed to be innocent and involuntarily detained. Although some suggest that because pretrial detainees are held under the suspicion of committing a crime, that they are distinct from involuntarily committed mentally ill inmates or unaccompanied alien children,[155] this distinction lacks significance because no matter what a pretrial detainee is suspected of, they are *presumed* to be innocent of that suspicion until proven guilty beyond a reasonable doubt.[156]

CONCLUSION

Access to adequate medical treatment is the minimum that the government must provide to pretrial detainees. Medical care is always at its best when it is proactive and preventive. To achieve that goal, objective reasonableness, though the vehicle of professional judgment, should be the standard for all substantive due process, pretrial detainee medical cases. This standard best ensures that pretrial detainees receive adequate medical treatment because unlike deliberate indifference, the professional-judgment standard requires courts to evaluate treatment against evolving medical standards. It, therefore, incentivizes jails and detention centers to employ

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[152] *See* sources cited *supra* note 149. While other circuits have declined to extend the *Kingsley* reasoning to inadequate medical care cases, some have stated in dicta that *Kingsley* created the question as to what the proper standard is. *See, e.g.*, Bowles v. Bourbon Cnty., No. 21-5012, 2021 WL 3028128, at *7 (quoting Richmond v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018)).

[153] Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977); *see also* Torraco v. Maloney, 923 F.2d 231, 234–36 (1st Cir. 1991); Inmates of Allegheny Cnty. Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979); Partridge v. Two Unknown Police Officers of City of Hous., 791 F.2d 1182, 1187 (5th Cir. 1986); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006); Ramos v. Lamm, 639 F.2d 559, 574–75 (10th Cir. 1980); Laaman v. Helgemoe, 437 F. Supp. 269, 313 (D.N.H. 1977).

[154] Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 339 (4th Cir. 2021) (quoting *Bowring*, 551 F.2d at 47).

[155] *Doe 4*, 985 F.3d at 339.

[156] Bell v. Wolfish, 441 U.S. 520, 538–39, 539 n.20 (1979).

proper medical protocols and procedures to avoid liability. A deliberate-indifference standard that requires courts to inquire into an individual's mind to determine whether they were "indifferent" to a detainee's serious medical needs, is insufficient. This is because pretrial detainees are distinct from prisoners who, under the Eighth Amendment, can be punished. Pretrial detainees maintain a presumption of innocence, cannot be punished, and may only be detained for regulatory purposes. When a jail official responsible for a pretrial detainee's medical care substantially deviates from the judgment of a medical professional, they are treating that detainee objectively unreasonable in violation of the Constitution.

Banned in the USA: Teachers' Free Speech in the Classroom

RACHEL EHRLICH*

ARTICLE CONTENTS

INTRODUCTION

In the United States, each state provides free education to children and young adults.[1] As the government provides the public with education, it remains a contentious question who determines the scope of classroom discussion and what is taught—the government, the teachers, or the students' parents?[2] Currently, there is a particularly heated debate over whether there can be state-imposed limitations over classroom discussions.[3]

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[1] EMILY PARKER, EDUC. COMM'N OF THE STATES, CONST. OBLIGATIONS FOR PUB. EDUC. 1 (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

[2] NAT'L CTR. FOR EDUC. STATS., WHO INFLUENCES DECISIONMAKING ABOUT SCHOOL CURRICULUM? 1 (July 1995).

[3] Akilah Alleyne, *Book Banning, Curriculum Restrictions, and the Politicization of U.S. Schools*, CTR. AM. PROGRESS (Sept. 19, 2022), https://www.americanprogress.org/article/book-banning-curriculum-restrictions-and-the-politicization-of-u-s-schools/.

A proliferation of policies banning books and teachings on race and gender are spreading nationwide. The fuel behind these bills are predominantly white parent groups such as Moms for Liberty and Parents Defending Education, who argue that "classroom teachings about race can serve to divide students and give them a pessimistic view of the country's history . . . [and] LGBTQ materials can make students vulnerable to sexual predation."[4] For example, during the final debate for the Virginia Gubernatorial election, Democratic candidate Terry McAuliffe voiced his adamant opposition to so-called parental interference in schools, stating "I'm not go[ing] to let parents come into schools and actually take books out. . . ."[5] Republican candidate Glenn Youngkin seized on McAuliffe's statement by making parents' involvement in education the centerpiece of his campaign.[6] Youngkin, a little-known figure before the election,[7] ultimately won the election by two points.[8] Exit polls revealed that education was the third most important issue to Virginia voters, preceded only by the economy and the COVID-19 pandemic.[9]

Virginia is not alone; voters in many other states have expressed an interest in limiting the content that teachers can teach. During 2022, thirty-six state legislatures considered 137 "educational gag orders," a term opponents used to describe the "state legislative efforts [that] restrict teaching about topics such as race, gender, American history, and LGBTQ+ identities in K–12 and higher education."[10] Most notably in Florida, Governor Ron DeSantis championed and signed The Parental Rights in Education Bill, described by opponents as the "Don't Say Gay Bill," and the Individual Freedom Act, which the DeSantis Administration titled as the

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[4] Asher Lehrer-Small, *The ACLU's Fight Against Classroom Censorship, State by State*, THE 74 (Sept. 16, 2022), https://www.the74million.org/article/the-aclus-fight-against-classroom-censorship-state-by-state/.

[5] S. Ernie Walton, *Why Virginians Should Be Terrified of Terry McAuliffe*, THE AM. SPECTATOR (Oct. 3, 2021, 11:05 PM), https://spectator.org/mcauliffe-echoes-totalitarians-in-debate-comments-and-virginia-voters-should-be-terrified/ ("McAuliffe was likely referencing the situation in Virginia's Fairfax County Public Schools, which were forced to pull two books, 'Gender Queer' and 'Lawn Boy,' after explicit material was revealed by the mother of one of the students during a school board meeting.").

[6] *See* Michael Stratford & Zach Montellaro, *Youngkin Tries to Harness Virginia Parent Anger in Possible '22 GOP Preview*, POLITICO (Oct. 22, 2021, 4:30 AM), https://www.politico.com/news/2021/10/22/virginia-governor-youngkin-education-gop-516625 ("Youngkin's messaging on education has extended well beyond his 'parents first' rallies and has been an almost singular focus of his campaign's TV ads in the final weeks.").

[7] Kathryn Watson, *Who Is Glenn Youngkin, the Republican Who Will Be the Next Governor of Virginia?*, CBS NEWS (Nov. 3, 2021, 7:54 AM), https://www.cbsnews.com/news/who-is-glenn-youngkin-virginia-governor-republican/ ("Until recently, most Americans—and most Virginians—had never heard of him. So who is Youngkin?").

[8] *2021 Virginia Governor Election Results*, CNN, https://www.cnn.com/election/2021/results/virginia/governor (Dec. 3, 2021, 10:21 AM).

[9] Associated Press, *Exit Poll Results: Virginia Voters Explain Which Issues Mattered Most to Them*, ABC7 NEWS, https://wjla.com/news/local/exit-poll-results-virginia-voters-explain-what-mattered-most-to-them (Nov. 2, 2021, 11:45 PM).

[10] Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), https://pen.org/report/americas-censored-classrooms/.

Stop WOKE (Wrong Against Our Kids and Employees) Act.[11] These laws limit the range of acceptable topics that public teachers can discuss as part of their official duties.[12] Since the Parental Rights in Education Bill bans "classroom instruction on gender identity and sexual orientation" without ever defining what constitutes "instruction," if a teacher is teaching about family, and a student with two mothers talks about their family dynamic, it could place a teacher in jeopardy of losing their job.

Opponents of the bills are currently challenging these restrictions, claiming that they unconstitutionally impinge upon the local teachers' First Amendment right to free speech.[13] However, the scope of teachers' First Amendment right while instructing students is unsettled.

Under *Garcetti v. Ceballos*, the Supreme Court determined that public employees enjoy no First Amendment protection for communications made pursuant to their official employment duties.[14] The Supreme Court intentionally did not decide whether this analysis would apply to public educators, allowing circuit courts to decide for themselves.[15] This intentional

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[11] Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html.; *see also* Press Release, Ron DeSantis, Governor, State of Florida, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

[12] Sam LaFrance & Jonathan Friedman, *Educational Intimidation: How "Parental Rights" Legislation Undermines the Freedom to Learn*, PEN AM. (Aug. 23, 2023), https://pen.org/report/educational-intimidation/#:~:text=Educational%20gag%20order%20component%3A%20Teachers,so%20by%20official%20school%20curricula (analyzing the social, political, and economic impact of these various state bills).

[13] M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071, at * 1–2 (N.D. Fla. Feb. 15, 2023) (dismissing plaintiff's amended complaint challenging the Don't Say Gay Bill due to lack of standing). Following the plaintiffs' appeal and defendant's cross-appeal, M.A. v. Fla. State Bd. of Educ., No. 23-11016 (11th Cir. Mar. 29, 2023) (the Florida State Legislature passed an expansion of H.B. 1557, which banned lessons on LGBTQ issues for grades 4-12 and the previous version only banned instruction on such issues in grades K-3). Brandon Girod, *Florida's 'Don't Say Gay' (HB1557) Expanded to All Grades. Everything You Need to Know:*, PENSACOLA NEWS J., https://www.pnj.com/story/news/education/2023/04/19/floridas-dont-say-gay-bill-expanded-through-all-grades-explainer/70132520007/ (Apr. 20, 2023, 12:05 PM). On March 11, 2024, the plaintiffs and the State of Florida entered into a settlement agreement, which clarified the practical ramifications of the Bill, outlining that it only bans classroom *instruction* on the subject of sexual orientation or gender identity, but does not limit teachers from discussing or referencing such topics in the classroom. Patricia Mazzei, *Legal Settlement Clarifies Reach of Florida's 'Don't Say Gay' Law*, N.Y. TIMES (Mar. 11, 2024), https://www.nytimes.com/2024/03/11/us/florida-dont-say-gay-law-settlement.html.; *see also* Cousins v. Sch. Bd. of Orange Cnty., Fla., 636 F. Supp. 3d 1360, 1381 (M.D. Fla. 2022) (dismissing a case challenging the Don't Say Gay Bill for lack of standing and that bullying is "simply a fact of life"). Plaintiff's second amended complaint was similarly dismissed. Cousins v. Sch. Bd. of Orange Cnty., Fla., No. 6:22-CV-1312-WWB-LHP, 2023 WL 5836463, at *14 (M.D. Fla. Aug. 16, 2023); Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (issuing an order that immediately blocked Florida's "Stop W.O.K.E." Act, which curbs classroom discussion on race and gender, from being enforced at the college level). The Eleventh Circuit subsequently denied a request to stay the injunction, pending appeal from a final district court decision. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

[14] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[15] *Id.* at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

ambiguity has led to broadly different approaches to the question across jurisdictions.[16]

Part I will examine the analysis of free speech rights of public employees before and after *Garcetti*. Part II will examine the two-tier circuit split over whether *Garcetti* has an exception for public educators and whether that exception only applies to educators at the university level, thus exploring how (or if) these bills will withstand First Amendment challenges. Part III will discuss the harm that can be incurred if *Garcetti* is applied to teachers' speech, allowing these bills to move forward, and perhaps potential avenues students can take to protect themselves from these bills.

I. DUAL PERSONALITY OF A GOVERNMENT PUBLIC EMPLOYEE

This discusses the established free speech rights of public employees. Part I.A. discusses the *Pickering-Connick* standard. Part I.B discusses the *Garcetti* opinion and its effect on the free speech rights of public employees. *Garcetti* changed the landscape of public employee speech by creating a bright-line test—but along with its clarity, it severely limited public employees' speech.

A. Pickering-Connick *Standard*

The First Amendment of the United States Constitution grants the right to free speech, stating: "Congress shall make no law . . . abridging the freedom of speech . . . ."[17] But the protections afforded to speech are *not* absolute. Expressions that fall within certain limited categories deemed to lack the values that the First Amendment is designed to protect, e.g. fighting words, are therefore not granted its protection.[18] Because of the Court's adherence to a narrow limit to free speech, there is a reluctance to abridge free speech, as it is regarded as fundamental to the country's style of democracy.[19]

Despite the government having sharp limits on its ability to restrict speech of private citizens, an individual who works for the government is not merely a private citizen, but also a public employee of the government.[20] Employers are allowed to restrict what their employees say because employees are deemed to be agents of their employers.[21] Therefore, when it

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[16] *See infra* Part II.

[17] U.S. CONST. amend. I.

[18] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992) ("fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.")

[19] *See, e.g.*, Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.")

[20] *Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

[21] *Garcetti*, 547 U.S. at 411.

acts as an employer, the government *does* have the power to restrain or discipline its employees for their speech.[22] This dual personality of public employees — representatives of the state and private citizens — has made it difficult for the courts to draw a clear line between when the public employee does or does not have a right to free speech.[23]

For most of the 1900s, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."[24] However, in 1968, the court changed this rule dramatically in *Pickering v. Bd. of Ed.*[25] In *Pickering*, the Supreme Court considered whether a high school teacher who wrote a letter to a local newspaper criticizing the school board's budgetary decisions was justly fired.[26] In its analysis, the Court created a test to balance the speech of public employees "commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[27] If a public employee is speaking on a matter of public concern, the court will weigh their statement against the potential harm and interference it causes to the employer.[28]

The Court's balancing test ultimately weighed in favor of the teacher because the letter did not encumber "the teacher's proper performance of his daily duties in the classroom or [] have interfered with the regular operation of the schools generally."[29] Even though the teacher was an employee of the school, the Court reasoned that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[30]

Fifteen years later, in *Connick v. Myers*, the Court clarified the *Pickering* decision by reiterating its emphasis that the right of a public employee to speak as a citizen is implicated when they are speaking on matters of public concern.[31] *Connick* concerned an Assistant District Attorney who prepared a critical questionnaire about his office's transfer policy, internal pressure on employees to work on political campaigns, and

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[22] *Id.*

[23] *Id.*

[24] Connick v. Myers, 461 U.S. 138, 143 (1983).

[25] Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

[26] *Id.* at 566–67.

[27] *Id.* at 568.

[28] *Id.* at 569–70 n.3 (discussing some considerations of the State that may limit a teacher's right to speak discussed throughout the opinion: (1) the need to maintain "discipline by immediate superiors or harmony among coworkers;" (2) the need to curtail conduct which "impede[s] the teacher's proper performance of his daily duties in the classroom;" and (3) the need to foster a close and personal "relationship between superior and subordinate . . .[and not] undermine the effectiveness of the working relationship between them").

[29] *Id.* at 572–73.

[30] *Id.* at 563.

[31] Connick v. Myers, 461 U.S. 138, 140 (1983).

general office morale.[32] The Court reiterated that this right to such dissent occupies the "highest rung of the hierarchy of First Amendment values."[33] However, the Court placed limits on what constitutes a matter of public concern: "employee expression [that] cannot be fairly considered as relating to any matter of political, social, or other concern of the community," is deemed not public concern.[34] The Court ultimately held that the District Attorney's office was justified in terminating the attorney who prepared and published the questionnaire, determining that his actions constituted "employee grievance concerning internal office policy" rather than a matter of public concern.[35] To reach this conclusion, the Court set up a two-step test to evaluate free speech claims of government employees.

The first prong of the test asks whether the public employee is speaking on a matter of public concern, using the definition provided that encompasses political, social, and community concerns."[36] If the first prong is satisfied, the next step in determining who prevails is to balance the interests of the speaker, as a citizen, in commenting upon matters of public concern against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[37] Under this evaluation, the Court determined Connick's interest in his questionnaire did not overcome his employer's interest in the efficiency of its services. The Court asserted that the District Attorney's office "should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[38] The *Pickering-Connick* test subsequently became the governing standard for free speech claims from public employees.

B. Garcetti *Altering the* Pickering-Connick *Standard*

The *Pickering-Connick* test governed free speech claims of public employees for the following two decades, until *Garcetti v. Ceballos*[39] shifted the landscape. Richard Ceballos, a Deputy District Attorney for the Los Angeles County District Attorney's Office, was working on a pending criminal case.[40] Believing that there were inaccuracies in an affidavit used to obtain a critical search warrant, Ceballos relayed his concerns to his

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[32] *Id.* at 138.

[33] *Id.* at 145 (quoting Carey v. Brown, 477 U.S. 455, 467 (1980)).

[34] *Id.* at 146.

[35] *Id.* at 154.

[36] *Id.* at 138–39 (determining whether an employee's speech addresses a matter of public concern, one must look at "content, form, and context of a given statement, as revealed by the whole record").

[37] *See generally* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (finding in favor of employee because the communication concerning the school district's allegedly racially discriminatory policies involved a matter of public concern that was not outweighed by employer discipline); Rankin v. McPherson, 483 U.S. 378 (1987) (finding in favor of employee because the communication when viewed in context addressed the policies of the President's administration; therefore, it was considered a matter of public concern that was not outweighed by employer discipline).

[38] *Connick*, 461 U.S. at 146.

[39] Garcetti v. Ceballos, 547 U.S. 410, 410 (2006).

[40] *Id.* at 413.

supervisors, wrote a memo about it, and submitted a request to dismiss the case.[41] Rather than dismissing the case, the District Attorney retaliated against Ceballos by transferring him to another courthouse, reassigning him from deputy to trial position, and denying him a promotion.[42]

Ceballos was a government employee and therefore faced the dilemma of the dual personality that encompasses that title—a citizen who works for the government and therefore is required to comply with the employer's limitations, but nonetheless deserves the full rights of a citizen. The Court resolved this issue by reasoning that "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employees might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[43] Therefore, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[44] Since Ceballos' expressions were made pursuant to his official duties as calendar deputy, they were afforded no First Amendment protection.[45] The decision in *Garcetti* drastically altered the *Pickering-Connick* analysis; even if public employees are speaking on a matter of public concern, if they speak pursuant to their official duties, they no longer have the privilege to speak as a citizen on that matter. Only if the public employee is not speaking pursuant to their official duties would the *Pickering-Connick* analysis be employed.

In his dissenting opinion joined by Justices Ginsberg and Stevens, Justice Souter worried about the implications of this decision to "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[46] Although the majority gave credence to Justice Souter's dissent by recognizing that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests," the majority explicitly declined to decide whether the analysis in *Garcetti* would apply to a case involving speech related to scholarship or teaching.[47] Accordingly, when cases implicating teacher's free speech arise, circuit courts have the individual discretion to curtail or broaden teachers' free speech rights by opting in or out of applying *Garcetti.*

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[41] *Id.* at 414.
[42] *Id.* at 415.
[43] *Id.* at 422–23.
[44] *Id.* at 421.
[45] *Garcetti*, 547 U.S. at 421.
[46] *Id.* at 438 (Souter J., dissenting).
[47] *Id.* at 425 (majority opinion).

II. TWO-TIER CIRCUIT SPLIT

The blank space that *Garcetti* left for speech related to scholarship and teaching has not been addressed by the Supreme Court since the 2006 decision. In its wake, the circuit courts have taken advantage of their discretion to decide for their circuits whether *Garcetti* should apply to speech of public teachers.[48] A circuit split has emerged on the speech of teachers in lower schools — elementary, middle, and high schools—as well as the speech of university professors.

A. *Tier I: Does* Garcetti *Apply to Lower Schools?*

The Sixth, Seventh, and Ninth Circuits have applied *Garcetti* to primary and high school public educators' speech while teaching, thereby removing any potential privilege a teacher had on any speech made by the teacher during the course of teaching.[49] The Tenth Circuit has not addressed whether *Garcetti* would apply in the classroom, but has gone so far to apply it to a school teacher's speech about curriculum and pedagogy outside the classroom.[50] The Second, Third, and Fourth Circuits declined to resolve the applicability of *Garcetti*, but these Circuits view a teacher's curricular and pedagogical choices as categorically unprotected speech, intended to further the goals of the schools, rather than as an arena for private speech.[51]

The Sixth Circuit took a different approach. In *Evans-Marshall v. Board of Education*, the Sixth Circuit held that *Garcetti* established a new threshold requirement that applied to a high school teacher's curricular speech—despite the speech being on matters of public concern and the Pickering balance requirement ruling in the teacher's favor. [52] In *Evans-*

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[48] *See generally* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 332 (6th Cir. 2010); Brown v. Chicago Bd. of Educ., 824 F.3d 713, 714 (7th Cir. 2016); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 964 (9th Cir. 2011); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007); Borden v. Sch. Dist., 523 F.3d 153, 171 n.13 (3d Cir. 2008); Edwards v. Cal. Univ. of Pa., 156 F. 3d 488, 491 (3d Cir. 1998); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990); Lee-Walker v. N.Y.C. Dep't. of Educ., 220 F. Supp. 3d 484, 492 (S.D.N.Y. 2016), *aff'd*, 712 F. App'x 43 (2d Cir. 2017); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 (4th Cir. 2007).

[49] *Evans-Marshall*, 624 F.3d at 332; *Brown*, 824 F.3d at 714; *Johnson*, 658 F.3d at 964.

[50] *Brammer-Hoelter*, 492 F.3d at 1204 (discussing how a group of teachers would meet off-campus and after hours to discuss concerns and grievances about the operation, management, and mission of the Academy). The Tenth Circuit applied the *Garcetti-Pickering* analysis and held that the vast majority of the matters were related to their duties as teachers and therefore enjoy no First Amendment protection and can be freely regulated by the Academy. *Id.* For the remaining matters discussed that were unrelated to teachers' employment duties, the court went through the traditional *Pickering-Connick* test to determine if the speech was a matter of public concern and outweighed the interest of the state as the employer. *Id.*

[51] *See Borden*, 523 F.3d at 171 n.13 (applying *Garcetti* to coach's speech since speech is not on a matter of public concern); *Edwards*, 156 F. 3d at 491 ("[A]lthough [a teacher] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom."); *Bradley*, 910 F.2d at 1176 ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected . . . her in-class conduct is not."); *Lee-Walker*, 220 F. Supp. 3d at 492 (deciding not to apply *Garcetti* because of the dubiousness of it applying to classroom instruction); *Lee*, 484 F.3d at 694 (choosing explicitly to not apply *Garcetti* as well).

[52] *Evans-Marshall*, 624 F.3d at 332.

Marshall, a high school teacher assigned her students to read Fahrenheit 451, in accordance with the school's standard curriculum.[53] To explore the book's central theme of censorship, the teacher assigned her students into groups and instructed them to choose a book from "100 Most Frequently Challenged Books"[54] and to lead an in-class debate about that book and why it was seemingly viewed as controversial.[55] Two student groups picked *Heather Has Two Mommies*,[56] which led to parent complaints.[57] When the teacher assigned *Siddhartha*[58] several parents complained about its explicit language and sexual themes.[59] The principal also received complaints about the teacher's choice of student writing samples which she shared with students seeking guidance for assignments.[60] The school subsequently did not renew the teacher's annual contract, and she sued for violation of her free-speech rights.[61] The Sixth Circuit acknowledged and quickly dispensed with Justice Souter's dissent with the majority's ruling in *Garcetti* imperiling academic freedom, because it addressed professors at the university and college level.[62] Moreover, the court opined that *even if* academic freedom "could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside the classroom."[63] As the school board is the one who hires the teachers, the court held that the board therefore has the ultimate decision as to what is discussed and taught in the classroom.[64] The teacher—like any other ordinary citizen—has no more free-speech right than anyone else to dictate the school's curriculum.[65] This is notably in contrast to the teacher in *Pickering* who, like other private citizens, did have a right to criticize the school board in its funding choices. The Sixth Circuit held that the *Evans-Marshall* teacher made her curricular and pedagogical choices about how to teach English to fifteen-year-old

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[53] RAY BRADBURY, FAHRENHEIT 451 (1953) (chronicling a world where books are outlawed by the government, follows the protagonist, a fireman, whose job is to burn books, and his disillusionment in censoring literature and destroying knowledge).

[54] *100 Most Frequently Challenged Books: 1990-1999*, AM. LIBR. ASS'N., https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/decade1999 (last visited Mar. 23, 2024).

[55] *Evans-Marshall*, 624 F.3d at 334–35.

[56] LESLÉA NEWMAN, HEATHER HAS TWO MOMMIES 3 (Allison Books 3d ed. 2009) (1989).

[57] *Evans-Marshall*, 624 F.3d at 335.

[58] HERMAN HESSE, SIDDHARTHA (Susan Bernofsky trans., Modern Library 2006) (1922) (chronicling the spiritual journey of a man named Siddhartha during the time of the Gautama Buddha).

[59] *Evans-Marshall*, 624 F.3d at 335.

[60] *Id.* at 336 (describing how some writing samples included a first account rape and a story about a young boy who murdered a priest and desecrated a church).

[61] *Id.*

[62] *Id.* at 343.

[63] *Id.* at 344.

[64] *Id.* at 340 (*quoting* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("And if it is the school board that hires that speech, it can surely 'regulate the content of what is or is not expressed' . . . . Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom.").

[65] *Evans-Marshall*, 624 F.3d at 340.

students in connection with her official duties as a teacher, and therefore, under *Garcetti*, had no First Amendment claim.[66]

The Seventh Circuit mirrored this logic in *Brown v. Chicago Board of Education*.[67] The court held that, because of *Garcetti*, a teacher's "First Amendment claims fail right out of the gate."[68] In *Brown*, the teacher confiscated a note passed during class.[69] After reading the note's inappropriate use of the n-word, the teacher decided to use this as an opportunity to teach his students about the harmful nature of the word.[70] By chance, the school principal was observing this lesson and swiftly suspended the teacher for violating sections of the Employee Discipline and Due Process Policy which prohibits "[u]sing verbally abusive language to or in front of students."[71] The court applied *Garcetti* to the teacher's speech, holding that in-classroom instruction—whether an impromptu lesson or part of the curriculum—constitutes statements pursuant to the teacher's official duties and therefore the teacher enjoyed no First Amendment claim.[72]

This decision was not the first time the Seventh Circuit applied *Garcetti* to narrow the scope of acceptable curricular instruction. In *Mayer v. Monroe County Community School Corp.*,[73] a former public-school teacher brought a § 1983 claim against her former school for terminating her after speaking about personal political stances in a current events lesson. The court held that the teacher's current events lesson was part of her assigned tasks in the classroom and therefore *Garcetti* applied.[74] In fact, the court went so far as to state that restricting the speech of teachers—who are specifically hired for their speech—is "an easier case for the employer than *Garcetti*, where speech was not what the employee was being paid to create. . . ."[75]

The last circuit to apply *Garcetti* to limit teacher's instructional speech in elementary and high schools was the Ninth Circuit in *Johnson v. Poway Unified School District*.[76] In *Johnson*, a high-school calculus teacher was forced to remove banners displayed in his classroom that were viewed as espousing religion.[77] The court held that since the teacher's "speech 'owe[d]

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[66] *Id*.

[67] *Brown*, 824 F.3d at 713.

[68] *Id.* at 715.

[69] *Id.* at 714.

[70] *Id.*

[71] *Id.* at 714–16.

[72] *Id.* The court also notes that maintaining classroom order is part of a teacher's duties and this lesson was an attempt to manage student behavior and therefore was pursuant to the teacher's official duties. Brown v. Chicago Bd. of Educ., 824 F.3d at 715 (relying on Weintraub v. New York Bd. of Educ., 593 F.3d 196, 198 (2d Cir. 2010)).

[73] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

[74] *Id.* at 480. Mayer involved an elementary school teacher talking about her involvement in a political demonstration during her current-events class.

[75] *Id.* at 479.

[76] *Johnson*, 658 F.3d at 964.

[77] *Id.* at 958. There were two banners under review—one had stripes in red, white, and blue and in each stripe had one of the following verses: "IN GOD WE TRUST," "ONE NATION UNDER GOD," "GOD BLESS AMERICA," and "GOD SHED HIS GRACE ON THEE." The other stated: "All men are

its existence' to his position as a teacher, then Johnson spoke as a public employee, not as a citizen, and our inquiry is at an end."[78] Just like other specific actions of teachers —such as taking attendance, supervising students, and teaching the curriculum—the hanging of the decorative banners in a teacher's classroom was an act that *only* a teacher—a government employee, not an ordinary citizen—could do.[79] In this decision, the Ninth Circuit extended *Garcetti* to implicate a teacher's choice of decorations in the school. This seems to be beyond the pale of the Sixth and Seventh Circuit which just applied *Garcetti* to teacher's classroom instruction and assignments.

In contrast, the Second and Fourth Circuits have both intentionally declined to apply *Garcetti* to educator's speech in their teaching capacity. In *Lee-Walker v. N.Y.C Department of Education*,[80] the Second Circuit was confronted with whether to apply *Garcetti* to a teacher's § 1983 action for First Amendment retaliation. The ninth grade English teacher was fired for teaching about the Central Park Five case,[81] to "highlight 'an American societal tendency to rush to adverse legal conclusions against black males.'"[82] The court, declined to apply *Garcetti* to the case at hand, relying on the reluctance of the majority opinion in *Garcetti* to decide if the analysis of "pursuant to . . . official duties" would apply to speech related to scholarship teaching.[83] Instead, the Second Circuit relied on its pre-*Garcetti* standard that allows school administrators to "limit the content of school-sponsored speech so long as the limitations are 'reasonably related to legitimate pedagogical concerns.'"[84] To determine "[w]hether a school official's action is reasonably related to a legitimate pedagogical concern will depend upon, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation."[85] Through this alternate test, the Second Circuit is recognizing that school administrators have a need to limit the content of school-sponsored speech, but not at the complete expense of teacher's rights to speech.

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created equal, they are endowed by their CREATOR." On that banner, the word "creator" occupied its own line, and each letter of "creator" was capitalized and nearly double the size of the other text.

[78] *Id.* at 966 (quoting *Garcetti*, 547 U.S. at 419).

[79] *Id.* at 968.

[80] Lee-Walker v. N.Y.C. Dep't of Educ., 220 F. Supp. 3d 484 (S.D.N.Y. 2016), *aff'd*, 712 F. App'x 43 (2d Cir. 2017).

[81] *Id.* at 487 (discussing the Central Park Five case about the aggravated assault and rape of a white woman in Manhattan's Central Park in which five Black and Latino youths were convicted for the crime and served sentences ranging from six to twelve years before being exonerated). *See generally*, People v. Wise, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002).

[82] *Lee-Walker*, 220 F. Supp. 3d at 488.

[83] *Id.* at 493; *see also* Panse v. Eastwood, 303 F. App'x 933, 934 (2d Cir. 2008) ("[i]t is an open question in this Circuit whether *Garcetti* applies to classroom instruction[]" in determining whether *Garcetti* would deny First Amendment protection to an art teacher who encouraged his students to attend a sketching class involving nude models).

