FIRST AMENDMENT LAW REVIEW

VOLUME 21 **ISSUE 1**

BOARD OF EDITORS

Editor-in-Chief
RACHEL ALLORE

Executive Editor
SYDNEY D. WELCH

Chief Articles and Notes Editor
ASHLEY E. TREIBLE

Managing Editor
LANDON WHITLEY

Online Editor
GABRIELA MONASTERIO

Symposium Editor
KENDALL WILLIAMS

Article Editors
CARLY AMATUZZO
BRIANNE E. MEGAHAN
TAYLOR DENISE OSBORNE

Note Editors
RYAN CARTER BROWN
LAUREN ENGLE
NICHOLAS R. ZANZOT

WRITING STAFF

ANNALEE BLANKS
AMELIA E. BROWN
KENNEDY L. BUECHNER
KELLY E. FITZGERALD
STEPHEN TROY HARRELSON
JUSTIN P. HAYES
GLORIA KIM
ANDREW KRAGIE
MAX KURKIN
WILLIAM JOSEPH MCDONALD
RYAN PATRICK MOORE
WHEELS MOYER
CHASE HARRISON NEVITT
ROBERT M. PORTER
BLYTHE RIGGAN
JOHN SCHENGBER
KENDALL SMITH
SHANE WALTER STOUT
TYLER VENTURA
DAVID BURNS WOODLIEF
ANNELISE R. YACKOW

FACULTY ADVISOR

DAVID S. ARDIA, *Associate Professor of Law and Co-Director of the UNC Center for Media Law and Policy*

SYMPOSIUM ADVISOR

MARY-ROSE PAPANDREA, *Samuel Ashe Distinguished Professor of Constitutional Law*

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

Administration

PETER HANS, B.A., M.A., *UNC System President*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and William Rand Kenan Jr. Distinguished Professor of Law*
CRAIG T. SMITH, B.A., J.D., LL.M., *Associate Dean for Academic Affairs, Assistant Dean for the Writing and Learning Resources Center, and Clinical Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy & Planning and Judge John J. Parker Distinguished Professor of Law*
JOHN F. COYLE, B.A., M.PHIL., J.D., *Associate Dean for Faculty Research and Reef C. Ivey II Distinguished Professor of Law*
KELLY PODGER SMITH, B.A., J.D., *Associate Dean for External Relations and Careers*
BIANCA MACK, B.A., M.B.A., J.D., *Associate Dean for Equity, Admissions, and Student Affairs and Adjunct Associate Professor of Law*
DEIRDRE GORDON, B.S., *Associate Dean for Advancement*
NICK P. GOETTSCH, B.A., B.A., M.P.A, *Associate Dean for Administration*
AMY BAREFOOT GRAEDON, B.A., *Assistant Dean for Communications*
JENNIFER L. GOTSHALL CLARK, B.S., *Assistant Dean for Finance*
ROBERT MICHAEL BIRRENKOTT, B.A., M.A., J.D., *Assistant Dean for Career Development*

Faculty

IFEOMA AJUNWA, B.A., J.D., M.PHIL., PH.D., *Associate Professor of Law and Founding Director of the Artificial Intelligence and Decision-Making Research Program*
DAVID S. ARDIA, B.S., M.S., J.D., LL.M., *Associate Professor Law, Reef C. Ivey II Excellence Fund Term Professor of Law, and Co-Director of the Center for Media Law and Policy*
KEVIN BENNARDO, B.A., J.D., *Clinical Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Clinical Professor of Law*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and William Rand Kenan Jr. Distinguished Professor of Law*
JOHN WESLEY BROOKER, B.A., J.D., LL.M., M.M.A.S., *Clinical Associate Professor of Law*
LISSA LAMKIN BROOME, B.S., J.D., *Burton Craige Distinguished Professor of Law and Director of the Center for Banking and Finance*
PATRICIA L. BRYAN, B.A., J.D., LL.M., *Henry P. Brandis Distinguished Professor of Law*
ELLIE CAMPBELL, B.A., M.A., M.A., J.D., M.L.I.S, *Reference Librarian and Clinical Assistant Professor of Law*
ALEXA Z. CHEW, A.B., J.D., *Clinical Professor of Law*
ANDREW CHIN, B.S., PH.D., J.D., *Paul B. Eaton Distinguished Professor of Law*
JOHN MARTIN CONLEY, B.A., J.D., PH.D., *William Rand Kenan Jr. Professor of Law*
JOHN F. COYLE, B.A., M.PHIL., J.D., *Associate Dean for Faculty Research and Reef C. Ivey II Distinguished Professor of Law*
NICOLE M. DOWNING, B.S., J.D., M.S.L.S., *Assistant Director for Public Services and Clinical Associate Professor of Law*
MAXINE N. EICHNER, B.A., J.D., M.A., PH.D., *Graham Kenan Distinguished Professor of Law*
KATE SABLOSKY ELENGOLD, B.A., J.D., *Assistant Professor of Law*
LEWIS MOORE EVERETT, B.A., M.A., J.D., *Clinical Professor of Law*
BARBARA A. FEDDERS, B.A., J.D., *Assistant Professor of Law and Director of Clinical Programs*
DEBORAH R. GERHARDT, A.B., J.D., *Reef C. Ivey II Excellence Term Professor of Law*
MICHAEL J. GERHARDT, B.A., M.S., J.D., *Burton Craige Distinguished Professor of Jurisprudence*
RACHEL I. GURVICH, B.A., J.D., *Clinical Associate Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy & Planning and Judge John J. Parker Distinguished Professor of Law*
CARISSA BYRNE HESSICK, B.A., J.D., *Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Geneva Yeargan Rand Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
MELISSA B. JACOBY, B.A., J.D., *Graham Kenan Professor of Law*
EISHA JAIN, B.A., J.D., *Assistant Professor of Law*
OSAMUDIA JAMES, B.A., J.D., LL.M., *Professor of Law*
THOMAS A. KELLEY, A.B., J.D., *James Dickson Phillips, Jr. Distinguished Professor of Law and Director of the UNC School of Law Institute for Innovation*
JOSEPH E. KENNEDY, B.A., J.D., *Martha Brandis Term Professor of Law*
JULIE L. KIMBROUGH, B.A., J.D., M.S.L.S., *Deputy Director of the Law Library and Clinical Professor of Law*
AARON S. KIRSCHENFELD, A.B., M.S.I.S., J.D., *Digital Initiatives Law Librarian and Clinical Associate Professor of Law*
P. ANNE KLINEFELTER, B.A., M.S.L.S., J.D., *Director of Law Library and Henry P. Brandis Distinguished Professor of Law*
JOAN H. KRAUSE, B.A., J.D., *Dan K. Moore Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
HOLNING S. LAU, B.A., J.D., *Willie Person Mangum Distinguished Professor of Law*
DUSTIN MARLAN, B.A., J.D., *Assistant Professor of Law*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan Jr Distinguished Professor of Law*
JONAS J. MONAST, B.A., J.D., *C. Boyden Gray Distinguished Fellow, Assistant Professor of Law, and Director of the Center on Climate, Energy, Environment & Economics (CE^3)*
ERIC L. MULLER, A.B., J.D., *Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics*
PETER NEMEROVSKI, A.B., J.D., *Clinical Associate Professor of Law*
GENE R. NICHOL, B.A., J.D., *Boyd Tinsley Distinguished Professor of Law*
DONNA L. NIXON, B.S., J.D., M.S.L.S., *Electronic Resources Librarian and Clinical Professor of Law*
LEIGH Z. OSOFSKY, A.B., J.D., *William D. Spry III Distinguished Professor of Law*
MARY-ROSE PAPANDREA, B.A., J.D., *Samuel Ashe Distinguished Professor of Constitutional Law*
BETH S. POSNER, A.B., M.A., J.D., *Clinical Associate Professor of Law*
KERRI-ANN ROWE, B.A., J.D., M.S., *Reference Librarian and Clinical Assistant Professor of Law*
STACEY L. ROWLAND, B.A., M.I.S., M.S., J.D., *Assistant Director for Collection & Technology Services and Clinical Associate Professor of Law*
KATHRYN A. SABBETH, B.A., J.D., LL.M., *Associate Professor of Law*
OSCAR J. SALINAS, B.A., J.D., M.A., *Director of Academic Excellence Program and Clinical Professor of Law*
MARIA SAVASTA-KENNEDY, B.A., J.D., *Director of the Externship Program and Clinical Professor of Law*
RICHARD S. SAVER, B.A., J.D., *Arch T. Allen Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*

ANNIE SCARDULLA, B.A., J.D., *Clinical Assistant Professor of Law*
EMILY SEAWELL, B.A., J.D., *Clinical Assistant Professor of Law*
THEODORE M. SHAW, B.A., J.D., *Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights*
CRAIG T. SMITH, B.A., J.D., LL.M., *Associate Dean for Academic Affairs, Assistant Dean for the Writing and Learning Resources Center, and Clinical Professor of Law*
RICK SU, B.A., J.D., *Professor of Law*
KATHLEEN DELANEY THOMAS, B.S., J.D., LL.M., *Associate Professor of Law, George R. Ward Term Professor of Law, and Director of UNC School of Law Tax Institute*
SARA B. WARF, B.A., J.D., *Clinical Associate Professor of Law*
W. MARK C. WEIDEMAIER, B.A., J.D., *Ralph M. Stockton, Jr. Distinguished Professor of Law*
DEBORAH M. WEISSMAN, B.A., J.D., *Reef C. Ivey II Distinguished Professor of Law*
MARJORIE S. WHITE, A.B., J.D., *Clinical Professor of Law*
ERIKA K. WILSON, B.S., J.D., *Professor of Law, Wade Edwards Distinguished Scholar, and Thomas Willis Lambeth Distinguished Chair in Public Policy*
JANINE M. ZANIN, B.A., J.D., *Assistant Director of Externship Programs and Clinical Professor of Law*

Adjunct Faculty

TERESA ARTIS, B.A., J.D., M.B.A., *Adjunct Professor of Law*
E. KENT AUBERRY, A.B., J.D., *Adjunct Professor of Law*
MICHAEL W. BALLANCE, B.A., J.D., *Adjunct Professor of Law*
CARMEN BANNON, B.S., J.D., *Adjunct Professor of Law*
E. WILLIAM BATES II, B.A., J.D., *Adjunct Professor of Law*
SETH A. BLUM, B.A., M.A., J.D., *Adjunct Professor of Law*
M. CHRISTOPHER BOLEN, B.S., M.B.A., J.D., *Adjunct Professor of Law*
ELIZABETH BRASWELL, B.A., J.D., *Adjunct Professor of Law*
ERIC J. BRIGNAC, B.A., J.D., *Adjunct Professor of Law*
JONATHAN E. BROUN, B.PH., J.D., *Adjunct Professor of Law*
SUZANNE BUCKLEY, B.A., J.D., *Adjunct Professor of Law*
ALLISON STANDARD CONSTANCE, B.A., J. D., *Director of Pro Bono Initiatives and Adjunct Associate Professor of Law*
FELICE M. CORPENING, B.A., J.D., *Adjunct Professor of Law*
BENJAMIN A. DAVIDSON, B.S., J.D., *Adjunct Associate Professor of Law*
THE HONORABLE CHRIS DILLON, B.A., J.D., *Adjunct Professor of Law*
ROBERT E. DUGGINS, B.S., J.D., *Adjunct Professor of Law*
CATHERINE ROSS DUNHAM, B.A., J.D., LL.M., *Adjunct Professor of Law*
ANITA S. EARLS, B.A., J.D., *Adjunct Professor of Law*
J. FORD EUBANKS, B.A., M.A., J.D., *Adjunct Assistant Professor of Law*
GLENN GERDING, B.A., J.D., LL.M., *Adjunct Professor of Law*
BETH YOUNT GRIMES, B.A., J.D., *Adjunct Professor of Law*
MIKAEL R. GROSS, B.S., M.S., J.D., *Adjunct Professor of Law*
KEN HAMMER, B.S., J.D., *Adjunct Professor of Law*
R. HARPER HECKMAN, B.A., J.D., *Adjunct Professor of Law*
MALCOLM HUNTER, B.A., J.D., *Adjunct Professor of Law*
SAMUEL S. JACKSON, A.B., J.D., *Adjunct Professor of Law*
ROBERT O. JENKINS, B.A., M.P.A., J.D., *Adjunct Professor of Law*
SALLY C. JOHNSON, B.S., M.D., *Adjunct Professor of Law*
JILLIAN C. KATZ, B.A., J.D., *Adjunct Associate Professor of Law*
JEFFREY R. KAUFMAN, A.A.S., B.S., M.B.A., J.D., *Adjunct Professor of Law*
TOD M. LEAVEN, B.S., J.D., *Adjunct Clinical Associate Professor of Law*
RINA LYUBKIN, B.S., B.S., J.D., *Adjunct Clinical Assistant Professor of Law*
J. CHRISTOPHER LYNCH, B.A., J.D., *Adjunct Professor of Law*
BIANCA MACK, B.A., M.B.A., J.D., *Associate Dean for Equity, Admissions, and Student Affairs and Adjunct Associate Professor of Law*
RICHARD L. MAGEE, A.B., J.D., *Adjunct Professor of Law*
JAMES M. MARKHAM, B.A., J.D., *Adjunct Professor of Law*
CHARLES MARSHALL, B.A., J.D., *Adjunct Associate Professor of Law*
C. STEVEN MASON, B.A., J.D., *Adjunct Professor of Law*
ERIK MAZZONE, B.A., J.D., *Adjunct Professor of Law*
JAYE MEYER, B.A., J.D., *Adjunct Professor of Law*
WILLIAM S. MILLS, A.B., J.D., *Adjunct Professor of Law*
CATHERINE MONTEZUMA, B.A., J.D., *Adjunct Professor of Law*
SYLVIA K. NOVINSKY, B.S., J.D., *Adjunct Professor of Law*
ORLA MARIE O'HANNAIDH, B.A., M.A., J.D., *Adjunct Associate Professor of law*
JOHN V. ORTH, A.B., J.D., M.A., PH.D., *William Rand Kenan Jr. Professor of Law Emeritus and Adjunct Professor of Law*
BARBARA OSBORNE, B.A., M.A., M.ED., J.D., *Adjunct Professor of Law*
RYAN PARK, B.A., J.D., *Adjunct Associate Professor of Law*
M. SCOTT PEELER, B.A., J.D., *Adjunct Professor of Law*
KATIE ROSE GUEST PRYAL, B.A., M.A., J.D., PH.D., *Adjunct Professor of Law*
AMANDA REID, B.A., M.A., J.D., PH.D., *Adjunct Assistant Professor of Law*
TODD S. ROESSLER, B.S., M.S., J.D., *Adjunct Professor of Law*
THOMAS C. SHANAHAN, B.S., J.D., *Adjunct Professor of Law*
ELLIOT M. SILVERSTEIN, B.S., J.D., PH.D., *Adjunct Professor of Law*
RICHARD A. SIMPSON, B.A., J.D., *Adjunct Professor of Law*
ERIC J. SPITLER, B.A., J.D., *Adjunct Professor of Law*
RAYMOND ALBERT STARLING, B.S., J.D., *Adjunct Professor of Law*
CHANDRA T. TAYLOR, B.A., J.D., *Adjunct Professor of Law*
KIMBERLY TRAN, B.S., M.A., PH.D., *Adjunct Associate Professor of Mental Health and the Law*
DEVON WHITE, B.A., M.A., J.D., *Adjunct Professor of Law*
JENNIFER VAN ZANT, B.A., J.D., *Adjunct Associate Professor of Law*
JONI L. WALSER, B.A., J.D., *Adjunct Professor of Law*

Faculty Emeriti

JOHN CHARLES BOGER, A.B., M.DIV., J.D., *Wade Edwards Distinguished Professor of Law Emeritus*
KENNETH S. BROUN, B.S., J.D., *Henry Brandis Professor of Law Emeritus*
CAROLINE NICHOLSON BROWN, B.A., M.A., J.D., *Professor of Law Emerita*
MICHAEL L. CORRADO, B.A., B.S., A.M., PH.D., J.D., *Arch T. Allen Distinguished Professor of Law Emeritus*
CHARLES EDWARD DAYE, B.A., J.D., *Henry Brandis Professor of Law Emeritus*
LAURA N. GASAWAY, B.A., M.S., J.D., *Paul B. Eaton Distinguished Professor of Law Emerita*
S. ELIZABETH GIBSON, B.A., J.D., *Burton Craige Professor of Law Emerita*
JOSEPH JOHN KALO, B.A., J.D., *Graham Kenan Professor of Law Emeritus*
RONALD CHARLES LINK, A.B., M.A., J.D., *Dan K. Moore Distinguished Professor of Law Emeritus*
RUTH ANN MCKINNEY, B.A., M.Ed., J.D., *Clinical Professor of Law Emerita*
ROBERT P. MOSTELLER, B.A., M.A., J.D., *J. Dickson Phillips Distinguished Professor of Law Emeritus*
RICHARD E. MYERS, B.A., M.A., J.D., *Henry Brandis Professor of Law Emeritus*
JOHN V. ORTH, A.B., J.D., M.A., PH.D., *William Rand Kenan Jr. Professor of Law Emeritus and Adjunct Professor of Law*
ALICE A. RATLIFF, B.A., M.A., J.D., *Clinical Professor of Law Emerita*
RICHARD A. ROSEN, B.A., J.D., *Professor of Law Emeritus*
WILLIAM J. TURNIER, B.S., M.A., J.D., *Willie Person Mangum Professor of Law Emeritus*
JUDITH WELCH WEGNER, B.A., J.D., *Burton Craige Professor of Law Emerita*
ARTHUR MARK WEISBURD, A.B., J.D., *Reef C. Ivey II Distinguished Professor of Law Emeritus*

The *First Amendment Law Review* is published three times a year by the First Amendment Law Review.
The views expressed in signed contributions to the *Review* do not necessarily reflect the opinions of the Board of Editors.

Subscriptions: We have stopped printing issues and therefore stopped accepting subscriptions. The contact information for the *Review* is listed below:

First Amendment Law Review
The University of North Carolina School of Law
100 Ridge Road, CB# 3380
3002 Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
(919) 843-6683
falr@unc.edu

Manuscripts: The *Review* invites the submission of unsolicited manuscripts. Manuscripts cannot be returned unless accompanied by a self-addressed, postage-paid envelope. Correspondence and manuscripts should be directed to the Editor-in-Chief.

Copyright: Copyright © 2018 by the North Carolina Law Review Association. Except as otherwise provided, permission is hereby granted for copies of each article to be made for classroom use, provided that: (1) all copies are distributed at no cost, (2) the author and the *First Amendment Law Review* are identified, (3) proper notice of copyright is affixed to each copy, and (4) the *First Amendment Law Review* is notified of the use.

Publication Information: The *Review* is exclusively online and available through Hein Online, LexisNexis, Westlaw, and on the *First Amendment Law Review's* website. The text and citations in Volume 21 conform generally to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds, 21st ed. 2020).

Cite as: FIRST AMEND. L. REV.

www.firstamendmentlawreview.org

The Board of Editors would like to thank the following individuals and organizations for their support of the *First Amendment Law Review*:

Dean Martin H. Brinkley

Professor David S. Ardia

Professor Mary-Rose Papandrea

Professor William P. Marshall

Student Development Lead Allison Standard Constance

University of North Carolina Center for Media Law & Policy

Graduate and Professional Student Government of the University of North Carolina at Chapel Hill

Student Bar Association

North Carolina Law Review

North Carolina Banking Institute

North Carolina Journal of International Law and Commercial Regulation

North Carolina Journal of Law and Technology

North Carolina Civil Rights Law Review

and the many alumni of the First Amendment Law Review and UNC School of Law who helped to build and continue to support this publication.

FIRST AMENDMENT LAW REVIEW

VOLUME 21 **ISSUE 1**

ARTICLES

INVESTIGATIVE GENETIC GENEALOGY AND THE FIRST AMENDMENT RIGHT TO NONINTERFERENCE WITH RECEIPT
David Gurney……………………………....…..……………………………1

REGULATING OFF-CAMPUS STUDENT EXPRESSION: *MAHANOY AREA SCHOOL DISTRICT v. B.L.* The Good News For College Student Journalists
Leslie Klein & Jonathan Peters......….…………………………………………40

NOTES

WHEN CIVIL RIGHTS AND RELIGIOUS FREEDOM COLLIDE: DISCERNING THE DIFFERENCE BETWEEN STATUTORY EXEMPTIONS TO ANTI-DISCRIMINATION STATUTES AND THE MINISTERIAL EXCEPTION
Ashley E. Treible..…..………………..………………..…..……………61

A STUDY OF *STATE V. MYLETT*: NORTH CAROLINA'S JUROR HARASSMENT STATUTE VIOLATES THE FIRST AMENDMENT RIGHT TO FREE SPEECH
Sydney D. Welch...…..………………..………………..…..………………89

INVESTIGATIVE GENETIC GENEALOGY AND THE FIRST AMENDMENT RIGHT TO NONINTERFERENCE WITH RECEIPT

David Gurney*

INTRODUCTION

In March 2018, the individual previously known only as "Buckskin Girl" was identified as Marcia Lenore Sossoman King.[1] King had been murdered in 1981 in Troy, Ohio, but no one came forward to identify her, and traditional DNA methods failed to turn up her name.[2] It took a new technique, derived from a well-worn genealogy hobbyist tool, to help solve the case.[3] That technique is now variously known as investigative genetic genealogy (IGG), forensic genetic genealogy, forensic investigative genetic genealogy, or forensic genealogy analysis and searching.[4] A month after King was identified, IGG was used to help reveal the identity of the infamous "Golden State Killer" who had terrorized Californians throughout the 1970s and 1980s.[5] Since that time, IGG has been used to help resolve over 800 cases.[6]

Almost immediately, IGG attracted concerned attention from privacy advocates, defense attorneys, constitutional scholars, the Federal Bureau of Investigation (FBI), and state legislators.[7] These concerns ranged from the reasonable (that IGG practitioners should only use genetic genealogy databases where users have given their consent for IGG searching) to the

---

* I would like to thank two anonymous reviewers for their helpful suggestions on this Article.