[84] *Id.* at 493 (quoting Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 722 (2d Cir. 1994)).

[85] *Id.* at 492 (quoting *Silano*, 42 F.3d at 722–23 (internal quotation marks omitted)).

Similar to the Second Circuit, the Fourth Circuit in *Lee v. York County School Division*,[86] declined to adopt *Garcetti* to a case about a high school teacher being forced to remove his religious classroom bulletin boards and instead applied the pre-*Garcetti*, *Pickering-Connick* standard.[87] Unlike the Ninth Circuit which applied *Garcetti* to the teacher's religious bulletin boards, thereby quickly dismissing the teacher's claim to his right of classroom decoration, the Fourth Circuit undertook a thorough analysis in determining whether the teacher had a right to keep his religious articles on a bulletin board posted in his classroom. The court recognized the teacher's compelling argument that the items removed from the bulletin "constitutes speech concerning a public matter, because each item involves either a political issue or a matter of interest to the community."[88] For example, the removed article outlining religious and philosophical differences between President George W. Bush and his challenger, John Kerry, explains political information on presidential candidates.[89] However, precedent dictates that public schools possess the right to regulate speech that occurs in the classroom, and that speech curricular in nature are per se not a matter of public concern.[90]

B. *Tier II: Does* Garcetti *Apply to Universities?*

The circuit courts further split on whether *Garcetti* applies to educators in a university or college setting. Universities provide a wholly different context for teachers and their level of instruction. Unlike the compulsory settings of lower schools, students decide for themselves whether they want to attend college or university, and what type of school they would like to attend. The students are usually of age (adults), and therefore can apply their sophistication and maturity in listening to the professors' teachings and forming their own conclusions on the material. Additionally, the professors at universities are usually scholars or researchers and therefore need protection to insulate their opinions and findings from non-academic judgment by college administrators.[91]

In this determination, the Fourth Circuit maintains its position of not applying *Garcetti* to professors.[92] The Sixth and Ninth Circuits, which

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[86] *See generally* Lee v. York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

[87] *Id.* at 694 n.11 ("The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching . . . . Thus, we continue to apply the *Pickering-Connick* standard."); *see also* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 171 n.13 (3d Cir. 2008) (engaged in the hypothetical that if *Garcetti* applied to this case, the football coach's bowing of head and taking a knee during the pre-game meal prayer would not be protected as they were made pursuant to his official duties as coach of the team, but does away with the hypothetical because the coach's speech was not a matter of public concern and therefore enjoys no First Amendment protection regardless).

[88] *Lee*, 484 F.3d at 694–95.

[89] *Id*. at 690.

[90] *Id.* at 693–95.

[91] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 288 n.137 (1989).

[92] *See* Adams v. Tr. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 563–64 (4th Cir. 2011).

maintain that *Garcetti* does apply to teachers in lower schools, both held that it does not apply to professors at the college level.[93] The Third and Seventh Circuit apply *Garcetti* to university professors but to cases that do not involve speech related to scholarship and teaching.[94]

The Fourth Circuit in *Adams v. Trustees of the University of N.C.-Wilmington*,[95] reiterated its position in *Lee* that *Garcetti*'s "pursuant to duties" analysis does not apply to teachers' First Amendment rights in the classroom.[96] Moreover, the court highlighted that the language in the *Garcetti* opinion is specifically concerned with the *Garcetti* analysis applying in the academic context of a public university; therefore, the court held that it surely should not apply to the scholarly writings of this university's assistant professor.[97] To note, the court considered that *Garcetti* may apply to "instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching."[98] This consideration unfolded when the Third and Seventh Circuits applied *Garcetti* to a university professor's speech in which the speech was unrelated to scholarship and teaching.[99]

In *Meriwether v. Hartop*, Nicholas Meriwether, a philosophy professor at Shawnee State University, sued the school for being forced to refer to his students by their preferred pronouns, claiming that the school's gender-identity policy violated the Free Speech Clause of the First Amendment.[100] Recognizing that the Supreme Court expressly declined to address whether its analysis in *Garcetti* would apply to cases involving speech related to scholarship or teaching, the Sixth Circuit invoked two prior Supreme Court's opinions: *Sweezy v. State of New Hampshire*[101] and *Keyishian v. Board of Regents*.[102] In both cases, the Supreme Court established that the First

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[93] *See* Demers v. Austin, 746 F.3d 402, 412–13 (9th Cir. 2014); Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021).

[94] *See* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 171 n.13 (3d Cir. 2008); *see also* Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (applying *Garcetti* to university professor's speech when he assisted a student at his disciplinary hearing); Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (applying *Garcetti* to university professor's speech when he complained about the school's use of grant funds).

[95] Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011) (regarding an assistant professor of criminology at University of North Carolina who published two papers: *Welcome to the Ivory Tower of Babel*: *Confessions of a Conservative College Professor,* and co-authored *Indoctri-Nation: How Universities are Destroying America*, which vocalized his views on political and social issues at the university and in society at large).

[96] *Id.* at 562 ("Our conclusion is based on the clear reservation of the issue in *Garcetti*, Fourth Circuit precedent, and the aspect of scholarship and teaching reflected by Adams' speech.").

[97] *Id.* at 563.

[98] *Id.*

[99] Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (applying *Garcetti* to university professor's speech when he assisted a student at his disciplinary hearing); Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (applying *Garcetti* to university professor's speech when he complained about the school's use of grant funds).

[100] Meriwether v. Hartop, 992 F.3d 492, 502 (6th Cir. 2021).

[101] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[102] Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

Amendment protects the free-speech rights of college professors when they are teaching.[103] The protections of the First Amendment are afforded to facilitate a marketplace of ideas that encourages freedom of thought and expression, and the Courts specially noted that "the classroom is *peculiarly* the 'marketplace of ideas.'[104] The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[105] Therefore, to "impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[106] Recognizing the importance of the college classroom in the free exchange of ideas, the Sixth Circuit invoked the hypothetical academic-freedom exception in *Garcetti* to "cover[] all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[107]

Likewise, in *Demers v. Austin*,[108] the Ninth Circuit held that *Garcetti* does not apply to a university professor's teaching and scholarly writings due to the caveat in *Garcetti* of a possible exception for university professors and that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[109]

A majority of the Circuit Courts — Sixth, Seventh, Ninth, and Tenth — have applied *Garcetti* to teachers' speech at the primary and secondary level, and those who opted not to directly apply *Garcetti*—Third, Fourth, and Fifth—can rely on their pre-*Garcetti* decisions that hold pedagogical and in-class conduct to be in control of the institution, not the teachers. Despite the way each court comes to their conclusion, the common thread running through them is that in-class curricular speech at the primary or secondary level is not protected by the First Amendment. However, at the college level, the majority of courts that have addressed this question—

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[103] *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603.

[104] *Keyishian*, 385 U.S. at 603 (emphasis added).

[105] *Id.* (alteration in original) (emphasis added) (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[106] *Sweezy*, 354 U.S. at 250.

[107] Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021). The court went through a *Pickering-Connick* analysis. It found that the speech was a matter of public concern as "[p]ronouns can and do convey a powerful message implicating a sensitive topic. . . ." *Id.* at 508. Since the professor came to a compromise that he would call the student by their last name and this facilitated the student's participation, the court found that the school's interest was minimal as the teacher's speech did not "inhibit[] his [daily] duties in the classroom, hamper[] the operation of the school, or [deny the student] any educational benefits." *Id.* at 511. Therefore, the Pickering balance came in favor of the teacher, and the court held that the university violated the teacher's free-speech rights when they fired the teacher, "flout[ing] that core principle of the First Amendment." *Id.*

[108] Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).

[109] *Id.* at 411 (David Demers, associate professor at Washington State University, brought action alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet called "The 7-Step Plan" which discusses a proposal for the school to restructure departments and included drafts from an in-progress book titled "The Ivory Tower of Babel" which examined the role and function of social science research in society).

Fourth, Sixth, and Ninth—hold that *Garcetti* does not apply to professors, and the Third and Seventh Circuit apply *Garcetti* narrowly to professors when it does not involve speech related to scholarship and teaching.

The Eleventh Circuit has not yet been confronted with a case that would involve applying *Garcetti*. This is likely to change, considering the number of lawsuits being filed in response to the Don't Say Gay Bill and Stop WOKE Act.[110] If these cases make it to the appeals court, they are likely to follow the majority of its sister courts in holding that *Garcetti* applies to the primary and secondary school, thereby allowing the Don't Say Gay Bill to succeed in any First Amendment challenges. The Eleventh Circuit may hold that *Garcetti* does not apply to teachers at the university level, allowing the Stop WOKE Act to apply only to lower schools.[111] These decisions can impact the scope and implementation of the Florida bills.

III. FLORIDA BILLS CENSORING TEACHERS' SPEECH

The Eleventh Circuit should not adopt *Garcetti*. Teachers are deserving of First Amendment rights; applying *Garcetti* to teachers strips them of that right. Moreover, in a state such as Florida where these bills exist, a teacher can be fired for a loose, vague translation of violating the bill and therefore needs the protection of the court. Florida's ban could even potentially curtail efforts from teachers to use pride symbols and posters in their classroom to build a safer environment for queer kids. Accordingly, the court should rely on the *Pickering- Connick* standard, which would allow for some nuance. Cases where the teacher is staying in line with class curriculum, but a question or discussion on gender or race arises from an assigned book, can

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[110] *See* M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071, at *1–2 (N.D. Fla. Feb. 15, 2023) (dismissing plaintiff's amended complaint challenging the Don't Say Gay Bill due to lack of standing). Following the plaintiffs' appeal and defendant's cross-appeal, M.A. v. Fla. State Bd. of Educ., No. 23-11016 (11th Cir. Mar. 29, 2023) (the Florida State Legislature passed an expansion of H.B. 1557, which banned lessons on LGBTQ issues for grades 4-12 and the previous version only banned instruction on such issues in grades K-3); *see also* Cousins v. Sch. Bd. of Orange Cnty., Fla., 636 F. Supp. 3d 1360, 1381 (M.D. Fla. 2022) (dismissing a case challenging the Don't Say Gay Bill for lack of standing and that bullying is "simply a fact of life"); Cousins v. Sch. Bd. of Orange Cnty., Fla., No. 6:22-CV-1312-WWB-LHP, 2023 WL 5836463, at *14 (M.D. Fla. Aug. 16, 2023); Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (issuing an order that immediately blocked Florida's "Stop W.O.K.E." Act, which curbs classroom discussion on race and gender, from being enforced at the college level). The Eleventh Circuit subsequently denied a request to stay the injunction, pending appeal from a final district court decision. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

[111] Pernell v. Fla. Bd. of Governors of State Univ. Sys., 2022 WL 16985720, at *1290 (quoting Paul Farhi, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, WASH. POST, (Feb. 24, 2017) https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html.) (citing Austin v. Univ. of Fla. Bd. of Tr., 580 F. Supp. 3d 1137, 1175 (N.D. Fla. 2022)) (granting a preliminary injunction to not enforce the Individual Freedom Act at the university level and noting, "[It is] "crystal clear [that] both robust intellectual inquiry and democracy require light to thrive. Our professors are critical to a healthy democracy, and the State of Florida's decision to choose which viewpoints are worthy of illumination and which must remain in the shadows has implications for us all. If our 'priests of democracy' are not allowed to shed light on challenging ideas, then democracy will die in darkness. But the First Amendment does not permit the State of Florida to muzzle its university professors, impose its own orthodoxy of viewpoints, and cast us all into the dark.")

be protected under the *Pickering-Connick* standard. Additionally, a history or current events lesson *should* be able to mention the racist undertones behind the event. Florida's ban on "race superiority" is an attempt at erasing Black history and limiting instruction on critical race studies.[112]

The issue of whether to apply *Garcetti* has escalated not just by court cases and individual teacher actions, but legislative action on behalf of conservative states seeking to constrain teacher instruction on certain topics.[113] Recently, Governor Ron DeSantis of Florida enacted two bills that would censor the speech of school teachers: The Parental Rights in Education bill which "prohibits classroom discussion about sexual orientation or gender identity in certain grade levels"[114] and the Stop Wrongs Against Our Kids and Employee, intentionally acronymic to be called the Stop WOKE Act, which prevents discriminatory instruction in the workplace and public schools, by:

> subjecting any K-20 public education student or employee to training or instruction, that espouses, promotes, advances, inculcates, or compels such individual to believe the following concepts constitutes an unlawful employment practice or unlawful discrimination:
> 1. Members of one race, color, national origin or sex are morally superior to members of another race, color, national origin or sex.
> 2. A person by virtue of his or her race, color, national origin, or sex is inherently racist, sexist or oppressive, whether consciously or unconsciously.
> 3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin or sex .
> 4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
> 5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because

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[112] The Stop WOKE Act specifies that students should not be subjected to the following concept: "members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex." FLA. STAT. § 1000.05(e)(4)(1)(1) (2023); *see also* Janai Nelson, *Ron DeSantis Wants to Erase Black History. Why?*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/opinion/ron-desantis-black-history.html ("Florida's rejection of the A.P. course and Mr. DeSantis's demand to excise specific subject areas from the curriculum stand in stark opposition to the state-issued mandate that all students be taught 'the history of African Americans . . . .'").

[113] Young, *supra* note 10, at 1.

[114] H.B. 1557, § 1001.42 Fla. H.R. (2022) (requiring schools to notify parents about changes in student services, such as if a transgender or nonbinary student wants to use new bathrooms or locker facilities, or seeks to change their name or pronouns at school). Due to the bill's discriminatory nature towards gay students, it has been coined the "Don't Say Gay" bill. *Id.*

> of, actions committed in the past by other members of the same race, color, national origin, or sex.
> 6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse diversity, equity, or inclusion.
> 7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
> 8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.
> However, training or instruction may include a discussion of such concepts if they are presented in an objective manner without endorsement.[115]

DeSantis signed these bills to assure "that public schools should focus on teaching core academics, not on pushing a liberal ideology."[116] These two bills have received considerable backlash for draconian censorship. The Stop WOKE bill is a direct response to the racial justice movement of 2020 that brought attention and focus on Critical Race Theory.[117] These bills are DeSantis' attempt not just to limit instruction on these topics, but to galvanize conservative voters around grievance politics, and racist and homophobic sentiments. Lawsuits challenging these laws have been filed.[118]

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[115] H.B. 7, § 1000.05(4), 2022 Fla. Laws.

[116] Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders*, N.Y. TIMES (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html.; *see also* Press Release, Ron DeSantis, Governor of Fla., Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

[117] Laura Ansley, *Don't Say Gay, Stop WOKE, Banned Books, and Anti-Trans Laws*, AM. HIST. ASS'N (Feb. 10, 2023), https://www.historians.org/research-and-publications/perspectives-on-history/february-2023/dont-say-gay-stop-woke-banned-books-and-anti-trans-laws-the-ahas-teaching-through-the-backlash-webinar.

[118] *See* M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071, at *1–2 (N.D. Fla. Feb. 15, 2023) (dismissing plaintiff's amended complaint challenging the Don't Say Gay Bill due to lack of standing). Following the plaintiffs' appeal and defendant's cross-appeal, M.A. v. Fla. State Bd. of Educ., No. 23-11016 (11th Cir. Mar. 29, 2023) (the Florida State Legislature passed an expansion of H.B. 1557, which banned lessons on LGBTQ issues for grades 4-12 and the previous version only banned instruction on such issues in grades K-3); *see also* Cousins v. Sch. Bd. of Orange Cnty., Fla., 636 F. Supp. 3d 1360, 1381 (M.D. Fla. 2022) (dismissing a case challenging the Don't Say Gay Bill for lack of standing and that bullying is "simply a fact of life"); Cousins v. Sch. Bd. of Orange Cnty., Fla., No. 6:22-CV-1312-WWB-LHP, 2023 WL 5836463, at *14 (M.D. Fla. Aug. 16, 2023); Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (issuing an order that immediately blocked Florida's "Stop W.O.K.E." Act, which curbs classroom discussion on race and

These bills are extremely worrisome due to concerns of the chilling effect they can have on teachers, thereby posing a direct negative impact on their students.

A. *The Harm That Can Be Caused From These Bills*

Laws, such as Florida's, which severely restrict teachers from discussing gender identity and expression in the classroom, can lead to a hostile and discriminatory environment for students with minority sexual orientations.[119] This can lead to irrevocable harm. The Trevor Project, a nonprofit suicide prevention organization for LGBTQ[120] youth—who are more prone to suicide risk because of their mistreatment and stigmatization in society—found that 45% of LGBTQ youth seriously considered attempting suicide in the past year.[121] This "hateful bill" could likely put LGBTQ students at greater risk.[122] This discrimination and isolation of LGBTQ youth, can lead to them experiencing even lower levels of self-esteem and higher levels of depression.[123]

Additionally, the Don't Say Gay Bill would preclude teachers from effectively helping or supporting students with minority sexual orientations. Teachers play a pivotal role in a student's life, and many students consider their teachers as much more than their educators.[124] Particularly for students

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gender, from being enforced at the college level). The Eleventh Circuit subsequently denied a request to stay the injunction, pending appeal from a final district court decision. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023); *see also* Ansley, *supra*, note 117; Mervosh, *supra* note 116 ("In response to a lawsuit challenging the law, state officials said that gay teachers could display family photos, employees could intervene against bullying based on gender and sexuality, and schools could host clubs for LGBTQ students. The law does not ban 'incidental references in literature to a gay or transgender person or to a same sex couple,' according to court documents. Still, the law has left some educators wondering: Where does discussion end and instruction begin?").

[119] Hannah Natanson & Mariah Balingit, *Teachers Who Mention Sexuality Are "Grooming" Kids, Conservatives Say*, WASH. POST (Apr. 5, 2022, 9:04 AM), https://www.washingtonpost.com/education/2022/04/05/teachers-groomers-pedophiles-dont-say- gay/ (since the bill passed the Florida Senate, there have already been reports of Florida teachers being instructed to remove pro-LGBTQ signage from their classrooms, marginalizing LGBTQ- plus students); *see also* Matt Lavietes, *Education Culture War Finds a New Target: Pride Flags in Classrooms*, NBC NEWS, https://www.nbcnews.com/nbc-out/out-news/education-culture-war-finds-new-target-pride-flags-classrooms-rcna2501 (Oct. 5, 2021, 11:44 AM) (gay student expressing that the rainbow sticker on his classroom door made him feel that he "[would] not be hated for who you love or what you identify as" and the ban of the stickers sent the message that "[he] do[es] not fit in here, [he] should not be here.").

[120] An acronym for lesbian, gay, bisexual, transgender, and queer.

[121] *2022 National Survey on LGBTQ Youth Mental Health*, The Trevor Project, https://www.thetrevorproject.org/survey-2022/ (last visited Feb. 12, 2024).

[122] President Joe Biden (@POTUS), TWITTER (Feb. 8, 2022, 6:07 PM), https://twitter.com/potus/status/1491186973511458818?lang=en.

[123] *See generally*, JOSEPH G. KOSCIW, CAITLIN M. CLARK, & LEESH MENARD., THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCE OF LESBIAN, GAY, BISEXUAL, AND TRANS YOUTH IN OUR NATION'S SCHOOLS (2021), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.

[124] *See* Lee v. York Cnty. Sch. Div., 484 F.3d 687, 691–92 (4th Cir. 2007) ("Because of his position as a teacher, Lee felt responsible for more than just the academic well-being of his students. He stated, 'I'm accountable in that classroom for [the students'] welfare and their attitudes and their feelings, which are sensitive and fluctuate daily, and I find the hope embodied in some images to be beneficial.'"); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 ("Teachers and coaches often serve as vital

grappling with their sexuality that may not receive support or acceptance from home, teachers can foster a safe space for advice and mentorship otherwise unavailable to them. Under the Florida bill, a teacher who themselves is part of the LGBTQ community would have to keep that private, barring any chance of serving as a role model for a child struggling with their gender identity and expression.[125] Indeed, even a cisgender heterosexual teacher might restrain themselves from mentoring a student who is part of the LGBTQ community, out of concern that the teacher might be accused of facilitating discussions about gender identity during classroom instruction—and thus run afoul of the strict Floridian laws.

Courts have recognized this kind of harm by emphasizing the importance of protecting the vulnerable LGBTQ youth. Recently, in *Tingley v. Ferguson*, the Ninth Circuit upheld laws banning conversion therapy[126] due to the harm that such therapies can inflict on children, whom are "a vulnerable group in the eyes of the law."[127] The court relied on a report that "concluded that there is a 'fair amount of evidence that conversion therapy is associated with negative health outcomes such as depression, self-stigma, [and] cognitive and emotional dissonance. . . .'"[128] This report illuminates both the harm that can be caused by conversion therapy and the court's consideration of harm in deciding the case.

B. *Can This Harm Prevail Over* Garcetti*?*

Applying *Garcetti* would render *all* classroom speech—curricular or impromptu lessons—pursuant to the teacher's official duties and therefore not in their control. With these government bills, teachers in Florida cannot talk about racism—and its role in history and society—or gender expression without suffering repercussions. To be sure, teachers never had control to

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role models.").

[125] *See* Natanson & Balingit, *supra* note 119 ("In classrooms, LGBTQ teachers are reconsidering how much of themselves they are willing to share with their students—including LGBTQ children who might be searching for mentors.").

[126] Therapy to minors with the goal of changing their sexual orientation and/or gender identity. *See Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx (last visited Feb. 29, 2024).

[127] Tingley v. Ferguson, 47 F.4th 1055, 1083 (9th Cir. 2022). *Cf.* Otto v. City of Boca Raton, Fla., 981 F.3d 869 (11th Cir. 2020) (holding that protecting children does not justify therapists' First Amendment rights being violated by the city ordinances banning conversion therapy. The court discussed how the research on the harm caused by conversion therapy is inconclusive due to its lack of rigor and recent research that "there are individuals [who have participated in conversion therapy] who perceive they have been harmed and others who perceive they have benefitted." Not only did the court determine the research inconclusive, but also noted that research by the American Psychiatric Association is subject to change; it was only 35 years ago that this organization removed homosexuality from being listed as a paraphilia, disorder, or disturbance. The court also pointed out that upholding this ban and its attendant speech restriction would mean that it would also have to uphold inverse laws, such as a law that prohibits validating and supporting a client's same sex attractions or gender identification. Lastly, the court quoted Texas v. Johnson, 491 U.S. 397, 414 (1989) that if there is a "bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[128] *Tingley*, 47 F.4th at 1078.

decide what and how to teach:

A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby– Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.[129]

Teachers are hired to teach the curriculum in the manner decided by the school. Teachers who deviate from that—personal discussions on a current event (*Lee-Walker*), creative assignment to teach assigned book (*Evans-Marshal*), banners in the classroom that espouse viewpoints (*Johnson*)—open themselves to discipline and retaliation. This position is not only in line with Supreme Court case-law, but it is the logical outcome: "[i]f some risk of indoctrination exists no matter who controls the content of teaching, better to entrust that power with the democratically elected school board than to leave students 'subject to teachers' idiosyncratic perspectives.'"[130]

However, it is not clear that *Garcetti* should be applied to totally limit teacher's free speech in the classroom.[131] "By assuming that teachers always act as teachers between the first and last bell of the school day. . . [there is] little left of the First Amendment. . . for public school employees."[132] Accordingly, there should be some distinction between deviating from the curriculum completely and leading a thoughtful discussion about issues that the teacher wishes to discuss, while complying with the required curriculum and suggested textbooks. For example, an eighth-grade teacher may use her school's required curriculum to assign her students *To Kill a Mockingbird*,[133] and when discussing character development, focus on the protagonist of the novel, Scout Flinch—who is described as enjoying rough outdoor play with her brother and regularly wearing overalls instead of dresses[134]—to springboard into a discussion of gender identity. Or perhaps, the teacher could use the book, which is about a lawyer defending a local Black man

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[129] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

[130] Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 704 (2010) (quoting *Mayer*, 474 F.3d at 479).

[131] *See generally* Maya McGrath, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2428, 2460 (2022) (arguing that broadly applying *Garcetti* is extremely troublesome for public school employees who can be fired for privately practicing their religious beliefs on the school campus).

[132] *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 935 (9th Cir. 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc).

[133] HARPER LEE, TO KILL A MOCKINGBIRD (1960) (published during the Civil Rights movement and hailed as an exposé of Southern racist society).

[134] *Id.* at chapter 9 (1960). ("Aunt Alexandra was fanatical on the subject of my attire. I could not possibly hope to be a lady if I wore breeches; when I said I could do nothing in a dress, she said I wasn't supposed to be doing things that required pants. Aunt Alexandra's vision of my deportment involved playing with small stoves, tea sets, and wearing the Add-A-Pearl necklace she gave me when I was born. . .").

accused of raping a white woman and the unjust consequences of prejudice and hate from the community, to delve into a class discussion about white privilege and the discrimination faced by people of color.

Peter Kauffman and Stephen Elkind argue that "*Garcetti* is too blunt an instrument to regulate the speech of public school teachers" and urge for the reinstatement of the *Connick- Pickering* balancing test.[135] They contend that this test as applied to homosexuality and gender identity would likely satisfy the first prong of the test as this speech involves matters of public concern.[136]

After establishing that the speech would be considered a matter of public concern, Kaufman and Elkind then argue that for the second prong of the *Connick-Pickering* test—which requires courts to involve themselves in a balancing test weighing the interests of the teacher as a citizen in commenting versus the government, the employer, in promoting the efficiency of its responsibilities to the public—to consider whether the school board has spoken on the matter at issue.[137] If the school board, or legislature, is silent on the subject, then the teacher's speech should fare better in the balancing test.[138] In states such as Florida, where the legislature has directly regulated whether teachers can speak about homosexuality and gender identity, then perhaps there is a more persuasive argument that the school's interests outweigh that of the teacher, but it is not definitive, as the balancing prong is highly fact-specific.[139]

Based on its prior rulings, it seems that if the Supreme Court would allow exception to *Garcetti*, it would likely only apply to university teachers. Justice Souter limited his concerns about *Garcetti*'s impact on academic freedom to the college level.[140] Moreover, academic freedom has

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[135] Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J. L. & EDUC. 147, 170 (2014). *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 935 (9th Cir. 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc) (in a statement regarding the denial of a rehearing en banc, O'Scannlain wrote "[f]or as Kennedy rightly observes in his brief, '*Garcetti* applied *Pickering*; it did not overrule it'").

[136] Elkind & Kauffman *supra* note 135, at 173. ("Connick recognized that some issues are 'inherently of public concern,' citing 'racial discrimination' as one example. I think it is impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate. Speech that 'touches upon' this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.") (citing *Rowland v. Mad River Loc. Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (cert denied) (Brennan, J. dissenting) (in a case involving the dismissal of a non-tenured guidance counselor after revealing she was bisexual to fellow colleagues and superiors); *see also* Snyder v. Phelps 562 U.S. 443, 454 (2011) (a case involving picketers at a military funeral with signs about homosexuality in the military, such as "God Hates the USA/Thank God for 9/11," "F[**] Troops," "Thank God for Dead Soldiers") (holding, in an 8-1 decision, that although constitutionally protected, the "[picketers'] signs plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'").

[137] Elkind & Kauffman, *supra* note 135, at 179.

[138] *Id.*

[139] *Id.*; *see also* Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. OF FREE SPEECH L. 615, 616 (2022) (a teacher purposefully misgendering a student would be viewed as being highly disruptive to the school's responsibilities and goals of educating students, and therefore fail the balancing test).

[140] Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Souter, J., dissenting) ("This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public

traditionally been defined as "scholarship and pedagogy called liberal education, a concept indigenous to the university."[141] This aligns with the Supreme Court's long-established views of "the important purpose of public education and the expansive freedom of speech and thought associated with the university environment, [thereby granting] universities [to] occupy a special niche in our constitutional tradition."[142]

This perspective also aligns with the Supreme Court's view of lower schools falling under the principle of "in loco parentis," a view that parents delegate authority over children to the public schools, overriding students' rights to free speech.[143] Although *in loco parentis* originated at a time when education was not compulsory, "the logic of the doctrine still applies because the fundamental right to educate children in the United States lies with the parents, and parents are still free to decide whether to send their children to public school, private school, or educate them at home."[144] Unlike a university, lower schools have state-mandated educational missions which essentially require the schools to oversee the curriculum and the power to decide what is considered deviating or distracting from the curriculum.[145]

A New York Times Opinion article encapsulates the clash between the support for and the backlash against the bill and their view of harms.[146] The article begins with a striking statistic: almost 21% of Generation Z (young adults born between 1997 and 2003) identifies as LGBTQ— as compared to 10.5% of the Millennials (young adults born between 1981-1996) and 4.2% of Generation X (born between 1965-1980) identifying as LGBTQ.[147] Ross Douthat provides three possible readings of the statistics.[148] The first interpretation is "*This is great news.*"[149] Our society is progressively stopping the suppression of sexual fluid, transgender, and nonbinary experiences, allowing us to finally see the accurate spectrum of sexual attractions and gender identities.[150] The second interpretation is "*We*

university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'").

[141] Byrne, *supra* note 91, at 283.

[142] Grutter v. Bollinger, 539 U.S. 306, 329 (2003); *see also* Healy v. James, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

[143] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–43 (2021).

[144] S. Ernie Walton, *In Loco Parentis, the First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, TEXAS TECH. L. REV. (forthcoming 2023).

[145] *See Mahanoy*, 141 S. Ct. at 2052 (Alito, J., concurring) (explaining that *in loco parentis* to modern-day schools means the parents implicitly delegate and relinquish "the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission.").

[146] Ross Douthat, *How to Make Sense of the New LGBTQ Culture War*, N.Y. TIMES, (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/transgender-culture-war.html.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

shouldn't read too much into it."[151] It is the nature of youth to explore themselves and try differentiating themselves from their parents.[152] The third interpretation is "*this trend is bad news* . . . a form of social contagion which our educational and medical institutions are encouraging and accelerating."[153] Ross Douthat provides three possible readings of the statistics.[154] The first interpretation is "*This is great news.*"[155] Our society is progressively stopping the suppression of sexual fluid, transgender, and nonbinary experiences, allowing us to finally see the accurate spectrum of sexual attractions and gender identities.[156] The second interpretation is "*We shouldn't read too much into it*."[157] It is the nature of youth to explore themselves and try differentiating themselves from their parents.[158] The third interpretation is "*this trend is bad news* . . . a form of social contagion which our educational and medical institutions are encouraging and accelerating."[159]

The Don't Say Gay bill is the third view clashing with the first view. Ross ultimately argues that society is "running an experiment on trans-identifying youth without good or certain evidence, inspired by ideological motives rather than scientific rigor, in a way that future generations will regard as a grave medical-political scandal."[160]

How is harm defined? In *Tingley*, the harm to children was conversion therapy and with the Florida bill, the harm to children is talking about gender identity and expression too much. Both are trying to protect children, but the outcomes are ironically opposite. This leads to the next question, who should be the ultimate decider of what constitutes harm. It seems, the answer lies with the legislators. Similar to abortion, this will become a state by state or city to city issue, which involves inherent inequities. For example, those living in some states will be afforded more rights than those living in others. Furthermore, those who have more money will have the means to resolve and expand their otherwise limited rights—whether by flying to other states that allow abortion or paying for a private education that is less restrictive. In *Mahoney*, the Court rationalized that *in loco parentis* can still apply to schools—despite education being compulsory—because parents still have the option to send their children to private schools or educate them at home.[161] In reality, private or home education is not an available alternative for everyone. Accordingly, these bills will need to be challenged in the courts, and if the First Amendment

[151] *Id.*
[152] Douthat, *supra* note 146.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Douthat, *supra* note 146.
[159] *Id.*
[160] *Id.*
[161] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2051–52 (2021).

challenges continue to fail, the bills will have to be contested through a different constitutional framework.

CONCLUSION

Teachers are deserving of First Amendment protection. Applying *Garcetti* to teachers would encompass all speech they make while at school, severely restricting their First Amendment rights. Although this may seem stringent, this Note argues that teachers never had free reign in the classroom and perhaps it is better to entrust the democratically elected school board or legislature to have carte blanche over the content of teaching instead of teachers.

Accordingly, the opponents of the Florida bills, which restrict teachers from discussing race and gender, will likely fail in challenging the bills from a First Amendment perspective.

Drag: Art. Obscenity. Crime

ELIOT T. TRACZ*

INTRODUCTION

On March 2, 2023, the Governor of Tennessee, Bill Lee, signed a bill into law which banned drag performances in certain circumstances.[1] The law contained the following language:

> (c)(1) It is an offense for a person to perform adult cabaret entertainment:
> (A) On public property; or
> (B) In a location where the adult cabaret entertainment could be viewed by a person who is not an adult.
> (2) Notwithstanding§ 7-51-1406, this subsection (c) expressly:
> (A) Preempts an ordinance, regulation, restriction, or license that was lawfully adopted or issued by a political subdivision prior to the effective date of this act that is in conflict with this subsection (c);
> (B) Prevents or preempts a political subdivision from enacting and enforcing in the future other ordinances, regulations, restrictions, or licenses that is in conflict with this subsection (c).
> (3) A first offense for a violation of subdivision (c)(1) is a Class A misdemeanor, and a second or subsequent such offense is a Class E felony.[2]

The law defines "adult cabaret entertainment" as "adult-oriented performances that are harmful to minors, as that term is defined in § 39-17-901, and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers" and "[i]ncludes a single performance or multiple performances by an entertainer."[3] This would supplement the definition of "adult cabaret," which the statute only defines as "a cabaret that features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or

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[1] Matt Lavietes, *Tennessee Governor Signs First-of-its-Kind Bill Restricting Drag Shows*, NBC NEWS (Mar. 2, 2023), https://www.nbcnews.com/feature/nbc-out/tennessee-governor-signs-first-its-kind-bill-restricting-drag-shows-n1303262.

[2] TENN. CODE ANN. § 7-51-1407 (2021).

[3] TENN. CODE ANN. § 7-51-1401 (2021).

similar entertainers."[4] Although the ban was subsequently struck down as a violation of the Constitution,[5] it was only one of a number of attempts by states to severely restrict, ban, or even criminalize drag performances.[6]

What we now call drag has existed, in various forms and various cultures, for centuries.[7] This has included the male portrayal of female characters in classical Greek theatre, Japanese Kabuki theatre, and of course, Shakespearean theatre.[8] The invention of motion pictures created a new medium for drag, with such notable drag performances as Tony Curtis and Jack Lemon in Some Like It Hot,[9] Robin Williams in Mrs. Doubtfire,[10] Mary Martin in Peter Pan,[11] Tyler Perry in the Medea movies,[12] and Matt Damon in The Good Shepherd.[13] All of this speaks to the widespread use, and indeed acceptance, of drag as an art form.

At the same time, drag has proved an important piece of LGBTQ culture, especially among African Americans involved in New York's Ballroom scene,[14] recently brought to mainstream attention by the award-winning TV show, Pose.[15] Equally important, drag—through brunches, library readings, and the incredible efforts of RuPaul—has helped introduce many heterosexual individuals to their own LGBTQ community.[16]

Unsurprisingly, there have been attempts to use the law as a means of suppressing gender nonconforming behavior.[17] Indeed, moral panic and gender-bending attire are old acquaintances in the United States. Beginning

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[4] *Id.*

[5] Micaela A. Watts & Omer Yusuf, *Federal Judge Tosses Tennessee's Controversial Anti-Drag Law, Declares it Unconstitutional*, USA TODAY (June 3, 2023), https://www.dispatch.com/story/news/local/2023/06/03/tennessees-unconstitutional-drag-ban-struck-down-by-federal-judge/70281619007/.

[6] *Restrictions on Drag Performances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions (last visited Mar. 6, 2024).

[7] *See* JAKE HALL, THE ART OF DRAG 11–13, 16, 23 (2020).

[8] *Id.* at 11–13, 16.

[9] SOME LIKE IT HOT (Mirisch Company 1959).

[10] MRS. DOUBTFIRE (20th Century Fox Blue Wolf Productions 1993).

[11] PETER PAN (National Broadcasting Company 1960).

[12] *See, e.g.*, MADEA'S BIG HAPPY FAMILY (Tyler Perry Studios 2011).

[13] THE GOOD SHEPHERD (Morgan Creek Productions 2006).

[14] SUSAN STRYKER, TRANSGENDER HISTORY THE ROOTS OF TODAY'S REVOLUTION 75–76 (2d ed. 2017).

[15] *See Pose*, TELEVISION ACADEMY, https://www.emmys.com/shows/pose (last visited Feb. 9, 2024) (noting various awards and nominations the television show *Pose* has received). *See generally Pose*, IMDB, https://www.imdb.com/title/tt7562112/ (last visited Feb. 10, 2024) (detailing the show is about ball culture in the gay and trans community).

[16] *See, e.g.*, Steven Schacht, *Beyond the Boundaries of the Classroom: Teaching Students About Gender and Sexuality at a Drag Show*, 46 J. HOMOSEXUALITY 225 (2004).

[17] WILLIAM N. ESKRIDGE, JR., GAYLAW CHALLENGING THE APARTHEID OF THE CLOSET 1, 338–41 (1999).

in the mid 1800's, cities like Columbus,[18] Chicago,[19] St. Louis,[20] and Fargo[21] all passed ordinances criminalizing an individual's wearing of clothing not appropriate to their sex.[22] Drag bans are simply a reinvention of these prior ordinances targeted at a narrower community.

Standing in the way of these bans is nothing less than the Constitution of the United States. Tennessee's ban was deemed "unconstitutionally vague,"[23] a finding which, though accurate, may not hold up. Instead, advocates bring the weight of the First Amendment to bear on other drag bans.

Before proceeding to summarize this article, a brief word on language. This piece uses "queer" and "LGBTQ" interchangeably, although to some readers they may not mean the same thing. Some other language, "cross-dressing" for example, is used begrudgingly. At times this piece substitutes "gender non-conforming" as a less loaded term. Finally, this piece attempts to refrain from language which invokes the transgender community. To be sure, there are transgender drag performers, but this piece does not wish to give the impression that drag and a performer's gender identity are necessarily linked.

Section II provides a brief history of drag—and historical performances—by artists in attire which may be considered gender non-conforming.[24] This begins by seeking to define "drag", which is no easy task.[25] Next, it looks at historical theatre practices which required that female roles be performed by men, a practice with wide geographic roots which helped lay the groundwork for modern day drag.[26] Next, it looks at the role of drag as a cultural phenomenon, both in the LGBTQ community at large, as well as in the black queer community.[27] Then it discusses drag in film and television.[28] Finally, it argues that drag is an expressive form of art.[29]

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[18] *See* City of Columbus v. Zanders, 266 N.E.2d 602, 603–04 (Ohio Mun. Ct., 1970) (citing COLUMBUS, OHIO, CODE OF ORDINANCES § 2343.04 (1970)) (holding the section of the Columbus City Code "has a real and substantial relation to the public safety and is therefore constitutional and a valid exercise of the police power").

[19] *See* City of Chicago v. Wilson, 357 N.E.2d 1337, 1339, 1342 (Ill. App. Ct. 1976) (holding "Section 192–8 of the Municipal Code of the City of Chicago, which prohibits a person from wearing the clothing of an opposite sex with the intent to conceal his or her sex" is constitutional).

[20] *See* District of Columbia v. City of St. Louis 795 F.2d 652, 652–53, 655 (8th Cir. 1986) (holding Ordinance 15.30.010, which prohibited cross-dressing, that the ordinance was "unconstitutionally vague insofar as it attempts to proscribe conduct by use of the words 'indecent or lewd act of behavior'").

[21] *See* City of Fargo v. Goss, 302 N.W.2d 404, 404–05 (N.D. 1981) (using § 10–0302 of the city of Fargo Revised Ordinance of 1965, that prohibits, in part a person appearing "in dress not belonging to his or her sex . . .").

[22] For a comprehensive list, *see* ESKRIDGE, *supra* note 17, at 338–41.

[23] Order Granting Temporary Restraining Order, Friends of George's, Inc. v. Tennessee, No. 2:23-CV-02163-TLP-tmp, 2023 WL 2755238 at *1, *12 (W.D. Tenn. Mar. 31, 2023).

[24] *See infra* Section II.B.i.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

Section III addresses the history of criminalizing gender non-conforming attire in the United States.[30] It begins by discussing the rash of municipal ordinances criminalizing public appearances by individuals in attire not considered suit to their sex.[31] Next, it discusses the leading obscenity case and examines how drag bans are structured to satisfy the obscenity requirements.[32] It then discusses a number of the attempted restrictions or bans on drag performances.[33] In doing so, it takes the position that drag bans are nothing more than a re-packaging of attacks on queer bodies rather than an attempt to protect children.[34]

Section IV argues that established constitutional principles do not support the passage of bans on drag performances.[35] First it does so by arguing that drag does not fall within the purview of the leading obscenity case, *Miller v. California*,[36] which addresses materials rather than performances.[37] It also argues that proposed restrictions on drag performances impermissibly restrict expressive speech.[38] Finally, it reviews the recent Tennessee case finding that the Tennessee drag ban was vague and overly broad.[39]

I. A HISTORY OF DRAG

A. *Defining Drag*

"Drag" is not an easily defined term: it may mean different things in different circumstances to different people. Professor Susan Stryker, a well-known transgender activist, defines "drag" as "clothing associated with a particular gender or activity, often worn in a parodic, self-conscious or theatrical manner."[40] Merriam-Webster, on the other hand, defines drag as, "entertainment in which performers caricature or challenge gender stereotypes (as by dressing in clothing that is stereotypical of another gender, by using exaggeratedly gendered mannerisms, or by combining elements of stereotypically male and female dress) and often wear elaborate or outrageous costumes."[41]

An alternative Merriam-Webster definition defines drag as, "the costumes worn by drag performers performing in drag" also, **"**stereotypically gendered clothing worn by someone who is of a different

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[30] *See infra* Sections III.A, III.B.i.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See infra* Section IV.
[36] *See generally* Miller v. California, 413 U.S. 15 (1973).
[37] *See infra* Sections IV.A.iii–iv.
[38] *Id.*
[39] *Id.*
[40] STRYKER, *supra* note 14, at 34.
[41] *Drag*, MERRIAM-WEBSTER (Oct. 6, 2023), https://www.merriam-webster.com/dictionary/drag.

gender."[42] This certainly highlights one element of drag, the often-elaborate costumes worn by queens during their performances.[43] These costumes include carefully selected wigs, shoes, accessories, and props.[44]

However, drag features more than just costuming. Makeup also fills an important role in distinguishing the appearance of drag performers.[45] Queens and kings use makeup to exaggerate facial features or create the illusion of being a different gender.[46] As a result, it is important that a performer's makeup is flawless.[47]

Music also plays a significant role in many drag performances.[48] Through the selection of music, performers set the tone of their performance and engage their audiences.[49] For those performers who dance or lip-sync, music is indispensable.

Taken together, drag is fundamentally about performance. Queens and kings "must be able to command the stage, engage the audience, and create a memorable experience that will be talked about long after the performance is over."[50] At the end of the day, a good performance includes humor, if not outright comedy, a little drama, and a whole lot of spectacles.[51]

One important thing to note is that drag is neither a sexual kink,[52] nor is it an attempt to "pass" as a member of a different sex.[53] Instead, Sasha Velour writes, it is "a mirror that reflects, and attempts to expand, our culture's view of gender, beauty, and of queer and trans people."[54] In this sense, drag is a celebration. At the same time, it is transgressive, challenging gender hierarchies through the idea that "all expressions of gender could be worthy and useful."[55] It is this idea, writes Velour, that makes drag powerful and threatening.[56]

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[42] *Id.*

[43] Sarawin Mungmee, *The Art of Drag: A Breakdown of the Elements That Make a Drag Performance Unique*, CELEBRITYCURRY (Feb. 1, 2023), https://celebritycurry.com/the-art-of-drag-a-breakdown-of-the-elements-that-make-a-drag-performance-unique/.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Mungmee, *supra* note 43.

[50] *Id.*

[51] *Id.*

[52] *See, e.g.*, Verta Taylor & Leila J. Rupp, *Chicks with Dicks, Men in Dresses: What It Means to Be a Drag Queen*, 46 J. HOMOSEXUALITY 113, 114–15 (2004) (noting drag queens are "gay men who dress and perform as not to be women or have women's bodies").

[53] Mayer Nissim, *Transvestite, Transsexual, Transgender: Here's What You Should Actually Call Trans People*, NORDA HOUSE PROJECT (Mar. 20, 2018), https://nordahouse.org/transsexual-transgender-transvestite-heres-what-you-should-actually-call-trans-people/.

[54] SASHA VELOUR, THE BIG REVEAL: AN ILLUSTRATED MANIFESTO OF DRAG, 10 (2023).

[55] *Id.* at 11.

[56] *Id.*

B. *Drag as Performance*

1. *A brief herstory*

"There isn't a corner of the world that hasn't seen a little drag at some point."[57] Drag as we understand it today has ancient roots. Jake Hall traces its roots to at least ancient Greece, where the over-the-top performances and comedic exaggerations of mimes helped lay the foundations for the camp of drag performances.[58] Drag queen and author Sasha Velour goes back even farther, arguing that performances of Mesolithic-era spiritual healers included cross-gender attire in order to "dance for luck, to remember the dead at yearly festivals, and more."[59]

More well-known is the role of drag in Shakespearean theatre, in which male performers would cross-dress in order to perform female roles.[60] As Hall relates, male performers "slicked their faces with white paint, lipstick and rouge" dressing in the "elaborate, full-skirted, flouncy gowns popular at the time."[61] A lot of these male performers were young boys.[62] Interestingly, at least one Shakespeare play, *Twelfth Night*, features drag as part of its plot, as the female character Viola cross-dresses as a man after a shipwreck.[63]

In 1603, a Japanese woman named Izumo no Okuni gathered together a troupe of female performers for a new style of dance, resulting in the birth of Kabuki theatre.[64] These women, who wore traditional male clothing, saw their popularity grow until in 1629 women were banned from Kabuki.[65] Male performers took over the female roles, with many dedicating themselves to "femininity, mastering soft, delicate movements and mannerisms."[66] To this day, male performers paint their faces white and perform in geisha wigs.[67]

Kathakali is a type of dance originating in southern India and based on Hindu folklore.[68] It includes the use of music, singing, choreographed dance, elaborate costumes, and makeup.[69] While more women have begun to study Kathakali, early roles were entirely filled by men.[70]

The Ottoman Empire is well known for the performances of the çengi or female belly dancers.[71] Less well known is that the çengi shared space

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[57] *Id.* at 1.
[58] HALL, *supra* note 7, at 11.
[59] VELOUR, *supra* note 54, at 2–3.
[60] HALL, *supra* note 7, at 12.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 13.
[64] *Id.* at 16.
[65] *Id.*
[66] HALL, *supra* note 7, at 16.
[67] *Id.*
[68] *Id.* at 18.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 19.

with another type of performer called the köçek.[72] These young, male performers, like their female counterparts, were skilled in dance and music.[73] Androgynous in appearance, köçek performers had carefully curled hair, wore long silk shirts, covered their faces in heavy make-up, and performed erotic dances.[74]

One of the more famous and longest lived examples of male performances in female attire is Chinese opera.[75] The best known of these is the Peking Opera, where performers are split into several categories.[76] Leading female roles, a category of performers known as Dan are among the best known.[77] Until 1912, when women were allowed to perform in the theater, these roles were filled by men wearing eyeliner, red eyeshadow, red lipstick, and boldly patterned clothing.[78] Jake Hall estimates Dan performers to be among the world's first true drag performers.[79]

Apart from these examples of cross-dressing/drag performance in diverse locations and different eras, drag also draws inspiration from more contemporary European sources. One example is pantomime with its slapstick nature and history of cross-dressing roles.[80] Another is the Vaudeville, with its satirical, comedic, and tongue-in-cheek nature.[81]

2. *Drag as performance*

Drag, like other art forms, has its own cultural aspects and movements. Some crass commenters may be inclined to dismiss drag as merely a man in a dress. In truth, drag consists of various types of performers and performances. The result is a rich art form with its own culture, language, and movements.

There are several ways to classify different types of performers.[82] One means of classification is to divide performers into the categories of High Camp and Low Camp.[83] High Camp has been described as "the kind of drag that wants to impress – those queens who are so flawless and beautiful that they make you gag."[84] Low Camp, on the other hand "includes pastiches of celebrities, drag that blurs gender roles, and drag that moves beyond mere impersonation of the opposite gender to something else entirely."[85]

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[72] HALL, *supra* note 7, at 19.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 20.
[76] *Id.*
[77] *Id.*
[78] HALL, *supra* note 7, at 20.
[79] *Id.*
[80] *Id.* at 23.
[81] *Id.* at 22.
[82] Daniel Wren, *A Fool's Guide to Drag 'Types',* VADA MAG. (July 25, 2014), https://vadamagazine.com/features/opinions/guide-drag-types.
[83] *Id.*
[84] *Id.*
[85] *Id.*

Another method is to classify various types of performers based on their type of performance. Club Queens are performers whose drag is often inspired by music and features outlandish themes.[86] Pageant Queens on the other hand are competitors with big looks, lip synching talents, and impressive wardrobes.[87] Faux Queens, on the other hand, are subversive females impersonating female impersonators.[88] Fish Queens look as close to traditionally female as they possibly can, casting a spotlight on femininity.[89]

It is well acknowledged that performance artists perform for different reasons. For some, like Sasha Velour, it is a coping mechanism through which they deal with tragedy.[90] Others view it as a political statement.[91] All have something to communicate in some manner.

Just as there are different types of performers, there are different types of drag performances. Pageants, such as the Miss Gay America Pageant, are similar to beauty pageants and are the domain of pageant queens.[92] Other venues might include Pride parades, clubs, or cabarets.

3. *Drag subculture*

i. *Language*

Like many artistic and social movements, drag has its own language. For example, a queen preparing to perform may say that she is "beating her face" which means to apply make-up.[93] A hyper-feminine queen may be described by peers as "fishy,"[94] while a fabulous look might be described as "sickening."[95]

A group of queens may get together to "read" one another, that is, to verbally insult someone with minimal effort.[96] This can be preceded by the facilitator declaring that "the library is open."[97] A particular, more subtle version of reading is referred to as throwing shade.[98]

Sometimes a group of queens may come together and create what is called a family. Families are led by "drag mothers," experienced queens

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[86] *Id.*

[87] *Id.*

[88] Wren, *supra* note 82.

[89] *Different Types of Drag Performers*, DRAGICKA (Nov. 16, 2022), https://www.dragicka.com/post/different-types-of-drag-performers.

[90] VELOUR, *supra* note 54, at 10.

[91] Keegan Williams, *What is it Like to Break into Drag in the Age of Drag Bans?*, LGBTQ NATION (June 23, 2023), https://www.lgbtqnation.com/2023/06/what-is-it-like-to-break-into-drag-in-the-age-of-drag-bans/.

[92] *See, e.g.*, MISS GAY AMERICA, http://www.missgayamerica.com/ (last visited Mar. 24, 2024).

[93] HALL, *supra* note 7, at 109.

[94] *Id.* It is important to note that "fishy" has derogatory origins. *See also* Andrea James, *Transgender Slang, Slurs, and Controversial Words*, TRANSGENDER MAP, https://www.transgendermap.com/guidance/resources/words/slang-slurs/ (Dec. 19, 2023).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

willing to teach the art of drag to newcomers.[99] Those new drag queens are called "drag daughters."[100] A family will usually take the last name of the mother.[101]

ii. *Ballroom*

One of the more fascinating areas of drag subculture is the Ballroom scene. Beginning in the 1970's when Crystal LaBeija founded the House of LaBeija, ballroom created an underground subculture for African American and Latino gay and trans men.[102] Drawing largely from pageant culture, ballroom performers compete for prizes, trophies, titles, and cash.[103] Competitors are judged on categories such as "voguing, pretty boy realness, butch queen, face, body, Wall Street, best dressed, pop fashion and sex siren."[104]

Another integral aspect of ballroom is its relationship to house culture.[105] Houses form units within the ballroom scene, with each participant being a member of a house.[106] Successful houses can rise to prominence within the drag community.

Although ballroom started in New York City, it experienced rapid growth into New Jersey and Philadelphia.[107] Soon after, Atlanta, Chicago, Los Angeles, and San Antonio followed, until ballroom spread into nearly every state.[108] Now, ballroom can be found internationally in places like London, Paris, and Berlin.[109]

Even as ballroom has expanded across the United States and around the globe, it has begun to shed some of its underground mystique. Many people were introduced to ballroom through the 1990 documentary, *Paris is Burning*.[110] More recently, the television show *Pose*, which garnered multiple Emmy Award nominations including a Best Drama Actor win for Billy Porter, dramatized the experiences of gay and trans house members competing in the Ballroom scene.[111]

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[99] *The Fabulous Guide to Drag Terminology*, HOMOCULTURE (July 29, 2020), https://www.thehomoculture.com/the-fabulous-guide-to-drag-terminology/.

[100] *Id.*

[101] *Id.*

[102] Laura Smythe, *The Ballroom Scene Has Been a Place for LGBTQ People of Color to Grow for Decades*, LGBTQ NATION (Oct. 15, 2019), https://www.lgbtqnation.com/2019/10/ballroom-scene-place-lgbtq-people-color-grow-decades/.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Smythe, *supra* note 102.

[109] *Id.*

[110] *Id.*

[111] Evan Real, *Emmys: 'Pose' Star Billy Porter Nominated for Best Drama Actor, Trans Actresses Snubbed*, THE HOLLYWOOD REP. (July 16, 2019), https://www.hollywoodreporter.com/tv/tv-news/pose-star-billy-porter-nominated-emmy-trans-actresses-snubbed-1224617/.

iii. *Activessle*

"[A]ctivessle's are drag collectives who typically dress alike and serve a particular purpose in their community."[112] Oftentimes Activessle Queens are involved in charitable civil rights work.[113] One particularly well-known activessle is the Sisters of Perpetual Indulgence.[114] The Sisters have "devoted ourselves to community service, ministry and outreach to those on the edges, and to promoting human rights, respect for diversity and spiritual enlightenment" by using "humor and irreverent wit to expose the forces of bigotry, complacency and guilt that chain the human spirit."[115]

Activessle Queens have a long history of rallying and supporting the LGBTQ community, including during its darkest moments. For example, The Sisters of Perpetual Indulgence provide information on Mpox through their website.[116] Another group known as the Armorettes have donated over $2 million to HIV/AIDS research over several decades.[117]

Many drag queens use their performances to engage in philanthropy.[118] Activessle drag uses numbers to multiply those efforts.[119] Through their work, Activessles use drag to provide important social services to the LGBTQ community[120]. This will become relevant later in this article.

II. CRIMINALIZATION AND THE POLICING OF QUEER BODIES

A. *Historical Bans on Gender Non-Conforming Attire*

Bans on people making public appearances in gender non-conforming attire are not new in the United States. Beginning in the mid-1800s, municipalities began passing ordinances penalizing people of all genders who appeared in attire not suitable to their sex.[121] This article examines two representative approaches to bans on gender non-conforming attire, one from San Francisco and one from New York.

1. *San Francisco, California*

San Francisco's Board of Supervisors chose to criminalize cross-dressing through a public order in 1863.[122] The text of the order stated that:

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[112] Wren, *supra* note 82, at 10.

[113] DRAGICKA, *supra* note 89, at 8.

[114] *See* THE SISTERS OF PERPETUAL INDULGENCE, https://www.thesisters.org/ (last visited Oct. 14, 2023).

[115] *Id.*

[116] *See Joy*, THE SISTERS OF PERPETUAL INDULGENCE, https://www.thesisters.org/joy (last visited Feb. 26, 2024).

[117] Ryan Lee, *Your Guide to Atlanta's Sub-Genres of Drag*, GA. VOICE (Aug. 13, 2017), https://thegavoice.com/community/guide-atlantas-countless-sub-genres-drag/.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, AND FASCINATION IN NINETIETH-CENTURY SAN FRANCISCO 45, 64, 66 (Jack Halberstam & Lisa Lowe eds., 2015).

[122] *Id.* at 41.

If any person shall appear in a public place in a state of nudity, or in a dress not belonging to his or her sex, or in an indecent or lewd dress, or shall make any indecent exposure of his or her person, or be guilty of any lewd or indecent act or behavior, or shall exhibit or perform any indecent, immoral or lewd play, or other representation, he should be guilty of a misdemeanor, and on conviction, shall pay a fine not exceeding five hundred dollars.[123]

Similarly worded ordinances appeared in other U.S. cities such as Columbus, Ohio.[124] These ordinances did not target cross-dressing or gender non-conforming behavior per se, instead they were aimed at public nuisances such as prostitution.[125]

What makes San Francisco—now considered a hub LGBTQ culture such an interesting case study is its history with gender-bending attire prior to the institution of its ban. San Francisco's history (at least during its time as a city in the United States, rather than its earlier history) is closely tied to the gold rush.[126] So too is its history with cross-dressing.[127]

Professor Clare Sears has documented the fascinating role of cross-dressing and gender-non-conforming behavior in gold rush San Francisco, finding that "multiple cross-dressing practices proliferated in gold rush San Francisco among men who wore women's clothing at predominantly male dances,"[128] women who lived and dressed as men while working in the gold mines,[129] female prostitutes who dressed as men in order to advertise their services,[130] and feminist dress reformers.[131]

It is the first of these groups that is particularly interesting. Professor Sears writes that during the gold rush years, the population of San Francisco was overwhelmingly male.[132] Indeed, in 1849 women constituted 2% of the population, a number which rose to 15% by 1852.[133] As a result, European American miners sought to create gender diversity in otherwise homosocial spaces.[134] One method of doing so involved using clothing to create the fantasy of a gender binary.[135]

It bears noting that the history of cross-dressing in gold rush era San Francisco involved an element of racism. While women were indeed a small demographic, there were many non-European American women present in

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[123] *Id.*; *see also* S.F., CAL., ORDINANCE No. 1587, § 20(7) (1898).

[124] *See* City of Columbus v. Zanders, 266 N.E.2d 602, 603 (Ohio Mun. Ct., 1970) (citing COLUMBUS, OHIO, CODE § 2343.04 (1970)).

[125] SEARS, *supra* note 121, at 41.

[126] *Id.* at 23–25.

[127] *Id.* at 23; *If You Are Gay or Lesbian, Chances Are You've Already Visited San Francisco. San Francisco Has Long Been Considered a Hub of Gay and Lesbian Life in North America*, GAYTRAVEL https://www.gaytravel.com/gay-guides/san-francisco/ (last visited Mar. 7, 2024).

[128] SEARS, *supra* note 121, at 23.

[129] *Id.* at 24.

[130] *Id.*

[131] SEARS, *supra* note 121, at 24.

[132] *Id.* at 27.

[133] *Id.*

[134] *Id.* at 28.

[135] *Id.* at 29–30.

San Francisco.[136] Instead, these indigenous, Mexican, and Chinese women were deemed unsuitable for marriage,[137] and sexual relationships outside of prostitution between European American men and these women were condemned.[138] Thus, in racially segregated mining camps, the role of women would have to be assumed by men.[139]

Eventually, the gold rush ended, and the thousands of miners had to decide what to do.[140] Many left, and many stayed.[141] Among those who stayed were many who then sent for their wives to join them.[142] As a result, the number of women in the city is thought to have increased by around 262%.[143]

With the arrival of more European American women, moral antivice sentiment resulted in a new focus on one of the other demographics engaging in the wearing of gender non-conforming attire: prostitutes.[144] Cross-dressing took on the label of "indecency,"[145] and the San Francisco Board of Supervisors was able to institute a ban.[146] Ultimately, San Francisco's cross-dressing ban became one of a number of similarly worded bans appearing in various parts of the country.

i. *State of New York*

The state of New York provides a different approach. *People v. Simmons*[147] involved a statute that read, "A person is guilty of criminal impersonation when he . . . (1) [i]mpersonates another and does an act in such assumed character with intent . . . to injure or defraud another."[148] Gene Simmons, not the rock star, was arrested while wearing a woman's wig, a dress, women's shoes, and makeup.[149] Simmons faced three charges, two of which—larceny and prostitution—were common charges in cases involving men dressed as women.[150]

The third charge, criminal impersonation, resulted from a complaint by a man named Luberoff, who alleged that after agreeing to pay Simmons $10 to "take care" of Luberoff, he drove with Simmons to a secluded area.[151] Luberoff claimed to have felt something in his pocket, and upon searching

[136] *Id.* at 27–28.
[137] SEARS, *supra* note 121, at 27–28.
[138] *Id.* at 28.
[139] *Id.* at 29.
[140] *Id.* at 45–46.
[141] *Id.* at 46.
[142] *Id.*
[143] SEARS, *supra* note 121, at 46.
[144] *Id.* at 49.
[145] *Id.* at 59.
[146] *Id.*
[147] People v. Simmons, 357 N.Y.S.2d 362, 364 (1974).
[148] N.Y. PENAL § 190.25 (1) (Consol. 2021).
[149] *Simmons*, 357 N.Y.S.2d at 363.
[150] *Id.* at 364.
[151] *Id.*

his pocket, found only a few dollars and some facial tissue.[152] Luberoff flagged down a passing police car, and Simmons was arrested.[153] Although the court ultimately decided that the criminal impersonation statute did not proscribe cross-dressing,[154] *People v. Simmons* presents another example of a statute being repurposed to target gender non-conforming behavior.