[1] *See Buckskin Girl*, DNA DOE PROJECT, https://dnadoeproject.org/case/buckskin-girl/ (last visited May 27, 2022).

[2] *Id.*

[3] *"Buckskin Girl" Case: DNA Breakthrough Leads to ID of 1981 Murder Victim*, CBS NEWS (Apr. 12, 2018, 3:57 PM), https://www.cbsnews.com/news/buckskin-girl-case-groundbreaking-dna-tech-leads-to-id-of-1981-murder-victim/.

[4] *See Investigative Genetic Genealogy FAQs*, INT'L SOC'Y OF GENETIC GENEALOGY WIKI (Mar. 25, 2022), https://isogg.org/wiki/Investigative_genetic_genealogy_FAQs#:~:text=Investigative%20genetic%20genealogy%20(sometimes%20also,crimes%20and%20identifying%20human%20remains (using "IGG" and "FGG"); *see also* U.S. DEP'T OF JUSTICE, *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2019), https://www.justice.gov/olp/page/file/1204386/download (using "FGGS"); John M. Butler, *Recent Advances in Forensic Biology and Forensic DNA Typing: INTERPOL Review 2019-2022*, 6 FORENSIC SCI. INT'L 100311 (2023) (using "FIGG").

[5] *See* Natalie Ram, *Genetic Privacy After* Carpenter, 105 VA. L. REV. 1357, 1359 (2019).

[6] Daniel Kling et al., *Investigative Genetic Genealogy: Current Methods, Knowledge and Practice*, 52 FORENSIC SCI. INT'L 102474, 102475 (2021); Tracy Dowdeswell, *Forensic Genetic Genealogy Project v. 2022*, https://data.mendeley.com/datasets/jcycgvhm96 (last updated Feb. 22, 2023).

[7] *See, e.g.*, Natalie Ram et al., *Genealogy Databases and the Future of Criminal Investigation*, 360 SCI. 6383 (2018); U.S. DEP'T OF JUSTICE, *supra* note 4.

hyperbolic (that IGG will lead to a dystopian country where the government maintains massive family tree networks showing how every citizen is related) and everything in between.[8]

The first governmental organization to directly regulate IGG was the Department of Justice (DOJ), which adopted interim guidelines regulating the use of IGG[9] by its agents and contractors in September 2019.[10] Those regulations, in part, limit the type of case that can be investigated using IGG,[11] require that IGG be conducted using only genetic genealogy databases where users have provided consent for IGG searching,[12] and require the removal of "[IGG] profile[s]" from genetic genealogy databases once a suspect is arrested.[13]

Following the DOJ interim guidelines and motivated in part through concerns raised by privacy and constitutional scholars, Maryland became the first state to regulate IGG.[14] The bill, pre-filed in late October 2020 and enacted by the governor on May 30, 2021, provides regulations similar to those in the FBI's interim guidelines but goes much further. Among other provisions, the law (the "Maryland Law") limits the people who can work on an IGG case and subjects those IGG practitioners to onerous rules.

Among those rules is a requirement that all IGG practitioners who work on cases in Maryland "shall turn over to the investigator all records and materials collected in the course of the [IGG], including material sourced from public records, family trees constructed, and any other genetic or nongenetic data collected in the [IGG]"[15] and that the "genetic genealogist may not keep any records or materials in any form, including digital or hard copy records."[16] Moreover, the Maryland Law

---

[8] *See, e.g.*, Clayton Rice, *Privacy and Genetic Genealogy Sites*, CLAYTON RICE, K.C. (June 30, 2021), https://www.claytonrice.com/privacy-and-genetic-genealogy-sites/ (likening IGG to a "government database containing the DNA of every citizen taken at birth," and suggesting that IGG involves "mandatory genetic testing"); John W. Whitehead, *The War Over Genetic Privacy is Just Beginning*, EURASIA REV. (June 9, 2021), https://www.eurasiareview.com/09062021-the-war-over-genetic-privacy-is-just-beginning-oped/ (arguing that the government "has embarked on a diabolical campaign to create a nation of suspects predicated on a massive national DNA database.").

[9] The DOJ refers to IGG as FGGS.

[10] U.S. DEP'T OF JUSTICE, *supra* note 4.

[11] *Id.* at 4–5.

[12] *Id.* at 6.

[13] *Id.* at 7–8.

[14] H.B. 240, 2021 Reg. Sess. (Md. 2021) (codified as MD. CODE, CRIM. PROC. § 17 (2022)).

[15] *Id.* at § 17-102(h)(1)(ii)(1.).

[16] *Id.* at § 17-102(h)(1)(ii)(2).

provides criminal penalties for IGG practitioners who fail to abide by the regulations, holding that "[a] person who violates this subsection is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both . . . ."[17] The Maryland Law also restricts IGG practitioners from disclosing any "genetic genealogy data" obtained in the course of an investigation and provides even harsher criminal penalties for violation of that requirement.[18]

While two additional states have sought to regulate IGG,[19] the Maryland Law is the most extensive and was crafted with help from organizations such as the Innocence Project and privacy and Fourth Amendment scholars.[20] Given its provenance, the Maryland law is well-placed to provide a template for other states to follow when enacting their own laws regulating IGG—a near-inevitability given the rapid pace of the technique's rollout since 2018 and the numerous articles and news stories raising concerns about its implications.[21]

This Article argues that regulations—such as those codified in the Maryland Law—that seek to limit an IGG practitioner's access, use, and dissemination of public records and information publicly shared by private individuals violates those IGG practitioner's First Amendment rights. Presenting this issue at an early stage of the regime for regulation around IGG is essential to ensure that additional states are wary to adopt similar unconstitutional provisions that are poorly targeted to the unique workspace of IGG.

---

[17] *Id.* at § 17-102(j)(2).
[18] *Id.* at § 17-102(i).
[19] *See* H.B. 602, 2021 Reg. Sess. (Mont. 2021) (codified as MONT. CODE § 44-6-104 (2022)); S.B. 156, 65th Leg., Gen. Sess. (Utah 2023). As of April 2023, additional bills are under consideration by several state legislatures.
[20] *See* Natalie Ram et al., *Regulating Forensic Genetic Genealogy*, 373 SCI. 1444 (2021); Sarah Chu and Susan Friedman, *Maryland Just Enacted a Historic Law Preventing the Misuse of Genetic Information*, INNOCENCE PROJECT (June 1, 2021), https://innocenceproject.org/maryland-passes-forensic-genetic-genealogy-law-dna/.
[21] *See* Ram et al., *Regulating Forensic Genetic Genealogy*, *supra* note 20; *see, e.g.*, Virginia Hughes, *Two New Laws Restrict Police Use of DNA Search Method*, NY TIMES (May 31, 2021), https://www.nytimes.com/2021/05/31/science/dna-police-laws.html; Paige St. John, *The Untold Story of How the Golden State Killer was Found: A Covert Operation and Private DNA*, LA TIMES (Dec. 8, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-12-08/man-in-the-window; Debbie Kennett and G. Samuel, *Problematizing Consent: Searching Genetic Genealogy Databases for Law Enforcement Purposes*, 40 NEW GENETICS & SOC'Y 284 (2020). Thankfully, Utah's S.B. 156, signed into law in early 2023, does not include the problematic materials from Maryland's law.

This Article proceeds in four Parts. Part I provides an overview of the new investigative technique of IGG and specifically addresses the aspects of IGG work that inherently limit the kinds of government regulations that can be constitutionally applied to IGG practitioners. By analogizing to real and imagined cases involving crimes solved with clues derived from books, newspapers, and other publicly available materials, this Part explains how several of the Maryland Law's regulations on IGG practitioners would present absurd outcomes in the real world. Part II considers United States Supreme Court cases *Florida Star v. B.J.F.*,[22] *L.A. Police Department v. United Reporting*,[23] and *Sorrell v. IMS Health Inc.*[24] and argues that they ensconce a robust First Amendment protection for access to and dissemination of publicly available information—what I shall call a right to noninterference with receipt of information legally held by another and otherwise available to the public. This Part brings the essential role of public records in IGG work into relief and demonstrates that regulations such as those highlighted in the Maryland Law infringe access to and use and dissemination of publicly available information. Part III analyzes the cases of *National Institute of Family and Life Advocates v. Becerra*,[25] *Snepp v. United States*,[26] and *United States v. Marchetti*[27] and shows that labeling IGG practitioners either as professionals or governments agents does not help to save the Maryland Law. Finally, Part IV demonstrates that the Maryland Law cannot meet strict scrutiny since it is both substantially overbroad and underinclusive.

I. INVESTIGATIVE GENETIC GENEALOGY

At least part of the issue underlying regulations such as the Maryland Law is a misunderstanding of what investigative genetic genealogy ("IGG") is—and what it is not.[28] The Maryland Law contains provisions that regulate the actual practice of IGG (as will be described in this Part), but it also contains provisions that regulate how biological samples from

[22] 491 U.S. 524 (1989).
[23] 528 U.S. 32 (1999).
[24] 564 U.S. 552 (2011).
[25] 138 S. Ct. 2361 (2018).
[26] 444 U.S. 507 (1980).
[27] 466 F.2d 1309 (4th Cir. 1972).
[28] For an overview of some of the most common misunderstandings, see Christi J. Guerrini et al., *Four Misconceptions About Investigative Genetic Genealogy*, 8 J. L. & BIOSCIENCES 1 (2021).

crime scenes and other sources are managed, analyzed, tracked, and disposed.[29] These regulations fit well into existing regulatory frameworks meant to ensure that strict protocols are followed when a government agency uses a scientific laboratory to analyze and store evidence related to a criminal investigation.[30] The wisdom of such regulations is clear: sloppy lab work can lead to a variety of problems, including lost evidence, contamination, and, most seriously, wrongful conviction when forensic scientists misapply a scientific method to evidence.[31]

But as this Part will show, IGG as practiced today is not akin to forensic laboratory science work. IGG today is not best thought of as a science at all; instead, IGG is more like forensic history or genealogical private investigation. To the extent that science comes into play in IGG, it is merely as a backdrop that generates the initial clues from which historical and investigative work then proceeds. As such, the differences in kind between IGG and forensic laboratory sciences make existing regulatory frameworks focused on the latter a poor fit for the former. More, such a procrustean regulatory effort leads to the First Amendment concerns that inform the rest of this Article.

A. IGG is GG

The GG in IGG stands for genetic genealogy. Genetic genealogy is based on the scientifically established fact that more closely related individuals will tend to share more DNA.[32] Children share approximately one half of their genetic code with each parent, grandchildren share approximately one quarter of

---

[29] MD. CODE, CRIM. PROC. § 17-102(e), (g), (h)(1)(i). The required destruction of actual biological samples is codified in the same subsection requiring destruction of "all records and materials" collected by IGG practitioners during the investigation; an example of the conflation of the Maryland Law's conflation of the work of an IGG with the work of a laboratory forensic scientist.

[30] *See, e.g.*, Statewide DNA Data Base System, MD. CODE, PUB. SAFETY, §§ 2-504 – 2-506, 2-511 (2022) (regulating the collection, analysis, storage, and disposal of biological DNA samples used in criminal investigations).

[31] *See, e.g.*, ERIN MURPHY, INSIDE THE CELL, Chapters 2–5 (Nations Books 2015) (describing the difficulties in ensuring that forensic biological samples are not contaminated or improperly analyzed); *see also* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 164 (2007) (illustrating the numerous ways that sloppy forensic work can lead to wrongful convictions).

[32] *See* Catherine A. Ball et al., *AncestryDNA Matching White Paper*, ANCESTRY 8 (March 31, 2016), https://www.ancestry.com/cs/dna-help/matches/whitepaper; *see also* Blaine T. Bettinger, *The Shared cM Project*, DNA PAINTER (March 2020), https://dnapainter.com/tools/sharedcmv4 (provides predicted relationships based on the amount of shared DNA between individuals, sourced from over 60,000 user submissions).

their genetic code with each grandparent, and so on.[33] Thus, if an individual tests her genetic code and finds that she shares half of her DNA with another individual, she knows that the individual must be either her parent, child, or full sibling.[34] To be sure, with a more distant relationship such as a first cousin, the amount of shared DNA between two individuals could be the same as that shared between individuals with a different relationship—say, a great-grandchild—but the amount of shared DNA between two individuals at this level still allows for the exclusion of possible relationships.[35] Without this general increased sharing of DNA between more closely-related individuals, genetic genealogy would not be possible.

Genetic genealogy began as a genuinely scientific enterprise. In 1994, relying on principles of genetic inheritance established by scientists beginning as far back as Charles Darwin, scientists obtained mitochondrial DNA ("mtDNA") from skeletonized remains found in a grave found in Ekaterinburg, Russia.[36] The scientists hypothesized that the remains belonged to a member of the executed Romanov family.[37] To test the hypothesis, they compared the mtDNA take from the skeletons to mtDNA from Prince Philip, a known relative of Tsarina Alexandra Romanov, a maternal granddaughter of Queen Victoria.[38] The mtDNA "matched," meaning that Prince Phillip was related to the remains along his maternal line.[39] This research project could be seen as the first use of *investigative* genetic genealogy (applying genetic genealogy to investigate an identity related to a criminal matter or missing person case), as the goal was to identify unknown human remains.[40] But the

---

[33] *See Autosomal DNA Statistics*, ISOGG WIKI, https://isogg.org/wiki/Autosomal_DNA_statistics#Table (last visited May 8, 2023) (table showing total DNA in centimorgans shared between individuals with various genealogical relationships).
[34] *See* Bettinger, *supra* note 32.
[35] *Id.*
[36] P.L. Ivanov et al., *Mitochondrial DNA Sequence Heteroplasmy in the Grand Duke of Russia Georgij Romanov Establishes the Authenticity of the Remains of Tsar Nicholas II*, 12 NATURE GENETICS 417 (1996).
[37] *Id.* at 417.
[38] *Id.*
[39] mtDNA is passed from mother to child, so it can be used to trace maternal heritage. *See Mitochondrial DNA Tests*, ISOGG WIKI, https://isogg.org/wiki/Mitochondrial_DNA_tests (last visited May 8, 2023).
[40] IGG has been defined in several ways. Sometimes it is defined in terms of the process employed. *See, e.g.*, Guerrini et al., *supra* note 28, at 2 ("Investigative genetic genealogy (IGG) is a new technique for identifying criminal suspects . . . . The process of IGG involves uploading a crime scene DNA profile to one or more

scientists in this project were acting *as scientists*: they used extraction techniques in a laboratory to obtain a viable sample from the skeleton, additional techniques to isolate the mtDNA from the sample, and so on.[41] These scientists were pioneering the use of genetic genealogy to identify unknown individuals, and it required them to apply the scientific method to a new area of study.

Another early use of genetic genealogy was published in *Nature* in 1997, when the research scientist Michael Hammer showed that a specific genetic marker was more often present in men who claimed membership in the Jewish priesthood (a designation passed down patrilaterally).[42] Here, too, Professor Hammer tested the Y chromosome ("Y-DNA") of the men in the study himself and used a variety of wet lab techniques—some developed through his own previous scientific research—to reach his conclusions.[43]

It was not long before entrepreneurs saw the financial upside of genetic genealogy. Working with Professor Hammer, the founders of Family Tree DNA ("FTDNA") developed the first direct-to-consumer genetic genealogy tests in 2000.[44] These early tests focused exclusively on Y-DNA, which is passed only from father to son and thus traces back in time along the paternal line.[45] Genealogy hobbyists devoured these early tests to prove or disprove previous genealogical hypotheses about their family origins and to develop new hypotheses based on the results.[46] But importantly, these hobbyists were not scientists; they were genealogists who were keen to use a new tool developed by others to help them bring more accuracy to their genealogical conclusions.

---

genetic genealogy databases with the intention of partially matching it to a criminal offender's genetic relatives and, eventually, locating the offender within their family tree."). Daniel Kling et al. defines IGG as "the use of SNP-based relative matching combined with family tree research to produce investigate leads in criminal investigations and missing persons cases." Kling et al., *supra* note 6, at 102475. I use a modified version of that definition of IGG.

[41] *See* Ivanov et al., *supra* note 36.

[42] Skorecki et al., *Y Chromosomes of Jewish Priests*, 385 NATURE 32 (1997).

[43] *Id. See also* Michael F. Hammer, *A Recent Common Ancestry for Human Y Chromosomes*, 378 NATURE 376 (1995).

[44] *See Family Tree DNA*, ISOGG WIKI (Feb. 20, 2022), https://isogg.org/wiki/Family_Tree_DNA.

[45] *See Y Chromosome*, ISOGG WIKI (Feb. 22, 2022), https://isogg.org/wiki/Y_chromosome.

[46] *See* Anne Belli, *Moneymakers: Bennett Greenspan*, HOUS. CHRON. (Jan. 18, 2005), https://www.chron.com/business/article/Moneymakers-Bennett-Greenspan-1657195.php.

B. Two Kinds of Genetic Genealogist

As noted, the early pioneers of genetic genealogy were true scientists. Using the scientific method within wet lab settings, they established the initial statistical metrics for identifying likely relationships between individuals based on amounts of shared DNA and applied those findings to real-world cases. In this sense, it is fair to call these scientists "genetic genealogists," though they do not refer to themselves as such.[47] But the term "genealogy" is used in a broad sense here, aligning with Webster's definition of "the study of family ancestral lines."[48] The researchers who developed the scientific basis for genetic genealogy were surely studying, in some sense, "family ancestral lines," but they were doing so entirely within the limited framework of genetics. At no time did the researchers working on the Romanov case—or Professor Hammer working on the Y-DNA line of Aaron—sit down with traditional genealogical records to establish a paper trail showing the relationship between individuals.[49] I refer to these first kind of genetic genealogists as *researchers*.

Hobbyists and practitioners of genetic genealogy today are more akin to the grandparent sorting through family artifacts than they are to scientists testing theories in laboratories. In 2007, seven years after FTDNA offered the first Y-DNA test to the public, the rival company 23andMe produced the first autosomal DNA ("atDNA") test for public use.[50] Unlike Y-DNA, atDNA is inherited from both parents.[51] Combined with its predictable inheritance patterns, atDNA allows for inferences about relationships on both the paternal and maternal sides of an individual's family.[52] Genealogy hobbyists once again devoured the tests, and this, arguably, is where the second kind of genetic genealogist began to develop.[53] I refer to these second kind of genetic genealogists as *practitioners*.

---

[47] *See, e.g., Michael Hammer,* U. ARIZ. COLL. OF MED., https://neurology.arizona.edu/michael-hammer-phd (faculty profiling listing Hammer as a "Professor and Research Scientist").

[48] *Genealogy*, def. 3, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/genealogy (last visited May 9, 2022).

[49] *See* Ivanov et al., *supra* note 36; Skorecki et al., *supra* note 42.

[50] *See* KRISTI LEW, GENETIC ANCESTRY TESTING 25 (2019).

[51] *See Autosomal DNA*, ISOGG WIKI (Oct. 21, 2020), https://isogg.org/wiki/Autosomal_DNA.

[52] *Id.*

[53] *See* Erika Check Hayden, *The Rise and Fall and Rise Again of 23andMe*, 550 NATURE 174, 176 (2017).

The differences between researcher and practitioner genetic genealogists are stark. The former are scientists who use the scientific method to arrive at conclusions about inheritance patterns of DNA and sometimes apply those conclusions to real-world problems. The latter use the conclusions developed by research genetic genealogists, but they do not generally engage in scientific work themselves.[54] Most significantly, practitioners use predictions of relationships based on genetics only as a starting point. The majority of work by practitioners occurs outside of the genetic framework, relying instead on traditional proof of genealogical relationships along with evidence from contemporary public records and other publicly available contemporary records.[55] As will be shown, investigative genetic genealogists (hereafter referred to as "IGG practitioners") are practitioners, not researchers.

C. What IGG practitioners Do and Do Not Do

IGG practitioners do not collect biological samples from crime scene evidence.[56] IGG practitioners do not test biological samples to develop genetic profiles.[57] IGG practitioners do not surreptitiously collect biological samples from suspects or persons of interest.[58] IGG practitioners do not conduct experiments.[59] IGG practitioners do not independently establish new conclusions about genetic genealogy using the scientific

---

[54] However, some genetic genealogists are both RGGs *and* PGGS. For example, Blaine T. Bettinger, a genetic genealogist, created the Shared cM Project, which brings together "crowd-sourced" findings of genealogical and genetic relatedness into a tool that allows genetic genealogists to use real-world data to estimate relationships based on shared DNA. *See* Bettinger, *supra* note 32. Leah Larkin, another genetic genealogist, developed the What Are the Odds? (WATO) tool, which aggregates the statistical probabilities of various relationships based on shared DNA and known genealogical relationships to provide weighed predictions of where an unknown ancestor fits into a family tree, along with other researchers. *See* Leah Larkin, *What Are the Odds?*, DNA PAINTER, https://dnapainter.com/tools/probability (last visited May 8, 2023). The important point here is that even when genetic genealogists do engage in research, they are not acting as PGGs when doing so—they are acting as RGGs. The two kinds of genetic genealogy are distinct practices.

[55] *See* Kling et al., *supra* note 6, at 6–8. As the authors note, "Genealogical research is a key component of IGG and generally the most time-consuming part of the process . . . . IGG is only possible because of the large quantities of genealogical records from around the world." *Id.* at 7. For records on living people, IGG practitioners rely on social media, online obituaries, and people find sites. *Id.*

[56] *See* Guerrini et al., *supra* note 28, at 5 (describing how the work of IGG practitioners is "book-ended by standard police work.").

[57] *Id.* at 5–6 (describing the forensic laboratory work that takes places *before* IGG practitioners begin working on a case).

[58] *Id.* at 7.

[59] *See supra* Part I.B.

method.[60] IGG practitioners do not work in wet labs or anywhere generally considered a science lab.[61] The "genetic" work of IGG practitioners never involves direct access to or use of the actual biological material of an individual.[62]

Instead, IGG practitioners use genetic genealogy and traditional genealogy to establish relationships between individuals, leading to a hypothesis about a specific identity with legal ramifications.[63] IGG practitioners work from a computer and do not require a laboratory environment.[64] An IGG practitioner's work begins *after* a forensic lab has analyzed a biological sample, generated a genetic profile, and uploaded the profile to publicly accessible genetic genealogy databases ("public genetic databases").[65]

An IGG practitioner begins by viewing a list of individuals who "match" to the Subject in the public genetic databases.[66] These individuals are related to the Subject to varying degrees.[67] In many cases, the match list will contain at least one individual who is a fourth-degree relative (e.g., a third cousin) or closer.[68] The list will also contain a large number of

---

[60] *Id.*

[61] *See* Antonio Regalado and Brian Alexander, *The Citizen Scientist Who Finds Killers From Her Couch*, MIT TECH. REV. (June 22, 2018), https://www.technologyreview.com/2018/06/22/142148/the-citizen-scientist-who-finds-killers-from-her-couch/.

[62] *See* Guerrini et al., *supra* note 28, at 8–10 (describing how IGG practitioners do not have direct access to anyone's genetic code, and how that information would not be directly useful for IGG in any case). It *is* possible for IGG practitioners to infer portions of a Subject's genetic code using a Chromosome browser, but this would be a difficult and time-consuming process that would render no benefits for conducting IGG. *See id.* at 9.

[63] This definition, my own, covers all current uses of IGG, including criminal investigations, missing and unidentified human remains, and military repatriation.

[64] *See* Regalado and Alexander, *supra* note 61. Even here, the descriptor of "citizen scientist" is misplaced. "Citizen historian" would better capture the bulk of what IGG practitioners do.

[65] *See* Guerrini et al., *supra* note 28, at 5–6.

[66] *See* Ellen M. Greytak et al., *Genetic Genealogy for Cold Case and Active Investigations*, 299 FORENSIC SCI. INT'L 103, 107 (2019).

[67] *See id.*

[68] *See* Yaniv Erlich et al., *Identity Inference of Genomic Data Using Long-Range Familial Searches*, 362 SCIENCE 690 (2018). Erlich et al. created a model demonstrating that when 2% of a target population is represented in a genetic database, nearly everyone in the target population will have a third-cousin or closer match in the genetic database. *Id.* FamilyTreeDNA alone has over two million genetic genealogy profiles. *See* Precious Silva, *DNA Testing Company FamilyTreeDNA Gives FBI Access to Nearly Two Million Profiles*, INT'L BUS. TIMES (Feb. 4, 2019), https://www.ibtimes.com/dna-testing-company-familytreedna-gives-fbi-access-nearly-two-million-profiles-2759401; Martin McDowell, *How Big is the FamilyTreeDNA Database?*, GENETIC GENEALOGY IR. (Feb. 11, 2020), https://ggi2013.blogspot.com/2020/02/how-big-is-

individuals who are more distantly related to the Subject.[69] The IGG practitioner can see how much DNA individuals in the match list share with the Subject, but they cannot see any match's raw genetic code.[70] This simplified match list is a good approximation of what match lists look like in a public genetic database:

Match Name	Match Email	DNA shared with Subject
John Doe	johndoe@gmail.com	100 cM
Jane Roe	janeroe@gmail.com	90 cM
Ice9	Ice9@yahoo.com	88 cM
CameoSpace	cspace@bing.com	88 cM

From the amount of shared DNA listed here, the IGG practitioner might use a relationship calculator, such as the Shared cM Project, to identify a range of possible relationships that each individual in the match list might share with the Subject.[71] With lower amounts of shared DNA, these ranges are not very specific.[72] For example, John Doe might be the Subject's half second cousin, third cousin, half first cousin once removed, or even a fourth cousin. Thus, unless the amount of shared DNA is so great as to make the relationship unambiguous, the IGG practitioner will have to rely on additional information to begin identifying the Subject.[73]

---

familytreedna-database.html (the size of the database grows continuously, so the number today is greater than in 2020).

[69] There can be hundreds or thousands of matches that are distantly related to the Subject. *See* Greytak et al., *supra* note 66, at 109.

[70] *Id.* at 107.

[71] The most commonly used calculator is the crowd-sourced project managed by Blaine T. Bettinger. *See* Bettinger, *supra* note 32.

[72] *See id.* Entering "50 cm" (a relatively low amount of shared DNA) into the search bar yields thirty-two possible relationships with varying likelihood probabilities, from the second-cousin range to the fifth, sixth, seventh, or even eighth cousin range. *See also* Greytak et al., *supra* note 66, at 107.

[73] Even the largest possible amount of shared DNA between individuals (excluding identical twins), approximately 3720 cM, will result in two possibilities for the

The next step the IGG practitioner might take would be to use tools available on each public genetic database to determine which matches also share DNA with one another.[74] This allows the IGG practitioner to break the match list into various clusters that represent different branches of the Subject's family tree.[75] As a simplified example, if John Doe and Ice9 share DNA with one another in addition to the Subject, but they do not share DNA with Jane Roe or CameoSpace, the former pair are likely related to the Subject on a different branch of his family tree than the latter pair.[76]

From there, the IGG practitioner would attempt to find out how individuals in each cluster relate to one another. This can be accomplished by several methods. One method is to view how much DNA is shared between individuals in a cluster.[77] However, this method is currently only available on one public genetic database, and even there, unless the amounts of shared DNA are quite large, the relationship between individuals in a cluster will remain ambiguous. Instead, the most useful method is for IGG practitioners to search for family trees associated with individuals in a cluster.[78] If John Doe has a publicly viewable family tree on Ancestry.com (or elsewhere on the web), it might show how he is related to Ice9.[79]

Subject: the Subject could be the parent, or the child, or the match. *See* Bettinger, *supra* note 32 (enter 3720 in the search bar). I am not aware of any cases where the top match has shared such a high amount of DNA with the Subject.

[74] GEDmatch offers a variety of tools for identifying genetic relationships between matches of the Subject's matches, including a tool that allows IGG practitioners (and the general public when using GEDmatch) to identify which of the Subject's matches also share DNA with one another. *See* "People who match both kits, or 1 of 2 kits" tool, *GEDMATCH,* https://app.gedmatch.com/people_match1.php (create free account; then scroll to menu on right side of the screen to select tool) (last visited Oct. 11, 2022); *see also* Kling et al., *supra* note 6, at 14.

[75] "Clustering" is a key tool for IGG and traditional genetic genealogy alike. Clustering can be performed by hand or using a number of automated tools such as the Collins Leeds Method at DNAGEDcom. *See, e.g.*, "Collin Leeds Method (CLM)," *DNAGEDCOM,* https://doc.dnagedcom.com/help/collins-leeds-method-clm/ (last visited Oct. 11, 2022).

[76] *See* Kling et al., *supra* note 6, at 8 (providing a description of clusters).

[77] This can only be accomplished on GEDmatch, which allows users to view the amount of shared DNA between matches. But as noted *supra* note 72, unless the amount of shared DNA is exceptionally high, there will be many possible relationships.

[78] *See* Kling et al., *supra* note 6, at 11. There are other methods used by IGG practitioners, but the details are beyond the scope of this Article.

[79] *Id.* Note that here, the IGG practitioner would be searching for the publicly available tree on Ancestry.com (or elsewhere). The IGG practitioner would not be uploading any DNA files to AncestryDNA or otherwise searching for relatives of the Subject using genetic matching.

Another method involves searching for the name of individuals in a cluster on social media sites (e.g., Facebook), public records repositories (e.g., WhitePages), and search engines (e.g., Google).[80] This method will often identify the parents, grandparents, children, and siblings of individuals in a cluster.[81] This method is also used to disambiguate pseudonyms in public genetic databases.[82] For example, the IGG practitioner might find a website where Ice9 used his real name, James Blank. This begins the process of building out the family tree for each cluster and identifying how the individuals in a cluster relate to one another. Once the IGG practitioner has identified close relatives of the individuals, the IGG practitioner could move on to using traditional genealogical records to fill out the family trees.[83] These records include documents that governments have made public: census records; birth, marriage, and death records; newspapers; family papers donated to repositories; and other historical records available to the public.[84] The materials that IGG practitioners access in these stages of their work consist entirely of historical and contemporary public records and other publicly accessible information. I refer to all of these materials as "publicly accessible information." As will be discussed in the remaining Parts of this Article, access to publicly accessible information involves materials and information that is of foundational First Amendment concern.[85]

Often, the next step the IGG practitioner will take is to make use of a time-saving tool called What Are The Odds

---

[80] *See* Kling et al., *supra* note 6, at 7; Greytak et al., *supra* note 66, at 108.

[81] IGG practitioners are only able to access Facebook (and other social media) pages that have been made public by the user. *See* Kling et al., *supra* note 6, at 7.

[82] *See* Debbie Kennett, *Using Genetic Genealogy Databases in Missing Persons Cases and to Develop Suspect Leads in Violent Crimes*, 301 FORENSIC SCI. INT'L 107, 113 (2019).

[83] Greytak et al., *supra* note 66, at 108.

[84] Federal census records are available to the public seventy-two years after they are collected. Act to Amend Chapter 21 of Title 44, Pub. L. No. 95-416, 92 Stat. 915 (1978). Ancestry.com estimates that they have approximately four billion records, including census records, vital records, newspapers, and others, in their online repository. *How Many Billions of Records Are on Ancestry.com?*, ANCESTRY, https://www.ancestry.com/corporate/blog/how-many-billions-of-records-are-on-ancestrycom (last visited Oct. 11, 2022). Ancestry.com obtains many of these records by approaching state archives and other holders of public records and offering to digitize them for free. Christine Garrett, Genealogical Research, Ancestry.com, and Archives 28 (May 14, 2010) (Masters thesis, Auburn University) (available at http://etd.auburn.edu/bitstream/handle/10415/2014/Christine.Garrett_thesis.pdf?sequence=1&ts=1425917830362).

[85] *See infra* Parts II, III.

(“WATO”).[86] WATO, developed by Leah Larkin and Jonny Perl, uses a statistical analysis that combines the probabilities of relatedness based on genetic genealogy and evidence from publicly accessible information to generate hypotheses as to where the Subject fits into a family tree.[87] The IGG practitioner transfers information from the family tree she developed using publicly accessible information into WATO and then enters the amount of shared DNA for the individuals in the tree who matched to the Subject in the public genetic database.[88] WATO then presents a ranked list of hypotheses for where the Subject might fit into the family tree.[89]

At this point, the IGG practitioner is well on her way to identifying the Subject. Using the hypotheses generated by WATO, as well as context clues about the Subject’s likely age, gender, and locale, the IGG practitioner would return to publicly accessible information to build out the family tree to the places where the Subject most likely fits in.[90] The IGG practitioner would also look for intersections on the family tree where an individual related to a different cluster developed from the public genetic database either married into or had a child with an individual in the cluster under consideration.[91] If the IGG practitioner finds such an intersection and identifies an individual who both fits into a hypothesis generated by WATO and matches the context clues for the Subject, the IGG practitioner has a lead that can then be forwarded to the agency that contracted with the IGG practitioner.[92]

At this stage, the IGG practitioner’s work is over.[93] If the case involves an unsolved crime, law enforcement will collect a DNA sample from the person of interest identified by the IGG

---

[86] Larkin, *supra* note 54. For an example of the use of WATO in IGG, *see* Amy R. Michael et al., *Identification of a Decedent in a 103-Year-Old Homicide Case Using Forensic Anthropology and Genetic Genealogy*, 7 FORENSIC SCI. RSCH. 412, 421 (2022), https://www.tandfonline.com/doi/pdf/10.1080/20961790.2022.2034717.

[87] *See Frequently Asked Questions About WATO*, DNA PAINTER, https://dnapainter.com/help/wato-faq (last visited Oct. 9, 2022). Larkin developed WATO using the probabilities described in an AncestryDNA white paper. *See generally* Ball et al., *supra* note 32.

[88] *Frequently Asked Questions About WATO*, *supra* note 87.

[89] *Id.*

[90] Greytak et al., *supra* note 66, at 109.

[91] *Id.*

[92] *See id.* at 110.

[93] In many cases, more work by the IGG practitioner will be required. If the IGG practitioner is unable to identify the Subject using the available matches, she may request that law enforcement to perform targeted outreach to other relatives of the Subject identified through PAGGDs. *See id.* at 108.

practitioner.[94] Law enforcement will forward the sample to a lab that will make a direct comparison between that sample and the sample from the crime scene.[95] Only then will an arrest be made.[96]

D. Regulation of Forensic Labs and Scientists

As noted in the Introduction, states and the federal government regulate forensic laboratories in a variety of ways. These regulations are guided by reasonable concerns about mistakes that can occur in lab settings and the terrible effect those mistakes can bring about.[97] If a forensic scientist working in a lab contaminates a sample from a crime scene with DNA from a suspect, an innocent person may be convicted of the crime—and a guilty person may go free.

Privacy concerns also predominate in government regulation of forensic labs. These labs deal with biological samples that can contain the entire genetic code of an individual. If a lab misplaced biological samples and they fell into the wrong hands, an individual's health risks could be exposed.[98]

Even forensic scientists are subjects of concern given that they apply the scientific method to evidence and testify in court in front of juries who will use that testimony to determine the guilt or innocence of a defendant. If a forensic scientist misapplies the scientific method in his analysis and testimony, an innocent person could be convicted of a crime while the guilty party walks.[99]

---

[94] *Id.* at 110.
[95] *Id.*
[96] *Id.*
[97] *See* NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 37 (2009) ("[I]f evidence and laboratory tests are mishandled or improperly analyzed; if the scientific evidence carries a false sense of significance; or if there is bias, incompetence, or a lack of adequate internal controls for the evidence introduced by the forensic scientists and their laboratories, the jury or court can be misled, and this could lead to wrongful conviction or exoneration.").
[98] Of course, the "wrong hands" could similarly obtain anyone's DNA by simply picking up a discarded Coke can, or even a pencil. *See* Khalid Mahmud Lodhi et al., *Generating Human DNA Profile(s) from Cell Phones for Forensic Investigation*, 6 J. FORENSIC RSCH. 1, 1 (2015) (describing how "touch DNA" can be obtained from a variety of objects and used to develop a DNA profile of the individual).
[99] *See, e.g.*, *FBI Admits Flawed Forensic Testimony Affected at Least 32 Death Penalty Cases*, EQUAL JUST. INITIATIVE (Apr. 29, 2015), https://eji.org/news/fbi-admits-flawed-forensic-testimony-in-32-death-penalty-cases/ (noting that the "FBI [] acknowledged . . . that, for decades, nearly every examiner in its microscopic hair comparison unit gave flawed testimony declaring that crime scene hair evidence 'matched' the hair of defendants . . . including in 32 capital trials that ended in a death sentence");

In light of these reasonable concerns, states and the federal government regulate forensic labs in precise ways. In several states, forensic scientists must dispose of biological samples from suspects who turn out to have no involvement in the crime.[100] This requirement reduces the source of contamination for future cases and reduces the chance the individuals' DNA might be obtained for nefarious purposes.[101] An individual's genetic code is generally not publicly available information, and we expect that when the government uses private information in its investigations, it does so in a way that safeguards that privacy to the greatest extent possible.[102]

E. Maryland's Law Regulating IGG

The Maryland Law attempts to regulate IGG using the framework applied to forensic laboratories. Large portions of the law do, in fact, regulate the treatment of biological samples. One section seeks to ensure that labs do not use biological samples to determine information about an individual that would violate the Health Insurance Portability and Accountability Act: "Biological samples subjected to [] DNA analysis, whether the forensic sample or third party reference samples, may not be used to determine the sample donor's genetic predisposition for disease or any other medical condition or psychological trait."[103] Another section requires all labs that use biological samples to generate DNA profiles be licensed by the Office of Health Care

---

MURPHY, *supra* note 31, at 52–53 (describing cases where forensic scientists made a variety of errors in their analysis crime-scene and suspect DNA, leading to numerous wrongful convictions).

[100] *See, e.g.*, MD. CODE REGS. 29.05.01.14. Not all states follow suit, e.g., New York City stores DNA profiles from tens of thousands of individuals—many of them never convicted of a crime—and compares them to crime-scene evidence. Troy Closson, *This Database Stores the DNA of 31,000 New Yorkers. Is it Legal?*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/nyregion/nyc-dna-database-nypd.html.

[101] *See* MURPHY, *supra* note 31, at 52 (describing how contamination from multiple evidence kits led to cases being compromised).

[102] This is not the same as saying that genetic data is "data in which individual can begin to claim a reasonable expectation of privacy" for Fourth Amendment purposes, as Natalie Ram has argued. Ram, *Genetic Privacy After* Carpenter, *supra* note 5, at 1386. It is simply to say that we expect law enforcement to use measures to safeguard information used in investigations that is not *generally* publicly available, such as the bank records at issue in *United States v. Miller*, 425 U.S. 435 (1976), and the phone records at issue in *Smith v. Maryland*, 442 U.S. 735 (1979). While bank and phone records are not "private" for Fourth Amendment purposes, it is reasonable to expect that law enforcement would take greater care with such records—not leaving them in a coffee shop, for example—than they would with generally publicly available materials such as newspapers and census records.

[103] MD. CODE ANN., CRIM. PROC. § 17-102(c) (LexisNexis 2022).

Quality.[104] Yet another section requires that the court with jurisdiction over the case "shall issue orders to all persons in possession of DNA samples gathered in the [investigation] . . . to destroy the samples" when a case is complete.[105] A proceeding section provides criminal penalties for failure to destroy the samples as required.[106]

The problem arises when the Maryland Law applies the same regulatory framework to the wholly different investigative area of IGG. The law defines "forensic genetic genealogy DNA analysis and search" (Maryland's term for IGG) broadly to include not only "the forensic genetic genealogical DNA analysis of biological material," but also "a genealogical search using public records and other lawful means to obtain information . . . ."[107] The same section of the law that requires destruction of biological samples also requires that "all genetic genealogy information derived from the [IGG] analysis" be destroyed, and that the IGG practitioner "turn over to the investigator all records and materials collected in the course of the [investigation], including material sourced from public records, family trees constructed, and any other genetic or nongenetic data collected . . . ."[108] The IGG practitioner "may not keep any records or materials in any form, including digital or hard copy records."[109] An IGG practitioner who retains any records is subject to criminal prosecution: "A person who violates this subsection is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both."[110] And an IGG practitioner who "disclose[s]" any records is subject to even higher criminal sanctions—five years in prison, a $5,000 fine, or both.[111] There is also a private right of action built into the law, allowing anyone whose information is wrongfully "disclosed, collected, or maintained" to bring a tort claim against the IGG practitioner.[112]

---

[104] *Id.* § 17-104.

[105] *Id.* § 17-102(h)(1)(i). A case is completed either when there is no prosecution, or upon acquittal, or on "completion of a sentence and postconviction litigation associated with a conviction obtained through the use of FGGS, or on completion of any criminal prosecution that may arise from the FGGS." *Id.* Given that post-conviction litigation can continue indefinitely, for all intents and purposes, in some cases the order will likely never be issued.

[106] *Id.* § 17-102(j)(2).

[107] *Id.* §§ 17-101(e)(1), 17-101(e)(3).

[108] *Id.* §§ 17-102(h)(1)(i), 17-102(h)(1)(ii)(1.).

[109] *Id.* § 17-102(h)(1)(ii)(2.).

[110] *Id.* § 17-102(j)(2).

[111] *Id.* § 17-102(i).

[112] *Id.* § 17-102(k).

These kinds of regulations would make sense if applied to biological samples, lab notes, and other materials developed within forensic laboratory conditions. We certainly do not want forensic scientists to maintain biological materials after a case has ended, especially if the biological materials come from someone who has been deemed innocent. And we might want to ensure that any notes derived from analysis of those biological materials are destroyed as well since the notes can contain detailed information about an individual's genetic code that came from direct scientific analysis of the individual's DNA. But there is no analogy between biological materials or notes containing information derived from analysis of those materials and the materials accessed by IGG practitioners in their work on a case. As described above, the majority of an IGG practitioner's work does not depend on access to any private information.[113] The only arguably private information viewed by an IGG is the Subject's match list in a public genetic database.[114] The rest of the IGG practitioner's work consists of digging through a variety of publicly accessible information, such as census records, vital records, public social media posts, and contemporary public records. These are the "materials" that an IGG uses in her work. Requiring that an IGG not keep any of these records or materials "in any form" is akin to a regulation saying that forensic scientists must turn over their beakers and pipettes once a case is complete. Such a law would surely be absurd, but there are graver concerns than absurdity here. Taken at face value, the Maryland Law would mean that IGG practitioners could not maintain any of the census records, birth, marriage, or death records, or any other public records used in the IGG practitioner's work on a case. But a census record contains information about a variety of individuals, as do many indexes that list births, marriages, and deaths. These records contain information of First Amendment concern. Requiring IGG practitioners to remove such records "in any form" after completion of a case violates the IGG practitioner's First

[113] *See supra* Part I.C.