This was not New York's first time repurposing a statute to target gender non-conforming behavior. In *People v. Archibald*,[155] the defendant, Mauricio Archibald, was convicted of violating a vagrancy law by impersonating a woman.[156] As cited in the case, the statute stated, "that one is a vagrant * * * who * * * [has] his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified."[157] The court, in a fairly routine order, affirmed the conviction.[158]

The dissent, however, provides interesting background on the vagrancy law. Historically, the statute in the case had nothing to do with gender non-conforming attire.[159] Instead, it was enacted as "An Act to Prevent Persons Appearing Disguised and Armed."[160] As it turns out,

> the original section was enacted as part of an overall policy aimed at ending the Anti-Rent Riots, an armed insurrection by farmers in the Hudson Valley. The rioting had reached such intensity that a state of insurrection had been declared. This particular statute was addressed to a specific group of insurrectionists who, while disguised as "Indians," murdered law enforcement officers attempting to serve writs upon the farmers. The "Indians" were in fact farmers, who as part of their costumes, wore women's calico dresses to further conceal their identities. The only connection this section had with men attired in female clothing was the fact that the attire was used in furtherance of a scheme of murder and insurrection. Indeed, males dressed in female attire for purposes other than discussed above were not even considered by the Legislature adopting the section. It thus would appear that the appellant's conduct herein was neither within the meaning of the section nor within the contemplation of the Legislature which first enacted the statute.[161]

Yet again, a statute was repurposed to target an LGBTQ individual.

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[152] *Id.*
[153] *Id.*
[154] *Id.* at 368.
[155] People v. Archibald, 296 N.Y.S.2d 834 (1968).
[156] *Id.* at 835.
[157] *Id.*
[158] *Id.* at 837.
[159] *Id.*
[160] *Id.*
[161] *Archibald*, 296 N.Y.S.2d at 837.

A. *Drag Bans*

1. *Structuring drag bans*

In order to understand the structure and text of many laws that effectively ban drag performances, it is important to understand their legal underpinning, which comes from the Supreme Court obscenity precedent. *Miller v. California* is the leading obscenity case.[162] Mr. Miller facilitated the mass mailing of brochures advertising the sale of illustrated books described as "'adult' material."[163] Following a jury trial, he was convicted of a misdemeanor for knowingly distributing obscene material.[164] In particular, Miller was convicted for "causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures."[165]

Writing for the majority, Chief Justice Warren Burger framed the case thus, "[t]his case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials."[166] Burger also invoked the Supreme Court's long history of recognizing the legitimate interest of states in prohibiting dissemination or exhibition of obscene material when that dissemination carries with it "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[167]

Miller limited the regulation of obscene materials to works depicting or describing sexual conduct.[168]

That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[169]

The majority further attempted to define what considerations a trier of fact must apply:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual

[162] Miller v. California, 413 U.S. 15 (1973) (internal citations omitted).
[163] *Id.* at 16.
[164] *Id.*
[165] *Id.* at 18.
[166] *Id.*
[167] *Id.* at 18–19.
[168] *Miller*, 413 U.S. at 24.
[169] *Id.*

> conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[170]

What constitutes "prurient interest" or "patently offensive" is left to the individual states.[171]

The statutes examined below are representative rather than exhaustive. Looking at the text, it becomes clear that some are designed to withstand a challenge under *Miller*.[172] Others take a more explicit approach to targeting drag performers.[173]

2. *Arkansas*

Arkansas is an example of a state that has sought a more opaque attack on drag. The relevant statute prohibits adult-oriented business activity in close proximity to places frequented by children. [174] A recent bill would amend the statute to include the following language:

Arkansas Code § 14-1-302, concerning definitions related to adult-oriented businesses, is amended to add additional subdivisions to read as follows:

> (26) "Adult-oriented performance" means a performance that is intended to appeal to the prurient interest and that features:
> (A) A person who appears in a state of nudity or is seminude;
> (B) The purposeful exposure, whether complete or partial, of:
> (i) A specific anatomical area; or
> (ii) Prosthetic genitalia or breasts; or
> (C) A specific sexual activity;
> (27) "Minor" means an individual who is less than eighteen (18) years of age; and
> (28) "Public funds" means funds, moneys, receivables, grants, investments, instruments, real or personal property, or other assets, liabilities, equities, revenues, receipts, or disbursements belonging to, held by, or passed through a governmental body.[175]

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[170] *Id.* (internal citations omitted).
[171] *Id.* at 30.
[172] *See* S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); 2023 Fla. Laws 2023-94.
[173] H.B. 0359, 68th Leg. (Mont. 2023).
[174] ARK. CODE ANN. § 14-1-301 (2023).
[175] S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

The provision including "prosthetic genitalia or breasts" specifically brings drag performers, who often use prosthetic breasts in their attire, within the purview of this law.

Lending further credence to the argument that this bill specifically targets drag performers was its original subtitle: To Classify A Drag Performance As An Adult-Oriented Business; And To Add Additional Location Restrictions To An Adult-Oriented Business.[176] It is difficult to countenance the argument that this law is about anything other than targeting the expression of drag performers. By extension, it is an attack on the LGBTQ community.

3. *Florida*

In early 2023, Florida joined the number of states targeting drag performances with the passage of a bill for the "Protection of Children."[177] Much like Arkansas's bill, the Florida law amends a previously existing statute by adding language that, seemingly innocuous on its face, implicates drag performances.[178] The text reads:

> Section 1. Section 255.70, Florida Statutes, is created to read:
> 255.70 Public permitting.—
> (1) As used in this section, the term "governmental entity" means any state, county, district, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, or corporation or business entity acting on behalf of any public agency.
> (2) A governmental entity may not issue a permit or otherwise authorize a person to conduct a performance in violation of s. 827.11.
> (3) If a violation of s. 827.11 occurs for a lawfully issued permit or other authorization, the individual who was issued the permit or other authorization commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
> . . .
> Section 4. Section 827.11, Florida Statutes, is created to read:
> 827.11 Exposing children to an adult live performance.—
> (1) As used in this section, the term:

[176] S.B. 43, 94th Gen. Assemb., Reg. Sess. amend. 1 (Ark. 2023).
[177] 2023 Fla. Laws 2023-94.
[178] *Id.*

> (a) "Adult live performance" means any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 847.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:
> 1. Predominantly appeals to a prurient, shameful, or morbid interest;
> 2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
> 3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.
> (b) "Knowingly" means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
> 1. The character and content of any adult live performance described in this section which is reasonably susceptible of examination by the defendant; and
> 2. The age of the child.
> (2) A person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona fide belief of a child's consent may not be raised as a defense in a prosecution for a violation of this section.
> (3) A person may not knowingly admit a child to an adult live performance.
> (4) A violation of subsection (3) constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.[179]

The language is consistent with *Miller*, and the intent is clearly to bring drag performances within the realm of obscenity. While drag is not specifically named in the statute, the inclusion of prosthetic breasts would bring many drag performances within the scope of the bill. It promises fines for offenses, as well as the potential for businesses hosting shows to lose their licensure.[180]

Florida's law has already run into trouble in the courts. A federal judge blocked the law on the grounds that it is overly vague and likely

[179] *Id.* at §§ 1, 4.
[180] *Id.* at § 2.

unconstitutional.[181] While the law was not overturned, a lawsuit challenging the law will go forward.[182]

4. *Montana*

Montana was the first state to weaponize the law against drag performers. Legislation passed by the Montana legislature, House Bill 0359, takes the typical approach of claiming to protect children.[183] The statute contains the following prohibitions:

> (1) A library that receives any form of funding from the state may not allow a sexually oriented performance as defined in [section 1] on its premises.
> (2) A school or library that receives any form of funding from the state may not allow a sexually oriented performance or drag story hour, as defined in [section 1], on its premises during regular operating hours or at any school-sanctioned extracurricular activity.
> (3) A sexually oriented performance is prohibited:
> (a) on public property in any location where the performance is in the presence of an individual under the age of 18; and
> (b) in a location owned by an entity that receives any form of funding from the state.
> (4) A library, a school, or library or school personnel, a public employee, or an entity described in subsection (3)(b) or an employee of the entity convicted of violating the prohibition under this section shall be fined $5,000 and, if applicable, proceedings must be initiated to suspend the teacher, administrator, or specialist certificate of the offender under 20-4-110 for 1 year. If an offender's certificate has previously been suspended pursuant to this subsection (4), proceedings must be initiated to permanently revoke the teacher, administrator, or specialist certificate of the offender under 20-4-110 on a subsequent violation of this section.[184]

Again, the legislature seeks to tie inappropriate sexual conduct and related harm to minors to drag performances. Interestingly enough, the

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[181] Brandon Girod, *New Florida Laws Go into Effect July 1 but a Handful Have Already Met Legal Hurdles*, PENSACOLA NEWS J. (June 29, 2023, 9:12 AM), https://www.pnj.com/story/news/politics/2023/06/29/florida-laws-on-transgender-care-stop-woke-drag-shows-face-challenge/70363961007/.

[182] Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023) (denying Florida's application for a stay of District Court order enjoing enforcement of the anit-drag ban).

[183] H.B. 0359, 68th Leg. (Mont. 2023).

[184] *Id.* § 3.

statute's definition of "drag story hour" contains no references to sexual behavior; instead, it is defined as "an event hosted by a drag queen or drag king who reads children's books and engages in other learning activities with minor children present."[185] Indeed, the very definitions of "drag king"[186] and "drag queen"[187] are also lacking in any reference to sexual behavior.

Drag bans are susceptible to First Amendment Free Speech challenges. As is well known, the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech. . . ."[188] This means that "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[189] Historically, courts have found that the First Amendment "permitted restrictions upon the content of speech in a few limited areas."[190] One of those areas is obscenity.[191]

That drag bans violate the First Amendments Free Speech protection is the most obvious, and likely strongest, argument. At least one court has found this persuasive.[192] But this article offers a second argument, that drag bans also constitute sex-based discrimination based on gender stereotyping.

A. *Drag as Protected Free Speech*

1. *Drag is speech*

While the outer limits of what constitutes "speech" are unknown, a body of case law exists that provides guidance. "Pure speech," for example, is speech that "includes written and spoken words, as well as other media such as paintings, music, and film 'that predominantly serve to express thoughts, emotions, or ideas.'"[193] Things like words, paintings, and pictures become speech when they are used as a means of self-expression.[194]

Getting narrower, there is a body of case law finding that conduct can be a form of speech. This could include refusing to salute the flag,[195] marching in a parade,[196] or staging a sit-in.[197] While none of these acts is "speech" in a verbal sense, all convey a message of some type. Instead, these

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[185] *Id.* § 1(3).

[186] *Id.* § 1(1) ("'Drag king' means a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup.").

[187] *Id.* § 1(2) ("'Drag queen' means a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup.").

[188] U.S. CONST. amend. I.

[189] Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)).

[190] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

[191] Roth v. United States, 354 U.S. 476, 483 (1957).

[192] Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023).

[193] Brush & Nib Studio, L.C. v. City of Phoenix, 448 P.3d 890, 905 (Ariz. 2019) (quoting Coleman v. City of Mesa, 284 P.3d 863, 869 (Ariz. 2012)).

[194] *Id.* at 906.

[195] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[196] *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos, 515 U.S. 557, 559 (1995).

[197] *See* Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

non-verbal actions are referred to as expressive speech.[198] Courts determine whether speech is expressive by determining "whether the plaintiff's symbolic acts constitute expressive speech which is protected."[199] This is done by applying the *Spence-Johnson* test, which requires evaluation of (1) whether the speaker intends for the conduct to convey a "particularized message," and (2) the "likelihood [is] great" that a reasonable third-party observer would understand the message.[200] When the speech is expressive, the court must decide whether the defendant's conduct was impermissible because it was meant to suppress that speech.[201]

Arguably, choices of attire may constitute protected speech.[202] In *Tinker v. Des Moines*, a group of students and adults decided to wear black armbands throughout the holiday season as a means of showing their objection to hostilities in Vietnam.[203] After the principals of the Des Moines schools became aware of this plan, they "adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[204]

After litigation commenced, both the District Court and the 8th Circuit sitting *en banc* found that wearing an armband constitutes symbolic speech.[205] The United States Supreme Court granted certiorari and affirmed, writing that:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.[206]

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[198] *See Hurley*, 515 U.S. at 569.

[199] Doe *ex rel*. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000).

[200] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[201] *See Johnson*, 491 U.S. at 403 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)); *see also Spence*, 418 U.S. at 414 n.8.

[202] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

[203] *Id.* at 504.

[204] *Id.*

[205] *Id.* at 505.

[206] *Id.* at 513.

Because "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred," the Court found that a First Amendment violation had occurred.[207]

Similarly, in *Doe v. Yunits*,[208] a Massachusetts court dealt with a similar issue when plaintiff Jane Doe, a 15-year-old student diagnosed with gender identity disorder.[209] Yunits filed suit seeking a preliminary injunction to prevent her school from barring her from wearing attire consistent with her gender.[210] In ruling for Yunits, the court found that there was a substantial likelihood that she would prevail on the merits because (1) her attire was an expression of herself and her gender identity;[211] (2) she was "likely to establish, through testimony, that her fellow students are well aware of the fact that she is a biological male more comfortable wearing traditionally 'female'-type clothing because of her identification with that gender";[212] and (3) the schools conduct was suppression of Yunits's speech.[213]

Finally, in *Schacht v. United States*,[214] the United States Supreme Court addressed the wearing of American Military Uniforms in a theatrical skit.[215] Daniel Jay Schacht was indicted and convicted for violating 18 U.S.C. § 702, "which makes it a crime for any person 'without authority [to wear] the uniform or a distinctive part thereof . . . of any of the armed forces of the United States. . . ."[216] The Court read the statute at issue as being related to another statute "which authorizes the wearing of military uniforms under certain conditions and circumstances including the circumstance of an actor portraying a member of the armed services in a 'theatrical production.'"[217] The Court found that limiting the interpretation of "theatrical performance" to professionally produced works, as the government argued it should, would run afoul of the First Amendment's free speech protections.[218]

2. *Drag bans impermissibly limit expressive speech*

The Supreme Court has been clear about the circumstances in which the government may regulate expressive speech. In *United States v.*

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[207] *Id.* at 514.
[208] Doe *ex rel*. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).
[209] *Id.*
[210] *Id.*
[211] *Id.* at *3.
[212] *Id.* at *4.
[213] *Id.*
[214] Schacht v. United States, 398 U.S. 58 (1970).
[215] *Id.* at 59–60.
[216] *Id.* at 59.
[217] *Id.* at 61 (citing 10 U.S.C. § 772(f)).
[218] *Id.* at 61–62.

O'Brien,[219] the court developed a test for evaluating such restrictions. The test requires that a government regulation may be sufficiently justified:

> [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial government interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[220]

The *O'Brien* test has been justifiably criticized for being incomplete, as well as for being removed from considerations of time, manner, and place restrictions.[221] Regardless, it remains good law.

Consider a not uncommon scenario: a public library hosts a drag story hour for children. The children read an age-appropriate book about a topic, such as accepting others who are different from them. The reader is a 45-year-old man, performing in his drag character Ms. Kaleigh Velvet. This performance requires extensive makeup, a wig, a ball gown that shows a small amount of prosthetic breasts, and high-heeled shoes. Nothing about reading involves adult content.

How would this event fare under the Arkansas ban? Assume for the sake of argument that the first prong of the *O'Brien* test, if it is within the constitutional power of the Government, is satisfied. Leaving aside for a moment the question of intent to appeal to a prurient interest, the partial expose of Ms. Kaleigh Velvet's prosthetic breast may be enough to bring this library reading within the definition of "adult oriented performance."

What about the second prong? The legislation itself contains no stated government interest. As a result, this prong would necessarily weigh against the government.

The third prong of the *O'Brien* test requires that the regulation be unrelated to the suppression of free speech. But, as argued above, drag is expressive speech. Furthermore, as discussed above in Section III, the original subtitle of the legislation manifested a clear intent to target drag performers.

3. *Drag does not fall under* Miller

Even if drag bans did not impermissibly limit free speech under *O'Brien*, it is arguable that drag performances do not fall within the purview of *Miller*. As Chief Justice Burger pointed out, the materials in *Miller* were

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[219] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[220] *Id.*

[221] Kristie LaSalle, *The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech*, 18 TEX. J. C. L. & C. R. 1, 16 (2012).

mailed without the recipient's consent.[222] Drag performances, on the other hand, are often ticketed events. Even when they are not ticketed, they tend to be well-advertised. The point is that consumers of drag performances choose to attend those performances, rather than being unwilling viewers.

4. *Even if* Miller *applied, drag is not inherently obscene*

Assuming arguendo that drag does fall under *Miller*, it would be difficult to describe drag as appealing to "prurient interest."[223] A *simple* look at drag's constituent parts should suffice. No court has found the application of makeup alone to be an appeal to the prurient interest.[224] What about dancing? The Supreme Court has found that "nude dancing is not without its First Amendment protections from official regulation."[225] Drag, by its very nature, does not go so far. How about lip-synching?

Now consider a different type of drag performance: a book reading in a public library. Here is a simple framing of the underlying question: is a person in a dress reading a book likely to be arousing or appealing to sexual desire in children? Apparently, in the legislatures of Tennessee and other states, the answer is "yes, if that person is a man." The question these legislatures can't seem to answer is: why?[226]

There is nothing inherently prurient about drag as a form of performance art. It is true that some drag performances may include sexual elements, just as many comedy routines, novels, songs, or movies do as part of the overall presentation, but it is unusual for these elements to be the point of the performance.

The consent of consumers to view performances, even those involving nudity, has been relevant to some courts' obscenity analysis. In *Commonwealth v. Plank*,[227] the Massachusetts Supreme Judicial Court set aside a finding of guilty in an obscenity case in which the defendant:

> wearing a "babydoll see-through negligee," open in front, revealing her breasts, pubic area and buttocks. She was dancing and "gyrating" to music from a jukebox. One of the officers watched her for about five minutes, and during that

[222] Miller v. California, 413 U.S. 15, 18 (1973).

[223] Prurient is defined as "marked by or arousing an immoderate or unwholesome interest or desire *especially*: marked by, arousing, or appealing to sexual desire." *Prurient*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prurient#:~:text=%3A (last visited Oct. 14, 2023).

[224] In United States v. Pryba, 900 F.2d 748, 751 (4th Cir. 1990), the Fourth Circuit wrote of one magazine called *Tender Shavers* that "[b]obby socks, ponytails and makeup are employed to underscore, if not create, the appearance of adolescence, presumably to appeal to hedophiles." The jury did reach the decision that *Tender Shavers* was obscene, but it is unclear the extent that makeup itself was relevant to that conviction.

[225] Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

[226] The author sees two possible reasons for this failure to answer: (1) that members of these legislatures are incapable of distinguishing between gender non-conforming behavior and sexuality; or (2) anti-LGBTQ animus.

[227] Commonwealth v. Plank, 392 N.E.2d 841 (Mass. 1979).

> time saw her hands "touch her bust area and also her pubic areas" three or four times.[228]

In setting aside the finding of guilty, the court found that "patent offensiveness [should] be decided in context" before pointing out that the performance took place in front of "willing adult patrons."[229]

In *Ginzburg v. United States*,[230] a case dealing with the publication and dissemination of written materials, Ralph Ginzburg was convicted for violating the obscenity statute.[231] Like in *Miller*, the materials were mailed indiscriminately.[232] After granting certiorari, the United States Supreme Court found that "the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity."[233]

5. *Drag has serious artistic and social value*

Assuming that one could find that drag performances are obscene, it is difficult, if not impossible, to argue that drag lacks serious artistic value. "Art" and "artistic value" defy objective definition or assessment.[234] In *Pope v. Illinois*, the United States Supreme Court tried to clarify, finding that the determination of artistic value should be made with reference to the opinion of an average reasonable person.[235]

That does not mean that expert witnesses have not tried to provide tests to determine artistic value. In *Tipp-It, Inc. v. Conboy*, an expert proposed either a "four-corners test," which included evaluating "space, composition, design, color, harmony, and form and balance" or, alternatively, a "'Dickey' analysis, which considers where the art has been exhibited as well as whether the work, or the putative artist, has achieved a certain degree of respect and recognition in the artistic community."[236]

B. *Drag Bans as Unconstitutionally Vague*

Both Florida and Tennessee have seen their anti-drag laws challenged in court. In Tennessee, the ban was challenged in the case of *Friends of George's, Inc. v. State of Tennessee*.[237] In granting a temporary restraining order, the court found a likelihood of success on the merits on three grounds:

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[228] *Id.* at 842.
[229] *Id.* at 844.
[230] Ginzburg v. United States, 383 U.S. 463 (1966).
[231] *Id.* at 463.
[232] *Id.* at 469.
[233] *Id.* at 465–66.
[234] Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 442 (1999).
[235] Pope v Illinois, 481 U.S. 497, 500–01 (1987).
[236] Tipp-It, Inc. v. Conboy, 596 N.W.2d 304, 314 (Neb. 1999).
[237] Friends of George's, Inc. v. Tennessee, No. 2:23-cv-02163-TLP-tmp, 2023 WL 2755238, at *1 (W.D. Tenn. Mar. 31, 2023).

content-based regulation, facially content-neutral but considered content-based regulation, and vagueness and overbreadth.[238]

The court emphasized that not only is the law content-based, but also viewpoint-based because whether the conduct violated the law is based on the identity of the performer.[239] Furthermore, the penalties are directed at the performers rather than the owners of offending establishments, as a similar law does.[240] As a result, the court found that the plaintiff made a strong case for evaluating the law under strict scrutiny.[241]

The court also looked at the legislative history of the law.[242] In its review, the court found that the law traced its origins to a lawsuit, filed by the law's sponsor, asking a court to declare a drag performance at a pride festival as a public nuisance.[243] Furthermore, floor speeches drew attention to the law's genesis in this lawsuit.[244] As a result, even if the law were assumed to be content neutral on its face, it still targeted specific content.

Finally, the law was deemed to likely be overbroad.[245] The plaintiff argued, and the court agreed, that the language of the statute could affect performers virtually anywhere.[246] Similarly, the court rejected an argument that the law is a time, manner, and place restriction as it mentions no time or manner and could apply anywhere.[247] Florida's law fared no better.[248]

CONCLUSION

Laws targeting queer individuals, whether directly (sodomy laws, same-sex marriage bans, drag bans, etc.) or indirectly (repurposing laws to target queer bodies), are not a new phenomenon. Nor is the stoking of moral panic in order to target the LGBTQ community.[249] As a result, drag bans are merely the latest attempt to use moral panic to target LGBTQ culture.

Yet even as drag bans have been instituted in a number of states, they have already stumbled in the face of constitutional challenges. Given its history, elemental makeup, and expressive nature, drag is clearly expressive speech. Its diverse origins, role in different cultural settings, and colorful subcultural aspects—from faux queens to ballroom extravaganza—speak to both its artistic and social value.

The First Amendment is clear in its protection of speech. Through a long history of precedent, the courts have defined various types of speech,

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[238] *Id.* at *4–6.
[239] *Id.* at *4.
[240] *Id.*
[241] *Id.*
[242] *Id.* at *10
[243] *Id.* at *5.
[244] *Friends of George's, Inc.*, 2023 WL 2755238, at *5.
[245] *Id.* at *6.
[246] *Id.*
[247] *Id.*
[248] Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023).
[249] *See, e.g.*, JAMES KIRCHICK, SECRET CITY: THE HIDDEN HISTORY OF GAY WASHINGTON (Henry Holt & Co. 2022).

such as pure speech and expressive speech. Whatever the outer limits of protected speech are, it is clear that drag falls within the First Amendment's protection. Drag bans, then, violate protected free speech.

Reminiscent of the Little Rock Nine and Ruby Bridges: Present Day Racially Offensive Comments That Create a Hostile Educational Environment

DAVID A. GREEN*

> "Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." – Frederick Douglass[1]

INTRODUCTION

Dr. William Anderson is a full professor at Anystate University, within the University's College of Arts & Sciences, Liberal Arts and Humanities Department, and has been at the University for over 20 years. While Dr. Anderson has always made controversial comments and has not been popular with students of color, during the last five years, he has been extremely bold, spouting borderline racist statements. He created a blog for his students to read following the death of George Floyd, where he made statements such as "black folks would not have trouble with the police, if they only cooperated and followed the police officer's directive." He further stated that the major problem involving white police officers interacting with the African American community is that "many of these black kids don't have any home training."

After the COVID-19 pandemic hit, which he only refers to on his blog and in class as the "China virus," Dr. Anderson recommended that the country revisit the idea of "concentration camps." During his philosophy class, he required freshmen students to write a paper on how American slavery was a benefit to the "primitive" African tribes. During the spring of 2021, students of all races demanded that actions be taken against Dr. Anderson, specifically that he be terminated. There were numerous protests, marches, letter writing campaigns and a threatened sit-in. Dr. Anderson takes the position that his actions are protected by both the First Amendment

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[1] Charlotte Mostertz, Comment, *Teach Your Children Well: Historical Memory of The Civil War and Reconstruction, Public Education, and Equal Protection*, 22 UNIV. PA. J. CONST. L. 589, 623 (2020) (quoting Frederick Douglass, The Blessings of Liberty and Education (Sept. 3, 1894), *in* 5 THE FREDERICK DOUGLASS PAPERS. SERIES ONE, SPEECHES, DEBATES, AND INTERVIEWS, 616, 623 (John W. Blassingame & John R. McKivigan eds. 1992)).

and academic freedom. The University seeks to terminate its relationship with Dr. Anderson and wants to avoid any litigation.[2]

As the political tension in the country intensifies, it seems that the country is going back in time. This tension is highlighted in the school setting, particularly in the university systems. The proliferation of racially implicated incidents across American universities is reminiscent of the opposition to the efforts to integrate public schools and the pictures of Elizabeth Ekford and Ruby Bridges. The picture of Elizabeth Ekford, taken in 1957, captures Ms. Ekford, as part of the Little Rock Nine, desegregating Little Rock High School in Arkansas as white citizens yelled racial epithets at her. The poignant picture of Ruby Bridges captures the little girl at the tender age of six entering an elementary school in New Orleans surrounded by United States Marshalls. While students may also feel unwelcome due to their gender, sexual orientation, disability, religion, national origins, and political affiliation, this article will address how some students of color, particularly African American students, feel unsafe and often attacked by their own professors.[3] The hypothetical above involving Dr. Anderson is designed to reflect the present-day environment and demonstrate that it has the same impact as the environment of the late 1950s and early 1960s, when African American students were overtly told that they were not welcome in schools.

Part II of this article will provide a historical overview of the opposition to educational integration and the hostility faced by African American students. Part III will discuss the concept of academic freedom and a review of Supreme Court decisions involving academic freedom in the context of the First Amendment. Moreover, this section will discuss the lower courts' application of academic freedom and the uncertainty of the law as it relates to First Amendment rights in the educational setting. Part IV of the article will discuss the present-day climate, the tension between academic freedom and a hostile education environment and the attack on critical race theory jurisprudence. Finally, Part V will recommend that university systems, including accrediting bodies, take the lead in directly providing guidance to ensure a welcoming educational environment for all faculty and students.

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[2] This is a fictitious hypothetical from Professor Green's spring 2022 Employment Discrimination seminar. The fact pattern is based on different recent incidents occurring around the country. After the students completed an intra-office memorandum based on their research, they had to provide an opinion letter to the University counsel. The students concluded that it was best that the University negotiate a buyout with Dr. Anderson based on his due process rights to a hearing and the need to resolve the matter as soon as possible. This fact pattern was also the basis of a discussion during the National Bar Association's Annual Mid-Year Conference and Gertrude Rush Awards Gala in April 2023.

[3] Racism targeted against African Americans and individuals of African descent has generated national attention and led to the "Black Lives Matter" movement. *See generally* BARBARA RANSBY, MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE 21ST CENTURY (2018) (outlining the scope and geology of the Black Lives Matter movement). Black Lives Matter began with a social media hashtag, #BlackLivesMatter, after the acquittal of George Zimmerman in the shooting death of Trayvon Martin in 2012. *Id.* The movement grew nationally in 2014 after the deaths of Michael Brown in Missouri and Eric Garner in New York. *Id.* at 47

I. HISTORICAL FLASHBACK TO THE OPPOSITION TO EDUCATIONAL INTEGRATION

As this country began its efforts to integrate education, African American children were clearly not welcomed with open arms in to the previously all white schools.[4] The images of Elizabeth Eckford, part of the Little Rock Nine, and Ruby Bridges, in New Orleans, captured the country in turmoil, as integration was met with hostility from white Americans who vehemently opposed having their children educated alongside African American children.[5] White citizens chanted, "Two, four, six, eight—we don't want to integrate" as the African American children walked to the previously all-white schools.[6] While the United States Supreme Court in *Brown v. Board of Education* decided that "separate but equal" was unconstitutional,[7] the images of Elizabeth Eckford and Ruby Bridges forever captured that not all Americans agreed.[8] The message was clear: African American children were not welcome in educational settings with white students.[9]

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[4] Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LA. L. REV. 1039, 1081, 1090 (2014).

[5] SHELLEY TOUGAS, LITTLE ROCK GIRL 1957: HOW A PHOTOGRAPH CHANGED THE FIGHT FOR INTEGRATION 4 (2012); RUBY BRIDGES, THROUGH MY EYES 14 (1999).

[6] TOUGAS, *supra* note 5, at 4.

[7] Brown v. Bd. of Educ., 347 U.S 483, 495 (1954). In 1954, African American children, through their legal representatives, challenged the "separate but equal" doctrine and sought admission to the public schools of their community on a nonsegregated basis. *Id.* at 487. The children were denied admission to schools attended by white children under laws requiring or permitting segregation according to race. *Id.* at 487–88. Because they contended that the segregation deprived the children of the equal protection of the laws under the Fourteenth Amendment, the children requested that the United States Supreme Court overturn the "separate but equal" doctrine announced by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537, 547–48 (1896). *Brown*, 347 U.S. at 488. The United States Supreme Court, in an opinion written by Chief Justice Earl Warren, held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment. *Brown*, 347 U.S. at 495.