[114] *See supra* Part I.C. But, of course, there is no privacy right in evidence left behind at a crime scene. The Subject's match list in a public genetic database is derived entirely from evidence left behind at a crime scene. Consider an analogous situation where law enforcement finds a cell phone likely belonging to the killer at a crime scene. Law enforcement could, of course, search the phone and develop a family and friend network for the suspect from the contents of his phone without obtaining a warrant. The killer has no privacy interest in the phone—or information derived from the phone—once it is left at a crime scene. Ditto for DNA.

Amendment right to noninterference with receipt of information legally held by another and otherwise available to the public.

II. THE FIRST AMENDMENT RIGHT OF NONINTERFERENCE WITH RECEIPT OF INFORMATION LEGALLY HELD BY ANOTHER AND OTHERWISE AVAILABLE TO THE PUBLIC

The First Amendment protects the right of individuals to publish—or otherwise make available to the public—a wide range of materials.[115] In accord with that right, the First Amendment also protects a right to noninterference with receipt of information legally held by another and otherwise available to the public (the "right of noninterference with receipt" for short). The materials accessed by IGG practitioners in their work—census and vital records, social media posts, newspapers articles—fit into this category.

The right of noninterference with receipt is inherently tied up with the question of the right to publish, since being able to receive information requires that the information has been published or made available in some other way. The United States Supreme Court has addressed these overlapping rights in a series of cases, most notably *Florida Star v. B.J.F.*,[116] *L.A. Police Department v. United Reporting*,[117] and *Sorrell v. IMS Health Inc.*[118] The reasoning in those cases clearly establishes a right of "noninterference with receipt." If such a right exists, the Maryland Law's restriction on IGG practitioners' access to public census and vital records, public social media posts, and newspaper articles conflicts with it.

A. Florida Star v. B.J.F.

The Court has recognized a general[119] First Amendment right to access publicly available materials and disseminate information based on those materials. While the Court has never

[115] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (upholding the right to publish pornography that is not "obscene" and does not depict children); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (restricting defamation suits brought by "public figures"); New York Times Co. v. United States, 403 U.S. 713 (1971) (restricting prior restraint of publication of classified materials); Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding the right to engage in a wide range of "violent" speech as long as it will not likely results in "imminent lawless action"); Texas v. Johnson, 491 U.S. 397 (1989) (establishing the right to burn the U.S. flag as a form of political protest); Snyder v. Phelps, 562 U.S. 443 (2011) (creating the right to demonstrate in an "offensive" or "outrageous" manner on a matter of public concern).
[116] 491 U.S. 524 (1989).
[117] 528 U.S. 32 (1999).
[118] 564 U.S. 552 (2011).
[119] Though perhaps not unlimited.

held that the *press* has an unfettered First Amendment right to publish any truthful information whatsoever, it has struck down every statute that punished publication of legally obtained, truthful, non-defamatory material. In *Florida Star*, the Court considered a circumstance where a sheriff's department had used the real name of a victim of robbery and sexual assault on a report that it made available to the press.[120] The Florida Star newspaper published the victim's name despite a Florida law that made it illegal to publish the name of a victim of a sexual offense.[121] Thus, the issue for the Court was whether the Florida law could, consistent with the First Amendment, punish someone for reporting the name of a victim obtained from a publicly released police report.[122] The Court's holding by Justice Marshall was limited. It did not recognize automatic constitutional protection for publication of truthful information nor did it hold that there is no zone of privacy that a State might protect even if it conflicts with principles of free speech.[123] But the Court did hold that "where a newspaper publishes truthful information which it has lawfully obtained," a law penalizing such publication must meet strict scrutiny, a nearly insurmountable burden.[124]

The right to receipt of (or access to) publicly available information was mentioned briefly by the Court in *Florida Star*. Justice Marshall noted that Florida was, in a sense, punishing the receipt of information—even though the law did not specifically say so—since the punishment was applied not to the government agency that released the information, but to the organization that received and published it.[125] Notably, this insight harkened back to Justice Brennan's concurring opinion

[120] 491 U.S. at 527.
[121] *Id.* at 526.
[122] *Id.* at 534.
[123] *Id.* at 541.
[124] *Id.*
[125] *See id.* at 536; *see also id.* at 547 (White, J,, dissenting) (noting that Florida already had a variety of laws on the books that forbid officials from releasing the names of rape victims); *Id.* at 536 (majority opinion) (noting that "the fact that the Department apparently failed to fulfill its obligation . . . not to cause or allow to be . . . published the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful.") (internal quotations omitted). *Arguendo*, Justice Marshall stated that "[e]ven assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* (emphasis in original). But Justice Marshall later stated that "[o]nce the government has placed [] information in the public domain, reliance must rest upon the judgement of those who decide what to publish or broadcast . . . ." *Id.* at 538 (internal quotations and citation omitted).

in *Lamont v. Postmaster General*.[126] In that case, addressees of material deemed "communist political propaganda" sued over a law that required the United States Post Office to hold such material and instead send addressees a postcard asking if they truly wanted to receive the material.[127] Only if the addressee responded with an affirmative yes would the mail be sent on.[128] The Court premised its decision on the right of the *recipients* of the materials, not the senders.[129] Justice Brennan made this explicit in his concurrence in *Lamont* when he wrote that "the right to receive publications is [] a fundamental right" that is "necessary to make the express guarantees [of the First Amendment] fully meaningful."[130]

B. L.A. Police Department v. United Reporting *and* Sorrell v. IMS Health Inc.

While Justice Marshall in *Florida Star* briefly raised the hypothetical of a law that proscribes receipt of publicly available information,[131] no such case has arisen, but it is possible to imagine such a case. In *Florida Star*, the sheriff's department had violated its own internal policies, as well as Florida law, by releasing the name of the victim to the public.[132] But imagine a law that penalizes receipt of information provided by the government to the public if the recipient knows that the information in question should not have been released by the government.[133] The Court would surely strike down such a law under the *Florida Star* principle. If a newspaper may not be punished for publishing information that it legally obtained from the government, surely an individual could not be punished for receiving information legally from the government. To be sure, the Court has never directly ruled on a case with these facts, but it has ensconced the principal of a First Amendment right to receive publicly accessible information in a circuitous way in two

[126] 381 U.S. 301 (1965).
[127] *Id.* at 302.
[128] *Id.* at 303.
[129] *Id.* at 307. While the case itself was about the constitutionality of a federal statute, whether that statute was constitutional required the Court to consider whether the addressees of "communist political propaganda" had the right to receive such information.
[130] 381 U.S. at 308.
[131] Fla. Star v. B.J.F., 491 U.S. 524, 536 (1989).
[132] *Id.* at 538.
[133] In *Florida Star*, Justice Marshall remarked that such a law "would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.*

cases: *L.A. Police Department v. United Reporting* and *Sorrell v. IMS Health Inc*. Before considering those cases, however, it is necessary to reframe the concept of a "right to receipt."

The concept of a "right to receipt" seems strange, since the word "receipt" implies an action by another. When you receive something, it is only because somebody (or some mechanism put in place by somebody) has provided it to you. Thus, taken literally, a "right to receipt" would require a concomitant right to make someone else act. But surely this is not what Justice Marshall had in mind in *Florida Star,* and not even what Justice Brennan had in mind in *Lamont*. If the producers of the materials at issue in *Lamont* had simply written up pamphlets but shown no interest in distributing them, no one would have a right to demand that the producers, or anyone else, provide them with the materials. To say otherwise would be akin to saying that once any (legal) information is produced, everyone has an affirmative right to have it provided to them—an absurdity. Instead, what Justice Brennan recognized in *Lamont* is that once constitutionally protected information is produced and made available to the public, the government may not *block* someone from receiving it.[134] Thus, the principle is better framed as the right of *noninterference* with receipt.

Consider *United Reporting*, where the Court addressed a Los Angeles Police Department ("LAPD") regulation that released arrestees' addresses if the recipient agreed to use the information for a short list of prescribed purposes, none of which included using the information to sell a product or service.[135] Writing for the majority, Chief Justice Rehnquist upheld the regulation, reasoning that it did not "prohibit[] a speaker from conveying information that the speaker already possesses" but was simply a "governmental denial of access to information in its possession."[136] The reasoning here assumes—without explicitly stating—that a law that attempted to regulate what a speaker did with legally obtained government information already in his possession would be treated differently by the Court.

Now imagine a twist on the law at issue in *United Reporting*, where in addition to restricting *new* access to arrestee

[134] *See* 381 U.S. at 308.
[135] L.A. Police Dep't v. United Rep. Pub. Corp., 528 U.S. 32, 34 (1999).
[136] *Id.* at 40. The decision in *United Reporting* was based on a facial challenge to the law, but whether the Court's reasoning would have been the same under an as-applied challenge is irrelevant to the point made by the Court regarding access to information made available by the government.

information, the law regulated what could be done with arrestee information that had previously been made generally available to the public. This would be prohibiting a speaker from conveying information that the speaker already possesses, and it would also restrict receipt of that information by parties prohibited by the law from accessing it. For example, if the law required that "previously public arrestee information held by a member of the public shall not be distributed to private investigators or anyone seeking information about individuals' arrest status," private investigators, and the entire public, would be restricted from receiving information that was legally in the possession of individuals willing to provide it. Far beyond a restriction on access to government-owned material, such a regulation would be a new government limit on what kinds of legally held information may be exchanged.

Indeed, the Court has addressed an analogous regulation in *Sorrell v. IMS Health, Inc*. The Vermont law at issue in that case restricted the use of pharmacy records that reveal doctors' prescribing practices for marketing purposes.[137] Thus, unlike the LAPD regulation in *United Reporting* which dealt with access to information held by the government, the Vermont law regulated how information held legally by private parties could be distributed. One of the groups that challenged the law was a Vermont data mining organization that scraped prescriber information from pharmacy records and leased the information to pharmaceutical companies.[138] Under the law, the group—the proposed recipient of the information—was blocked from receiving information about doctors' prescribing practices, even though the owners of the information (pharmacies) were perfectly willing to provide it.[139] In overturning the Vermont law on First Amendment grounds, Justice Kennedy recognized the right of noninterference with receipt, highlighting the data miner's First Amendment interest in receiving the information.[140] Justice Kennedy emphasized that in concurring and dissenting opinions in *United Reporting*, eight Justices had recognized that "restrictions on the disclosure of [] information can facilitate or burden the expression of potential recipients" in

[137] Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).
[138] *Id.*
[139] *Id.* at 558.
[140] *Id.* at 569–70 ("Vermont's law imposes a content- and speaker- based burden *on respondent's own speech*.") (emphasis added).

addition to burdening the expression of those who are willing to provide the information.[141]

C. The Maryland Law Interferes with the Right of Noninterference with Receipt

Under the Court's precedents in *Florida Star*, *United Reporting*, and *Sorrell*, a state may not interfere with receipt of information legally held by another and available to the public. The Maryland Law regulating IGG requires that, at the end of an investigation, IGG practitioners "turn over to the investigator all records and materials collected in the course of the [investigation], including material sourced from public records, family trees constructed, and any other genetic or nongenetic data collected,"[142] and provides criminal penalties for retaining any records.[143] As discussed above, the "records and materials" collected and used by IGG practitioners in their work consist almost entirely of publicly-accessible materials legally held by private organization or made generally available by states and the federal government.[144]

For example, in the course of an investigation, an IGG might consult:

- a 1940 U.S. Census record listing the names and addresses of families living in a particular neighborhood;
- a 1910 birth record issued by the state of Utah;
- an obituary published in a newspaper;
- a public Facebook post;
- a public family tree on Ancestry.com.

These materials and records are all legally held and otherwise generally available to the public. The U.S. Census is made public by federal statute.[145] The birth record is made public

[141] *Id.* at 569. After *Sorrell*, a whole host of laws that restrict access to information in public records depending on the recipient's intended use are arguably under threat. *See* Carolyn Petersen et al., *Sorrell v. IMS Health: Issues and Opportunities for Informaticians*, 20 J. AM. MED. INFO. ASS'N. 35, 36 (2012). Indeed, as Ashutosh Bhagwat reasons, after *Sorrell*, "few laws preventing data disclosure to protect privacy are likely to survive the 'compelling interest' requirement' of the traditional strict scrutiny test," now applied to nearly all speech. Ashutosh Bhagwat, *Sorrell v. IMS Health*: *Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 873 (2012).
[142] MD. CODE ANN., CRIM. PROC. § 17-102(h)(1)(ii)(1.) (LexisNexis 2022).
[143] *Id.* § 17-102(j)(2).
[144] *See supra* Part I.C.
[145] Act of Oct. 5, 1978, Pub. L. No. 95-416, 92 Stat. 915 (establishing the "72-Year Rule").

by state statute.[146] The obituary is information printed in a newspaper generally available to the public. The Facebook page was made public by choice of the user[147] as was the family tree on Ancestry.com.[148] The census, birth, and obituary records are also made available to the public through information aggregation sites such as Ancestry.com, FamilySearch.org, and others.[149] In this sense, these materials represent a crossover of the materials at issue in *Florida Star*, *United Reporting*, and *Sorrell*. Where those cases involved either government records made available directly to the public or information generated and held by private parties, the records offered by sites such as Ancestry.com contain information that is made generally available to the public *and* held legally by private parties who make the information more easily accessible to the public. A law requiring that IGG practitioners turn over all such records—with criminal penalties if the records are later found in the IGG practitioner's possession—restricts IGG practitioners' First Amendment right of noninterference with receipt.[150] While in *United Reporting* the Court recognized that the government may restrict who has access to government records, the Court in *Florida Star* recognized the corollary that if the government provides public access to its materials, it cannot (without meeting strict scrutiny) restrict publication of those materials. And *Sorrell* recognized the same rule with respect to information legally held by private parties. Yet, if an IGG working under the thumb of the Maryland Law were later in need of the same 1940 U.S. Census record, Utah birth record, obituary, or other public

[146] UTAH CODE ANN. § 26-2-22(5)(a) (2021).
[147] *See Choose Who Can See Your Post on Facebook,* FACEBOOK, https://www.facebook.com/help/120939471321735?ref=dp (last visited Mar. 9, 2023).
[148] *See Privacy for Your Family Tree*, ANCESTRY, https://www.ancestry.com/c/legal/privacyforyourfamilytree (last visited Mar. 9, 2023).
[149] *See United State Online Genealogy Records*, FAMILYSEARCH WIKI, https://www.familysearch.org/en/wiki/United_States_Online_Genealogy_Records (last visited Mar. 9, 2023) (showing which aggregation sites hold which public records).
[150] Note that this is true even if we take it on board that certain information in public records *should* be subject to privacy protections, as Daniel J. Solove argues. *See generally* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137 (2002). This is because even if Solove is right, the Maryland Law only restricts IGG practitioners from receiving and distributing information about Subjects' family relationship (and any documents containing even bits and pieces of that information). *See* MD. CODE, CRIM. PROC. § 17-102. It does not stop anyone else from receiving or sharing that information, so whatever privacy interest might exist is not bolstered by the law. *See id.*

record, for a different genealogical problem unrelated to IGG work in Maryland, she would be unable to access them without fear of criminal sanction. Simply having the same page of the 1940 U.S. Census record "in any form" on her computer would subject her to the penalties under the Maryland Law.

As noted above, it may very well be that these provisions of the Maryland Law stem from a misunderstanding of the work of IGG practitioners and a misguided attempt to apply clinical laboratory regulations to primarily historical and private investigations work.[151] Indeed, the Maryland Law applies a similar requirement to destruction of the genetic profiles collected and analyzed during the investigation as well as any reports generated from those samples. But note the difference: the genetic profiles were collected and analyzed only as a result of the investigation; they do not independently exist as information available to the public. Requiring that labs destroy such samples does not interfere with any lab employee's First Amendment rights. Whether or not the Maryland Law's regulation of materials used by IGG practitioners stems from a good-faith conflation of IGG work with the work of a wet lab, the effect is the same: an interference with an IGG practitioner's First Amendment right to receive and use information legally held by others and on offer to the public.

D. The Right of Noninterference as Distinct from Enforcement of Private Contracts

On first blush, the right of noninterference with receipt may appear to conflict with certain well-established and generally accepted laws. In particular, laws restricting the dissemination of trade secrets clearly interfere with receipt of information. For example, California's Uniform Trade Secrets Act defines "misappropriation" as, in part, "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means . . . ."[152] We can easily imagine someone who is legally in possession of the information contained in a trade secret by virtue of present or past employment with a company and agrees to share it with the public.[153] Yet, the California law states that the public may not receive that information (at least as long as the public knows the information is a trade secret), and the

[151] *See supra* Part I.E.
[152] CAL. CIV. CODE § 3426.1(b)(1) (2012).
[153] Thanks to an anonymous reviewer who raised this point.

California law and similar laws in other states have not been seriously challenged on First Amendment grounds.[154]

Despite appearing, on the surface, to contradict the right articulated here, protection of trade secrets by state governments does not implicate the First Amendment right of noninterference with receipt for three related reasons.[155] First, trade secret laws are enforced against the entire population of people who might knowingly expose or receive them. For example, California's Uniform Trade Secrets Act restricts *anyone* from knowingly revealing a trade secret without consent. It further restricts *anyone* from receiving the information contained in the trade secret if the individual knows the information is part of a trade secret and the right-holder has not given consent for the trade secret's release. In other words, the law protects trade secrets *generally*—it does not single out particular individuals for liability while allowing the rest of the public to freely share trade secrets. This is unlike the Maryland Law, which freely allows anyone other than IGG practitioners to receive publicly available information related to the family relationships of a Subject in an IGG investigation.

Second, trade secret law specifically protects information that is *not* otherwise available to the public. As Pamela Samuelson notes, "a firm cannot enforce a contract that information should be treated as a trade secret when it is not, in fact, a secret."[156] In other words, trade secret law is not enforced against an individual if the holder of the information has allowed others to share the information publicly. Again, trade secret law is meant to stop trade secrets from becoming available to others without consent of the right-holder. The Maryland Law, on the other hand, cannot have the goal of stopping the release or receipt of information related to the family relationships of a Subject since, again, only IGG practitioners are restricted by the law. Indeed, the comparison between trade secret law and the

---

[154] Pamela Samuelson, *Principles for Resolving Conflicts between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 779 (2007) ("Courts rarely consider First Amendment implications when issuing preliminary or permanent injunctions to prohibit the use or disclosure of trade secrets because defendants rarely raise the First Amendment as a defense to trade secret misappropriation claims."). *But see* Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is it Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425, 1425 n.1 (2009) (collecting articles arguing that trade secret law goes too far when it allows right-holders to use the law to silence otherwise protected speech or as a sword rather than a shield).

[155] Other commentators have argued why trade secret law does not generally interfere with the First Amendment. My specific purpose here is to show that the concerns about interference with receipt present in the Maryland Law are not implicated in trade secret law.

[156] Samuelson, *supra* note 154, at 788.

Maryland Law is apt at showing the problem with the latter if we imagine a trade secret law that allowed companies to stop a particular employee from sharing information while allowing all other employees to do so freely.

Drawing from that comparison, the third reason that trade secret law does not implicate the right of noninterference with receipt is that the Maryland Law contains several "limiting doctrines . . . [that] mediate [First Amendment] tensions that might otherwise arise . . . ."[157] As Pamela Samuelson notes, enforcement of trade secrets can be lost by reverse engineering, accidental disclosure, independent creation by another, or through other means, proper and improper.[158] The upshot for First Amendment purposes is that once a trade secret has become, through whatever means, part of the "public domain," the law will no longer restrict any individual from receiving or sharing it.[159] The Maryland Law contains no such limited principles. IGG practitioners—and IGG practitioners alone—are restricted from receiving information that is otherwise part of the public domain. It would perhaps be one thing if the law restricted IGG practitioners from releasing information about a Subject's family relationships before the Subject's name was made public. But the law is not so limited. It restricts IGG practitioners from *receiving*—let alone releasing—that information for *all time*. The restriction applies even after a Subject's name has been made public, at which point anyone other than the IGG practitioner who worked on the case would be free to receive and share information about the Subject's family tree. *This* is a violation of the First Amendment right of noninterference with receipt of information legally held by another and otherwise available to the public.

III. REGULATION OF IGG AS A PROFESSION

The argument above would hold with special strength if the Maryland Law somehow applied to all genealogists (even if such a law is difficult to imagine). Yet, the Maryland Law specifically regulates IGG practitioners *as professionals*.[160] The

---

[157] *Id.* at 782.
[158] *Id.* at 784 (citing Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)).
[159] *Id.* at 787.
[160] *See* MD. CODE ANN., CRIM. PROC. § 17-104(a)(2) (LexisNexis 2022) (requiring a license for IGG practitioners who perform IGG work in Maryland). While IGG practitioners will often be conducting work for government agencies, there are other times when they will be working directly with defense and post-conviction attorneys,

question then arises whether an IGG practitioner's status as a professional—and one working as a government contractor—nullifies the claim that the Maryland Law violates an IGG practitioner's First Amendment right of noninterference with receipt. The key case here is *National Institute of Family and Life Advocates v. Becerra*,[161] which began to clarify the incipient "professional speech" doctrine. An analysis of that case, and its reframing of past cases dealing with similar issues, shows that framing IGG practitioners as professionals does not give a state carte blanche to restrict IGG practitioners' free speech rights. Another pair of cases instructive to the question is *Snepp v. United States*[162] and *United States v. Marchetti*,[163] both of which considered whether the government has greater authority to restrict its own employees' speech. Those two cases demonstrate that, while the government may restrict its employees' speech in certain ways, it may not do so with respect to publicly available information such as that accessed by IGG practitioners.