The named plaintiff, the father of Linda Brown, who lived in a mixed-race neighborhood, began the challenge in 1950, when Linda was ready to begin the third grade. Paul E. Wilson, *The Genesis of* Brown v. Board of Education, 6 KAN. J. L. & PUB. POL'Y 7, 10, 11 (1996); *see also* Nicole Love, Note, Parents Involved in Community Schools v. Seattle School District No. 1*: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K–12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 117–18 (2009). While the children of their white and other non-Black neighbors attended Sumner Elementary School ("Sumner"), about seven blocks from the Brown residence, Linda attended the all-Black school, Monroe Elementary School ("Monroe"), located twenty-one blocks from her home. Wilson, *supra* note 7, at 10–11. Linda and the other black students had to travel a dangerous path through a railroad crossing and heavy traffic to get to Monroe. *Id.* at 11. As the school year began, Oliver Brown, Linda's father, was concerned about his daughter's safety and comfort, the inconvenience of her daily trip to and from Monroe, and the quality of the educational opportunity afforded her by the Topeka school district. *Id.* On the day classes were to begin, Mr. Brown decided to challenge the segregation in Topeka. *Id.* Principal Frank Wilson, who had been warned that the local NAACP would challenge the separation policy, was waiting for the encounter with Mr. Brown and denied Mr. Brown's request to admit Linda to the Sumner school due to her race. *Id.* at 10, 11.

[8] *See* TOUGAS, *supra* note 5, at 5, 6, 8, 9 (using photographs of Elizabeth Eckford and Ruby Bridges). *See also* BRIDGES *supra* note 5 (using photographs of protestors, police officers, and federal marshals).

[9] *See* TOUGAS, *supra* note 5. *See also* BRIDGES *supra* note 5.

On September 4, 1957, the Little Rock Nine[10] were scheduled to integrate Little Rock Central High School in Little Rock, Arkansas.[11] Elizabeth Eckford arrived alone to enter the high school, but she was turned away by the Arkansas National Guard.[12] As she attempted to enter the school, the hatred that she encountered was captured in an image for history and for the world to witness.[13] As Elizabeth Eckford attempted to enter the school, this infamous day of conflict was captured by the reporters and photographers who were present.[14]

> *"Go back to where you came from!" a woman shouted at her. Elizabeth had felt a moment of hope when she noticed soldiers with rifles near the school's entrance. She guessed that the soldiers' job was to make sure she and the eight other students entered the school safely. Elizabeth guessed wrong. As she approached the door, the soldiers, who were in the Arkansas National Guard, crossed their rifles and blocked her path. On the orders of Arkansas' governor, Orval Faubus, they wouldn't allow her to enter the building. Her legs started shaking. The crowd continued to yell. "Go home! Whites have rights too!" She looked for a calm adult, someone who would make her feel safe. She noticed a woman with a kind face, but the woman lunged forward and spit on her.*[15]

The incidents of the day made it clear that integration was not going to be easy and that some white citizens were not going to give up without a fight.

On November 14, 1960, Ruby Bridges, six years old and alone, integrated William Frantz Public School in New Orleans, Louisiana.[16] The historic event is captured in a poignant picture of Ruby Bridges being surrounded by four United States Marshals. Ruby Bridges has reflected on that day, stating:[17]

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[10] The Little Rock Nine comprised of Thelma Mothershed, Minnijean Brown, Elizabeth Eckford, Gloria Ray, Ernest Green, Melba Pattillo, Terrance Roberts, Carlotta Walls, and Jefferson Thomas. TOUGAS, *supra* note 5, at 48–49.

[11] *Id.* at 4.

[12] *Id.* at 4–5. Daisy Bates, president of the Arkansas chapter of the National Association for the Advancement of Colored People (NAACP), had planned for the students to walk to the school with black and white ministers in order to ensure that the students felt safe, but Elizabeth Eckford's family never got a call about the plan because they did not have a telephone. *Id.* at 10. The Arkansas National Guard turned all the children away. *Id.* at 9.

[13] *Id.* at 6. "Photographer Will Counts [of the local newspaper, the *Arkansas Democrat*] said when he 'saw Hazel Bryan's contorted face in the camera's viewfinder, I knew that I have released the shutter at an important moment.'" TOUGAS, *supra* note 5, at 6. With "her face twisted with rage," Hazel Bryan screamed, "'Go home, n[*****]!' . . . 'Go back to Africa!'" *Id.*

[14] *Id.* at 4–10.

[15] *Id.* at 4–5 (emphasis added); Finkelman, *supra* note 4, at 1089.

[16] BRIDGES, *supra* note 5, at 14.

[17] *Id.*

> *My mother took special care getting me ready for school. When somebody knocked on my door that morning, my mother expected to see people from the NAACP. Instead, she saw four serious-looking white men, dressed in suits and wearing armbands. They were U.S. federal marshals. They had come to drive us to school and stay with us all day. I learned they were carrying guns. I remember climbing into the back seat of the marshal's car with my mother, but I don't remember feeling frightened. William Frantz Public School was only five blocks away, so one of the marshals in the front seat told my mother right away what we should do when we got there. "Let us get out of the car first," the marshal said. "Then you'll get out, and the four of us will surround you and your daughter. We'll walk you to the door together. Just walk straight ahead, and don't look back." . . . As we walked through the crowd, I didn't see any faces. I guess that's because I wasn't very tall and I was surrounded by the marshals. People yelled and threw things. I could see the school building, and it looked bigger and nicer than my old school. When we climbed the high steps to the front door, there were policemen in uniforms at the top. The policemen at the door and the crowd behind us made me think that this was an important place. It must be college, I thought to myself.*[18]

Ruby Bridges entered into a segregated school and entered into the history books as this event garnered national attention.[19]

II. THE CONCEPT OF ACADEMIC FREEDOM AND THE SUPREME COURT REVIEW

A. Creation of Academic Freedom

As far back as the debates involving Socrates, Plato and Aristotle, it was accepted that the pursuit of higher education can only effectively occur if there is academic freedom.[20] The American Association of University

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[18] *Id.* at 15–16 (emphasis added).

[19] Finkelman, *supra* note 4, at 1089 ("In 1960, Ruby Bridges's historic and courageous walk to that school—protected from a hate-filled crowd by federal marshals—made national headlines. The facts surrounding the marshals escorting Bridges to the school later inspired Norman Rockwell's famous painting, 'The Problem We All Live With,' which appeared in *Look Magazine* and was seen by millions of Americans.").

[20] Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 87, 119 (2018).

Professors (AAUP)[21] has led the effort to define and defend academic freedom.[22] With its original declaration in 1915, the AAUP provided that:

> a university has three core purposes: "to promote inquiry and advance the sum of human knowledge; to provide general instruction to students; and to develop experts of various branches of public service." As such, "[a]cademic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action."[23]

Consistent with the goal of professors, the professor should be allowed to discuss controversial matters, but should:

> set forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.[24]

"In 1940, the AAUP issued a Statement of Principles of Academic Freedom and Tenure," which provided that "[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to the subject."[25] With this statement, it was accepted that academic freedom was a right within the university system.

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[21] *Mission*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/about/mission-1 (last visited Feb. 13, 2024) ("The mission of the American Association of University Professors (AAUP) is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, postdoctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. Founded in 1915, the AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country's colleges and universities.").

[22] Shepard & Culver, *supra* note 20, at 119.

[23] *Id.* at 120 (citing John K. Wilson, *AAUP's 1915 Declaration of Principles: Conservative and Radical, Visionary and Myopic*, 7 AAUP J. ACAD. FREEDOM, 2016, at 1, https://www.aaup.org/sites/default/files/Wilson_1.pdf).

[24] *Id.* at 120 (quoting Wilson, *supra* note 23, at 4–5).

[25] *Id.* at 121.

B. *Supreme Court Review of Academic Freedom in the Context of the First Amendment*

In 1957, the United States Supreme Court recognized the doctrine of academic freedom in the context of the First Amendment in *Sweezy v. New Hampshire*.[26] Professor Paul Sweezy, a college professor at the University of New Hampshire, was investigated for alleged involvement in subversive groups such as the Communist Party.[27] As part of the investigation, the New Hampshire Attorney General asked Professor Sweezy questions about his coverage of material in the classroom as it related to his potential beliefs in communism and socialism.[28] Professor Sweezy declined to answer the questions, and when the Attorney General filed a petition in state court to order Professor Sweezy to respond, Professor Sweezy maintained his refusal and was held in contempt and committed to jail.[29] In a plurality opinion, Chief Justice Warren concluded "that there unquestionably was an invasion of [Professor Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[30] He noted:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[31]

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[26] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

[27] *Id.* at 243–44.

[28] *Id.* (The Attorney General asked: "'What was the subject of your lecture?' 'Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?' 'Did you advocate Marxism at that time?' 'Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?' 'Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?'").

[29] *Id.* at 244–45.

[30] *Id.* at 250.

[31] *Id.; see also Sweezy*, 354 U.S. at 261 (Frankfurter, J., concurring) ("When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.").

In reversing the contempt judgment, the Supreme Court made clear that academic freedom protects professors from the state overreaching into matters in the classroom.[32]

Ten years after *Sweezy*, the Supreme Court reaffirmed its support for academic freedom in *Keyishian v. Board of Regents*.[33] The New York State University system established a plan to ensure that there were no appointments or retention of "subversive" persons in state employment.[34] Professor Keyishian and several of his colleagues each refused to sign "a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York."[35] The Supreme Court found the New York law impermissibly overbroad and in violation of the First Amendment.[36] Justice Brennan, writing for the majority, held that:

> [o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[37]

The Supreme Court weighed the State's attempts to address concerns of subversion and communism but placed a premium on academic freedom.[38]

A year after *Keyishian*, the Supreme Court announced a balancing test for considering the free speech rights of teachers outside of the classroom.[39] In *Pickering v. Board of Education*, the Supreme Court rejected the argument that teachers relinquish their free speech rights as a condition of employment.[40] In *Pickering*, the Board of Education dismissed Marvin L.

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[32] *Id.* at 250 (majority opinion).

[33] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[34] *Id.* at 591–92.

[35] *Id.* at 592.

[36] *Id.* at 609.

[37] *Id.* at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[38] *Id.* at 589–90. *But see Keyishian*, 385 U.S. at 624 (Clark, J., dissenting) (quoting Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952) ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.")).

[39] Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 563–64 (1968).

[40] *Id.* at 568 ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in

Pickering, an Illinois high school teacher, for sending a letter to a local newspaper in which he criticized the Board's handling of past proposals to raise new revenue for the schools.[41] The Board determined that his letter was "detrimental to the efficient operation and administration of the schools of the district" and therefore warranted his dismissal.[42] The Supreme Court unequivocally rejected the Board's contention that "even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone. . . ."[43] While reversing the dismissal of Mr. Pickering, Justice Marshall, writing for the Court, noted that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[44] Without providing a bright line test, the Court provided analytical factors a court should use when adjudicating a teacher's speech.[45]

In 1983, in addressing the public employee case of *Connick v. Myers*, the Supreme Court relied upon the *Pickering* principles and provided further guidance regarding a public employee's free speech rights and the government's legitimate interest in efficient operations.[46] *Connick* involved the District Attorney in New Orleans, Harry Connick, and his decision to terminate Assistant District Attorney Sheila Myers after she opposed his decision to transfer her and circulated an office questionnaire regarding office morale and pressure to work in political campaigns.[47] Mr. Connick informed Ms. Myers that she was creating a "mini-insurrection" and that her distribution of the questionnaire was an act of insubordination.[48] The Court concluded that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment."[49] The Court "caution[ed] that a stronger showing [of workplace disruption] may be necessary if the employee's speech more substantially involved matters of public concern.[50]

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numerous prior decisions of this Court.") (first citing Wieman v. Updegraff, 344 U.S. 183 (1952); then citing *Shelton*, 364 U.S. at 479; and then citing *Keyishian*, 385 U.S. at 589).

[41] *Id.* at 564.

[42] *Id.* at 564–65.

[43] *Id.* at 570.

[44] *Id*. at 568.

[45] *Pickering*, 391 U.S. at 569–73; *see also* Shepard & Culver, *supra* note 20, at 128 (summarizing the *Pickering* analytical factors as: "whether (1) [a] close working relationship existed between the educator and the people whom he criticized; (2) [t]he speech addressed a matter of public concern; (3) [t]he speech had a detrimental impact on the administration of the education system; (4) [t]he educator's performance of his daily duties was impeded; [and] (5) [t]he educator spoke as a public employee or a private citizen.").

[46] Connick v. Myers, 461 U.S. 138, 150 (1983).

[47] *Id.* at 140–41.

[48] *Id.* at 141.

[49] *Id.* at 154.

[50] *Id.* at 152.

As a result of these two Supreme Court decisions, courts use the *Pickering-Connick* two-part test in deciding whether speech by a public employee is constitutionally protected.[51] While public employees, including public teachers, still maintain a right to discuss matters of public concern, even this protected speech is not protected above an employer's efficiency interests.[52] In *Connick*, the Supreme Court revisited the balancing test established in *Pickering* and determined that a court must make two inquiries when determining whether a public employee's speech is protected by the First Amendment.[53] The threshold question is whether the speech touched on a "matter[] of public concern."[54] To qualify as such, the speech or expression must relate to a "matter of political, social, or other concern to the community."[55] Next, a balance should be struck between the employee's interests, as a citizen, in commenting on matters of public concern and the employer's interests in promoting efficiency.[56] Finally, the Court determined that the employer bears the burden of proving substantial interference with office operations.[57]

In 2006, the Supreme Court strengthened a public employer's ability to regulate the workplace despite First Amendment implications in *Garcetti v. Ceballos*.[58] Richard Ceballos, a district attorney in California, was demoted and transferred after he wrote a memorandum to his supervisors, criticizing certain practices by the sheriff's department.[59] Ceballos subsequently sued his supervisors, arguing that they had retaliated against him for writing the memorandum and had violated his First Amendment right to free speech.[60] After a district court dismissed Ceballos' claim, ruling that his memorandum was not protected speech because it was written as part of his employment duties, the Ninth Circuit overturned the decision, ruling that First Amendment protections did apply.[61] On appeal, the Supreme Court reversed and held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

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[51] Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interest*, 66 S. CAL. L. REV. 2533, 2544 (1993).

[52] *Connick*, 461 U.S. at 140; *see* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

[53] *Connick*, 461 U.S. at 140.

[54] *Id.*

[55] *Id.* at 146.

[56] *Id.* at 140.

[57] *Id.* at 149–50.

[58] Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006). In dissent, joined by Justices Ginsburg and Stevens, Justice Souter raised concerns over the majority's deference to the employer. *Id.* at 428 ("I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.").

[59] *Id.* at 413–14 (majority opinion).

[60] *Id.* at 415.

[61] *Id.*

communications from employer discipline."[62] The Court reasoned that public employers must have the ability to restrict the speech of their employees in order for public institutions to operate efficiently and effectively.[63]

Although *Garcetti* does not directly address higher education, the implications of the Supreme Court's decision affect academia.[64] In his dissent, Justice Souter raised a concern over the overreaching impact of *Garcetti* into higher education:

> [t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."[65]

In response, Justice Kennedy, writing for the majority stated:

> Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.[66]

The Supreme Court's decision in *Garcetti* did not provide clear guidance in the public education setting.

Courts have not uniformly accepted that *Garcetti* applies to public education;[67] to the extent that it is discussed, courts have separated out acts

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[62] *Id.* at 421.

[63] *Garcetti*, 547 U.S. at 421–23.

[64] *See id.* at 438–39 (Souter, J., dissenting).

[65] *Id.* at 438 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.")).

[66] *Id.* at 425 (majority opinion).

[67] Shepard & Culver, *supra* note 20, at 131 ("Since the decision, lower courts have split on whether, or how, to apply *Garcetti* to First Amendment claims from university faculty. Two Circuits have explicitly ruled that *Garcetti* does not apply to academic speech—a category described as a '*Garcetti*' exception—the Ninth and Fourth Circuits. Three other Circuits, the Third, Sixth, and Seventh, have applied *Garcetti* to conclude that faculty speech related to official duties is not immune from discipline based on the First Amendment.").

by the faculty member related to scholarship and teaching from other actions by the teacher.[68] Consistent with the reservation raised in the *Garcetti* case, courts have not applied those principles to actions by faculty members involving scholarship and teaching.[69] In *Garcetti*, the Supreme Court chose not to decide whether the principles articulated in that case apply to scholarship or teaching in the academic arena.[70] The Fourth Circuit noted:

> [t]he Supreme Court in *Garcetti* held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering–Connick* standard . . . to this appeal.[71]

The lack of clarity in *Garcetti*'s application in the academic setting leaves unclear the extent of the protection afforded faculty members asserting a First Amendment right.

While the Supreme Court has acknowledged that a public educator has academic freedom, the Court has only done so in the context of the First Amendment, and the Court has not acknowledged academic freedom as a separate constitutional right.[72] Standing alone, the courts have not provided a clear definition of academic freedom.[73] The Fourth Circuit, in litigation

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[68] *See* Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) ("*Garcetti* does not apply to 'speech related to scholarship or teaching.'"); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment."); Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (holding that if a faculty member's "actions so clearly were not 'speech related to scholarship or teaching,' . . . [then] such a determination [would] not 'imperil First Amendment protection of academic freedom in public colleges and universities'"); Savage v. Gee, 665 F.3d 732, 739 (6th Cir. 2012) (holding that the faculty member's "speech as a committee member commenting on a book recommendation was not related to classroom instruction and was only loosely, if at all, related to academic scholarship . . . [and therefore] does not fall within the realm of speech that might fall outside of *Garcetti*'s reach.").

[69] *See, e.g.*, *Demers*, 746 F.3d at 406.

[70] *Garcetti*, 547 U.S. at 425.

[71] Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 n.11 (4th Cir. 2007).

[72] *See* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000); *see also* Amy H. Candido, Comment, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 86–88 (1997) ("Although the boundaries of the Supreme Court's academic freedom doctrine remain uncharted, and the text of the First Amendment does not mention academic freedom, courts have been clear that academic freedom is 'entitled to some measure of constitutional protection.'").

[73] *Urofsky*, 216 F.3d at 410 ("'Academic freedom' is a term that is often used, but little explained, by federal courts.") (citing W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.")); *see also* J. Peter Byrne,

involving professors employed by various public colleges and universities in Virginia challenging the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state that the professors, concluded that individual professors do not have a constitutional right to academic freedom.[74] The Fourth Circuit noted that "[i]t is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment . . . [but] . . . the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom."[75] The scope of the concept of academic freedom remains unclear, but the Supreme Court has established that academic freedom is entitled to some constitutional protection.[76]

The application of the doctrine of academic freedom is further blurred because of the Court's reluctance to get involved in academic decisions.[77] The Supreme Court has noted:

> [i]f a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,"[78] far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking."[79]

Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L.J. 251, 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.").

[74] *Urofsky*, 216 F.3d at 411–12.

[75] *Id.* (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 227 n.12 (1985) (In a university student's lawsuit against the regents of a state university challenging the constitutionality of his dismissal from a six-year program of study culminating in an undergraduate degree and medical degree, the Court, in dismissing the lawsuit, acknowledged its "concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom."; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978) (opinion of Powell, J.) (In a case where a white male applicant challenged the state medical school's affirmative action policy, the Court held that the special admissions program was illegal, but race may be one of a number of factors considered by school in passing on applications. The Court further noted "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body; *see also*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250, 261–63 (1957) (citing the plurality opinion and Justice Frankfurter's concurring opinion)). *Cf.* Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287–88 (1984) (stating that the Court has not recognized a First Amendment right of faculty to participate in academic policymaking)).

[76] Candido, *supra* note 72, at 87–88.

[77] *Ewing*, 474 U.S. at 226.

[78] *Id.* (quoting Bishop v. Wood, 426 U.S. 341, 349 (1976)).

[79] *Id.* (quoting Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978)).

The Supreme Court has determined that great deference should be afforded to an educational institution when it undertakes a review of an academic determination.[80] The Court has further noted that a reviewing court may not overturn an academic decision "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[81] The Court rightfully defers to the educational institution in balancing the best course of action.

III. PRESENT DAY DEBATE BETWEEN ACADEMIC FREEDOM VERSUS HOSTILE EDUCATIONAL ENVIRONMENT.

While the tension between academic freedom and protecting a welcoming educational environment is not new,[82] the election of Donald Trump to the presidency in 2016 during high profile racial incidents involving the death of African American victims has heightened that tension.[83] Faculty, administrators, and students felt challenged and unwelcomed by Trump's rhetoric, while those who supported his views felt "marginalized" due to their support of Trump.[84] Moreover, with the advent of the Black Lives Matter movement[85] and public protest, such as Colin

[80] *Id.* at 225 ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment.").

[81] *Id. Cf.* Mawakana v. Bd. of Trs. of Univ. of the D.C., 926 F.3d 859, 865 n.4 (D.C. Cir. 2019) (while determining that the University is not entitled to special deference in Title VII cases, the D.C. Circuit noted that "[s]ome cases simply apply the same Title VII standard to faculty members as to other discrimination plaintiffs; others discuss *Ewing* and the concept of academic freedom, expressing solicitude for academic institutions' faculty employment decisions" (citations omitted)).

[82] *See* ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM & THE UNIVERSITIES (1986) (recounting how the anti-Communist fervor during the 1950s affected the nation's colleges and universities and how hundreds of professors had to decide whether to cooperate with investigations accusing them of "un-American" activities or lose their jobs); *see also* Prokop, *supra* note 51, at 2534–36 (1993) (discussing the publicized cases involving two professors at City College of the City University of New York, Michael Levin and Leonard Jeffries, Jr. Levin "wrote a letter in 1987 to the *New York Times* in which he argued that shop owners should be allowed to bar [B]lack patrons from their stores if it would reduce 'the risk of murder for white store owners' by '[B]lack criminals.'" In subsequent publications, he "denounced affirmative action programs, arguing that they are doomed to failure because 'on average, [B]lacks are significantly less intelligent than [W]hites.'" Meanwhile, "Jeffries accused Jews of putting together 'a financial system of destruction of [B]lack people,'" and he "lectured in his classes that people of European ancestry, whom he called the 'ice people,' are fundamentally materialistic, greedy, and intent on domination, while people of African descent, whom he called the 'sun people,' are essentially humanistic and communal. Jeffries also declared that AIDS was created as part of a conspiracy by Whites to destroy Blacks.").

[83] *See* Shepard & Culver, *supra* note 20, at 89 ("The election of Donald J. Trump as President of the United States in November 2016 created yet more controversies in which campuses across the country wrestled with the necessary free expression push-and-pull between rights and responsibilities. At a time when many people felt the nation was more politically divided than it had been in their lifetimes, administrators, faculty, and students faced a gamut of challenging questions, ranging from feelings of insecurity among those who felt targeted by Trump's rhetoric to the reactions among those who felt marginalized because of their support for him.").

[84] *Id.*

[85] RANSBY, *supra* note 3, at 29.

Kaepernick's decision to kneel during the playing of the National Anthem,[86] there is a greater need for public discourse on racial issues. While colleges campuses have long been a place where the debate over freedom of expression has taken place, the manner of the debate and whether restrictions should be placed upon the discussion is a debate within itself.[87] To no surprise, recent surveys of college students showed that the views on freedom of expression varied based on race, gender, and political affiliation,[88] with students of color, particularly African American students, feeling unsafe and unprotected by offensive speech and therefore supporting restrictions, whereas white students do not feel the same need for protection.[89] Accordingly, present-day tension between academic freedom, freedom of speech, and the need for a welcoming educational environment has created additional challenges.

During the last few years, there has been outrage over comments and actions of faculty members at universities, which has begged the question as to the line between academic freedom and racially offensive comments. There was outrage in North Carolina when a professor of criminology tweeted that people who wear masks look like "fools" and referred to the Governor of North Carolina, Roy Cooper, as a "fascist" in his handling of the COVID-19 pandemic.[90] The professor further stated, "[t]his evening I ate pizza and drank beer with six guys at a six seat table top. I almost felt like a free man who was not living in the slave state of North Carolina."[91] The professor, a white male, added, "Massa Cooper, let my people go!"[92] There was additional outrage in Chicago, Illinois when a civil procedure

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[86] Cindy Boren, *A Timeline of Colin Kaepernick's Protests Against Police Brutality, Four Years After They Began*, WASH. POST (Aug. 26, 2020), https://www.washingtonpost.com/sports/2020/06/01/colin-kaepernick-kneeling-history/ (Kaepernick stated, "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football, and it would be selfish on my part to look the other way. There are bodies in the street and people getting paid leave and getting away with murder."); *see also* Kurt Streeter, *Kneeling, Fiercely Debated in the N.F.L., Resonates in Protests*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html.

[87] *E.g.*, SEAN STEVENS & ANNE SCHWICHTENBERG, FOUND. FOR INDIVIDUAL RTS. IN EDUC., COLLEGE FREE SPEECH RANKINGS: WHAT'S THE CLIMATE FOR FREE SPEECH ON AMERICA'S COLLEGE CAMPUSES? (2021), https://www.thefire.org/research-learn/2021-college-free-speech-rankings; *see also* JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP, THE FIRST AMENDMENT ON CAMPUS 2020 REPORT: COLLEGE STUDENTS' VIEWS OF FREE EXPRESSION (2020), https://knightfoundation.org/wp-content/uploads/2020/05/First-Amendment-on-Campus-2020.pdf [hereinafter JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP 2020]; JOHN S. & JAMES L. KNIGHT FOUND. & IPSOS, COLLEGE STUDENT VIEWS ON FREE EXPRESSION AND CAMPUS SPEECH 2022: A LOOK AT KEY TRENDS IN STUDENT SPEECH VIEWS SINCE 2016 (2022), https://knightfoundation.org/reports/college-student-views-on-free-expression-and-campus-speech-2022/ [hereinafter JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP 2022].

[88] JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP 2022, *supra* note 87, at 2.

[89] *Id.* at 2, 20 fig.17.

[90] Jordan Culver, *A North Carolina Professor Who Sparked Outrage with His Tweets Still Has His Job. Why? It's Called the First Amendment*, USA TODAY (June 11, 2020, 12:22 PM), https://www.usatoday.com/story/news/nation/2020/06/10/first-amendment-north-carolina-wilmington-professor-tweets/3173332001/.

[91] *Id.*

[92] *Id.*

professor included an employment discrimination question testing the concept of work product on a final examination chose to use the "b word" and the "n word," without spelling the words out, in referencing an African American woman.[93] Further, an administrator sought to sanction a law professor at Penn State for "racist, sexist, xenophobic, and homophobic actions and statements."[94] The professor made "inflammatory and derogatory public comments," such as that the United States would be "better off with fewer Asians and less Asian immigration," and said to a Black faculty colleague that it is "rational to be afraid of Black men in elevators."[95] The tension between academic freedom and racially offensive comments is further exemplified by a decision to relieve a tenured professor at San Diego State University (SDSU) of his teaching duties in race and critical thinking after he made racially charged comments in class lectures, which received both support and criticism.[96] SDSU's Associated Students supported the decision, while the Foundation for the Individual Rights in Education (FIRE)[97] slammed it.[98] There continues to be a conflict over the lines between academic freedom and hostile educational environment.

As the tension between academic freedom and hostile education environment mounts, there is a movement afoot to ban critical race theory,[99] which further hampers diversity and inclusion in education.[100] The murder

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[93] Erick Johnson, *Exam Question Stirs Outrage at John Marshall Law School*, THE CRUSADER (Feb. 20, 2021, 3:11 PM), https://chicagocrusader.com/exam-question-stirs-outrage-at-john-marshall-law-school/.

[94] Chanel Hill, *Penn Law Professor Faces Evaluation by Peers for 'Racist Speech,'* PA. CAP.-STAR (July 19, 2022, 2:01 PM), https://www.penncapital-star.com/blog/penn-law-professor-faces-evaluation-by-peers-for-racist-speech/.

[95] *Id.*

[96] Gary Robbins, *SDSU Slammed, Supported for Reassigning Teacher who Used Racial Epithets in Lectures*, SAN DIEGO UNION-TRIB. (Mar. 9, 2022, 4:45 PM), https://www.sandiegouniontribune.com/news/education/story/2022-03-09/san-diego-state-university-teacher-racial-epithets.

[97] *Id.* FIRE asserts that it acts on behalf of people who the organization believes "were the victims of illiberal policies and double standards." *Id.*

[98] *Id.*

[99] Vanessa Miller, Frank Fernandez & Neal H. Hutchens, *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 MO. L. REV. 61, 66–67 (2023) ("Critical race theory is an academic legal framework based on the premise that race and racism are central in the formation of American law and society. It rose to prominence in the 1970s and 1980s based on the work of legal scholars who became disillusioned with the unfulfilled social, political, and economic promises of the Civil Rights Movement. CRT scholars hold that stark racial disparities persist in the United States despite decades of civil rights legislation because racism is embedded into the systems and traditions of American society, which maintain and enforce racial hierarchies that produce disparities. CRT scholarship does not hold a canonical set of principles or methodologies but does generally seek to examine the relationship between law and race and challenges the ways in which race is constructed and represented in American legal culture.").

[100] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 17:34.30 (2d ed. 2023) (noting that "[a]mong the byproducts of America's polarized politics and culture wars has been a movement to ban the teaching of 'Critical Race Theory' from the nation's schools, colleges, and universities"); *see also* Joshua Gutzmann, Essay, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333, 333–34 (2022) (noting that "Fox News mentioned critical race theory (CRT) more than 1,900 times from April to mid-July of 2021, marking CRT as a new focus of Republicans and conservative donors and sparking a

of George Floyd not only brought protest due to the mistreatment of African American citizens, but also provoked activism from conservative legislators and citizens who did not want to address racial tension.[101] One form of response was the conservative activist movement to ban critical race theory, which quickly won the support of Donald Trump.[102] These decisions to eliminate critical race theory from the classroom are another message to African American students that they are not welcome and that their presence and history are not valued.[103] While the objective of critical race theory is to address the continued presence of racism in the American justice system, the ban on critical theory works to suppress the issues and fails to address racism.[104] Like racially offensive comments, the decision to ban critical race theory creates a hostile educational environment.