A. Professional Speech Doctrine

1. *NIFLA v. Becerra*

Prior to *Becerra*, numerous federal courts had applied lesser scrutiny to First Amendment cases involving "professional speech," defined as speech based on "expert knowledge and judgment" by "individuals who provide personalized services to clients and who are subject to a generally applicable licensing and regulatory regime."[164] These courts carved the "professional speech" doctrine from a number of United States Supreme Court cases that had recognized states' right to regulate professions such as lawyering and providing medical services.[165] In *Becerra*, the Court took up a challenge to the incipient "professional speech" doctrine based on a California law that required some medical providers to notify anyone who attended the clinic of the availability of reproductive-related care provided through

which the law itself contemplates. *See id.* § 17-103. Thus, this Part addresses the First Amendment concerns with the Maryland Law for IGG practitioners as professionals generally, while the next addresses the concerns for IGG practitioners as government contracts specifically. Thanks to an anonymous reviewer for this important clarification.

[161] 138 S. Ct. 2361 (2018).

[162] 444 U.S. 507 (1980).

[163] 466 F.2d 1309 (4th Cir. 1972).

[164] *Becerra*, 138 S. Ct. at 2371 (internal quotations omitted).

[165] *See id.* (collecting cases).

various California services.[166] While the regulation directly at issue in *Becerra*—as well as many of the regulations cited in that case—involved what might be termed "compelled speech,"[167] the Court's reasoning applies equally well to regulations such as the Maryland Law.

In *Becerra*, Justice Thomas, writing for the majority, noted two narrow areas where compelled speech may be subject to lesser scrutiny: disclosures and professional conduct.[168] The first comes from the case of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[169] where Ohio required contingency-fee based attorneys to disclose the possibility of additional fees and costs in any advertisements. The Court deemed this requirement to touch only "purely factual and uncontroversial information about the terms under which . . . services will be available."[170]

The second involves "regulations of professional conduct that incidentally involves speech."[171] Justice Thomas lifted language from *Planned Parenthood of Southeastern v. Casey*[172] to define an area of professional speech subject to state regulation, namely speech that is "part of the *practice* [of a profession], subject to reasonable licensing and regulation by the State."[173] Justice Thomas noted that in *Casey*, the Court upheld the informed consent requirements for physicians performing abortions as "professional conduct that incidentally burdens speech."[174] In other words, the regulation there targeted the proper *practice* of medicine, which is within the power of the state to regulate, even if those regulations incidentally burden speech by requiring doctors to speak certain words.

Another relevant example of a regulation of professional conduct are laws that restrict attorneys from disclosing information learned from their clients. The rules of professional attorney conduct restrict attorneys' speech through two doctrines: attorney-client privilege and confidentiality.[175] These

---

[166] *Id.* at 2365. The law also required unlicensed clinics to notify women that the clinic was not licensed by California to provide medical services. *Id.*
[167] *Id.* at 2376 ("California could inform low-income women about its services without burdening a speaker with unwanted speech.") (internal quotations omitted).
[168] *Id.* at 2372–73.
[169] 471 U.S. 626, 633 (1985).
[170] *Id.* at 651.
[171] *Becerra*, 138 S. Ct. at 2373.
[172] 505 U.S. 833 (1992).
[173] *Becerra*, 138 S. Ct. at 2373 (emphasis in original).
[174] *Id.*
[175] *See, e.g.*, MODEL RULES OF PRO. CONDUCT R. 1.6 (AM. BAR ASS'N 2020); *see also id.* R. 1.9(c).

doctrines limit what information an attorney may disclose from her professional relationship with a client even after the relationship has ended.[176] As with informed consent requirements, attorney-client privilege and confidentiality affect speech, but that effect is incidental to the regulation of professional *conduct*. While the former regulation requires speech and the latter restricts speech, the Court's interpretation of the First Amendment allows for both, subject to lesser scrutiny, so long as they are targeted at conduct by professionals that is "likely to pose dangers that the State has a right to prevent" and has "long been viewed as inconsistent with the profession's ideal . . . ."[177]

Considering the California regulation at issue in *Becerra*, the Court there found that it did not qualify as either a disclosure or a regulation of professional conduct.[178] Rather, the regulation required certain clinics to advise patients of services not necessarily related to their care.[179] Thus, the regulation was not a disclosure since it did not describe anything that might happen to the patient as a result of seeking care at the clinic, and it was not a regulation of professional conduct since it was not related to any procedure carried out at the clinic.[180]

While the two "narrow areas" of disclosure and professional conduct subject to less scrutiny are relevant to regulation of IGG practitioners' work, even more important is the Court's repudiation, in *Becerra*, of a broad swath of "professional speech" subject to lesser First Amendment scrutiny. Justice Thomas highlighted the danger of opening up whole areas of speech to government regulation based on the speaker's denotation as a "professional":

> "Professional speech" is [] a difficult category to define . . . . All that is required to make something a "profession" . . . is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered

[176] MODEL RULES OF PRO. CONDUCT R. 1.9(c) (AM. BAR ASS'N 2019). The conclusions of this Article arguably apply to rules restricting attorney disclosure of *publicly known* information as well, but that specific topic is beyond the scope here.
[177] Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 447 (1978) (cited in *Becerra*, 138 S. Ct. at 2372–73).
[178] *Becerra*, 138 S. Ct. at 2373.
[179] *Id.* at 2373–74.
[180] *Id.*

> power to reduce a group's First Amendment right by simply imposing a licensing requirement.[181]

Justice Thomas emphasized that this fear of creeping government overreach is precisely why the Court "has been reluctant to mark off new categories of speech for diminished constitutional protection."[182] To be sure, much of Justice Thomas' discussion of this concern in *Becerra* involved invocations of a nefarious government seeking to "suppress unpopular ideas or information."[183] But, as is clear from the preceding case of *Reed v. Town of Gilbert*[184] that struck down a town's differential treatment of directional signs, the Court is concerned with any content-based regulations of speech, even if the motive behind the regulation is entirely benign.[185] Given the Court's very broad concern with protecting speech from encroaching government regulation, the larger message of *Becerra* is that, outside of the two narrow categories described in that case, States may not use a scheme of professional licensing to restrict individuals' speech, broadly construed.

2. The Maryland Law Cannot Survive the *Becerra* Analysis

The Maryland Law calls for a licensing scheme for IGG practitioners to be developed by 2024.[186] IGG practitioners, though surely professionals in the colloquial sense already, would come under a "licensing and regulatory regime" at that time.[187] Only licensed IGG practitioners will be permitted to carry out IGG work in Maryland once the licensing scheme is adopted.[188] But as the Court's broad holding in *Becerra*—supplemented by *Reed*—makes clear, Maryland may not restrict IGG practitioners' free speech rights on this basis alone. And the Maryland Law does not fall into either of the narrow categories of professional speech regulation subject to lesser scrutiny. Under the Maryland Law, IGG practitioners are required to turn over "all records and materials" after completion of an

---

[181] *Id.* at 2375.
[182] *Id.* at 2372 (internal quotations omitted).
[183] *Id.* at 2374 (internal quotations omitted).
[184] 576 U.S. 155 (2015) (Thomas, J.).
[185] *See id.* at 165 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.") (internal quotations omitted).
[186] MD. CODE ANN., CRIM. PROC. § 17-104(a)(2) (LexisNexis 2022).
[187] *Becerra*, 138 S. Ct. at 2371.
[188] § 17-104(d)(2).

investigation, and they may not retain those materials "in any form," subject to criminal prosecution.[189] This clearly is not a disclosure requirement. The question is whether it is a permissible regulation of professional conduct which only incidentally involves speech.

The Maryland Law apparently seeks to prevent a variety of potential harms to individuals whose information might be accessed in the course of an IGG investigation.[190] But the reasoning of *Becerra* shows that this concern—even if reasonable—is outside the scope of permissible regulation of professional conduct. As described above, the Court in *Becerra* tightly circumscribed what interests a State may seek to protect in regulating professional conduct.[191] The regulation at issue in that case was meant to reduce harm to women who needed reproductive services by providing them with notice of the availability of such services at other clinics and regulate conduct by individuals who were licensed to carry out reproductive services. But because the notice requirement did not regulate professional conduct *by* clinicians *to* their clients (or prospective clients), the regulation did not fall into the narrow category of professional conduct.[192] This was in contrast to the informed consent requirement in *Casey*, where the regulation ensured that clients knew what they were getting into when undergoing a specific medical procedure by a specific medical provider. In other words, to fall under the professional conduct category, a regulation must directly involve the interests of the client with respect to the specific professional.[193]

With the Maryland Law, on the other hand, the regulation seeks to prevent harm, not to the client but to third parties. The "client" for an IGG is the State itself. The State hires the IGG practitioner to conduct a genetic genealogical investigation.[194] The IGG practitioner is paid by the State. All of the benefits of the IGG practitioner's work confer to the State. Third parties whose publicly available information—through

[189] *Id.* §§ 17-102(h)(1)(ii)(1.), 17-102(h)(1)(ii)(2.), 17-102(j)(2).
[190] In the judiciary committee bill hearing, Del. Shetty said the bill sought to balance the "privacy concerns of individuals presumed innocent, and defendants, with the ability of law enforcement and prosecutors to effective use this [IGG] technology." *Forensic Genetic Genealogy DNA Analysis, Searching, Regulation, and Oversight: Hearing on H.B. 240 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021) (statement of Del. Emily Shetty, Member, Judiciary Comm.).
[191] *See supra* Part III.A.1.
[192] *See id.*
[193] *Id.*
[194] The IGG practitioner may also work directly for the State.

census records, vital records, social media posts, newspapers articles, etc.—is accessed by IGG practitioners during their work on a case are not clients. As such, in keeping with *Becerra*, Maryland may not use the cover of a professional licensing scheme to restrict IGG practitioners' speech with respect to those third parties.

B. IGG practitioners as Government Agents – Lesser First Amendment Protections?

1. *Snepp v. United States* and *United States v. Marchetti*

In addition to being professionals in their own right, in many contexts, IGG practitioners will be acting as either government employees or government contractors. This raises the question of whether IGG practitioners in those contexts would be subject to lesser First Amendment protections vis-à-vis the Maryland Law provisions requiring them to remove from their access "all records and materials" in "any form" after completion of a case.[195] The Court has made it clear that States may restrict what government employees can say—and publish—within the context of their employment. Most relevant to the issue at hand in the Maryland Law, the Court in *Snepp v. United States* held that a CIA official who published classified information without obtaining consent could be required to pay punitive damages for breaching his non-disclosure agreement.[196] The per curiam opinion did not directly address whether the same holding would apply to publication of *non*-classified material since the government in that case did not deny "as a general principle—Snepp's right to publish unclassified information."[197] However, in his dissent, Justice Stevens argued that "the Government's censorship authority would surely have been limited to the excision of classified material"[198] and noted that the Court had not disagreed with the reasoning from an earlier, Fourth Circuit case *United States v. Marchetti*.[199]

In *Marchetti*, the Fourth Circuit considered a circumstance similar to that in *Snepp*. Marchetti, an ex-CIA employee, published both classified and non-classified information in violation of a non-disclosure agreement he had signed.[200] The Fourth Circuit held that, while the government

[195] MD. CODE ANN., CRIM. PROC. § 17-102(h)(1)(ii) (LexisNexis 2022).
[196] 444 U.S. 507, 514–16 (1980).
[197] *Id.* at 511.
[198] *Id.* at 521, 521 n.11 (Stevens, J., dissenting).
[199] 466 F.2d 1309 (1972).
[200] *Id.* at 1311.

could restrict publication of classified information, "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed . . . ."[201] The *Marchetti* court recognized the government's clear interest in protecting secret information and the corresponding lack of interest in protecting information available to the public.[202] And importantly, as Justice Stevens noted in *Snepp*, the Court has not repudiated the Fourth Circuit's analysis in *Marchetti*, and other federal courts have relied on the *Marchetti* holding—protecting a government employee's First Amendment right to publish non-classified information—in subsequent years.[203] The result is a clear principle that even government employees may not be restricted from accessing or publishing publicly accessible information.

2. The Maryland Law Cannot Survive the *Snepp-Marchetti* Analysis

The reach of the Maryland Law would force IGG practitioners to relinquish access to a broad range of publicly accessible information. The *Snepp-Marchetti* line makes it clear that such a law goes too far and infringes directly on IGG practitioners' protected First Amendment rights. Even assuming that Maryland has a legitimate interest in protecting the release of the initial genetic matches to the Subject obtained by submitting DNA derived from a crime-scene sample to a public genetic database, that interest cannot extend to information otherwise available to the public.[204] Census records, vital records,

---

[201] *Id.* at 1313.

[202] *See id.*

[203] *See* Heidi Kitrosser, *Free Speech Aboard the Leaky Ship: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y, 410, 411 (2013)*; see also* McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983); Wilson v. CIA, 586 F.3d 171 (2d Cir. 2009).

[204] The question might arise whether the government could restrict employees and contractors from sharing something like lists of social security numbers (thanks to an anonymous reviewer for this idea). Perhaps. But laws already exist that restrict sharing of social security numbers. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-1016T, *Federal and State Laws Restrict Use of SSNs, yet Gaps Remain* (2005), https://www.gao.gov/products/gao-05-1016t. Social security numbers are, thus, not generally available to the public. If they were so available, a law restricting only particular government employees from sharing—or even receiving—them, while they otherwise proliferated freely in the public domain, would fall afoul of the right to noninterference with receipt.

obituaries published in newspapers, and even public social media posts are all accessible by the public,[205] so the information in those sources is *not* being protected by the Maryland Law. The only effect of the Maryland Law is to restrict specific individuals'—namely, IGG practitioners'—ability to access those otherwise publicly accessible materials.

IV. THE MARYLAND LAW CANNOT MEET STRICT SCRUTINY

The relevant provisions of the Maryland Law interfere with the protected First Amendment interest in noninterference with receipt, and this interest is not lessened by IGG practitioners' status as professionals or government contractors. The Maryland Law is, thus, presumptively unconstitutional. However, as is the case with all such laws, if Maryland can demonstrate that that law meets strict scrutiny, it could stand. Thus, the final question is whether the law furthers a compelling government interest and is narrowly tailored to that end.

A. The Maryland Law Arguably Seeks to Protect "An Interest of the Highest Order"

In the judiciary committee bill hearing for the HB 240, which would become the Maryland Law on February 23, 2021, Delegate Shetty, the bill's sponsor, stated the purpose of the bill as "balanc[ing] the constitutional privacy concerns of individuals who are presumed innocent and defendants with the ability of law enforcement and prosecutors to effectively use this technology."[206] To be sure, the State has an interest in protecting innocent individuals from having their lives unnecessarily intruded upon in the course of a criminal investigation, and it is clear that Maryland had such an interest in mind when putting the Maryland Law into place. While the exact interest is nowhere explicitly stated, it seems clear from surrounding context that Maryland is concerned about law enforcement building family trees based on genetic and genealogical evidence that connect innocent people and their innocent ancestors to criminal perpetrators. Natalie Ram, a law professor who testified in support of the Maryland Law,[207] has written that IGG "subject[s] ordinary individuals to suspicionless genetic

---

[205] *See supra* Part II.C.

[206] *Forensic Genetic Genealogy DNA Analysis, Searching, Regulation, and Oversight: Hearing on H.B. 240*, *supra* note 190.

[207] Natalie Ram, *Written testimony of Prof. Natalie Ram supporting Senate Bill 187* (2021), https://mgaleg.maryland.gov/cmte_testimony/2021/jpr/1gMP-3A24Apotay4ezdSrOL74wYqh7xdo.pdf (last visited May 9, 2023).

searches"[208] and that "genetic profiles yield an extensive web of genetic relatives through whom an individual may potentially be identified . . . [and] [s]uch broad identifiability makes large swaths of American residents genetically identifiable to law enforcement, whether or not they have themselves participated in a consumer genetics platform."[209] Erin Murphy, another law professor who testified in support of the Maryland Law, has written similarly about the about the potential effects of individuals learning that they are related to a serious criminal perpetrator.[210]

Whether the interest articulated by Delegate Shetty and expanded on by Ram and Murphy is one of the "highest order" is debatable.[211] Innocent individuals are routinely caught up in criminal investigations and often those individuals are family members of the true perpetrator. Indeed, it is the very nature of criminal investigations that they intrude, on some level, on the lives of innocent individuals. Even the most clear-cut criminal investigation implicates an innocent person—at least for legal purposes—up until the moment of conviction, when the presumption of innocence vanishes.[212] But most criminal investigations are not so clear cut, and any number of innocent individuals may have their information—including publicly accessible and non-publicly accessible—accessed by law enforcement.[213] Some of these innocent individuals may be suspects, but often they are simply individuals who have some coincidental relation to the investigation. Thus, it is not clear that the privacy interests of individuals in the context of a law enforcement investigation is an interest of the highest order since that interest is routinely overridden by the interest in ensuring law enforcement can solve crimes. However, there is no harm in assuming, for the sake of argument, that the interest articulated

---

[208] Ram et al., *Genealogy Databases and the Future of Criminal Investigation*, *supra* note 7, at 4.

[209] Natalie Ram, *Investigative Genetic Genealogy and the Problem of Familial Forensic Identification*, *in* CONSUMER GENETIC TECHNOLOGIES: ETHICAL AND LEGAL CONSIDERATIONS, 211, 218 (2021).

[210] Erin Murphy, *Testimony of Erin Murphy* (2019), https://mgaleg.maryland.gov/cmte_testimony/2020/jpr/3363_03102020_103023-811.pdf (last visited May 9, 2023).

[211] Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

[212] *See* Ross v. Moffitt, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view it to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt.").

[213] In addition to publicly accessible records, law enforcement has access to non-publicly accessible databases that contain drivers' licenses, license plates, non-public criminal history, etc.

by Delegate Shetty is, indeed, an "interest of the highest order"[214] because the Maryland Law cannot meet the second prong of the strict scrutiny analysis.

B. The Maryland Law is Both Overbroad and Underinclusive

A restriction on First Amendment protected speech is unconstitutionally overbroad when it restricts more speech than necessary to accomplish the state's compelling interest in regulating that speech and "could never be applied in a valid manner" or inhibit the "constitutionally protected speech of third parties."[215] However, the Court has made it clear that the overbreadth doctrine is "strong medicine" that should be only "sparingly" employed, preferring limiting constructions that narrow the reach of the restriction only to unprotected speech.[216]

The Maryland Law is substantially overbroad. As described in Part I, the law requires IGG practitioners to turn over "all records and materials collected in the course of the FGGS, including material sourced from public records . . . ."[217] On its face, this language includes publicly accessible records such as census records, vital records, public social media posts, and others. Yet, it is possible that a Maryland court could put a limiting construction on the language, applying it only to *non*-public records and materials accessed and created by IGG practitioners in the course of their work.

The larger problem for the Maryland Law is that it is hopelessly underinclusive. As the Court in *Reed* has made clear, a restriction on speech protected by the First Amendment cannot survive if it is underinclusive since "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited . . . ."[218] If the interest of the Maryland Law is to ensure that innocent individuals' genetic and genealogical ties to a criminal perpetrator are not made public, the law cannot achieve this end. Once the identity of a criminal perpetrator is made public, any member of the public could use the same publicly accessible materials available to IGG practitioners to identify the perpetrator's parents, grandparents, cousins, and so

---

[214] *Reed*, 576 U.S. at 172.
[215] N.Y. State Club Assn. v. N.Y.C., 487 U.S. 1, 4 (1988) (internal quotations omitted) (quoting Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984)).
[216] *Id.* at 14 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).
[217] MD. CODE ANN., CRIM. PROC. § 17-102(h)(1)(ii)(1.) (LexisNexis 2022).
[218] *Reed*, 576 U.S. at 172.

on. And once genealogical ties are known, genetic ties are known as well given the predictable inheritance patterns of DNA.[219] Thus, the Maryland Law does nothing to protect the family members—whether close or distant—from being connected to the criminal perpetrator.

CONCLUSION

IGG is a revolution in investigations. Over 800 cold cases have been resolved with the help of this four-year-old technique.[220] Innocent individuals have been exonerated. Countless victims have seen justice done. At the same time, there are legitimate concerns with IGG. Many of the provisions of the Maryland Law address these concerns in a way that balances the interest in protecting the public from overzealous law enforcement with the interest in seeing serious crimes solved (and innocent people exonerated). However, the provisions of the Maryland Law that require IGG practitioners to remove their access to "all records and materials"[221] gathered in the course of their work goes too far and infringes on IGG practitioners' First Amendment rights. Specifically, the Maryland Law infringes on IGG practitioners' right of noninterference with receipt of information legally held by another and otherwise available to the public, and the IGG practitioners' status as professionals or government agents does not reduce this protection. As other jurisdictions consider regulation of IGG, they should take care to avoid the infringing provisions of the Maryland Law.[222]

---

[219] *See supra* Part I.B.
[220] Dowdeswell, *supra* note 6.
[221] § 17-102(h)(1)(ii)(1.).
[222] As of April 2023, Montana and Utah are the only other states that directly regulate IGG, and both avoid provisions that violates IGG practitioners' First Amendment rights. *See* MONT. CODE ANN. § 44-6-1 (2022); S.B. 156, 65th Leg., Gen. Sess. (Utah 2023). Others will surely follow.