The country is at a crossroads of the debate between academic freedom and a hostile educational environment. As noted above with the viewpoints of the SDSU Associated Students and FIRE, this tension will not easily go away, and there are no simple solutions to the conflict. As the country confronts a political divide on major issues[105] and a new makeup of the Supreme Court,[106] this tension will last for a long time. The universities continue to be venues for constant debates. The university system must take

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movement to ban teaching of the theory in schools. Nine states have already passed legislation intended to ban the teaching of CRT, and nineteen states are considering similar legislation."); Maria Ignacia Araya, Comment, *Censorship of the Marketplace of Ideas: Why Critical Race Theory Bans in Public Schools Violate the First and Fourteenth Amendments*, 47 NOVA L. REV. 31, 31 (2022) (noting that "[c]ritical race theory has reemerged under the national spotlight in the last two years"); Ebony McKeever, *Who Turned Out the Lights?: How Critical Race Theory Bans Keep People in the Dark,* 15 WASH. U. JURIS. REV. 111, 139 (2022) (arguing that "[b]ans on critical race theory are undeniably both a product of racism *and* an instance of contrived ignorance being weaponized by state legislatures"); Miller, Fernandez, & Hutchens, *supra* note 99, at 63 ("Conservative government officials across the country are supporting state education laws and policies that could alter the nature of higher education in some states. The laws and policies attempt to ban institutions from teaching critical race theory ('CRT'), an academic framework that scholars use to examine the relationship between law and race, and more broadly seek to prohibit the teaching of ideas that include the premise that racism and sexism are pervasive in our society.").

[101] Miller, Fernandez, & Hutchens, *supra* note 99, at 69–81.

[102] *Id.* at 69–73 (noting that while the murder of George Floyd and the ensuing protests received national attention, a White conservative activist called on then-President Donald Trump to ban teaching critical race theory).

[103] Nicquel Terry Ellis & Eva McKend, *Black Parents Say Movement to Ban Critical Race Theory is Ruining Their Children's Education*, CNN (Dec. 2, 2021, 4:51 PM) https://www.cnn.com/2021/12/02/us/black-parents-and-critical-race-theory/index.html (an African American mother of a second grader lamented regarding the ban on critical race theory that "[t]his is a way for them to stop, or try to prevent the schools from actually teaching, and practicing, equity, diversity and inclusion across the schools. . . . I hear a lot of White mothers say they think their child is too young to learn about racism. You know what, my child's not too young to experience it.").

[104] Miller, Fernandez, & Hutchens, *supra* note 99, at 95–102.

[105] *See generally* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015) (The author notes that "[p]olitical polarization has become a major focus in contemporary discussions on congressional activity and governance." She further notes that "[t]he tone of these discussions has grown increasingly grim, as many political scientists argue that a constitutional system of divided and shared powers hardens current levels of partisan warfare into legislative gridlock.").

[106] Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html.

the lead in striking this balance, with a process that includes faculty, student governance, and accrediting bodies.

CONCLUSION

The Supreme Court was correct in deferring to the public school systems in addressing issues of academic freedom and regulating the actives of faculty and students in an educational setting.[107] Public university systems must take the lead in establishing reform and regulating activities on campus in order to rightfully protect academic freedom, while concurrently ensuring that the educational environment is not hostile and that all faculty and students feel welcomed. Constituents of faculty governance must ensure that tenure and promotion procedures provide clear criteria for acceptable and unacceptable behavior. In addition, accrediting bodies—like the ABA, whose standards are presently lacking in clarity—must revise their standards to provide clearer directives on measuring appropriate behavior by faculty.[108] These bodies should be guided by the standards established in sexual harassment employment discrimination cases, where the Supreme Court provided a two-prong objective and subjective standard on when a claim is actionable.[109] Similar to the Supreme Court standard, internal review of faculty behavior should be based on an objectively reasonable standard and a subjective standard based on the effect on the offended person. The tension between academic freedom and racially offensive comments must be addressed, and the shared governance process within the educational setting must take the lead in reform. A reviewing court should only intervene and overturn an academic decision if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[110] The time to take action is now.

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[107] *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985).

[108] Am. Bar Ass'n, *ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023*, 13–15 (Erin Winters ed., 2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the bar/standards/2022-2023/22-23-standard-ch2.pdf.

[109] *See, e.g.*, Harris v. Forklift Sys., 510 U.S. 17, 21–22 (1993) ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, 'mere utterance of an . . . epithet which engenders offensive feelings in an employee,' . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.") (citations omitted); Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) ("So, in *Harris*, we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.") (citing *Harris*, 510 U.S. at 21–22).

[110] *Ewing*, 474 U.S. at 225.

Bipolar Disorder and Nursing Homes: Amending Training Requirements Set Forth In § 19a-562a of The Connecticut General Statutes to Encompass Geriatric Mental Illness

STEPHANIE C. GREER*

ABSTRACT

The current aging population in the United States is increasing rapidly. Connecticut has implemented many programs to assist seniors in remaining in the community, but little has been done regarding training requirements for staff working in memory care facilities across the state. Though the focus of enacted legislation is dementia care, there remain unmet needs that can be solved through legislative amendments. Those living with bipolar disorder are significantly more likely to develop dementia, therefore likely to be placed in memory care units. Because of this correlation, current training requirements should be amended to include mental health training requirements that encompass illnesses such as bipolar disorder.

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INTRODUCTION

It is no secret that the population in the United States is aging. It is predicted that in the next five to ten years, the United States population over the age of sixty will grow "3.5 times more rapidly than the general population."[1] Due to this rapid increase, it is critical that Connecticut works to develop medical care suited to meet the health needs of this growing population of older adults.[2]

When one thinks of health issues faced by older adults, one may quickly consider various dementias and related memory disorders, but mental illnesses such as bipolar disorder are prominent factors in a person ultimately requiring skilled nursing care. Nursing home staff are often "ill-equipped" to serve mentally ill residents "despite the high prevalence of mental illness other than dementia in nursing homes."[3] However, nursing homes are often where loved ones will be placed[4] based on whether the individual's safety can be ensured through other means such as home-based programs.[5] Though necessary, nursing homes suffer from a lack of staff, high turnover rates, and other factors[6] that serve to limit the experience of staff and the care available to manage residents' needs.[7]

Patients living with bipolar disorder are more likely than the general population to develop dementia.[8] Therefore, this patient population is likely

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[1] Martha Sajatovic, Sergio A. Strejilevich, Ariel G. Gildengers, Annemiek Dols, Rayan K. Al Jurdi, Brent P. Forester, Lars Vendel Kessing, John Beyer, Facundo Manes, Soham Rej, Adriane R Rosa, Sigfried NTM Schouws, Shang-Ying Tsai, Robert C. Young, & Kenneth I. Shulman, *A Report on Older-Age Bipolar Disorder from the International Society for Bipolar Disorders Task Force*, 17 BIPOLAR DISORDERS 689, 689 (2015) [hereinafter Sajatovic].

[2] *See id.*

[3] David C. Grabowski, Kelly A. Aschbrenner, Vincent F. Rome, & Stephen J. Bartels, *Quality of Mental Health Care for Nursing Home Residents: A Literature Review*, 67 MED. CARE & RSCH. REV. 627, 628 (2010) [hereinafter Grabowski].

[4] *Staffing is the Key to Quality Care*, CONN. LONG-TERM CARE OMBUDSMAN PROGRAM, https://portal.ct.gov/LTCOP/Content/Advocacy-Center/Nursing-Home-Staffing (last visited Sept. 23, 2023) ("[M]ore than 40% of Americans who reach the age of 65 will spend some time in a nursing home during their remaining years."). *See Better Staffing: The Key to Better Care*, THE NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, https://theconsumervoice.org/betterstaffing (last visited Sept. 23, 2023).

[5] Paul Wynn, *Nursing Home Requirements: Who's Eligible?*, U.S. NEWS (July 13, 2023, 9:43 AM), https://health.usnews.com/senior-care/articles/nursing-home-requirements ("Two-thirds of people admitted to a nursing home for short-term post-acute nursing or rehabilitation care are able to return home . . . .").

[6] *Staffing is the Key to Quality Care*, *supra* note 4 ("[H]igher levels of staffing lead to better care, but the federal government does not require nursing homes to have at least a minimum number of staff on duty. . . . Under-staffing harms nursing home residents and can lead to pressure ulcers [bedsores], infections, malnutrition, dehydration, and injuries from falls." Connecticut has "one of the lowest staffing requirements in the country. . . .").

[7] CONN. AGENCIES REGS. § 19-13-D8t (proposed Nov. 21, 2022). This regulation is marked as "proposed" as of January 27, 2023, despite a proposed implementation date of November 21, 2022. *See also* Medicare and Medicaid Requirements for Long Term Care Facilities, 54 Fed. Reg. 5300 (Feb. 2, 1989) (to be codified at 42 C.F.R. § 483.30).

[8] Kuan-Yi Wu, Chia-Ming Chang, Hsin-Yi Liang, Chi-Shin Wu, Erin Chia-Hsan Wu, Chia-Hsiang Chen, Yeuk-Lun Chau, & Hui-Ju Tsai, *Increased Risk of Developing Dementia in Patients with Bipolar Disorder: A Nested Matched Case–Control Study*, 15 BIPOLAR DISORDERS 787, 790 (2013) [hereinafter Wu].

to be statistically significant in memory care units, warranting additional training requirements for nursing staff as to frequently occurring comorbidities to dementia, such as bipolar disorder.

I. DISCUSSION

A. *The Current System*

Currently, options for long-term residential skilled nursing care are limited for older adults with cooccurring dementia and bipolar disorder.[9] But why does the population with co-occurring bipolar disorder and dementia require attention? Studies have examined the association between bipolar disorder and the development of dementia and have found that those with bipolar disorder had a significantly higher risk of developing dementia, but have not clearly identified the correlation between the two disorders.[10] This is confirmed by other studies as patients diagnosed with bipolar disorder had a greater risk of developing dementia both before and after reaching the age of sixty-five,[11] and "4.5% to 19% of elderly individuals with [bipolar disorder] have dementia."[12]

When considering options for psychiatric skilled nursing care, the State of Connecticut provides no listing of nursing homes offering psychiatric services.[13] Additionally, even a Connecticut State document, updated in 2021, listing "State Options for Older Adults" makes no mention of skilled nursing facilities, aside from one program, Small-Housing Nursing Home Pilot Program,[14] which has not been implemented.[15] This report notes that while the pilot has not begun, one home in Bridgeport is a "small house

[9] While there are options for mental health care such as iCare facilities, there are few older adult-specific facilities equipped to handle the complexities of geriatric mental health conditions coupled with non-geriatric specific conditions. Facilities such as Masonicare or the Institute of Living offer care for acute situations, but patients must be discharged to a capable facility or caretaker. *Behavioral Health Hospital*, MASONICARE https://www.masonicare.org/services/health-wellness/behavioral-health, (last visited Jan. 18, 2024); *Home*, ICARE HEALTH NETWORK, https://www.icarehn.com/ (last visited Jan. 18, 2024); *About Us*, HARTFORD HEALTHCARE: INSTITUTE OF LIVING, https://instituteofliving.org/about-us (last visited Feb. 28, 2024).

[10] Wu, *supra* note 8, at 790 ("[S]ubjects with bipolar disorder had a 4.07-fold higher risk of dementia."). *See id.* at 791 tbl.2 (noting crude and adjusted odds ratio of developing dementia in patients with bipolar disorder, but not clearly identifying a correlation between the two disorders).

[11] *Id.* at 792. *Id.* at tbl.3 (explaining that senile dementia is that in which the onset is after age 65, and pre-senile dementia is that in which the onset is before age 65).

[12] Sonali V. Lala & Martha Sajatovic, *Medical and Psychiatric Comorbidities Among Elderly Individuals with Bipolar Disorder: A Literature Review*, 25 J. GERIATRIC PSYCHIATRY & NEUROLOGY 20, 20 (2012).

[13] HELGA NIESZ, CONN. GEN. ASSEMBLY, NURSING HOMES AND PSYCHIATRIC SERVICES, 2001-R-0034 (2001) https://www.cga.ct.gov/2001/rpt/2001-R-0034.htm ("There is no official listing of nursing homes that offer psychiatric services, but six homes list 'psychiatric care' as one of the programs they offer in the Department of Public Health's 1999-2000 directory."). It is important to note that this response has not been updated since 2001.

[14] CONN. GEN. STAT. § 17b-372 (2014).

[15] *See* NICOLE DUBE, CONN. GEN. ASSEMBLY, STATE PROGRAMS FOR OLDER ADULTS, 2021-R-0110 at 16 (2021). The report does note the presence of one long-term care facility meeting the requirements and designated as a small long-term care home, but it also notes that there are only fourteen beds available in each unit. *Id.*

nursing home" with fourteen beds.[16] While there *are* options, the problem lies in patients' quality of life which is at the pinnacle of the State of Connecticut's goals for elder care. This pilot program is designed to improve quality of life for older adults and offers the opportunity for such homes to specialize in particular communities whose needs are not being met.

Current training requirements for memory care staff depend on the licensure status of staff members.[17] Those licensed to provide direct care must receive ten hours of annual training,[18] while unlicensed staff need only receive one hour of annual training.[19] There are no requirements designed to address mental health conditions aside from dementia. The strong correlation between bipolar disorder and dementia demonstrates the importance of specific training to care for this population.

The simple comorbidity of bipolar with dementia is not necessarily in itself a concern warranting legislative reform; however, the quality of life for patients experiencing such comorbidities does warrant significant legislative action. The Connecticut State Department of Aging and Disability Services aims to maximize opportunities for the independence of older adults in Connecticut,[20] and the "No Wrong Door" initiative works to support older adults by providing resources to remain in the community.[21] It is clear that Connecticut state agencies want to improve the way older adults receive help,[22] and through many of the State of Connecticut's departments, missions, and past reforms, it is evident that quality of life and quality of care is a high priority. That leads to the question: why is dementia the only condition warranting additional training?

B. *Bipolar Disorder in the Elderly*

Bipolar disorder is a mental disorder which causes "dramatic shifts in mood, energy, and activity levels."[23] These shifts affect ability to complete daily tasks and are "more severe than the normal ups and downs that are

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[16] *Id. See also* Mozaic Jewish Home, MOZAIC SENIOR LIFE, https://www.mozaicsl.org/services/long-term-care/the-jewish-home (last visited Jan. 18, 2024).

[17] CONN. GEN. STAT. § 19a-562a (2022).

[18] *See* § 19a-562a(b).

[19] *See* § 19a-562a(c).

[20] *Programs and Services*, DEP'T AGING & DISABILITY SERVS., https://portal.ct.gov/AgingandDisability/Content-Pages/Main/Programs-and-Services (last visited Sept. 23, 2023) (noting that it "provides many programs and services to maximize opportunities for the independence and well-being of people with disabilities and older adults in Connecticut").

[21] *No Wrong Door Initiatives–Improving Behavioral Health Services for Older Adults*, DEP'T AGING & DISABILITY SERVS., https://portal.ct.gov/AgingandDisability/Content-Pages/Programs/No-Wrong-Door-Initiatives--Improving-Behavioral-Health-Services-for-Older-Adults (last visited Sept. 23, 2023) ("The No Wrong Door describes the way State, Federal and local agencies work together to help individuals needing long term services and supports [to] remain in the community.").

[22] *Id.* ("The Department of Aging and Disability Services State Unit on Aging, the Connecticut Department of Social Services, and other state agencies are working together to . . . improve the way older adults . . . receive help.").

[23] *Bipolar Disorder*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/bipolar-disorder (last visited Sept. 16, 2023).

experienced by everyone."[24] Bipolar disorder affects about 1% of adults, which may not seem significant, but this number solely represents those remaining in the broader community.[25] In the United States, it is estimated that 4.4% of adults live with bipolar disorder.[26] The United States Census Bureau notes that the United States population as of the April 1, 2020 census was 331,449,281 and the population over the age of 18 was 77.8%.[27] It is then estimated that about 11.3 million adults in the United States will suffer from bipolar disorder at some point during their lifetime, and, once diagnosed, there is no "cure," and episodes can be intermittent, with sometimes years between them.[28]

Late-life bipolar disorder is often referred to as "BD in individuals aged ≥ 60 years" living with bipolar disorder, but refers to this population as OABD.[29] This population, although seemingly specified, "represent[s] as much as 25% of the population with [bipolar disorder]."[30] Sajatovic notes that topics related to OABD have previously been the subjects of little research and training, because the population is aging, "we can no longer conceptualize OABD as a 'special population' for whom understanding of the disorder and recommended management can simply be extrapolated from experience in mixed age groups."[31] Additionally, despite bipolar disorder *appearing* "to become less common with age . . . , it is present in 6% of geriatric psychiatry outpatient visits and 8% to 10% of geriatric inpatient admissions."[32] North American studies report that patients living with bipolar disorder constitute a notable percentage of nursing home residents (3%) and elderly patients in psychiatric emergency rooms (17%).[33] This population makes up a significant portion of nursing home residents and elderly community members, yet there are no current statutory training requirements for staff working with these patients. Training is necessary due to the specificity of the interplay between dementia and bipolar disorder and the frequency of co-occurrence. Perhaps with additional training, there would come to be fewer elderly bipolar patients in psychiatric emergency rooms, and instead, hopefully, experiencing a better quality of life due to an improved quality of care.

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[24] *Id.*

[25] Akshya Vasudev & Alan Thomas, *'Bipolar Disorder' in the Elderly: What's in a Name?*, 66 MATURITAS 231, 231 (2010).

[26] *Bipolar Disorder*, *supra* note 23.

[27] *Quick Facts, United States,* U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/POP010220 (last visited Sept. 9, 2023).

[28] *See* Mauricio Tohen, *Expert Q&A: Bipolar Disorder*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/bipolar-disorders/expert-q-and-a (last visited Sept. 16, 2023) ("Studies have shown that approximately 10 percent of patients have a single episode only. However, the majority of patients have more than one.").

[29] Sajatovic, *supra* note 1.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 691.

[33] *Id.*

C. *Interplay Between Bipolar and Dementia*

Dementia, and the various types of dementias, such as Alzheimer's, are such common diagnoses in the elderly population that the State of Connecticut has established the opportunity for nursing homes to create specific "memory care" units. These units are required to ensure that staff undergoes training specific to the unit population meeting statutory requirements.[34]

Current training requirements for memory care staff depend on whether staff members are licensed to provide direct care, or support those who are licensed.[35] Licensed individuals must receive ten hours of training annually.[36] Eight hours of which must be dementia-specific, and two hours must be related to pain recognition and pain management techniques.[37] Unlicensed staff members, need only attend one hour of training annually.[38] The statute does not enumerate specific requirements as to training contents and does not require training for any mental health conditions aside from dementia. While the training itself offers an opportunity to include such topics, a requiring such training would assure that it is provided and received.

While training of this kind is necessary, there remains a gap in Connecticut's care options for elderly patients. The CDC estimated that as of 2020,[39] there were 1.3 million nursing home residents, and as of 2002, "an estimated 560,000 nursing home residents . . . had a mental illness other than dementia."[40] "Among persons with mental illness, a diagnosis of schizophrenia or bipolar disorder was found to be associated with a greater likelihood of admission to a nursing home over a three-year period."[41] Moreover, "individuals admitted with mental illness or dementia differed from other nursing home residents (and from one another) in their demographic characteristics, co-morbid conditions, and treatments received."[42] Among others, these differences included marital status, the more frequent use of antipsychotic medications, less frequent training to allow individuals to reenter the community, and more frequent use of restraints.[43]

Though the State of Connecticut has recognized that caring for dementia patients requires unique training through the approval of

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[34] CONN. GEN. STAT. § 19a-562a.

[35] *Id.*

[36] *Id.* at § 19a-562a(b).

[37] *Id.*

[38] *Id.* at § 19a-562a(c).

[39] *Nursing Home Care*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited Jan. 18, 2024), https://www.cdc.gov/nchs/fastats/nursing-home-care.htm.

[40] Catherine Anne Fullerton, Thomas G. McGuire, Zhanlian Feng, Vincent Mor, & David C. Grabowski, *Trends in Mental Health Admissions to Nursing Homes, 1999–2005*, 60 PSYCHIATRIC SERVS. 965, 965 (2009).

[41] *Id.*

[42] *Id.* at 967.

[43] *Id.* at 968

legislation requiring specialized training for staff employed in a memory care unit,[44] bipolar disorder has a set of symptoms unique from dementia.[45] Reviews suggest that bipolar disorder experienced later in life is likely "a distinct diagnostic entity compared to the younger bipolar patients."[46] This conclusion is drawn from the observation that in elderly patients, bipolar disorder "has a different presentation, etiology and hence perhaps needs different treatment strategies."[47]

D. *Memory Care Units*

The amendment to section 19a-562a in 2014,[48] which set specialized training requirements for memory care facilities and other care providers, led to general improvements in these units. A 2018 study found that "among residents with dementia admitted to a nursing home with [a memory care unit]," there was a "significant reduction in the use of inappropriate antipsychotics, restraints, pressure ulcers, feeding tubes, and hospitalizations."[49] While the study found the presence of a memory care unit to have "a direct effect" on quality of care, researchers also found characteristic differences between those facilities with and without a memory care unit.[50] The study concluded that it is possible that "facilities with [memory care units] tend to provide better quality overall, and the [memory care unit] also provides better quality care for patients with dementia."[51] This leads to the possibility that the implementation of comparable training requirements or units for patients with bipolar disorder may yield similar results.

E. *Connecticut Programs for Psychiatric Care*

Many Connecticut programs for psychiatric care focus on home care or community resources;[52] however, there is no available list of nursing homes with psychiatrists on staff or a simple means of finding facilities or beds available. One requirement of the nursing home reform provisions, passed

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[44] § 19a-562a.

[45] *See generally*, Lala & Sajatovic, *supra* note 12.

[46] Vasudev & Thomas, *supra* note 25, at 231.

[47] *Id.*

[48] § 19a-562a.

[49] Nina R. Joyce, Thomas G. McGuire, Stephen J. Bartels, Susan L. Mitchell, & David C. Grabowski, *The Impact of Dementia Special Care Units on Quality of Care: An Instrumental Variables Analysis*, 53 HEALTH SERVS. RSCH. J. 3657, 3673 (2018). This is likely due to better understanding of the condition and appropriate means of responding in various situations.

[50] *Id.*

[51] *Id.*; *see* Jane M. Cioffi, Andrew Fleming, Lesley Wilkes, Melissa Sinfield, & Jenny Le Miere, *The Effect of Environmental Change on Residents with Dementia*, 6 DEMENTIA 215, 223, 227 (2007); *see also* Andrea Gruneir. Kate L. Lapane, Susan C. Miller, & Vincent Mor, *Does the Presence of a Dementia Special Care Unit Improve Nursing Home Quality?*, 20 J. AGING & HEALTH 837, 851 (2008).

[52] *Behavioral Health Homes*, DEP'T MENTAL HEALTH & ADDICTION SERVS., https://portal.ct.gov/DMHAS/Divisions/Behavioral-Health-Division/Behavioral-Health-Homes (last visited Sept. 9, 2023).

through the 1987 Omnibus Budget Reconciliation Act (OBRA-87), stipulates that:

> nursing home applicants receive preadmission screening for mental illness . . . to identify the proper residential settings to accommodate their needs[]. The Centers for Medicare and Medicaid Services (CMS[]) . . . .[53] developed what is now called Preadmission Screening and Resident Review (PASRR) as the interpretive guidelines regulating how states implement the preadmission requirements . . . . For residents with both a mental illness and a need for nursing assistance, the regulations require that facilities provide active mental health treatment.[54]

Unfortunately, "[d]espite the high prevalence of mental illness in the nursing home, most nursing homes do not have access to mental health providers with training in psychiatry and mental health treatment."[55] Federal regulation requires that the nursing facility "provide mental health or intellectual disability services which are of a lesser intensity than specialized services to all residents who need such services."[56]

Not having psychiatrists on staff further limits options for those with mental illness and leads to increased hospitalizations to receive appropriate care.[57] Frequent environmental changes such as being transferred to a hospital and back to one's residence can exacerbate behavioral and psychiatric symptoms in dementia patients.[58] Often, psychiatric problems, which could be addressed or avoided through timely mental health services, worsen until they require hospitalization.[59] Early intervention would likely decrease hospitalizations, leading to cost savings for state programs providing medical benefits; but more importantly, ensuring that residents receive the best care possible.

Providing care for mentally ill residents has proven to be challenging for nursing facilities. In a case of requested involuntary transfer of a mentally ill patient by a nursing home, the court found that the nursing home "'must provide' mental health services which are of a lesser intensity than 'specialized services' to all residents who need such services." The court

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[53] Ann D. Bagchi, James M. Verdier, & Samuel E. Simon, *How Many Nursing Home Residents Live with a Mental Illness?*, 60 PSYCHIATRIC SERVS. 958, 958 (2009) (at the time CMS was the HealthCare Financing Administration).

[54] *Id.*

[55] Grabowski, *supra* note 3, at 634 (noting that many psychiatrists or those who can provide specialized care respond on an "as needed" basis rather than as an employee at the residential facility).

[56] 42 C.F.R. § 483.120 (2021).

[57] *Id.*

[58] Davina Porock, Philip Clissett, Rowan H. Harwood, & John R.F. Gladman, *Disruption, Control and Coping: Responses of and to the Person with Dementia in Hospital*, 35 AGING & SOC'Y 37, 42 (2015).

[59] Grabowski, *supra* note 3, at 640.

then found that, although the resident's "special needs" were a challenge for the nursing home, under federal law, the nursing home could not transfer or discharge the resident "without first trying to provide the required services." Despite attempts to provide mental health services, the court found that the attempts were insufficient to comply with the required "plan of care and treatment" for the resident's mental health needs.[60]

Though frontline providers play an important role in the detection and treatment of mental illness in nursing homes,[61] their training is often limited.[62] The court above hypothesized that the nursing home could substantially reduce "problem behaviors" by acquiring a better understanding of the patient's "mental condition and needs through an assessment and care plan."[63]

In accordance with the notion above, the American Geriatrics Society and the American Association for Geriatric Psychiatry report recommended that CMS "develop standards that promote and support the implementation of training models with demonstrated effectiveness"[64] and provides numerous recommendations worth consideration.[65] It is clear that there are options to ensure a better quality of life for elderly persons living with mental illness, but implementation, or simply a pilot, of such options are necessary.

II. PROPOSAL

It is clear from this discussion that there are many problems to be addressed in nursing home regulation; however, this proposal focuses on one way Connecticut could address this issue. Similar to the court's view in *In re Involuntary Discharge or Transfer*, better understanding of mental conditions allows for improved assessment of residents' needs and the services best able to meet those needs.

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[60] *In re* Involuntary Discharge or Transfer of J.S. by Hall, 512 N.W.2d 604, 611–12 (Minn. Ct. App. 1994).

[61] *Id.* (citing Judy A. Glaister & Charles Blair, *Improved Education and Training for Nursing Assistants: Keys to Promoting the Mental Health of Nursing Home Residents*, 29 ISSUES MENTAL HEALTH NURSING 863 (2009)).

[62] Am. Geriatrics Soc'y & Am. Ass'n for Geriatric Psychiatry, *The American Geriatrics Society and American Association for Geriatric Psychiatry Recommendations for Policies in Support of Quality Mental Health Care in U.S. Nursing Homes*, 51 J. AM. GERIATRICS SOC'Y 1299, 1302 (2003) ("Innovative approaches to ongoing training and support for nursing home staff are needed in assessment and interventions for mental health and behavioral needs of residents." Additionally, "[n]urse training requirements inadequately address many mental health problems or require coverage of so many other topics that mental health problems cannot be adequately emphasized. Training focuses on medical care, with minimal attention to behavioral health care.").

[63] *In re Involuntary Discharge or Transfer of J.S. by Hall*, 512 N.W.2d at 612.

[64] Am. Geriatrics Soc'y & Am. Ass'n for Geriatric Psychiatry, *supra* note 62, at 1302. These recommendations include incentives for psychiatrists and other specialized providers to work at nursing homes, such as peer training programs; the recommendations also include improved access to services and insurance changes to provide broader coverage. Although insightful, these recommendations are outside the scope of this project.

[65] Grabowski, *supra* note 3, at 648.

Connecticut must first account for the current situation in nursing homes within the state. As Senator Kelly noted in the Connecticut General Assembly Senate Proceedings, Florida and Connecticut were matched with the number of elderly citizens.[66] Compared to other states and federal resources, Connecticut provides little data allowing assessment or knowledge of current nursing facilities across the state.[67] With more attenuated data specific to Connecticut, it would better allow for assessment as to what training is needed and in which facilities. This would be the first step necessary to assess the subject matter and the form of training necessary to mitigate the current shortfalls.

The State of Connecticut should consider addressing this issue through statutory and regulatory changes like the 2007 amendment to Connecticut General Statutes section 19a-562a, which created training requirements for healthcare providers working with dementia patients.[68] Changes in training requirements will provide a basis for providers to consider in assessing patients' needs. Though psychiatrists and other doctors may meet with patients occasionally, it is the staff and aides who spend the most time with these patients. For this reason, requiring additional training for nursing home staff would allow for a broader understanding and assessment of needs better in accordance with 42 C.F.R. § 483.120.

CONCLUSION

The State of Connecticut believes in training. In the hearing committee on May 2, 2014, Senator Andres Ayala presented a training bill that came to the floor after a task force was assembled and experts were consulted;[69] therefore, it is likely that here a similar process would take place.

Senator Ayala pointed out, and other members of the Senate agreed, that it is important to have knowledgeable, aware, and understanding caretakers for those going through the "disease."[70] It is unclear why this sentiment would not hold true for other common mental health disorders experienced by elderly persons.

We may hear less about bipolar disorder compared to dementia, but that does not mean that there is no need in this population. The stigma surrounding bipolar disorder and related illnesses leads many to avoid discussing symptoms or the diagnosis, which is not indicated to reduce with

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[66] Conn. Gen. Assemb., S. Proc., 2014 Sess. 2231 (2014) (statement of Senator Andres Ayala, Jr.), http://hdl.handle.net/11134/30002:719752747.

[67] *Id.*

[68] CONN. GEN. STAT. § 19a-562a (2006) (amended 2007).

[69] Conn. Gen. Assemb., S. Proc., 2014 Sess. 2231, *supra* note 66, at 69.

[70] *Id.* (Senator Ayala notes that the bill, "asks individuals that deal with our senior population and individuals that have Alzheimer's and dementia to get training in the disease to ensure that we have people who are knowledgeable, who know what to look for, who understand the different signs of patients that are actually going through the disease at that particular moment.").

age.[71] Additional training requirements will allow care providers to better assess mental health challenges aside from dementia and will improve residents' quality of life.