REGULATING OFF-CAMPUS STUDENT EXPRESSION: *MAHANOY AREA SCHOOL DISTRICT v. B.L.*

The Good News For College Student Journalists

Leslie Klein* & Jonathan Peters**

ABSTRACT

This essay argues that the 2021 U.S. Supreme Court case *Mahanoy Area School District v. B.L.* protects off-campus college student journalism (if not published in a school-sponsored outlet) from school censorship and punishment—thanks to the majority opinion's reliance on *in loco parentis* principles. In short, *Mahanoy* made clear that K-12 students generally have diminished First Amendment rights on campus because parents have delegated to teachers and staff some of their supervisory authority. That reasoning applies with less force when students speak off campus, and it applies with no force if the speaker is a legal adult, as nearly all college students are. The consequences are far-reaching because the lower courts, for more than a decade, have expanded the authority of colleges and universities to punish students for off-campus speech, while at the same time college student journalists have been playing an increasingly critical role in meeting the news needs of their communities. This essay begins by providing context about the major Supreme Court cases that have established how student expression is regulated. Then the essay discusses the facts and reasoning of *Mahanoy*, followed by the history of the *in loco parentis* doctrine and its

---

* Leslie Klein is the Carter Research Fellow at the Grady College of Journalism and Mass Communication at the University of Georgia. She is a former public high school teacher at Florida State University Schools, in Tallahassee, where she taught English, language arts, and journalism. She also advised the award-winning student newspaper *The Tomahawk Talk* and the award-winning student yearbook *The Renegade*. She is an active member of the Law and Policy Division of the Association for Education in Journalism and Mass Communication, as well as the Journalism Education Association.

** Jonathan Peters is a media law professor at the University of Georgia, where he is the chair of the Department of Journalism and a faculty member in the School of Law. His research focuses on media law and has appeared in journals published by the law schools at Berkeley, Harvard, NYU, Virginia, and North Carolina, among others. He is a coauthor of the book *The Law of Public Communication*, and by invitation he has blogged about the First Amendment for the *Harvard Law Review* and *Harvard Law & Policy Review*. Peters is a frequent commentator on media law issues for *The New York Times*, *The Washington Post*, *Vanity Fair*, CNN, NBC, CBS, and NPR. He has been a consultant on press rights for the U.N. Development Programme, and he is a member of OSCE-ODIHR Panel of Experts on Freedom of Peaceful Assembly and Association, which is part of the Organization for Security and Co-operation in Europe and its Office for Democratic Institutions and Human Rights.

application to public colleges and universities. All of which leads to the conclusion that *Mahanoy*, intentionally or not, through its use of *in loco parentis* principles, is highly protective of off-campus college student journalism.

INTRODUCTION

At first glance, the Supreme Court case *Mahanoy Area School District v. B.L.*, decided in 2021, may not appear to have significant implications for college student journalists.[1] After all, the facts involved a high school freshman who was suspended from her cheerleading team for sending profane Snapchats to her friends to vent her frustrations with school and life.[2] But a closer analysis of the majority and concurring opinions, which both address the extent to which public school officials may regulate off-campus student speech, reveals that *Mahanoy* is actually good news for college student journalists because of its use of *in loco parentis* principles. In short, *Mahanoy* said that K-12 students have diminished First Amendment rights when they are in school because parents have delegated to teachers and staff some of their supervisory authority.[3] That authority applies with less force when students speak off campus, and critically it applies with no force if the speaker is a legal adult, as nearly all college students are.[4] This has far-reaching consequences because, for more than a decade, the lower courts have expanded the authority of state colleges and universities to punish students for their off-campus speech.[5]

At the same time, college student journalists have been playing a critical role in meeting their communities' news needs.[6] In a number of states, there are more students than full-time

---

[1] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
[2] *Id*. at 2040.
[3] *Id*. at 2046.
[4] Frank D. LoMonte, *The Supreme Court's Cheerleader Decision Has Something to Frustrate and Disappoint Everyone*, SLATE (June 25, 2021, 12:07 PM), https://slate.com/technology/2021/06/supreme-court-snapchat-cheerleader-student-speech-rights.html.
[5] *See, e.g.*, Keefe v. Adams, 840 F.3d 523 (8th Cir. 2016); Yoder v. Univ. of Louisville, 526 Fed. Appx. 537 (6th Cir. 2013); Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).
[6] Jonathan Peters and Frank D. LoMonte, *College Journalists Need Free Speech More Than Ever*, THE ATLANTIC (March 1, 2013), https://www.theatlantic.com/national/archive/2013/03/college-journalists-need-free-speech-more-than-ever/273634/.

journalists covering the legislature,[7] and, in some towns, a college media outlet is the only source of news.[8] Student journalists often report important stories not reported in other media, too, because of their special access to campus and to fellow students as well as faculty and staff.[9]

Recently, for example, college student journalists have been profiles in honest and courageous reporting during the COVID pandemic.[10] They have exposed campus outbreaks and raised questions about reopening plans.[11] They have documented social-distancing violations on and off campus.[12] They have followed and explained fast-breaking changes to instructional modes and public events.[13] They have demanded transparency from administrators.[14] Through it all, they have told the story of the human experience. At the University of North Carolina-Chapel Hill, the independent *Daily Tar Heel* published a biting editorial under the headline "UNC has a clusterfuck on its

---

[7] Anna Schiffbauer, *Under the Dome: As Professional News Outlets Vacate State Capitols Because of Budget Constraints, Student Journalists Move in to Fill the Gap*, SPLC (March 24, 2015), https://splc.org/2015/03/under-the-dome-2/.

[8] Dan Levin, *When the Student Newspaper Is the Only Daily Paper in Town*, N.Y. TIMES (Oct. 19, 2019), https://www.nytimes.com/2019/10/19/us/news-desert-ann-arbor-michigan.html.

[9] Amelia Nierenberg, *Covid Is the Big Story on Campus. College Reporters Have the Scoop.*, N.Y. TIMES (Nov. 20, 2020), https://www.nytimes.com/2020/11/04/us/college-journalists-covid.html.

[10] Jonathan Peters, *The Legal Landscape for Frontline Student Journalists*, COLUM. JOURNALISM REV. (Oct. 20, 2020), https://www.cjr.org/covering_the_pandemic/covid-19-pandemic-student-journalists.php.

[11] *See, e.g.*, Matthew Fischetti and Trace Miller, *NYU's Rubin Hall Placed Under Mandatory Quarantine*, WASH. SQUARE NEWS (Sept. 14, 2020), https:// nyunews.com/news/ 2020/09/14/nyu-covid-outbreak-rubin-hall/; Elissa Nadworny and Lauren Migaki, *'We're Living The News': Student Journalists Are Owning The College Reopening Story*, WABE (Aug. 27, 2020), https://www.wabe.org/we-re-living-the-news-student-journalists-are-owning-the-college-reopening-story/.

[12] *See, e.g.*, Erin Kenney, *11 UGA Greek Fraternities Fined $24,000 for Violating Social Distancing Guidelines*, THE RED & BLACK (Sept. 17, 2020), https://bit.ly/3qWF io6.

[13] *See, e.g.*, Sage Smith, *Virtual Instruction for Iowa State Classes to Extend Through End of Spring Semester*, IOWA ST. DAILY (March 18, 2020), https://iowastatedaily.com/240203/news/virtual-instruction-for-iowa-state-classes-to-extend-through-end-of-spring-semester/; Blaise Mesa, *Breaking: Commencement Canceled; Manifest May Go Virtual*, THE COLUM. CHRON. (March 23, 2020), https://columbiachronicle.com/breaking-commencement-canceled-manifest-may-go-virtual.

[14] *See, e.g.*, Editorial Staff, *Editorial: We Need Transparency as Students, Journalists*, THE DAILY GAMECOCK (Sept. 21, 2020, 12:09 AM), https://www.dailygamecock.com/article/2020/09/editorial-we-need-transparency-as-students-journalists.

hands" after virus clusters were discovered in campus housing.[15] At the University of Missouri, student journalists for *The Maneater*, also independent, reported that two students had been hospitalized with COVID-19, which was contrary to statements made by school officials and magnified by the university's instructions to staff members to "publicly support" all university decisions regarding COVID-19.[16]

College student journalists are making vital contributions to public knowledge, and their work is frequently produced off campus—through independent publications and websites and through social-media platforms, all allowing student journalists and ordinary students alike to commit acts of journalism using Twitter and Instagram.[17] Such off-campus journalism is indispensable because the Supreme Court has granted school officials expansive authority to regulate what may be published in school-sponsored student media,[18] an authority that a growing number of lower courts have extended to post-secondary institutions.[19] However, thanks to its use of *in loco parentis* principles, *Mahanoy* is a "bright-red slam-the-brakes light for colleges," holding effectively that off-campus college student journalism—provided it is not published in school-sponsored student media—is not subject to school censorship or punishment.[20] This essay explores and explains why.

Part I provides context by covering the major Supreme Court cases that set out how student expression is regulated at public schools. Part II discusses the facts and reasoning of *Mahanoy*, with a focus on its majority and concurring opinions. Part III includes a history of the *in loco parentis* doctrine and its application to colleges and universities. And, finally, the conclusion shows that *Mahanoy*, with its reliance on *in loco parentis*, will generally protect off-campus college student journalism from school censorship and punishment.

I. MAJOR SUPREME COURT CASES ON STUDENT EXPRESSION

---

[15] *North Carolina's Flagship University Moves Online After 130 Covid-19 Cases*, THE GUARDIAN (Aug. 17, 2020, 5:40 PM), https://www.theguardian.com/us-news/2020/aug/17/north-carolina-university-moves-online-covid-19.
[16] Nierenberg, *supra* note 9.
[17] *Workshop: Using Social Media as a Journalist & Advocate*, SPLC (Feb. 8, 2022), https://splc.org/2022/02/using-social-media-as-a-journalist-advocate/.
[18] Hazelwood Sch. Dist. v. Kuhlmeier*,* 484 U.S. 260 (1988).
[19] *See, e.g.*, Ward v. Polite, 667 F.3d 727 (6th Cir. 2012); Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc); Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989).
[20] LoMonte, *supra* note 4.

It is helpful to start with a wide view and some context regarding how student expression is regulated at public schools. The Supreme Court embarked upon its modern jurisprudence[21] in 1969 with its landmark decision in *Tinker v. Des Moines Independent Community School District*.[22] The case began in 1965 when three students were suspended after wearing black armbands to school in protest of the U.S.'s involvement in the Vietnam War.[23] The students and their parents filed a suit in the U.S. District Court for the Southern District of Iowa seeking nominal damages and an injunction, arguing that the school had violated their speech rights by forbidding them to wear the armbands.[24] The district court dismissed the case on the grounds that the school was within its rights to ask the students to remove the armbands to prevent disturbance.[25] The U.S. Court of Appeals for the Eighth Circuit affirmed the decision, without opinion.[26] The students then appealed to the U.S. Supreme Court, which reversed.[27]

Justice Abe Fortas, writing for the majority, said that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[28] Further, the Court held that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[29] This created what is now known as the *Tinker* standard, under which on-campus student expression is protected unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[30] Schools must demonstrate (1) "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,"[31] and (2) more

---

[21] Prior to *Tinker*, the Supreme Court noted in *West Virginia State Board. of Education v. Barnette*, 319 U.S. 624, 637 (1943) that schools perform "important, delicate, and highly discretionary functions" but must comply with the Constitution in performing them. The Court observed that the expressive rights of minors are subject to "scrupulous protection" to ensure we don't "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."
[22] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[23] *Id.* at 504.
[24] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).
[25] *Id.*
[26] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).
[27] *Tinker*, 393 U.S. at 514.
[28] *Id.* at 506.
[29] *Id.* at 511.
[30] *Id.* at 513.
[31] *Id.* at 509.

than "undifferentiated fear or apprehension of disturbance."[32] *Tinker*, then, effectively affirmed broad student speech rights while recognizing a narrow exception for student speech that schools may regulate.[33]

After *Tinker*, the Supreme Court further limited the protections for other types of on-campus student expression.[34] These limits are based on the general principle that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[35] In *Bethel School District No. 403 v. Fraser*, decided in 1986, the Supreme Court created a categorical exception for speech that is vulgar or offensive. Matthew Fraser, a high school student, was suspended after giving a speech in front of the student body that referred to another student in an "elaborate, graphic, and explicit sexual metaphor."[36] Fraser first appealed through the school board's grievance procedures, but the punishment was upheld.[37] He and his father then filed a suit in the U.S. District Court for the Western District of Washington, claiming that his First Amendment rights had been abridged. The court agreed, holding that the suspension violated his freedom of speech.[38] The U.S. Court of Appeals for the Ninth Circuit affirmed,[39] and the case later reached the Supreme Court, where the decision was reversed.[40]

The majority concluded that school administrators have the right to limit student speech because it is their public duty to educate students in civility, ultimately reasoning that "[t]he undoubted freedom to advocate unpopular and controversial

---

[32] *Id.* at 508.
[33] For more analysis of *Tinker* and its implications, see Joseph Russomanno, *Dissent Yesterday and Today: The* Tinker *Case and Its Legacy*, 11 COMMC'N. L. POL'Y 367, 367–91 (2006); Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate-Students' Rights Thirty Years After* Tinker v. Des Moines Independent Community School District, 48 DRAKE L. REV. 445, 445–72 (2000); Frank D. LoMonte, *Shrinking* Tinker*: Students Are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1323–59 (2009); Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1167–91 (2009).
[34] Rory Allen Weeks, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials' Authority Over Off-Campus Student Speech*, 46 GA. L. REV. 1157, 1157–93 (2012); Shannon M. Raley, *Tweaking* Tinker*: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 773–99 (2011).
[35] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
[36] *Id.* at 678.
[37] *Id.* at 678–79.
[38] *Id.* at 679. The oral opinion, findings of fact, conclusions of law, and judgment of the Western District of Washington are unreported.
[39] Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985).
[40] *Bethel*, 478 U.S. at 680.

views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[41] To those ends, the Court relied[42] on cases such as *Federal Communications Commission v. Pacifica Foundation*, in which the majority held that broadcasting has limited First Amendment protection partly because it is "uniquely accessible to children,"[43] and *Ginsberg v. New York,*[44] in which the majority upheld a state law making it a crime to give minors access to certain sexual materials. The *Bethel* court used those cases to make the general points that the government's power to regulate the conduct of minors reaches beyond the scope of its power over adults, and that the government's power to regulate is enhanced where the interests of minors are involved.[45]

Two years later, the Supreme Court ruled that schools can restrict some student speech in school-sponsored activities. In *Hazelwood School District v. Kuhlmeier*,[46] several high school journalists sued their school district after their principal removed pages of the student newspaper, *The Spectrum*, during the pre-publication editing and review process.[47] The pages featured two stories: one detailing experiences of teenage pregnancy and the other considering the impact of divorce on students.[48] The principal believed the articles were inappropriate and should not be published.[49] The students, in turn, filed a suit alleging that their First Amendment rights had been violated, seeking money damages and injunctive relief.[50] The U.S. District Court for the Eastern District of Missouri ruled against the students and

---

[41] *Id.* at 681.
[42] *Id.* at 684.
[43] 438 U.S. 726, 749 (1978).
[44] 390 U.S. 629 (1968).
[45] For more analysis of *Bethel* and its implications, *see* Sara Slaff, *Silencing Student Speech:* Bethel School District No. 403 v. Fraser, 37 AM. U. L. REV. 203 (1987); Therese Thibodeaux, Bethel School District No. 403 v. Fraser*: The Supreme Court Supports School in Sanctioning Student for Sexual Innuendo in Speech*, 33 LOY. L. REV. 516 (1987); Robert Block, *Students' Shrinking First Amendment Rights in the Public Schools:* Bethel School District. No. 403 v. Fraser, 35 DEPAUL L. REV. 739, 739–62 (1986); Phoebe Graubard, *The Expanded Role of School Administrators and Governing Boards in First Amendment Student Speech Disputes:* Bethel School District No. 403 v. Fraser, 17 GOLDEN GATE U. L. REV. 257, 257–78 (1987).
[46] Hazelwood Sch. Dist. v. Kuhlmeier*,* 484 U.S. 260 (1988).
[47] *Id.* at 262–64.
[48] *Id*. at 263.
[49] *Id*. at 263–64.
[50] Kuhlmeier v. Hazelwood Sch. Dist., 596 F. Supp. 1422 (E.D. Mo. 1984); Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450 (E.D. Mo. 1985).

observed that "school officials may impose restraints on students' speech in activities that are 'an integral part of the school's educational function.'"[51] The U.S. Court of Appeals for the Eighth Circuit reversed, citing *The Spectrum*'s status as a public forum.[52]

Ultimately, the Supreme Court found that the student paper was *not* a public forum, either by policy or practice, and reversed again. As the majority put it, "Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns."[53] *The Spectrum* was written and edited by students in a journalism course at the school and was funded by the school district; therefore, it was not a public forum. Moreover, the Court held that where a school is acting as a publisher, it may dissociate itself from student speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," as well as from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[54] Consequently, *Hazelwood* set the precedent that some school-sponsored student expression could be regulated more strictly than other on-campus student expression.[55]

Finally, in 2007, the Supreme Court held that schools may regulate student expression that teachers or administrators "reasonably regard as promoting illegal drug use."[56] In *Morse v. Frederick*, the 5–4 majority ruled that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use]."[57] Students at a high school in Juneau, Alaska, were permitted to

---

[51] *Hazelwood,* 484 U.S. at 264.
[52] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986).
[53] *Hazelwood,* 484 U.S. at 273.
[54] *Id.* at 271.
[55] For more analysis of *Hazelwood* and its implications, see Frank D. LoMonte, *The Key Word Is Student:* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 305–63 (2013); J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706 (1988); Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After* Hazelwood School District v. Kuhlmeier*: A Content Analysis Case Study*, 29 J.L. & EDUC. 463 (2000); Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008).
[56] Morse v. Frederick, 551 U.S. 393, 408 (2007).
[57] *Id.* at 410.

leave class as an approved event or class trip to observe the 2002 Winter Olympics torch relay from a nearby street, while teachers and administrators supervised the students.[58] One of them, Joseph Frederick, stood with his friends across the street from the school and held up a banner that read "BONG HiTS 4 JESUS."[59] He was suspended after refusing to comply with his principal's order to take down the banner.[60]

Frederick filed a suit in the U.S. District Court for the District of Alaska, alleging that his First Amendment rights had been violated, but the court granted summary judgment in the principal's favor, saying she "had the authority, if not the obligation, to stop such messages at a school-sanctioned activity."[61] The Ninth Circuit reversed and cited *Tinker*, finding that there was no evidence that the banner was substantially disruptive.[62] The Supreme Court reversed again, concluding that because the banner did not contain political speech and the school had a compelling interest in dissuading drug use among students, the principal was within her rights not only to ask Frederick to take the banner down but also to suspend him when he did not do so.[63] Notably, Chief Justice John Roberts, writing for the majority, emphasized that Frederick was "in the midst of his fellow students, during school hours, at a school-sanctioned activity," adding, "There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts."[64]

II. *MAHANOY V. B.L.* AND REGULATING OFF-CAMPUS STUDENT EXPRESSION

That "uncertainty at the outer boundaries" was the focus of *Mahanoy Area School District v. B.L.*, the most recent Supreme

---

[58] *Id.* at 397.
[59] *Id.*
[60] *Id.* at 396.
[61] Frederick v. Morse, No. J 02–008 CV(JWS), 2003 WL 25274689, at *5 (D. Alaska May 27, 2003).
[62] Frederick v. Morse, 439 F.3d 1114, 1123, 1125 (9th Cir. 2006).
[63] *Morse*, 551 U.S. at 409–10.
[64] *Id.* at 401. For more analysis of *Morse* and its implications, see Clay Calvert, *Misuse and Abuse of* Morse v. Frederick *by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1 (2008); Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835 (2008); Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17 (2008); Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 WM. & MARY BILL RTS. J. 657 (2009); Emily Gold Waldman, *No Jokes About Dope:* Morse v. Frederick*'s Educational Rationale*, 81 UMKC L. REV. 685 (2013).