[71] Lisa D. Hawke, Sagar V. Parikh, & Erin E. Michalak., *Stigma and Bipolar Disorder: A Review of the Literature*, 150 J. AFFECTIVE DISORDERS 181, 188 (2013) (noting that "[s]ince stigma is experienced not only in the proximal social environment, but also from the general public, in the workplace and in the healthcare industry, these diverse populations must not be forgotten in future attempts to understand and address stigma and its impacts"). *See generally* Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 WORLD PSYCHIATRY 16, 16–17 (2002).

NCAA 2K25: Federal Oversight Edition

OLALEYE ONIKUYIDE*

INTRODUCTION

"This game is played between the ears" is a cliché used across many sports.[1] The takeaway is simple: an athlete's most valuable asset is their brain. Yet, the current state of concussion safety across the National Collegiate Athletic Association ("NCAA") and its member schools leaves student-athletes vulnerable to harm. Student-athlete exploitation, athletic programs undermining concussion safety, and lackluster enforcement of concussion protocols have led to countless injuries and a backlog in courts.[2] The NCAA was created through government action; yet, it has strayed from its purpose. The NCAA needs regulation to fall back in line. Despite prior litigation, schools will not cede power fast enough to protect students. The creation of a federal oversight committee will promote student-athlete safety. This piece looks at the NCAA's origins before unpacking concussions and student-athlete life. Next, the piece analyzes some seminal cases and some of their effects on modern day concussion safety. The piece also discusses past legislative efforts to protect student-athletes and an idea for a federal oversight committee. Finally, the piece analyzes the committee's potential benefits, shortcomings, and adjustments that could be made.

I. ORIGINS OF THE NCAA

A. *Presidential Mandate*

The 1905 college sports season was a painful one. With eighteen college and amateur players dead and more than 150 who suffered injuries, there was a public outcry.[3] Matters reached a tipping point at Harvard freshman football practice when Teddy Roosevelt Jr.—the son of the sitting

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[1] AZ QUOTES, https://www.azquotes.com/quote/1057783 (last visited Jan. 1, 2024).

[2] *See, e.g.*, Langston v. Mid-America Intercollegiate Athletic Ass'n, 448 F. Supp. 3d 938, 944 (N.D. Ill. 2020); Weston v. Big Sky Conf., 466 F. Supp. 3d 896, 901 (N.D. Ill. 2020); Richardson v. Se. Conf., 612 F. Supp. 3d 753, 759 (N.D. Ill. 2020); Rose v. Nat'l Collegiate Athletic Ass'n, 346 F. Supp. 3d 1212, 1216 (N.D. Ill. 2018).

[3] Anthony R. Caruso, *Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?*, 10 J. BUS. & TECH. L. 15, 19 (2015).

president—was left bleeding from a cut above his eye.[4] People wondered—not for the first or last time—whether football was too dangerous to play.[5] Later that year, President Theodore Roosevelt held a conference at the White House on college sports regulation.[6] The attendees eventually agreed on terms and an organization was born.[7] Originally called the Intercollegiate Athletic Association of the United States ("IAAUS"), the NCAA was created to promote safety in college sports.[8] As the IAAUS became the NCAA, the organization's scope expanded to contain definitions of amateurism as well as athlete safety.[9] The NCAA's rules for amateurism and athletics, in general, were very buttoned up as athletes could not receive scholarships for athletics alone, coaches were absent from sidelines, and fans were not allowed to cheer.[10] Although the aforementioned rules have gone away, the NCAA still reserves the right to define amateurism and control many aspects of athletes' lives.[11]

B. *Growth of Televised Sports*

The 1970s brought about a boom in televised college sports.[12] College sports were marketed like the professional leagues and they played a role in enticing prospective students.[13] This growth led to *NCAA v. Board of Regents*, a real challenge to the NCAA's authority.[14] The Universities of Oklahoma and Georgia brought an antitrust lawsuit against the NCAA alleging that it unlawfully restricted the football games the schools could air on TV.[15] The Supreme Court held the actions of NCAA member schools were subject to antitrust scrutiny and it was unlawful to limit to TV broadcasts[16] The NCAA used the decision as an opportunity to lean into commercialization.[17]

It is difficult to study the NCAA without assessing the role football has played in its success. Men's basketball and football are the highest earning sports, with media rights, bowl revenues, ticket sales, royalties and licensing,

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[4] John T. Holden, Marc Edelman, Thomas A. Baker III, & Andrew G. Shuman, *Reimagining the Governance of College Sports after* Alston, 74 FLA. L. REV. 427, 431 (2022).

[5] Caruso, *supra* note 3, at 19.

[6] *Id.*; Holden, *supra* note 4, at 431; Bryant Lee, *Knocked Unconscionable: College Football Scholarships and Traumatic Brain Injury*, 85 GEO. WASH. L. REV. 613, 620 (2017).

[7] Lee, *supra* note 6, at 620.

[8] *Id.*; K. Adam Pretty, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2378 (2014).

[9] Lee, *supra* note 6, at 620.

[10] *Id.* at 620.

[11] *Id.* at 621.

[12] Holden, *supra* note 4, at 434.

[13] *Id.* at 435.

[14] *Id.* at 436 (citing NCAA v. Bd. of Regents, 468 U.S. 85, 88 (1984)).

[15] *Id.* (citing *NCAA*, 468 U.S. at 88).

[16] *Id.* (citing *NCAA*, 468 U.S. at 120).

[17] *Id.*

donor contributions, and other sources making up revenue.[18] In 2017, it was reported that the average revenue at the largest NCAA football schools was almost $32 million.[19] Consequently, this piece focuses on football because it is one of the NCAA's cash cows. Football is also one of the sports that produces the most concussions.[20]

II. SPORT CONCUSSIONS

A. *What is a Concussion*?

The brain is made of a soft, fatty tissue like Jell-O.[21] The brain is protected by the skull and other layers, but a sudden jolt can make it bump against the hard interior of the skull.[22] Head trauma can damage the approximately 90 billion neurons that make up the brain's tissue.[23] Neurons are a fragile, wire-like network that communicates throughout the brain to control our bodies.[24] Trauma can cause neurons to stretch, tear, and release a toxin called tau.[25] Tau protein microtubules clump together when released

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[18] Andrew Zimbalist, *Analysis: Who is Winning in the High-Revenue World of College Sports?*, PBS NEWSHOUR (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports.

[19] Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money Than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 3:36 PM), https://www.businessinsider.com/college-sports-football-revenue-2017-10.

[20] Complete Concussions, *What Sport Has the Most Concussions?*, COMPLETE CONCUSSIONS (Dec. 6, 2018), https://completeconcussions.com/concussion-research/concussion-rates-what-sport-most-concussions/.

[21] *A Surgeon's-Eye View of the Brain*, NPR (May 10, 2006) (quoting excerpts from KATRINA FIRLIK, ANOTHER DAY IN THE FRONTAL LOBE: A BRAIN SURGEON EXPOSES LIFE ON THE INSIDE (2007)), https://web.archive.org/web/20171107023155/http://www.npr.org/templates/story/story.php?storyId=5396115; *see also* Colin Schultz, *Fresh Brains Are Way Squishier Than You Think*, SMITHSONIAN MAG. (Nov. 20, 2013), https://www.smithsonianmag.com/smart-news/fresh-brains-are-way-squishier-than-you-thought-180947787/; Ted-Ed, *What Happens When You Have a Concussion? - Clifford Robbins*, YOUTUBE (Jul. 27, 2017), https://www.youtube.com/watch?v=xvjK-4NXRsM&t=1s [hereinafter Robbins].

[22] *Mild TBI and Concussion*, CDC INJURY CENTER (Nov. 14, 2022), https://www.cdc.gov/traumaticbraininjury/concussion/index.html [hereinafter *CDC 1*]; *Brain Basics: Know Your Brain*, NAT'L INST. HEALTH, https://www.ninds.nih.gov/health-information/public-education/brain-basics/brain-basics-know-your-brain (last visited Mar. 5, 2024); *see also*, Schultz, *supra* note 21.

[23] Ann C. McKee, Robert C. Catu, Christopher J. Nowinski, E. Tessa Hedley-Whyte, Brandon E. Gavett, Andrew E. Budson, Veronica E. Santini, Hyo-Soon Lee, Caroline A. Kubilus, Robert A. Stern, *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. Neuropathology & Experimental Neurology 709, 720, 731, 733 (2009) [hereinafter McKee 1]; *see also* Ann McKee, Robert A. Stern, Christopher J. Nowinski, Thor D. Stein, Victor E. Alvarez, Daniel H. Daneshvar, Hyo-Soon Lee, Sydney M. Wojtowicz, Garth Hall, Christine M. Baugh, David O. Riley, Caroline A. Kubilus, Kerry A. Cormier, Matthew A. Jacobs, Brett R. Martin, Carmela R. Abraham, Tsuneya Ikezu, Robert Ross Reichard, Benjamin L, Wolozin, Andrew E. Budson, Lee E. Goldstein, Neil W. Kowall, Robert C. Cantu, *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 BRAIN 43, 61 (2013) [hereinafter McKee 2]; *see also* Michael Saulle & Brian Greenwald, *Chronic Traumatic Encephalopathy: A Review*, REHAB. RSCH. AND PRAC. 1, 4 (2012).

[24] Robbins, *supra* note 21; *CDC 1*, *supra* note 22.

[25] Robbins, *supra* note 21. *See* Saulle & Greenwald, *supra* note 23, at 4–5. *See also* McKee 1, *supra* note 23, at 726 (axons do not always tear on impact, but they are damaged); McKee 2, *supra* note 23, at 45, 60 (noting "[t]au is primarily associated with microtubules in axons, where it is neither toxic nor

into the brain, disrupting signals attempting to travel through the axons from neurons, which results in a concussion, a form of traumatic brain injury (TBI). [26]

Due to differences in human brains, concussions are hard to diagnose and symptoms manifest in a variety of ways over time.[27] Concussions can affect how one thinks, learns, feels, acts, and sleeps.[28] Physically, concussions can cause dizziness, headaches, balance problems, and vision problems.[29] Regarding thinking and memory, concussions can cause issues with attention, memory, and clarity of thought.[30] Regarding social and emotional abilities, concussions can cause anxiety and irritability, among other issues.[31]

Recovery can take days or weeks with rest and a gradual return to activities.[32] Brain cells are very sensitive after a concussion and are susceptible to further damage.[33] Second Impact Syndrome (SIS) can manifest in the form of constant headaches, difficulty learning and behavioral issues.[34] SIS often occurs due to athletes being rushed back to play too soon after a concussion.[35] If mismanaged, SIS can persist for months or years after the initial concussion.[36]

Sub-concussive hits are lesser impacts to the head that do not rise to the level of a concussion.[37] They may never result in a concussion or symptoms, but they may lead to severe degenerative brain disease overtime.[38]

B. *Concussions and Football*

Three forms of TBI are linked to football: concussions, SIS, and chronic traumatic encephalopathy ("CTE").[39] CTE is the most advanced of the aforementioned TBIs. Some CTE researchers believe the disorder is

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associated with neurofibrillary pathology" and tau can be toxic when it is exposed to the interior of the brain).

[26] Robbins, *supra* note 21; McKee 1, *supra* note 22, at 726; McKee 2, *supra* note 22, at 44–45, 61 (highlighting "the frequent association of chronic traumatic encephalopathy with other neurodegenerative disorders suggests that repetitive brain trauma and hyperphosphorylated tau protein deposition promote the accumulation of other abnormally aggregated proteins . . ." and that it is "likely that axonal dysfunction and loss contribute to the production of clinical symptoms . . ."); Saulle & Greenwald, *supra* note 23, at 4.

[27] *CDC 1*, *supra* note 22.

[28] *Id.*

[29] *Id.*; Robbins, *supra* note 21.

[30] *Symptoms of Mild TBI and Concussion*, CDC INJURY CENTER, https://www.cdc.gov/traumaticbraininjury/concussion/symptoms.html (last visited Oct. 10, 2023) [hereinafter *CDC 2*]; Robbins, *supra* note 21.

[31] *CDC 2*, *supra* note 30; Robbins, *supra* note 21.

[32] *CDC 2*, *supra* note 30.

[33] Aaron Caputo, Note, *The Bell Has Rung: Answering the Door for Student-Athlete Concussion Issues in the National Collegiate Athletic Association*, 32 J. L. & HEALTH 58, 62 (2019).

[34] Robbins, *supra* note 21.

[35] Caputo, *supra* note 33, at 64; Robbins, *supra* note 21.

[36] Robbins, *supra* note 21.

[37] *Id.*

[38] *Id.*; *see* McKee 1, *supra* note 23, at 710.

[39] Lee, *supra* note 6, at 623.

linked to excessive tau leakage in the brain.[40] The brain goes from a pink and squishy consistency to shriveled and brown.[41] CTE can cause heightened issues with mood swings, issues with thinking and memory, and dementia.[42] Although CTE symptoms usually manifest in athletes' thirties and forties, it has been found in people who did not have long professional careers.[43] Such findings suggest the disease develops earlier, perhaps at the youth or college levels.[44] A 2017 study of 202 deceased football players found CTE in ninety-nine percent of the sample NFL players, ninety-one percent of the sample college football players, and twenty-one percent of the sample high school players.[45] A notable case is former New England Patriot, Aaron Hernandez, who had stage three CTE at just twenty-seven.[46]

Dr. Bennet Omalu, a Nigerian-American physician, is credited as the first to find a link between football and CTE.[47] After the death of former Pittsburgh Steelers center, Mike Webster, Dr. Omalu discovered excessive tau leakage in Webster's brain.[48] Boston University has emerged as a leader in CTE research and built on Dr. Omalu's work.[49] Although the discovery was groundbreaking, the findings of Dr. Omalu and others were often met with firm pushback from the National Football League (NFL).[50] Despite their protests, the NFL and NCAA have known of the risks associated with

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[40] Robbins, *supra* note 21; McKee 1, *supra* note 23, at 710, 726, 731–32 (noting axons do not always tear on impact and "CTE is characterized by cerebral . . . extensive tau-immunoreactive pathology throughout the neo-cortex, medial temporal lobe, diencephalon, brainstem, and spinal cord.").

[41] Robbins, *supra* note 21; McKee 1, *supra* note 23, at 720; McKee 2, *supra* note 23, at 47 fig. 1, 52 fig. 3.

[42] Robbins, *supra* note 21; McKee 1 *supra* note 23, at 710; McKee 2, *supra* note 23, at 44; Saulle & Greenwald, *supra* note 23, at 3–4, 6. *See also* McKee 2, *supra* note 23, at 2, 52, 55–56, 58–59 (including information on clinical symptoms).

[43] Pretty, *supra* note 8, at 2366.

[44] *Id.* (noting that the first case of CTE in a college player belonged to Chris Borich. Borich, a former wide receiver at Western Illinois University, died of a drug overdose after a battle with depression).

[45] Jesse Mez, Daniel H. Daneshvar, Patrick T. Kiernan, Bobak Abdolmohammadi, Victor E. Alvarez, Bertrand R. Huber, Michael L. Alosco, Todd M. Solomon, Christopher J. Nowinski, Lisa McHale, Kerry A. Cormier, Caroline A. Kubilus, Brett M. Martin, Lauren Murphy, Christine M. Baugh, Phillip H. Montenigro. Christine E. Chaisson, Yorghos Tripodis, Neil W. Kowall, Jennifer Weuve, Michael D. McClean, Robert C. Cantu, Lee E. Goldstein, Douglas I. Katz, Robert A. Stern, Thor D. Stein, Ann C. McKee, *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 JAMA 360, 362 (2017) [hereinafter Mez].

[46] Caputo, *supra* note 33, at 63.

[47] *See generally* UW Epi News, *Dr. Bennet Omalu Spotlights a Profoundly Inconvenient Truth*, UNIV. WASH., DEP'T OF EPIDEMIOLOGY (Sept. 28, 2017), https://perma.cc/DD8E-H8JN.

[48] *Id.*

[49] *See*, *e.g.*, Mez, *supra* note 45, at 369–70; Lee E. Goldstein, Andrew M. Fisher, Chad A. Tagge, Xiao-Lei Zhang, Libor Velisek, John A. Sullivan, Chirag Upreti, Jonathan M. Kracht, Maria Ericsson, Mark W. Wojnarowicz, Cezar J. Goletiani, Giorgi M. Maglakelidze, Noel Casey, Juliet A. Moncaster, Olga Minaeva, Robert D. Moir, Christopher J. Nowinski, Robert A. Stern, Robert C. Cantu, James Geiling, Jan K. Blusztajn, Benjamin L. Wolozin, Tsuneya Ikezu, Thor D. Stein, Andrew E. Budson, Neil W. Kowall, David Chargin, Andre Sharon, Sudad Saman, Garth F. Hall, William C. Moss, Robin O. Cleveland, Rudolph E. Tanzi, Patric K. Stanton, & Ann C. McKee, *Chronic Traumatic Encephalopathy in Blast-Exposed Military Veterans and a Blast Neurotrauma Mouse Model*, 4 SCI. TRANSLATIONAL MED. 1, 11–12 (2012) (finding that CTE found in military veterans who had repeated blast exposure mirrored CTE in football players).

[50] UW Epi News, *supra* note 47.

football and TBIs for some time.[51] There is still a debate among scientists regarding a causal relationship between football and TBIs in general.[52] However, those who argue that there is no causal link are "increasingly in the minority."[53]

III. STUDENT-ATHLETE LIFE

Student-Athlete Life is often set against a backdrop of coaches' being desperate to win. A fish rots from the head and coaches are at least the figurehead of programs across the nation. Consequently, coaches' desire to win can led to their encouraging academic dishonesty, turning a blind eye to athlete injuries, and influencing the judgement of medical professionals.[54] Such behavior is often enabled by all parties, students, coaches, and medical professionals, having a vested interest in athletes being fit enough to play.[55]

A. *Finances*

Despite the glamorous picture of the NCAA student-athlete life that can be seen on TV, the financial realities can be a stark contrast. Although the term "full ride" is often associated with college sports, most student-athletes do not receive such scholarships.[56] In fact, athlete compensation has been restricted to institutions providing tuition and fees, room, board and course-related materials.[57] Furthermore, the perks one can experience at larger schools, such as a nutritionist or professional-grade training facilities, are not enjoyed by all athletes.[58] It helps that student-athletes are now able to profit off of their name, image, and likeness (NIL),[59] but such deals are concentrated among a small number relative to athletes in Divisions I-III.[60] Despite bringing in millions for NCAA schools, many college athletes had to wonder where their next meal was coming from.[61] En route to the 2014 NCAA Men's Basketball Championship, UConn player Shabazz Napier spoke about the many nights he went to bed hungry.[62] Two weeks later, the NCAA approved unlimited meals for athletes.[63]

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[51] Caputo, *supra* note 33, at 65.

[52] Lee, *supra* note 6, at 618; Steve Fainaru, *NFL Acknowledges, for First Time, Link Between Football, Brain Disease*, ESPN, (Mar. 14, 2016) http://espn.go.com/espn/otl/story/_/id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first.

[53] Lee, *supra* note 6, at 618; *see* Fainaru, *supra* note 52.

[54] Holden, *supra* note 4, at 447–48.

[55] *Id.*

[56] Caruso, *supra* note 3, at 20.

[57] Lee, *supra* note 6, at 621.

[58] Caruso, *supra* note 3, at 20–21.

[59] Holden, *supra* note 4, at 454–55.

[60] *See generally* Holden, *supra* note 4.

[61] Sara Ganim, *UConn Guard On Unions: I Go to Bed 'Starving'* CNN (Apr. 8, 2014, 1:24 PM), https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html.

[62] *Id.*

[63] *Id.*; Tyler Conway, *NCAA Approves Unlimited Meals and Snacks for Division I Student-Athletes*, BLEACHER REPORT (Apr. 15, 2014), https://bleacherreport.com/articles/2030620-ncaa-approves-

B. *"Walk It Off"*

NCAA schools control so many aspects of student lives: when to wake up, when to eat, when to study, how much they can weigh (in many cases); yet, many schools use this relationship to exploit, instead of protect.[64] Such exploitation has manifested through a long history of programs encouraging athletes to play through injuries, especially TBIs.[65] Playing through TBIs has resulted in serious injury and even death for many student-athletes.[66]

The Oklahoma drill is an exercise usually done during the first few weeks of football practice.[67] A fullback and linebacker line up opposite each other and collide headfirst.[68] There is no technique being honed by the drill; coaches simply use it to assess whether players are afraid of being hit.[69] Derek Sheely was a fullback on Frostburg State University's football team.[70] In 2011, the Oklahoma drill was a part of Frostburg's preseason training.[71] During the drill, a cut on Sheely's head opened for the fourth time in three days.[72] Despite his injuries, Sheely's team trainer made him return to practice.[73] Following the drill, Sheely allegedly complained to his coach that he "'didn't feel right' and had a 'headache'"[74] In response, the coach yelled, "stop your b-tching and moaning and quit acting like a p-ssy and get back out there Sheely!"[75] Sheely's teammates alleged that those who reported or complained about injuries were looked down upon.[76] Student-athletes who sought to tend to their injuries were ostracized by the coaching staff and the rest of the team; they were often forced to clean the practice facilities as a form of punishment.[77] Such practices fly in the face of best practices put forward by the medical community.[78]

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unlimited-meals-and-snacks-for-division-i-student-athletes (noting some skeptical observers felt the move was only due to backlash caused by Napier's comments).

[64] Ted Tatos, *Abuse and Mistreatment of Athletes at U.S. Universities: Legal Implications for Institutional Duty-to-Protect*, 21 TEX. REV. ENT. & SPORTS L. 1, 34, 46–47 (2020).

[65] Holden, *supra* note 4, at 447–48; Pretty, *supra* note 8, at 2371.

[66] Holden, *supra* note 4, at 447–48; Pretty, *supra* note 8, at 2365–66, 2371.

[67] Pretty, *supra* note 8, at 2359–60.

[68] *Id.*

[69] *Id.*; Dan Diamond, *A Head Injury in Practice Killed Derek Sheely. Is the NCAA to Blame?*, FORBES (Sept. 2, 2013, 7:47 AM), https://www.forbes.com/sites/dandiamond/2013/09/02/a-head-injury-in-practice-killed-derek-sheely-is-the-ncaa-to-blame/.

[70] Pretty, *supra* note 8, at 2359; Diamond, *supra* note 69.

[71] Pretty, *supra* note 8, at 2359.

[72] *Id.* at 2360; Diamond, *supra* note 69.

[73] Pretty, *supra* note 8, at 2360; Diamond, *supra* note 69.

[74] Pretty, *supra* note 8, at 2360.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *See* Breton M. Asken, Michael A. McCrea, James R. Clugston, Aliyah R. Snyder, Zachary M. Houck, & Russel M. Bauer, *"Playing Through It": Delayed Reporting & Removal From Athletic Activity After Concussion Predicts Prolonged Recovery* 51 J. ATHLETIC. TRAINING 329, 333 (2016) ("Athletes who do not immediately report symptoms of a concussion and continue to participate in athletic activity are at risk for longer recoveries than athletes who immediately report symptoms and are immediately removed from activity."). Further, athletes who are pressured to remain in play are at greater risk of further injury. *Id.* at 329 ("One significant implication of these findings relates to educating athletes and

Shortly after, Sheely collapsed after another blow to the head.[79] Sheely never woke up.[80] Sheely experienced significant brain swelling and sadly passed away after six days in a coma.[81] Unfortunately, there have been many Derek Sheely's under the watch of the NCAA and its member institutions.[82] Yet, even more cases go unreported due to a toxic culture around playing through injuries in football and other sports.[83] Although schools often contribute to that harm that comes from playing through injuries, such instances rarely spawn the substantive change needed to protect athletes.[84]

For neither the first nor the last time, we see a student-athlete unable to defend themselves in the face of abuse and exploitation. Student-athletes are a vulnerable group who cannot be expected to uphold safety protocols all by themselves. Since the current framework is defective, it is time to reassess how far we are willing to go to protect young people.

IV. NCAA INJURY JURISPRUDENCE

For much of the NCAA's existence, they rarely lost in court.[85] Similar to academic deference, courts let the NCAA—who are responsible for student safety—do what they thought was best.[86] Yet, the tide took a significant turn in 2016.

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coaches. Athletes are sometimes motivated to hide their symptoms because of both internal and external pressure to perform."); *see also* Emily Kroshus, Bernice Garnett, Matt Hawrilenko, Christine M. Baugh, Jerel P. Calzo, *Concussion Under-Reporting and Pressure from Coaches, Teammates, Fans, and Parents*, 134 SOC. SCI. MED. 66, 66–75 (2015); Saulle & Greenwald, *supra* note 23, at 1–2 (noting pressures on athletes to ignore their own injuries and perform); Pretty, *supra* note 8, at 2363 (noting "every concussion is case is unique, and thus the injury presents a challenge for medical professionals to properly diagnose, as well as for players to self-report their symptoms"); Pretty, *supra* note 8, at 2389 ("[I]t is imperative that athletes understand not only the symptoms of a concussion, but also the absolute necessity of reporting their symptoms, rather than hiding them."); Kelly G. Kilcoyne, Jonathan F. Dickens. Steven J. Svoboda, Brett D. Owens, Kenneth L. Cameron, Robert T. Sullivan, & John-Paul Rue, *Reported Concussion Rates for Three Division I Football Programs*, 6 SPORTS HEALTH 402–05 (2014) (noting "athletes, for various reasons, often underreport and minimize the importance of concussions" and "In other instances, the athlete may not want to report symptoms for fear of missing current and future games.").

[79] *Id.*; Diamond, *supra* note 69.

[80] Pretty, *supra* note 8, at 2359; Diamond, *supra* note 69.

[81] Pretty, *supra* note 8, at 2359; Diamond, *supra* note 69.

[82] Matthew Rubino, *Gridlocked on the Gridiron: Medical Monitoring Is the Incorrect Response to the NCAA Concussion Litigation*, 93 TEMP. L. REV. 423, 424 (2021); *see infra* note 83.

[83] Christine M. Baugh, William P. Meehan III, Emily Kroshus, Thomas G. McGuire, & Laura T. Hatfield, *College Football Players Less Likely to Report Concussions and Other Injuries with Increased Injury Accumulation*, 36 J. NEUROTRAUMA 2065, 2065 (2019) (stating approximately fifty percent of injuries go unreported). *See, e.g.*, Caputo, *supra* note 33, at 59–60. Angel Mitchel was a soccer player at Ouachita Baptist University. *Id.* Mitchel was concussed after colliding with a player, and her condition was poorly managed by the school. *Id.* Mitchel wisely went to the hospital, against the wishes of her coaches, and never played for the school again. *Id.*

[84] Pretty, *supra* note 8, at 2367.

[85] Caruso, *supra* note 3, at 24.

[86] *See generally id.* at 22–26; Univ. of Denver v. Nemeth, 257 P.2d 423, 424 (1953) (en banc); Rensing v. Ind. State Univ. Bd. Trs., 444 N.E.2d 1170, 1174 (1983).

A. In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation (*In re NCAA*)

In re NCAA was the first class action settlement concerning the NCAA and concussions.[87] The class contended the NCAA breached their duty of reasonable care due to insufficient concussion rules and enforcement.[88] The first member of the class was Adrian Arrington, a former football player for Eastern Illinois University.[89] Similarly situated athletes throughout the country filed class actions.[90] The Multidistrict Litigation (MDL) Panel consolidated the cases into the Northern District of Illinois, under U.S. District Judge John Z. Lee (Judge Lee).[91] The class alleged the NCAA failed to: address improper coaching as it relates to tackling; properly educate coaches, other team staff, and student-athletes as to concussion-related symptoms; implement adequate return-to-play guidelines; and implement guidelines for the screening and detection of concussions.[92] The class demanded corrective measures, such as medical monitoring and an improved concussion protocols.[93]

After failing to agree on the first proposed settlement, the second settlement was approved by the court.[94] The settlement, agreed for $75 million, defined the settlement class as "All Persons who played an NCAA-sanctioned sport at an NCAA member institution on or prior to [July 15, 2016.]"[95] As a result, the class does not include present or future athletes. There were four key components to the settlement: (1) the medical monitoring fund, (2) changes to NCAA concussion management policies, (3) release of certain claims, and (4) fees and awards.[96] The medical monitoring program and concussion protocol changes are discussed below.[97] This case was a massive win for student-athletes against the previously untouchable NCAA. Not only was the class able to receive some form of relief, but the NCAA had to change the way concussions were handled on paper; concussion management in practice is a different discussion entirely.

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[87] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. 202, 202 (N.D. Ill. 2019).

[88] *Id.* at 208.

[89] Rubino, *supra* note 80, at 431–32. After Arrington's first three concussions at Eastern Illinois, the team's medical staff allowed him to return to play the very next day. *Id.* Arrington subsequently experienced memory loss and seizures. *Id.*

[90] *Id.*

[91] *See generally In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 222.

[92] Rubino, *supra* note 80, at 432.

[93] *Id.*

[94] *Id.* Another class member objected to how contact and non-contact sports were treated differently under the first proposed settlement. It was argued that both types would need medical professionals to handle head injuries.

[95] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 209–10.

[96] Rubino, *supra* note 80, at 435, 437.

[97] *See infra* Part III.C–D.

B. Sheely v. NCAA

After the events the led up to Derek Sheely's death,[98] his family filed a wrongful death lawsuit in 2013 against the NCAA, members of the Frostburg State coaching staff, and the helmet manufacturer Schutt.[99] The Sheely's alleged the NCAA's negligence led to Derek's death by failing to enforce or investigate its concussion rules.[100] The case focused on the NCAA's knowledge about second-impact syndrome and whether it did enough to inform member institutions about how to prevent it.[101] Montgomery County Circuit Court Judge David Boynton held the NCAA has a "special relationship" with athletes due to its mission statement and had a legal duty to protect them.[102] Judge Boynton stated SIS is not inherent to football, so a duty to warn exists.[103] Judge Boynton denied the NCAA's motion for summary judgement, potentially setting up a trial, but the parties settled for $1.2 million.[104] Majority of the settlement amount went to the Sheely Foundation.[105] This case is considered noteworthy because it is the first TBI case that the NCAA agreed to pay a significant amount of money to settle.[106] After the settlement, Derek's mother said, "You can have all the rules you want, but if you don't enforce them, they're useless . . . I don't know what it's going to take to change things."[107]

C. *The Bellwether Cases*

Due to *In re NCAA*, hundreds of subsequent cases were consolidated as part of an MDL.[108] Judge Lee, from *In re NCAA*, wrote opinions on the motions to dismiss that comprise the bellwether cases. The four sample cases were supposed to be representative of conclusion claims against NCAA and member schools.[109] The cases are, (1) *Langston et al. v. Mid-America Intercollegiate Athletics Association* (*Langston*);[110] (2) *Weston v. Big Sky*

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[98] *See supra* Part IV.B.