Court case regarding student expression.[65] It required the justices to consider whether off-campus student speech should be regulated under the same standards as on-campus student speech.[66] The respondent, Brandi Levy, attended Mahanoy Area High School, a public school in Pennsylvania.[67] As a freshman, she tried out for the varsity cheerleading team and a local private softball team.[68] When she did not make the cheerleading team or get her preferred softball position, she used the social media application Snapchat to complain to her friends.[69] Levy posted two photos to her Snapchat story that were only viewable for 24 hours by her approximately 250 Snapchat friends.[70] The first photo was of Levy and her friend with their middle fingers raised to the camera, and it included the caption "Fuck school fuck softball fuck cheer fuck everything."[71] The second photo was blank but had the caption "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?"[72] Both photos were taken and posted at the Cocoa Hut, a convenience store in Mahanoy City.[73]

Members of the cheerleading team viewed the photos, and at least one member took a picture of the photos to share with other team members.[74] The photos were also shown to the cheerleading coaches, who discussed them with the school principal.[75] Then, supported by the athletic director, principal, superintendent, and school board, the coaches decided that Levy's use of profanity violated the team's rules, and she was suspended from the junior varsity team (on which she had earned a spot) for the coming year.[76] In turn, Levy and her parents filed a suit in the U.S. District Court for the Middle District of Pennsylvania alleging that the punishment violated Levy's First Amendment rights.[77]

The district court granted a preliminary injunction that ordered the school to allow Levy to return to the cheerleading

[65] Mahanoy Area Sch. Dist. v. Levy *ex rel*. B.L., 141 S. Ct. 2038 (2021).
[66] *Id*.
[67] *Id.* at 2043.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Levy *ex rel*. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp.3d 429, 433 (M.D. Pa. 2019).

team.[78] The court also held that under *Tinker* the Snapchat posts had not caused substantial disruption of normal school activities and, therefore, found that Levy's punishment violated the First Amendment.[79] The case was brought to the U.S. Court of Appeals for the Third Circuit, which affirmed.[80] The court held that while there was no evidence Levy's speech caused a substantial disruption of school activities, the *Tinker* standard should not apply because it was a matter of off-campus speech.[81] The Third Circuit held that because the photos constituted off-campus speech, the school could not discipline Levy. [82] The school district asked the Supreme Court to review the case and decide whether *Tinker* applies to off-campus student speech.[83]

The majority opinion, written by Justice Stephen Breyer, held that public schools may have a special interest in regulating *some* off-campus student speech, but the interests offered by the school in this case were not sufficient to overcome Levy's interest in free expression.[84] More specifically, the Court noted certain types of speech and behavior that schools may have a special interest in regulating: (1) severe bullying or harassment; (2) threats aimed at teachers or students; (3) the failure to follow rules during online school activities; and (4) breaches of school security devices.[85]

The majority acknowledged that speech is not necessarily off-campus just because a student is not on physical school property, observing that remote learning and extra-curricular activities can extend the boundaries of on-campus activity.[86] The Court declined, however, to set a black-letter rule regarding what constitutes off-campus student speech and how that speech may

---

[78] *Id.*
[79] *Id.* at 444–45.
[80] Levy *ex rel*. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020).
[81] *Id.* at 178.
[82] *Id.*
[83] Because the *Mahanoy* case came down so recently, there is not yet much published scholarship on it, but several articles analyzing its implications are worthy of noting: David L. Hudson Jr., Mahanoy Area School District v. B.L.*: The Court Protects Student Social Media but Leaves Unanswered Questions*, 2021 CATO SUP. CT. REV. 93 (2021); Jenny Diamond Cheng, *Deciding Not to Decide:* Mahanoy Area School District v. B.L. *and the Supreme Court's Ambivalence Towards Student Speech Rights*, 74 VAND. L. REV. EN BANC 511 (2021); Victoria Bonds, *Tinkering with the Schoolhouse Gate: The Future of Student Speech After* Mahanoy Area School District v. B.L., 42 LOY. L.A. ENT. L. REV. 83 (2022); Meghan K. Lawrence, Tinker *Stays Home: Student Freedom of Expression in Virtual Learning Platforms*, 101 B.U.L. REV. 2249 (2021).
[84] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2045 (2021).
[85] *Id.*
[86] *Id.*

be regulated by public schools.[87] Justice Breyer wrote that the Court "hesitate[s] to determine precisely which of many school-related off-campus activities belong on such a list" and "how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself."[88] Instead, the Court outlined three features of off-campus student speech that would diminish the authority of school officials to regulate such speech—to be considered in this case and in future litigation.[89]

First, the Court determined that schools rarely stand *in loco parentis* (i.e., in place of parents) for off-campus student speech because geographically that speech will normally fall to the regulation of a student's actual parents.[90] Second, because regulating off-campus and on-campus student speech would result in the regulation of *all* student speech in a 24-hour period, "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."[91] Third, because the public schools have a material interest in protecting unpopular student expression as "the nurseries of democracy," the majority reasoned that schools have an inherent interest in not regulating unpopular speech, particularly if it takes place off campus.[92]

Applying those considerations to Levy's case, the Court held that the school violated her First Amendment rights by suspending her from the cheerleading squad.[93] The majority concluded that Levy's Snapchats amounted to criticism of her school's rules and that they did not involve characteristics (e.g., threats, severe bullying, or harassment) placing them outside First Amendment protection.[94] Moreover, the Court held that the circumstances of Levy's speech *did* diminish the school's interest in regulating it.[95] Her Snapchats were sent outside of school hours, off campus, using a personal cellphone, to an audience of friends.[96] As a result, the Court found that the school did not stand *in loco parentis* because "there is no reason to believe B.L.'s parents had delegated to school officials their own control

---

[87] *Id.*
[88] *Id.*
[89] *Id.* at 2046.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 2040.
[93] *Id.* at 2047–48.
[94] *Id.*
[95] *Id.* at 2047.
[96] *Id.*

of B.L.'s behavior at the Cocoa Hut."[97] Moreover, Levy's posts neither identified the school nor targeted a member of the school community,[98] and, based on the factual record, there was no evidence of substantial disruption of normal school activities.[99] The majority opinion closed by noting that "[i]t might be tempting to dismiss B.L.'s words as unworthy of . . . robust First Amendment protections . . . , [but] sometimes it is necessary to protect the superfluous in order to preserve the necessary."[100]

Justice Clarence Thomas filed a lone dissent that explored the First Amendment's ordinary meaning at the time of the Fourteenth Amendment's ratification, ultimately asserting that schools historically had expansive discretion to discipline students—and, therefore, Levy's suspension from the cheerleading team was permissible.[101] In his concurring opinion, Justice Samuel Alito, joined by Justice Neil Gorsuch, discussed in greater detail the doctrine of *in loco parentis*.[102] He noted that during the Founding era, a father implicitly consented for his child to give up some of the child's free-expression rights when enrolling the child in education.[103] Justice Alito went on to explain that whether a school can regulate particular types of off-campus student expression is an issue of whether parents, under the given circumstances, could reasonably be understood to have delegated that authority to the school (he provided as examples online instruction and transportation to and from the school).[104] As one legal commentary put it: "[T]he concurrence relied on the early conceptions of the *in loco parentis* doctrine to strike a

---

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 2048.
[101] *Id.* at 2059 (Thomas, J., dissenting). Thomas also wrote that "a more searching review reveals that schools historically could discipline students in circumstances like those presented here." *Id.* He added that "the majority fails to consider whether schools often will have more authority, not less, to discipline students who transmit speech through social media." *Id.* at 2062. He asserted, too, that schools could more easily restrict the speech of students "who are active in extracurricular programs [and] have a greater potential, by virtue of their participation, to harm those programs." *Id.* And he reasoned that the majority opinion was "untethered from any textual or historical foundation," leaving the lower courts to figure out how to apply the *Mahanoy* framework. *Id.* at 2061, 2063.
[102] *Id.* at 2048 (Alito, J., concurring).
[103] *Id.* at 2051 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453 (1765)).
[104] *Id.* at 2054.

middle ground between the dissent's historical and the majority's doctrinal approaches."[105]

III. *IN LOCO PARENTIS* AND HIGHER EDUCATION

The *in loco parentis* doctrine is derived from English common law and the eighteenth-century writings of William Blackstone, who first used the term when he observed:

> [The father] may also delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, . . . that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[106]

Applied to modern times in the United States, as Justice Alito wrote in his concurrence, this is a doctrine of "inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[107] In practice, courts in the twentieth century frequently construed *in loco parentis* as a source of plenary power for K-12 schools, allowing them to conduct and justify, for example, invasive searches[108] and corporal punishment.[109]

At the post-secondary level, early American colleges were modeled after those in England, meaning they played a paternalistic role in housing and educating students, with a distinct emphasis on virtuous moral development.[110] It was not until after the Civil War that colleges began to transform into the universities that we know today that focus on research and

---

[105] *First Amendment—Free Speech—Public Schools—*Mahanoy v. B.L., 135 HARV. L. REV. 353, 358 (2021).
[106] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *441 (1765).
[107] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2052 (2021) (Alito, J., concurring).
[108] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (affirming a policy of mandatory random drug testing for public school student athletes); New Jersey v. T.L.O., 469 U.S. 325 (1985) (affirming a practice of warrantless searches for cigarettes and drugs in public schools).
[109] Ingraham v. Wright, 430 U.S. 651 (1977) (affirming a practice of disciplinary corporal punishment of public school students); *see also* William C. Nevin, *In the Weeds with Thomas:* Morse*, In Loco Parentis, Corporal Punishment, and the Narrowest View of Student Speech Rights*, 2014 B.Y.U. EDUC. & L.J. 249 (2014).
[110] Brian Jackson, *Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1136 (1991).

instructional curricula.[111] With that in mind, the doctrine's use at the post-secondary level in the U.S. traces back to the 1886 case *People v. Wheaton College*, in which a student at a private college was suspended for joining a secret society in violation of campus rules.[112] The Supreme Court of Illinois ruled in the college's favor, writing that colleges had been given the discretionary power to "regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family."[113] Although the opinion did not explicitly discuss or reference *in loco parentis*, it clearly channeled the doctrine's underlying theory by recognizing that the college's broad authority was similar to that of a parent.[114]

In loco parentis made its first explicit appearance at the post-secondary level in *Gott v. Berea College*, a 1913 case in which several students were expelled from a private liberal arts college for violating an institutional rule prohibiting its enrolled students from eating at off-campus restaurants.[115] A restaurant owner, whose establishment was across the street from campus, challenged the rule on the basis that punishing students for eating there unlawfully harmed his business.[116] Ultimately, the Kentucky Court of Appeals ruled that colleges could set conduct guidelines for their students because "[c]ollege authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils," and the doctrine of *in loco parentis* granted them the authority to "make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose."[117]

In loco parentis reappeared, explicitly, 11 years later in the 1924 case *John B. Stetson University v. Hunt*.[118] A student sued her private university for a deprivation of due process after she was summarily suspended for "ringing cow bells and parading in the halls of the dormitory at forbidden hours, cutting the lights, and such other events as were subversive of the discipline and rules

[111] *Id.* at 1141.
[112] 40 Ill. 186 (1866).
[113] *Id.* at 187.
[114] *Id.* at 187–88.
[115] 156 Ky. 376 (1913).
[116] *Id.* at 205–06.
[117] *Id.* at 206.
[118] 88 Fla. 510 (1924).

of the University."[119] The Florida Supreme Court, citing *Gott*, ruled for the university and upheld the suspension, reasoning:

> As to mental training, moral and physical discipline and welfare of the pupils, college authorities stand *in loco parentis* and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[120]

Eventually, the doctrine of *in loco parentis* fell out of favor at colleges and universities around the time of the rise of student protests in the 1960s that prompted courts nationwide to reconsider students' fundamental rights at their post-secondary institutions,[121] including those guaranteed by the First Amendment.[122] These shifts in how the courts viewed the responsibilities of college and university authorities had the effect of extending to students unprecedented autonomy to regulate their own affairs.[123] Then came the ratification of the 26th Amendment in 1971 that lowered the voting age to 18.[124] Colleges and universities could no longer use the age of majority as a rationale to act in the place of students' parents.[125] In his concurrence in the 1972 case *Healy v. James*, Justice William O. Douglas contextualized the free-speech rights of college students, stating:

> Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community. Their interests and concerns are often quite different from those of the faculty. They . . . have values, views, and

[119] *Id.* at 515.
[120] *Id.* at 513 (emphasis added).
[121] Philip Lee, *The Curious Life of in Loco Parentis at American Universities*, 8 HIGHER EDUC. IN REV. 65 (2011).
[122] *Id.* at 73–74.
[123] *Id.*
[124] U.S. CONST. amend. XXVI.
[125] *See* Lee, *supra* note 121, at 76.

> ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.[126]

The U.S. Court of Appeals for the Third Circuit said something similar in *Bradshaw v. Rawlings* in 1979: "At one time, exercising their rights and duties *In loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives . . . . [They] have reached the age of majority and are capable of protecting their own self interests."[127] The Third Circuit went on to underscore that college and university students could legally vote, marry, make a will, serve as a guardian, register as a public accountant, practice veterinary medicine, and so on.[128] As a result of these and other developments, such students had come to be "identified with an expansive bundle of individual and social interests and [to] possess discrete rights not held by college students from decades past."[129] Further, the Third Circuit observed that the "campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were . . . [a] demand for more . . . rights," adding, "In general, the students succeeded . . . in acquiring a new status at colleges throughout the country."[130]

Since the 1970s, state and federal courts alike have continued to reject the application of *in loco parentis* principles at the post-secondary level. In a 1990 case involving a private liberal arts college, the Supreme Court of Pennsylvania found that it would be "inappropriate" in modern times to invoke *in loco parentis* in higher education.[131] As the Court found, quoting *Bradshaw*:

> Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students.[132]

---

[126] 408 U.S. 169, 197 (1972) (Douglas, J., concurring).
[127] 612 F.2d 135, 140 (3d Cir. 1979).
[128] *Id.* at 139.
[129] *Id.*
[130] *Id.*
[131] Alumni Ass'n v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990).
[132] *Id*. (quoting *Bradshaw*, 612 F.2d at 138).

Two years later, a student sued Lehigh University after she became inebriated at on-campus fraternity parties and injured herself in a fall.[133] She alleged, among other claims, that the private school's "Social Policy" regarding alcohol use was a written promise to act *in loco parentis* to protect students from harm at on-campus social functions.[134] The U.S. District Court for the Eastern District of Pennsylvania ruled for Lehigh, finding that to require the university to supervise all of its students "would render null and void the freedoms won by adult students and place Lehigh *in loco parentis* . . . . Lehigh's position, and rightly so, was to assume . . . the adult students were responsible enough to make their own decisions."[135]

In a similar case involving the University of Delaware, the Supreme Court of Delaware acknowledged in 1991 that colleges and universities have a duty to protect their students by regulating dangerous activities on campus, but, at the same time, the Court concluded that "the concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life" and that to the extent "the doctrine . . . is still viable, its application is limited to claims against high school authorities."[136]

In 2010, the Third Circuit reiterated that *in loco parentis* does not apply to post-secondary institutions. A student sued the University of the Virgin Islands for charging him with violating its student code of conduct after he harassed a person who had accused his friend of rape.[137] The Court wrote that "[t]he idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance."[138] This echoed an Eighth Circuit opinion from 2003, in which the three-judge panel commented that "since the late 1970s, the general rule is that no special relationship exists between a college and its own students."[139] All of which is to say: Although the Supreme Court has not directly ruled on the use of *in loco parentis* on college and university campuses, there is a substantial body of law developed by the lower courts in the past 50 years that rejects such uses.

---

[133] Booker v. Lehigh Univ., 800 F.Supp. 234, 235 (E.D. Pa. 1992).
[134] *Id.* at 237.
[135] *Id.* at 241.
[136] Furek v. Univ. of Del., 594 A.2d 506, 516–17 (Del. 1991).
[137] McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010).
[138] *Id.* at 245.
[139] Freeman v. Busch, 349 F.3d 582, 587 (8th Cir. 2003).

IV. CONCLUSION

Depending on the circumstances and jurisdiction, the First Amendment rights of a college student journalist—assuming that she attends a public school—may be subject to limits (where, for example, a school-sponsored media outlet is involved). But *Mahanoy*, because of its use of *in loco parentis* principles, effectively declared that off-campus college journalism—if it is not published in a school-sponsored outlet—is beyond the reach of institutional censorship or punishment.[140]

The *in loco parentis* doctrine is derived from English common law and the writings of Blackstone,[141] but in the modern era in the United States it has evolved into a doctrine of "inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[142] Although its use at the post-secondary level traces back to 1886,[143] it fell out of favor at colleges and universities in the 1970s amid widespread student protests that prompted the courts to reconsider the nature and scope of students' rights at post-secondary institutions,[144] including those guaranteed by the First Amendment.[145] This is significant because in addressing the extent to which public school officials may regulate off-campus student speech, in *Mahanoy* the Supreme Court relied on *in loco parentis* to justify the diminution of students' First Amendment rights in a K-12 school on the theory that parents have delegated to the school some of their supervisory authority.[146] In turn, Justice Breyer's majority opinion noted that schools rarely stand in the place of parents for off-campus student speech because geographically that speech normally falls to the regulation of a student's actual parents.[147] And, in any event, *in loco parentis* does not apply if the student speaker is a legal adult, as nearly all college students are.

The last 50 years of case law makes clear that *in loco parentis* cannot be used to regulate college student behavior or expression. State and federal courts alike have rejected the

---

[140] Mahanoy Area Sch. Dist. v. Levy *ex rel* B.L., 141 S. Ct. 2038, 2048 (2021).
[141] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *441 (1765).
[142] *Mahanoy*, 141 S. Ct. at 2052.
[143] People ex rel. Pratt v. Wheaton Coll., 40 Ill. 186 (1866).
[144] Lee, *supra* note 121, at 65.
[145] *Id.* at 73–74.
[146] *Mahanoy,* 141 S. Ct. at 2045.
[147] *Id.*

application of *in loco parentis* principles at the post-secondary level. Justice Douglas said that "[s]tudents—who, by reason of the Twenty-Sixth Amendment, become eligible to vote when 18 years of age—are adults."[148] The Third Circuit said that college students now "possess discrete rights not held by . . . students from decades past"[149] and that "[t]he idea that . . . universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance."[150] The Supreme Court of Pennsylvania said that it would be "inappropriate" in modern times to invoke *in loco parentis* in higher education.[151] The Eastern District of Pennsylvania said that to apply *in loco parentis* to a university "would render null and void the freedoms won by adult students,"[152] and the Supreme Court of Delaware said that "the concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life."[153] Again, shifts in how the lower courts viewed the responsibilities of college and university authorities have had the effect of extending to post-secondary students the general autonomy to regulate their own affairs.[154] Colleges and universities can no longer use the age of majority as a rationale to act in the place of parents.[155]

The Supreme Court's reliance on *in loco parentis* in *Mahanoy* means that off-campus college student journalism, if not published in a school-sponsored outlet, will generally be protected from institutional censorship and punishment. This is significant because the lower courts, for more than a decade, have expanded the authority of state colleges and universities to punish students for their off-campus speech. And at the same time, college student journalists have been playing a critical role in meeting their communities' news needs, producing a large amount of it off campus through independent publications and websites and through social-media platforms like Twitter, Facebook, and YouTube. This is all the more meaningful because of Supreme Court precedent granting school officials expansive authority to regulate the content of school-sponsored

[148] Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).
[149] Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979).
[150] McCauley v. Univ. of the V.I., 618 F.3d 232, 245 (3d Cir. 2010).
[151] Alumni Ass'n v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990).
[152] Booker v. Lehigh Univ., 800 F. Supp. 234, 241 (E.D. Pa. 1992).
[153] Furek v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991).
[154] Lee, *supra* note 121, at 73–74.
[155] *Id.*

student media, with a growing number of lower courts extending that authority to post-secondary institutions. However, *Mahanoy*'s use of *in loco parentis* principles promises to neutralize the effects of that authority for off-campus college student journalists, serving as a "bright-red slam-the-brakes light for colleges" that otherwise might be tempted to engage in censorship or punishment in connection with their work.[156]

[156] LoMonte, *supra* note 4.

WHEN CIVIL RIGHTS AND RELIGIOUS FREEDOM COLLIDE: DISCERNING THE DIFFERENCE BETWEEN STATUTORY EXEMPTIONS TO ANTI-DISCRIMINATION STATUTES AND THE MINISTERIAL EXCEPTION

Ashley E. Treible[*]

Table of Contents

I. Introduction ***61***
II. Exemptions for Religious Organizations to Anti-Discrimination Statutes ***63***
A. The History of the Civil Rights Act **64**
B. Origins of the Exemption **65**
C. State Equivalents to the Civil Rights Act **67**
D. Judicial Interpretation of the Statutory Exemption **67**
E. The Boundaries of the Statutory Exception **68**
III. The Constitutional Ministerial Exception ***70***
A. Judicial History of the Ministerial Exception **71**
B. Current Status **75**
IV. The Interplay with LGBTQ+ Rights ***76***
V.* Woods v. Seattle Gospel Union Mission** ***79
A. Case History **79**
B. Washington Supreme Court's Reasoning **82**
C. Misapplication of the Ministerial Exception **84**
D. Implications from the Ruling **86**
VI. Conclusion and Recommendation ***86***

I. INTRODUCTION

There is little disagreement that discriminatory employment practices are often damaging and should generally be prohibited. The Fourteenth Amendment guarantees freedom from such injurious practices in public employment settings.[1] Nevertheless, our country's history is rife with examples of marginalized genders, races, or other groups being excluded from employment based solely on their group identity.[2] In response, almost six decades ago, the Civil Rights Act of 1964 laid a foundation for barring such practices, and nearly all states

---

[*] J.D. Candidate, Class of 2023, University of North Carolina School of Law
[1] *See Equal Protection*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection (last visited Aug. 15, 2022).
[2] Roxann Wedegartner, *Editorial, History of Job Discrimination*, GREENFIELD RECORDER (June 27, 2018, 9:00 AM), https://www.recorder.com/wedegartner-18133865; *see also A History of Progress: African Americans in the Workforce*, PEOPLESCOUT, https://www.peoplescout.com/insights/racial-discrimination-in-the-workplace/ (last visited Aug. 1, 2022).

responded by enacting anti-discrimination laws at the state level, many of which exceed the federal protections.[3]

Both federal and state statutes largely exempt religious organizations from certain anti-discrimination requirements, allowing them the freedom to make employment decisions based on an applicant's religious beliefs.[4] These exemptions protect religious organizations from being forced to employ people who hold conflicting religious beliefs and ensure the separation of church and state established in the First Amendment.[5]

However, in the past decade, there has been a growing tension between the right of employees to be free from discriminatory employment practices and the right of religious organizations to hire only those who adhere to a similar belief system—a classification referred to as coreligionists.[6] As a result, "[t]he [C]ourt is confronted with the clash of two deeply held American convictions. One, embodied in the Civil Rights Acts . . . , is to prevent discrimination; the other, embodied in the First Amendment . . . is to protect the free exercise of religion."[7]

To complicate matters, the Supreme Court has created two different pathways by which religious organizations can seek protection for their hiring practices.[8] One path is embodied in the statutory exemptions to anti-discrimination laws, and the other is rooted in the First Amendment.[9]

---

[3] *See* Lisa Nagele-Piazza, *Not All State Employment Discrimination Laws Are Created Equal*, SHRM (Sept.15, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-employment-discrimination-laws.aspx; *see also Discrimination - Employment Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 27, 2015), https://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.