[99] Caputo, *supra* note 33, at 72.

[100] *Id.* at 72–73.

[101] Michael Dresser, *NCAA, State Reach Settlement in Case of Frostburg Football Player who Died after Head Injury*, BALTIMORE SUN (July 27, 2016, 12:15 PM), https://www.baltimoresun.com/politics/bs-md-ncaa-lawsuit-20160725-story.html.

[102] Jon Solomon, *NCAA and Other Co-Defendants Reach $1.2 Million Settlement in Football Player's Death*, CBSSPORTS.COM (Aug. 8, 2016, 5:24 PM), https://www.cbssports.com/college-football/news/ncaa-and-other-co-defendants-reach-1-2-million-settlement-in-football-players-death/.

[103] *Id.* The Sheely's alleged the NCAA had known about SIS since 1993; NCAA then-president Mark Emmert denied this during a deposition. Dresser, *supra* note 101.

[104] Caputo, *supra* note 33, at 73; Solomon, *supra* note 102.

[105] Solomon, *supra* note 102. The NCAA and Frostburg state also provided a grant to support catastrophic risk research. *Id.*

[106] *Id.*

[107] *Id.*

[108] Caputo, *supra* note 33, at 74.

[109] *Id.*

[110] Zack Langston played outside linebacker for Pittsburg State University from 2007 to 2010. Langston v. Mid-America Intercollegiate Athletic Ass'n, 448 F. Supp. 3d 938, 944 (N.D. Ill. 2020). During practices and games, he suffered repeated concussive and sub-concussive hits; he was told to

Conference, Inc. (*Weston*);[111] (3) *Richardson v. Southeastern Conference* (*Richardson*);[112] and (4) *Rose v. National Collegiate Athletic Association.* [113] The outcomes of three of the former cases are detailed below.

There are a number of takeaways from the bellwether cases. Judge Lee assessing another set of concussion related claims allows for insights into what makes a successful case against the NCAA and affiliates. First, the facts need to draw a clear line between the plaintiffs and the NCAA; when they do, the court is very sympathetic. Judge Lee often cited the NCAA's primary principle of safeguarding athlete's mental and physical wellbeing[114] As a result, Judge Lee concluded the NCAA and affiliates owed student-athletes a duty of care.[115] After establishing a duty, the court was open to arguments regarding various claims such as: fraudulent concealment, breach of contract, and unjust enrichment.[116] Yet, the court will not entertain parties who try to sue the NCAA in states that have no ties to where the alleged injuries occurred.[117] Instead, it is advantageous for parties to pursue lawsuits in states where their competitions and trainings occurred or took place and claim those courts have supplemental jurisdiction over the NCAA.[118] Parties equipped with injuries from activities overseen by the NCAA, jurisdiction appropriate claims, and facts that demonstrate negligent concussion protocol enforcement are at least likely to survive summary judgement where the NCAA are headquartered.

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walk them off. *Id.* After suffering from mental issues, Langston shot himself at the age of twenty-six. *Id.* An examination at Boston University's Chronic Traumatic Encephalopathy Center revealed Langston had stage II/IV CTE. *Id.*

[111] Eric Weston played defensive end for WSU University in Utah from 1996 to 1997. Weston v. Big Sky Conf., 466 F. Supp. 3d 896, 901 (N.D. Ill. 2020). In that role, he sustained concussive and sub-concussive hits during practices and games. *Id.* The hits would sometimes leave Weston unable to remember the game he was playing in. *Id.* Coaches had him return to play shortly after. *Id.* Consequently, Weston suffers from an array of mental and physical health issues. *Id.*

[112] Jamie Richardson played wide receiver for the University of Florida football team from 1994 to 1996. Richardson v. Se. Conf., 612 F. Supp. 3d 753, 759 (N.D. Ill. 2020). During practices and games, he suffered repeated concussive and sub-concussive hits. *Id.* Consequently, Richardson suffers from an array of mental and physical health issues. *Id.*

[113] Michael Rose and Timothy Stratton were football players at Purdue University from 1996 to 2001. Rose v. Nat'l Collegiate Athletic Ass'n, 346 F. Supp. 3d 1212, 1216 (N.D. Ill. 2018). The men suffered from thousands of repetitive concussive and subconcussive impacts to the head. *Id.* At the time of the case, as a result of repetitive brain trauma, the two are suffering with debilitating with both debilitating cognitive impairments and neurodegenerative disorders. *Id.*

[114] *Langston*, 448 F. Supp. 3d at 945; *Weston*, 466 F. Supp. 3d at 901; *Richardson*, 612 F. Supp. 3d at 760.

[115] *Langston*, 448 F. Supp. 3d at 945; *Weston*, 466 F. Supp. 3d at 901; *Richardson*, 612 F. Supp. 3d at 760.

[116] *See Langston*, 448 F. Supp. 3d at 950; *Weston*, 466 F. Supp. 3d at 904; *Richardson*, 612 F. Supp. 3d at 760.

[117] *Weston*, 466 F. Supp. 3d at 906. Due to the NCAA being headquartered in Indiana, various parties will seek redress under those state laws instead of the state where their respective school is based; the court has not rewarded forum shopping. *Id.*

[118] *Richardson*, 612 F. Supp. 3d at 767.

D. *Effects*

1. *Medical monitoring*

Medical monitoring is a key part of the *In re NCAA* settlement. Medical monitoring is "a form of surveillance based on repetitive use of the same test or test group to detect a specified change in the patient indicating a change in [their] prognosis or need for . . . a change in [their] treatment."[119] To enable this program, a portion of the $70 million settlement will be used to pay for resources such as medical screening, questionnaire costs, and administrative costs.[120] The medical monitoring program will last fifty years and consists of a number of components to monitor the health of class members.[121] Medical monitoring is helpful partly because it gives class members access to medical testing and aids early diagnosis.[122] Such programs can also help those who would normally need to pay for their injuries out of pocket.[123]

Despite its merits, medical monitoring is a less than ideal way to take care of student-athletes who pursue concussion litigation. A main concern is the additional pressure put on courts to give student-athletes relief. In the immediate wake of *In re NCAA*, the NCAA was facing over 300 concussion related class-action lawsuits on behalf of former student-athletes.[124] The steady stream of new concussion litigation shows that medical monitoring programs are not enough to prevent harm going forward.[125]

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[119] Rubino, *supra* note 80, at 439 (quoting Victor E. Schwartz, Leah Lorber, & Emily J. Laird, *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 351 (2005) [hereinafter Schwartz]).

[120] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 211. Other costs include, but are not limited to, notice and administrative costs, medical science committee costs, approved attorneys' fees, and class representative compensation. *Id.*

[121] Rubino, *supra* note 80, at 435. The program has two different assessment phases: screening and evaluation. *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 211. Screening is conducted via a questionnaire that seeks to analyze class members' CTE symptoms. *Id.* Class members may seek an analysis of their symptoms once every five years until they reach age fifty. *Id.* Evaluation assesses post-concussion syndrome symptoms, which are early indicators of neurodegenerative diseases like CTE. *Id.* at 212. The medical monitoring medical committee may make annual recommendations and aids with the intricacies of evaluations. *Id.* Class members may be evaluated twice a year during a fifty-year period and can appeal for a third evaluation. *Id.* Alternatively, members can be given extra care if they display suicidal tendencies. Rubino, *supra* note 80, at 437.

[122] David I. W. Hamer, *Medical Monitoring in North America: Does This Horse Have Legs*, 77 DEF. COUNS. J. 50, 51 (2010).

[123] *Id. See generally* Caruso, *supra* note 3, at 20–22.

[124] Caputo, *supra* note 33, at 72.

[125] Even if failure to protect student-athletes going forward was not enough to write off medical monitoring, there are other issues inherent to the resource. From a legal standpoint, concussions are not an ideal fit for medical monitoring. Rubino, *supra* note 80, at 441–42. The NCAA has a stronger case for student-athlete assumption of risk; the causal link between football and TBIs is slightly weaker than a regular instance of an entity exposing others to dangerous conditions; and there are concerns about those without CTE symptoms creating a backlog in courts. *Id.* Medically, information about CTE can only be gathered after one has died. *Id.* at 447. There are also concerns about the limited pie a medical monitoring fund program provides. *See generally* Schwartz, *supra* note 119; Hamer, *supra* note 122.

2. *Concussion protocol changes*

In re NCAA brought about a number of changes to the NCAA's concussion protocol. The court announced that the NCAA agreed—via the settlement—to adopt some best practices for concussion safety.[126] Member schools would need to: (1) administer baseline concussion tests among athletes so the pre-season results can be compared to results post-trauma;[127] (2) ensure there is no return to play on the same day as a concussion diagnosis; (3) require physician clearance to return to play post-diagnosis; (4) require medical personnel trained in concussion-related diagnosis, treatment, and management at all contact sports games; and (5) have such medical professionals with concussion training present at all practices.[128]

There are additional conditions the NCAA must meet due to the settlement: (1) member schools must submit return to play protocols to the NCAA six months after the effective date of the settlement; (2) the NCAA must establish a reporting process where schools report diagnosed concussions and track their progress until resolution; (3) the NCAA must also establish process where third parties, such as athletes or their parents, can do the same; (4) the NCAA member institutions must distribute NCAA-supplied information to faculty in the event a student-athlete needs academic concussion accommodations; (5) the NCAA member institutions must provide NCAA-approved concussion education to all student-athletes, coaches, and athletic trainers before each season throughout the medical monitoring period.[129] The court also implemented processes where member schools and third parties, such as student-athletes or their parents, are able to file reports regarding settlement compliance directly to the NCAA.[130]

Changes to the concussion protocol may bring about a number of benefits, perceived or otherwise. Improved concussion education is key; some consider it the most important way to protect student-athletes going forward.[131] Improved education can clear up concussion misconceptions, help schools stay up to date regarding advancements in concussion safety, and puts parties closest to concussions in a better position to spot them. Additionally, the protocols require schools to put procedures on record.[132] This enables parties to point out any violations should they assert a school must be punished.[133]

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[126] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 218.

[127] *Id.* at 212; Rubino, *supra* note 80, at 437.

[128] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 212.

[129] *Id.* at 212–13.

[130] *Id.* The court also implemented processes where member schools and third parties, such as student-athletes or their parents, are able to file reports regarding settlement compliance directly to the NCAA. *Id.* at 213.

[131] "The only way to break the current culture of playing through concussions in football is an education system that continually inundates players with information about the associated risks, especially the danger of returning to play after sustaining a concussion." Pretty, *supra* note 8, at 2389.

[132] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 212.

[133] *Id.* at 213.

Despite benefits from the new concussion protocols, there are a number of drawbacks. The protocols rely primarily on the member schools to administer concussion management procedures.[134] As student-athlete safety can often be secondary to member schools, quality in concussion management varies.[135] Institutions often see concussion protocols as a hurdle to overcome instead of an essential part of keeping student-athletes safe.[136] Although there are a number of weak points in the protocols,[137] my main concern is a trio of conflicting interests that significantly weaken them.

The three actors closest to injuries are: players, medical staff, and coaches. They are key to enforcement because they must be educated and ensure the protocols are being followed.[138] First, players want to be seen as tough and avoid being labelled as "injury-prone," hurting their NFL draft stock.[139] Medical staff are at the forefront of concussion safety because schools often use team doctors to enforce protocols.[140] Medical staff often want to end up at or have job safety within large college football programs.[141] Such positions are "prestigious, often lucrative, and highly sought after within the sports medicine community."[142] Consequently, medical staff are highly invested in clearing student-athletes and not being blamed for their unavailability. Coaches are similarly biased and can be unreliable when it comes to enforcing concussion protocols. They have a vested interest in fielding the best team possible so they can win games and keep their job.[143] To this end, they may put pressure on players to be available and medical staff to clear them. An equilateral triangle is the strongest shape only when all three sides maintain their integrity; the aforementioned trio are all compromised.[144] As a result, an independent authority is needed so players are as safe as they can be.

V. LEGISLATIVE SOLUTION ANALYSIS

There has been a variety of creative solutions suggested to protect student-athletes. Some scholars have written about the in loco parentis

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[134] *See* Holden, *supra* note 4, at 447 (noting the NCAA's concussion management plan relies on individual schools enforcing policies, and this can lead to different degrees of policy enforcement); Caputo, *supra* note 33, at 68 (noting the NCAA has required member schools to keep concussion management plans on file, but they may be ineffective without an enforcement mechanism).

[135] Holden, *supra* note 4, at 447; Pretty, *supra* note 8, at 2373, 2381.

[136] *See generally* Tatos, *supra* note 64, at 46–47.

[137] For example, the NCAA does not require concussion protocols to be uniform across all institutions. Caputo, *supra* note 33, at 68. "Power 5" schools must submit to committee, but over 1,000 schools still fall through cracks. *Id.*

[138] Pretty, *supra* note 8, at 2371–73.

[139] *Id.* at 2372. "College football players are never more than a single major injury away from losing their scholarship if coaches or athletic directors determine that the player has become expendable." *Id.*

[140] Holden, *supra* note 4, at 447.

[141] Pretty, *supra* note 8, at 2372.

[142] *Id.*

[143] *Id.*

[144] This is not a slight to the aforementioned parties; their burdens just need to be eased.

doctrine,[145] special relationships between the NCAA and athletes,[146] holding institutions responsible along with the NCAA,[147] independent medical professionals,[148] unconscionability,[149] and a number of tort theories. Yet, a solution must ease the burden on courts. Legislation allows for a deeper dive into the issue and the option to be proactive.

A. *Past Efforts*

Congress has appeared open to acting to protect student-athletes. There have been a number of efforts in the past,[150] including a college athlete bill of rights (CA Bill of Rights).[151] In June 2021, Martin McNair testified at a congressional hearing regarding the future of college sports.[152] McNair is the father of Jordan McNair, a Maryland football player who died of heatstroke due to a training drill.[153] He testified in support of a CA Bill of Rights and his calls were heeded by some when the bill was introduced.[154] The bill's main sponsor is Senator Corey Booker (D-NJ), a former Stanford University football player.[155] The bill seeks to remedy issues regarding rights to compensation, health and safety standards, and educational opportunities for student-athletes.[156] Among other functions, the bill would penalize schools, athletic associations, and conferences that violate specified protections for student-athletes.[157] Furthermore, the bill would "direct the Centers for Disease Control and Prevention to establish health, wellness, and safety standards for intercollegiate athletic programs."[158] In August 2022, Senator Booker reintroduced the proposal to the Senate Judiciary Committee.[159] Although the bill was introduced, it did not make it past the first committee; it has yet to gain bipartisan support.[160] My main concern regarding the CA Bill of Rights is that once it is created, parties will look to courts for enforcement. Although flawed, the CA Bill of Rights is a measure that can be taken in addition to independent oversight.

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[145] *See generally* Tatos, *supra* note 64.
[146] *See generally* Pretty, *supra* note 8.
[147] Tatos, *supra* note 64, at 52.
[148] Holden, *supra* note 4, at 466.
[149] *See generally* Lee, *supra* note 6.
[150] Pretty, *supra* note 8, at 2374. Protections "would be limited[] to schools whose athletics generate at least $10 million in media rights fees annually." *Id.*
[151] Holden, *supra* note 4, at 457–58; S. 4724, 177th Cong. (2022).
[152] *See* NCAA Student Athletes and NIL Rights: Hearing Before the S. Comm. on Com., Sci. & Transp., 117th Cong. (2021) [hereinafter *NIL Hearing*].
[153] Heather Dinich, *Sources: Maryland OL Jordan McNair Showed Signs of Extreme Exhaustion*, ESPN (Aug. 10, 2018, 5:00 PM), https://www.espn.com/college-football/story/_/id/24343021/jordan-mcnair-maryland-terrapins-died-heatstroke-team-workout.
[154] *NIL Hearing*, *supra* note 152; S. 4724.
[155] Holden, *supra* note 4, at 458.
[156] S. 4724.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*

B. *Framework of the Oversight Committee*

One idea to keep student-athletes safe stands out: the Concussion Safety Oversight Committee (CSOC).[161] Aaron Caputo elaborated on this idea in *The Journal of Law and Health*.[162] The idea of a CSOC has since been championed by Senator Booker in his most recent proposal for the College Athlete Bill of Rights.[163] The proposed legislation would create a Commission on College Athletics to protect the economic, health, and safety interests of college athletes.[164] A more robust version of Caputo's CSOC, more in line with proposed legislation, would be ideal.

Such a committee can regulate, investigate and penalize member institutions for violating the NCAA's concussion protocols.[165] Instead of the current framework for reporting violations—student-athletes and third-parties reporting to the NCAA—parties can report to the Committee concurrently.[166] Penalties should include, at least, sanctions, fines, recruitment penalties, scholarship penalties, and suspensions;[167] head coach penalties should be included as well. Coaches wield tremendous influence and are often the ones pressuring concussed athletes to return to play.[168]

The Committee can be implemented through the Higher Education Act (HEA), a federal law governing higher education in the United States.[169] The law authorizes numerous federal student aid programs.[170] Per the Congressional Research Service, Title IV "authorizes the federal government's major student financial aid programs, which are the primary source of direct federal support to students pursuing postsecondary education."[171] The HEA can be amended to create the Committee and pull Title IV funding from schools who do not comply.[172] The HEA amendment would prohibit a member school with an intercollegiate athletic program from membership in a nonprofit athletic association[173] unless it creates and

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[161] *See* Caputo, *supra* note 33, at 81.

[162] *See* Caputo, *supra* note 33 (The Journal of Law and Health is published by the Cleveland State University College of Law).

[163] *See* S. 4724, 117th Congress (2022).

[164] *Id.*

[165] Caputo, *supra* note 33, at 81.

[166] *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. at 213.

[167] Caputo, *supra* note 33, at 83.

[168] Pretty, *supra* note 8, at 2387–88 ("If coaches, trainers, and athletic directors know that a failure to comply with the terms of their concussion plans could expose their football programs to serious penalties, it would provide a strong incentive for all parties to ensure that head injuries receive proper attention.").

[169] Caputo, *supra* note 33, at 85.

[170] Alexandra Hegji, CONG. RSCH. SERV., R43351, The Higher Education Act (HEA): A Primer, Aug. 25, 2017, https://fas.org/sgp/crs/misc/R43351.pdf; Caputo, *supra* note 33, at 86 ("Some of the programs include: supporting students in financing their education, providing support to less-advantaged students, providing support to students pursuing an international education and certain professional degrees, and supporting certain institutions to improve their ability to offer postsecondary education programs.").

[171] Hegji, *supra* note 170.

[172] Caputo, *supra* note 33, at 85.

[173] Such as the NCAA.

maintains or allows a third party[174] to create and maintain the CSOC.[175] In short, schools would see a drop in funding unless they are affiliated with an intercollegiate athletic association overseen by the CSOC. The NCAA would likely encourage schools to join; well-funded schools are more likely to pay NCAA membership fees.

C. *Benefits*

The CSOC would come with a number of benefits. The CSOC would act as a direct remedy to glaring issues in new protocols,[176] medical monitoring,[177] and judicial remedies.[178] Regarding concussion protocols, the CSOC would ease the burden of enforcing borne by student-athletes, medical staff, and coaches. Penalties for risking student-athlete safety can then come from a disinterested party. Second, medical monitoring simply does not do much to stop the creation of new cases. The process resembles shoveling a driveway while snow is still falling. The CSOC would bring student-athletes closer to lasting change by at least slowing the rate of new concussions through proper protocol enforcement. Third, the CSOC could also ease the burden concussion litigation puts on courts. *In re NCAA* has led to a spike in claims;[179] easing this caseload may speed things up for parties that find themselves in court. The risk of an unmanageable caseload increases as researchers at Boston University continue to develop a CTE blood test.[180] Since post-mortem CTE diagnoses would no longer be the only option, scores of student-athlete claims could become active tomorrow.

Finally, a body such as the CSOC is better equipped to clear the hurdles that can arise while handling such a complex issue. With positions occupied by experts in sports medicine and college athletics, the CSOC could approach concussion safety in a way courts cannot. While courts are on the outside looking in, CSOC members would have been steeped in the worlds of college athletics and sports medicine throughout their careers. CSOC members understand the intricacies of college athletic programs; current state of concussion research and protocol best practices; and can better anticipate unforeseen hurdles regarding policies, investigations, and enforcement. This way, the CSOC can work with a scalpel instead of a hammer.

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[174] Such as the federal government.
[175] Caputo, *supra* note 33, at 86.
[176] *See supra* Part IV.D.2.
[177] *See supra* Part IV.D.1.
[178] *See supra* Part IV.A–C.
[179] Caputo, *supra* note 33, at 72.
[180] Ken Belson, *A Test for C.T.E. in the Living May Be Closer Than Ever*, N.Y. TIMES (Nov. 17, 2022), https://www.nytimes.com/2022/11/17/sports/football/cte-test-concussions-alzheimers.html.

D. *Adjustments*

Multiple adjustments can be made to improve the CSOC's impact. First, mental health advancements could be a mandate the CSOC hands down to the NCAA. Improved access to mental health resources is a preventative measure to slow creation of new cases. Student-athletes will also be educated on mental wellness, which has taken a backseat to physical fitness.[181]

A number of student athlete suicides have ignited a national conversation regarding mental health in collegiate sports. Madison Holleran was a University of Pennsylvania track athlete.[182] Holleran was blessed to be surrounded by the love of her friends and family.[183] Despite her achievements as a Division I athlete, Holleran grappled with challenges few could understand.[184] Many knew Holleran was unhappy, but they could not understand how deep her struggle was.[185] Holleran herself struggled to understand what was happening in her mind; "[her] track coach knew that the nineteen-year-old University of Pennsylvania track runner was struggling to figure out whether track was making her unhappy, or just Penn."[186] Unable to find help on her own, Madison Holleran killed herself by jumping off from the ninth level of a parking garage.[187]

Unfortunately, cases like Madison Holleran's are far too common. Kosta Karageorge was a football player at The Ohio State University.[188] Karageorge had gone missing before he was found dead in a dumpster on Ohio State's campus: he had shot himself in the head.[189] Right before his death, Karageorge texted his mother saying he felt he was "an embarrassment" and that his "concussions have [his] head all f--ed up."[190] Kosta Karageorge is neither the first nor the last student-athlete who fell by the wayside due to insufficient mental health protections. Despite the grim nature of these high-profile deaths, they have not resulted in long-term change. Scores of female athletes indicated they had no knowledge of any

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[181] There have been many student-athlete suicides due to effects of concussions and other mental illnesses. *See generally* Jayce Born, *National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association*, 92 IND. L.J. 1221, 1223 (2017); *see* Nicole Noren, *College Mental Health Awareness Grows*, ESPN (Jan. 22, 2014), https://www.espn.com/espn/otl/story/_/id/10335925/awareness-better-treatment-college-athletes-mental-health-begins-take-shape; Associated Press, *NCAA trainers draft mental health proposal*, ESPN (Sept. 25, 2013, 10:56 AM), https://www.espn.com/college-sports/story/_/id/9720732/ncaa-trainers-make-mental-health-recommendations.

[182] Born, *supra* note 181, at 1221.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] Terrence McCoy, *The Violent Death of Ohio State's Kosta Karageorge--and the Troubling Link Between Suicide and Concussions*, WASH. POST (Dec. 1, 2014, 6:04 AM), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/01/the-violent-death-of-ohio-state-football-player-kosta-karageorge-and-concussions-suicidal-impact/ [https://perma.cc/4PFZ-GHA3].

[189] *Id.*

[190] *Id.*

tangible NCAA mental health resources, despite their heightened risk of depression, anxiety and eating disorders.[191]

Tackling mental wellness can help combat concussion effects and the stress that comes with college athletics.[192] This can take the form of intakes before each season[193] and improved access to on-campus counselors equipped to work with student-athletes. With counselors becoming confidants, Sessions can even be safe spaces for players to report concussion safety violations.

Second, the CSOC's scope must be broadened beyond Division I men's football to contact sports generally. Concussions are intertwined with football, not Division I football. Overseeing Divisions I-III is a task the NCAA does already, so the CSOC must work to protect all athletes. Likewise, overseeing other sports is necessary. There are few women's football programs at a high level, but harm happens elsewhere. With female athletes being more vulnerable to concussions,[194] the CSOC must ensure the NCAA lives up to its mission. Overseeing contact sports is feasible if the CSOC phases them in over time. The CSOC comes with the full might of the federal government; it has the power to protect all student-athletes. The CSOC does not need to be all or nothing. The initial focus can be Division I football and expand in order of sports with the highest concussion rates.

E. *Concerns and Suggestions*

Despite the numerous benefits, creating the CSOC comes with concerns. First, the threat of a legislative logjam is very real. If an amendment to the HEA cannot make it through Congress, the Committee will never get a chance to go to work for student-athletes. Yet, Congress has approached the issue in the past and may still be open to it.[195] While researching the issue, Senator Chris Murphy of Connecticut spoke of bipartisan support for solutions.[196] Although Senator Murphy was not specifically referring to the Committee, he spoke of support for solutions in

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[191] Born, *supra* note 181, at 1223.

[192] There have been many student-athlete suicides due to effects of concussions and other mental illnesses. Born, *supra* note 181, at 1221; *see* Noren, *supra* note 181.

[193] This would enable players to both feel supported and receive education on mental health resources available.

[194] Neil K. McGroarty, Symone M. Brown & Mary K. Mulcahey, *Sport-Related Concussion in Female Athletes: A Systematic Review*, 8 ORTHOPEDIC J. SPORTS MED., Jul. 16, 2020, at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7366411/; Katharine Sanderson, *Why Sports Concussions are Worse for Women*, 596 NATURE., 26 (Aug. 3, 2021, https://www.nature.com/articles/d41586-021-02089-2 (last visited May 10, 2023); *Women May be More Vulnerable to Concussions Because of "Leaner" Nerve Fibers, Penn Study Suggests*, PENN MED., Nov. 27, 2017, https://www.pennmedicine.org/news/news-releases/2017/november/women-may-be-more-vulnerable-to-concussions-because-of-leaner-nerve-fibers-penn-study-suggests (last visited May 10, 2023).

[195] S. 4724, 177th Cong. (2022).

[196] *See* Press Release, Chris Murphy, U.S. Senator, *The NCAA and Colleges Must Do More to Make Sure Athletes' Health Comes First*, (Dec. 16, 2019), https://www.murphy.senate.gov/newsroom/press-releases/murphy-the-ncaa-and-colleges-must-do-more-to-make-sure-athletes-health-comes-first.

general. Virtually any issue faces the risk of being politicized and held up; but for now, with bipartisan support, the Committee could make it through Congress intact.

Another concern regarding the CSOC's effectiveness is the possibility of a revolving door. A revolving door refers to instances where people take up a position at a private employer after working in the public sector.[197] This phenomenon is troubling when the interests of one's next job impairs their decision-making in their current one.[198] As a community, we do not want our public employees to have their visions clouded by conflicting interests. In the case of the CSOC, it would not be ideal for a sports medicine expert to secure a post-committee position at Louisiana State University (LSU). Although LSU is a public institution, the concern would be the CSOC member making decisions directly impacting their future employers. Long "cooldown" periods for CSOC members could help. For example, a CSOC member may not be allowed to work at the NCAA or member institutions the CSOC investigated for a period of three years after their term ends. The high degree of employment turnover in college sports could ensure that three years may blunt any potential unethical benefits to CSOC members. Recusal in the face of conflicts may help, but a CSOC member's entire term could live in the shadow of securing a favorable position afterward.

The CSOC must also exist on firm constitutional grounds so it may impose harsh penalties. Varying tiers and types of penalties in the event of violations are probably the best way to assure compliance.[199] To this end, the most the Committee can do itself is pull Title IV funds via the HEL.[200] One could argue that the NCAA and the organization's members affect interstate commerce.[201] However, this argument is not guaranteed to be effective.[202] The federal government, through the CSOC, looking for funds to pull elsewhere could be unconstitutional.[203]

What else could be done if schools do not respond to pulled Title IV funding? The CSOC should direct the NCAA to issue punishments, which is already in their power. The NCAA has come down on schools in the past, such as Southern Methodist University and the "death penalty."[204] This

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[197] *Revolving Door Prohibitions*, NCSL (Aug. 24, 2021), https://www.ncsl.org/ethics/revolving-door-prohibitions#:~:text=The%20phrase%20%22revolving%20door%22%20describes,public%20service%20for%20lobbying%20positions.

[198] *Id.*

[199] Pretty, *supra* note 8, at 2386–87.

[200] Hegji, *supra* note 170, at 3.

[201] Born, *supra* note 181, at 1241.

[202] *See generally* United States v. Morrison, 529 U.S. 598, 627 (2000) (ruling that Section 13981, which provided a federal civil remedy for victims of gender-motivated violence, could not be sustained under the Commerce Clause).

[203] South Dakota v. Dole, 479 U.S. 203, 211 (1986). *See* Nat'l Collegiate Athletic Ass'n v. Smith 525 U.S. 459, 468 (1999).

[204] Eric Dodds, *The "Death Penalty" and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), https://time.com/3720498/ncaa-smu-death-penalty/ (citing to the rule in

"cat's paw" arrangement, which sees the NCAA acting as an agent of the CSOC, depends on the NCAA. To keep the NCAA in line, the CSOC could recommend the IRS revoke NCAA's tax-exempt status under section 501(c)(3) of the Internal Revenue Code.[205] The CSOC can demonstrate the NCAA's activities, such as shirking student-athlete safety duties, are less than charitable.[206] In that case, the IRS is likely to heed the CSOC's recommendation. To promote cooperation between the CSOC and NCAA, the CSOC could include an NCAA representative. This representative could be a non-voting member of the CSOC who will offer the NCAA's viewpoint regarding regulation and enforcement. The NCAA representative should decrease the opportunity of a disconnect between the CSOC and NCAA.

CONCLUSION

Student-athletes are vulnerable and should be protected from further harm. Football is an inherently dangerous sport, but our representatives in the Federal Government must do what they can. They must ensure that the NCAA and member schools are ultimately putting students first, since they have proven they will not do it on their own. To this end, we should use the might of our government to create oversight and ensure our children—our future—are being protected.

Official NCAA parlance that wiped out Southern Methodist University's entire 1987 season and forced others to cancel their seasons as well after the NCAA determined school had been paying several football players).

[205] 26 U.S.C. § 501(c)(3).

[206] Caputo, *supra* note 33, at 84; *see* Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).