[4] *See* John T. Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J. L. & RELIGION 280, 285 (2018).

[5] *See id.*

[6] *See id.* at 584 ("Even though the religious exemption in Title VII is nearly half a century old, real-world cases testing its limits are only just now visible on the horizon."); *see Coreligionist*, MERRIAM-WEBSTER (12th ed. 2022); *see also* Daniel J. Rosenthal, *Charitable Choice Programs and Title VII's Co-Religionist Exemption*, 39 CREIGHTON L. REV. 641, 642 (2006).

[7] EEOC v. Roman Cath. Diocese of Raleigh, N.C., 48 F. Supp. 2d 505, 507 (E.D.N.C. 1999), *aff'd*, 213 F.3d 795 (4th Cir. 2000).

[8] *See* Melcon, *supra* note 4, at 286 ("Title VII is also subject to an *implicit* religious exemption known as the 'ministerial exception,' not to be confused with the *explicit* exemption in §702(a). This implicit ministerial exception is thought to arise from the Establishment Clause, and precludes the application of Title VII and other employment nondiscrimination laws from claims concerning the employment relationship between a religious institution and its ministers. In other words, none of Title VII's prohibitions apply to ministers, even its prohibitions against sex and race discrimination." (citations omitted)).

[9] *Id.*

This Note seeks to clarify the distinctions between statutory exemptions for religious organizations to anti-discrimination statutes, which are found in both the federal Civil Rights Act and state statutes, and the ministerial exception, which is rooted in the First Amendment. Part One will examine the history and function of state and federal statutory exemptions for religious organizations. Part Two will analyze the constitutional ministerial exception. Part Three will assess the current judicial landscape concerning LGBTQ+ rights, discriminatory practices, and religious freedoms. Part Four will discuss how the convoluted interplay between the two defenses resulted in an erroneous ruling in *Woods v. Seattle's Union Gospel Mission*.[10]

While both anti-discrimination statutes and the Constitution permit religious organizations freedom in hiring decisions, clarifying the difference will allow courts to protect religious freedoms more effectively while simultaneously promoting equitable employment practices.

II. ANTI-DISCRIMINATION STATUTES' EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS

In accordance with the principles of equal protection, both state and federal legislatures have rightfully enacted legislation to prohibit employment discrimination and ensure equal protection for historically marginalized groups.[11] These statutes seek to protect those seeking employment and those already employed from unlawful discrimination—safeguarding employees from discrimination based on race, gender, religion, national origin, and more.[12] The protections make it impermissible for a company to refuse to hire a woman solely based on her gender or for a secular organization to fire an employee for recently converting to Judaism.

However, while discriminatory employment practices are often thought of as invidious and un-American, certain types of employment discrimination are not only permissible but crucial for building an effective workplace. Clearly, companies should be permitted to hire an applicant with more experience or whose personality would best fit the workplace. A daycare should refuse

---

[10] *See generally* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (Wash. 2021).

[11] *See* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 469–70 (2002).

[12] *See, e.g.*, 42 U.S.C. § 2000e-2.

to hire someone who does not like children. A nonprofit should pass over an applicant who does not believe in its cause. Similarly, statutory exemptions to anti-discrimination legislation permit religious organizations to only hire those whose religious beliefs accord with the organizations' stated beliefs.[13]

A. The History of the Civil Rights Act

The Civil Rights Act is the cornerstone of most anti-discrimination statutes.[14] In response to the racial unrest of the 1950s and early 1960s, President Kennedy proposed that Congress should introduce a bill that would guarantee freedom from discrimination regarding "race, color, religion, national origin, or ancestry."[15] Over the next year, the bill went through multiple revisions, drastically altering its content.[16]

From its inception, the bill was controversial and met with stringent resistance from certain factions within the legislature.[17] Members of Congress fiercely disagreed about which types of discrimination should be included.[18] Some advocated for including age as a protected class;[19] others saw the bill only as a mechanism to punish southern states for their racist heritage.[20]

Congressman Howard Smith, who vehemently opposed the bill, "offered an amendment that included sex among the protected categories, a measure aimed to prevent discrimination against what he gleefully called a 'minority sex.'"[21] Certain legislators were appalled at the implication that both sexes should be treated equally in the workplace.[22] In reality, Smith agreed with them.[23] He had no intention of sex being included in the bill; he merely wanted to point out that the bill was "as full of booby traps as a dog is full of fleas."[24]

---

[13] *See* Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L. J. 86, 118 (2002).
[14] *See* Rosenthal, *supra* note 6, at 642.
[15] H.R. REP. NO. 88-914, pt. 1 at 87 (1963), as reprinted in 1964 U.S.C.A.N. 2391, 2444.
[16] Belcove-Shalin, *supra* note 13, at 89–91.
[17] *See id.* at 89–90.
[18] *Id.* at 90.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 89 (quoting 110 Cong. Rec. 2484 (1964)).
[22] *See id.* at 89–90.
[23] *Id.* at 89.
[24] *Id.* (quoting CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 116 (1985)).

Unsurprisingly, the process to get the bill signed into law was arduous.[25] After the longest filibuster in congressional history, the country's religious leaders rallied together to help get the bill passed.[26] "Two hundred clergymen from forty-one states traveled to Washington D.C. to solicit their representatives. Seminaries from different parts of the country dispatched their students to conduct a round-the-clock vigil at the Lincoln Memorial."[27]

Journalists Robert Novak and Rowland Evans remarked that "[n]ot since Prohibition has the church attempted to influence political action in Congress as it is now doing on behalf of President Johnson's civil rights bill."[28] Georgia Senator Richard Russell, who had led the filibuster attempt, lamented, "I have observed with profound sorrow the role that many religious leaders have played in urging passage of the bill, because I cannot make their activities jibe with my concept of the proper place of religious leaders in our national life."[29] Indeed, "[n]ever before . . . had so many religious people expended so much time, money, and energy in support of a single piece of legislation."[30]

Coupled with other heroic efforts, such as the March on Washington and protests across the South, the clergy members' show of support worked.[31] On June 10, 1964, the Senate passed the Civil Rights Act of 1964.[32] Ironically, Congressman Smith had miscalculated support for the inclusion of sex as a discriminating factor, and much to his horror, the bill's final iteration prohibited discrimination based on sex.[33]

B. Origins of the Exemption

Once passed, Title VII of the Civil Rights Act made it unlawful for an employer to hire, fire, or otherwise discriminate against an employee based on race, color, sex, national origin, or religion.[34]

---

[25] *See Civil Rights Act of 1964*, HISTORY.COM (Jan. 4, 2010), https://www.history.com/topics/black-history/civil-rights-act.
[26] *See* Belcove-Shalin, *supra* note 13, at 90.
[27] *Id.*
[28] JOHN W. COMPTON, THE END OF EMPATHY: WHY WHITE PROTESTANTS STOPPED LOVING THEIR NEIGHBORS 169 (Oxford Univ. Press 2020).
[29] *Id.* at 169–70.
[30] *Id.* at 170.
[31] *See* Belcove-Shalin, *supra* note 13, at 90.
[32] *Id.*
[33] *Civil Rights Act of 1964*, ENCYCLOPEDIA VA., https://encyclopediavirginia.org/entries/civil-rights-act-of-1964/ (last visited Mar. 17, 2022).
[34] 42 U.S.C. § 2000e-2.

> This legislation put every employer and federal agency on notice that racism would no longer be tolerated. It provided an enforcement mechanism in the form of the Equal Employment Opportunity Commission endowed with subpoena power and the right to sue biased employers. And, it gave blacks, women, and religious minorities strong protections against discrimination in the workplace.[35]

While the bill was born out of a desire to do good and ensure that all people were treated equitably, Congress also realized that the legislation could have disastrous consequences for religious organizations.[36] Catholic churches could be forced to violate their sincerely held beliefs and hire female priests and male nuns. Likewise, Protestant churches could face litigation if they refused to hire an atheist as their pastor.

To prevent these type of conflicts, Congress provided an exemption for religious organizations whose hiring practices might violate the Act's prohibition on discrimination.[37] When the bill was originally passed in 1964, the exemption was limited only to employment decisions involving an organization's "religious activities."[38] However, there was concern that the exemption's language would only offer protection for hiring decisions involving employees directly connected to an organization's religious activities—like a chaplain or pastor—but would not protect religious employers seeking like-minded employees whose duties could be considered religiously neutral—like a secretary or janitor.[39]

Recognizing the limitations of the exemption's language, six years after the bill was passed, Congress broadened the 2000e exemption to clearly include all employees within a religious organization, not just those whose job descriptions were "religious."[40] Today, this broadened protection allows for churches and parochial schools to hire only coreligionists,

---

[35] Belcove-Shalin, *supra* note 13, at 90.
[36] *See* Jessica Cappock, Note, *Meeting the Religious Organization Exemption to Title VII of the Civil Rights Act of 1964: Choosing the Proper Test,* 20 FLA. COASTAL L. REV. 147, 149 (2020).
[37] 42 U.S.C. § 2000e-1; *see also* Cappock, *supra* note 36, at 149.
[38] Civil Rights Act of 1964 § 702; 42 U.S.C. § 2000e-1.
[39] *See* Cappock, *supra* note 36, at 149.
[40] Act of Mar. 24, 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-4.

regardless of the job's duties.[41] Furthermore, it allows religious organizations the freedom to fire employees who no longer adhere to the tenets of the organization's beliefs, even if their jobs do not require them to perform duties that are religious in nature.[42]

C. State Equivalents to the Civil Rights Act

Nearly all states have passed their own version of the Civil Rights Act.[43] Some states extended the federal language to protect other marginalized groups.[44] For example, Washington state's anti-discrimination statute, the Washington Law Against Discrimination (WLAD), prohibits employers from discriminating against employees based on age, sex, marital status, sexual orientation, gender identity, race, creed, color, national origin, military status, disability, breastfeeding, pregnancy, and retaliation.[45]

Many states have also included an exemption that parallels the 2000e exemption.[46] For instance, the WLAD exempts any "religious or sectarian organization not organized for private profit" from the statute's definition of employer.[47]

D. Judicial Interpretation of Statutory Exemptions

Generally, courts have interpreted statutory religious exemptions narrowly[48] so that the protection only applies when a religious organization's employment decisions are "based on religious convictions . . . and not on [other] discriminatory reasons prohibited."[49] Thus, while the exemption broadly covers all positions within an organization, it limits the permissible

[41] *See* Religious Discrimination: EEOC Guidance No. 915.063 (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_43047406513191610748727011.
[42] *See id.* at 56–57.
[43] *See* Discrimination – Employment Laws (July 27, 2015), https://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.
[44] *See id.*
[45] *Id.*
[46] Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63, 79 (2006).
[47] Wash. Rev. Code Ann. § 49.60.040 (West 2020).
[48] *See* Messner, *supra* note 46, at 79.
[49] Nevin D. Beiler, Note, *Deciphering Title VII & Executive Order 13672: To What Extent Are Religious Organizations Free to Discriminate in Their Hiring Practices?* 29 REGENT U. L. REV. 339, 342 (2017).

discrimination to only those stemming from disparate religious beliefs.[50]

The Supreme Court affirmed the constitutionality of statutory religious exemptions in *Corporation of Presiding Bishop of Jesus Christ of Latter-day Saints v. Amos*.[51] The *Amos* Court addressed whether a gymnasium "intimately connected" to the Mormon church could fire a building engineer because he refused membership to any Mormon temple.[52] Ultimately, the Court upheld both the church's right to fire the employee and the constitutionality of the 2000e exemption, noting that the exemption neither violated the Equal Protection Clause nor the Establishment Clause.[53] Thus, the Court affirmed that, regardless of an employee's job duties, religious organizations had the statutory and constitutional freedom to terminate employees if they did not adhere to the organization's belief system.[54]

E. Boundaries of the Statutory Exception

When evaluating these statutory exemptions, it is important to consider what is still prohibited. The exemption is not a carte blanche for religious organizations to discriminate. All other types of discrimination not based on religious beliefs, like those based on race, national origin, sex, and color, are still barred.[55]

Unsurprisingly, the distinction between permissible discrimination based on religious beliefs and impermissible discrimination that involves protected classes can become murky because religious beliefs often also implicate "race, color, sex, [or] national origin."[56] For example, many types of Christianity, Judaism, and Islam believe that only one gender can hold certain roles,[57] a practice that could be seen as sex discrimination. Also, certain orthodox religions require a particular maternal ancestral

---

[50] *Id.*
[51] 483 U.S. 327, 330 (1987).
[52] *Id.* at 332.
[53] *See id.*
[54] *See id.*
[55] Messner, *supra* note 46, at 80.
[56] 42 U.S.C.A. § 2000e-2.
[57] David Crary, *Male-Dominated Religions Challenge Women*, THE COLUMBIAN (Jan. 19, 2019), https://www.columbian.com/news/2019/jan/19/male-dominated-religions-challenge-women/; *see also* Aleksandra Sandstorn, *Women Relatively Rare in Top Positions of Religious Leadership*, PEW RSCH. CTR. (Mar. 2, 2016), https://www.pewresearch.org/fact-tank/2016/03/02/women-relatively-rare-in-top-positions-of-religious-leadership/.

lineage for membership.[58] There is even disagreement about whether Judaism should be considered a religion or a race.[59]

When both religious beliefs and a protected class are implicated, courts have required that the accusing party show that similarly situated employees were treated differently, and thus the employment decision could not have been based solely on religious beliefs.[60] For example, in *EEOC v. Fremont Christian School*, the Ninth Circuit considered whether a Christian school could refuse to provide health insurance for married female employees under the Title VII exemption.[61] According to the school, their sincerely held religious beliefs espoused that the husband was the "head of the household" and part of his responsibility in that role was providing health insurance for his family.[62] Therefore, the school argued that it should not be forced to provide health insurance to married women.[63]

The plaintiff employees argued that the discrimination was not based on the school's religious beliefs but instead solely on the employee's sex.[64] The Ninth Circuit agreed, ruling that the statutory exemption should not apply.[65] In support of their ruling, the court reasoned that the school's decision could not have been based solely on its religious beliefs because it had previously "abandoned [a] policy of paying the [male] 'head of household' at a rate higher than similarly situated female employees."[66] This prior flexibility for similarly situated employees "evidence[d] that there would be no substantial impact upon religious beliefs by forcing Fremont Christian to drop a similar policy of giving heads of household health insurance, to the exclusion of similarly situated women."[67]

---

[58] Oscar Schwartz, *What Does it Mean to be Genetically Jewish?*, THE GUARDIAN (June 13, 2009), https://www.theguardian.com/lifeandstyle/2019/jun/12/what-does-it-mean-to-be-genetically-jewish.

[59] Julie Zaumer Weil, *Is Judaism an Ethnicity? A Race? A Nationality? Trump Signs an Order and Provokes an Identity Crisis*, WASH. POST (Dec. 19, 2019), https://www.washingtonpost.com/religion/2019/12/19/is-judaism-an-ethnicity-race-nationality-trump-signs-an-order-provokes-an-identity-crisis/.

[60] *See* Tricia M. Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage If They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 464 (2008).

[61] 781 F.2d 1362, 1365 (9th Cir. 1986).

[62] *Id.* at 1364–65.

[63] *Id.* at 1365.

[64] *Id.*

[65] *Id.* at 1368.

[66] *Id.*

[67] *Id.*

III. THE CONSTITUTIONAL MINISTERIAL EXCEPTION

Some religious freedom advocates have expressed worry that statutory exemptions do not go far enough; there is concern that allowing the state to become involved in any way in a religious organization's employment decisions "breach[es] the wall between church and state."[68] This concern is rooted in the well-established doctrines relating to the Free Exercise Clause,[69] which strictly prohibits excessive entanglement between the state and religion.[70] While there is no bright line between permissible governmental intrusion and excessive entanglement, courts have generally been extremely hesitant to delve too deep into whether a religious belief is sincerely held.[71] The question then arises—how can the legislature statutorily protect employees at a religious organization from prohibited types of discrimination while the court also simultaneously protects religious organizations from unconstitutional governmental entanglement?

To address these concerns, the Supreme Court adopted a constitutionally based doctrine known as the ministerial exception.[72] The exception is "judicial shorthand for two conclusions: the first is that the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion; [and] . . . second . . . that the state's interest in eliminating employment discrimination is out-weighed by a church's constitutional right of autonomy in its own domain."[73]

While statutory exemptions and the ministerial exception might seem duplicative, there are clear distinctions between them. Unlike statutory exemptions, the ministerial exception allows religious organizations to engage in all types of discrimination but only towards those employees who serve as ministers.[74] This allows religious organizations to retain ultimate autonomy over the selection of its spiritual leaders, while the state is still permitted to protect all other employees from

---

[68] *See* Belcove-Shalin, *supra* note 13, at 91; *see also Fremont Christian Sch.,* 781 F.2d at 1366.
[69] *See* Cappock, *supra* note 36, at 148.
[70] *See id.*
[71] *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 3 (2011); *see also* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") (citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716).
[72] *See* Lund, *supra* note 71, at 3.
[73] *See id.*
[74] *Id.*

discrimination that does not stem from a religious conviction.[75] Depending on one's view, the ministerial exemption either offers religious employers full constitutional protection from government interference regarding its ministerial employees, or it permits religious organizations full license to discriminate against their ministerial employees. Unsurprisingly, the question then becomes—who should be considered a minister?

A. Judicial History of the Ministerial Exception

The history of the ministerial exception illustrates both the complexities in determining who should be considered a minister and when the court has crossed the line into excessive entanglement. In 1871, the Supreme Court, in *Watson v. Jones*, refused to rule in a case involving a property dispute between two warring factions of a church.[76] The Court held that the judiciary runs the risk of excessive entanglement by ruling in *any* ecclesiastical matters.[77] It further cautioned that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories . . . the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[78]

For nearly a century following *Watson*, the Court was silent on the matter. Finally, in 1952, a similar property dispute to *Watson* arose in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*.[79] The Court again refused to become involved and specifically cautioned that, when delving into the employment of religious leaders, the risk of excessive entanglement is particularly strong.[80] In neither case did the Court prescribe a specific test or even factors to consider when deciding how to rule.

Twenty years after *Kedroff* and eight years after the Civil Rights Act was adopted, the Fifth Circuit articulated the first iteration of the ministerial exception in *McClure v. Salvation Army*.[81] Plaintiff McClure was a female officer in the Salvation Army and brought a Title VII sex-based discrimination claim because her comparable male counterparts received a higher

[75] *Id.* at 35.
[76] 80 U.S. 679, 734–35 (1871).
[77] *Id.*
[78] *Id.* at 727.
[79] 344 U.S. 94, 119 (1952).
[80] *Id.*
[81] 460 F.2d 553 (5th Cir. 1972).

salary and greater benefits.[82] Importantly, both parties agreed that officers were the equivalent of ministers within the organization.[83] The Salvation Army argued that the discrepancy was permissible because their decision to pay men more stemmed from their sincerely held religious beliefs regarding the role of men as head of their households.[84]

The Fifth Circuit refused to analyze the claim under Title VII. Instead, it noted that "Congress could not have intended through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between [a] church and [a] minister."[85] It also noted the importance and distinction of ministerial positions:

> [T]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.[86]

The court reasoned that any judicial intrusion "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment."[87]

While the ministerial exception could be erroneously viewed as an extension of the Title VII exemption, the *McClure* Court made it clear that there are two related but distinct defenses that can be raised by religious organizations as a defense to an employment discrimination claim.[88] First, statutory

[82] *Id.* at 555.
[83] *Id.* at 556.
[84] *Id.*
[85] *Id.* at 560–61.
[86] *Id.* at 558–59.
[87] *Id.* at 560.
[88] *Id.*

exemptions provide a defense against *any* employee's claim involving discrimination based upon religious beliefs.[89] Second, if an employee holds a ministerial position, excessive entanglement can be raised as a constitutional defense via the ministerial exception.[90]

Thus, a court could find that even though a statutory exemption was inapplicable, a religious organization could still find protection under the ministerial exception or vice versa. For example, if a spiritual leader brought a claim that she was discriminated against because of her national origin, the court could hold that even though discriminatory practices based on national origin are statutorily prohibited, the ministerial exception prevents the court from becoming entangled in the church's relationship with their spiritual leaders. Conversely, if a church groundskeeper claimed she was fired because of her gender, the church could not claim protection under the ministerial exception because the janitor did not serve in a spiritual leadership role.

Unsurprisingly, the interplay between statutory exemptions and the ministerial exception has triggered much confusion in the courts. For several decades, lower courts attempted to resolve the differences between the two defenses. Absent clear guidance from the Supreme Court, some lower courts reasoned that the ministerial exception barred discrimination claims against only those classes expressly listed in Title VII—race, disability, national origin, sexual harassment, and sex.[91] Other lower courts completely rejected the idea that the ministerial exception provides any constitutional defense against such claims.[92]

Moreover, confusion remained over how the court should define a minister. For many years, lower courts largely used the primary duties test, which held that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy," and thus the employer was constitutionally

---

[89] *See id.* at 558 ("The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.").

[90] *See id.* at 560–61.

[91] *See id.* at 557–58; *see generally* Belcove-Shalin, *supra* note 13.

[92] *See generally* Belcove-Shalin, *supra* note 13.

protected.[93] However, the Supreme Court neither accepted nor rejected the primary duties test.

In 2012, it appeared that the Supreme Court would provide some clarity into when and how the ministerial exception should be applied. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a parochial schoolteacher claimed that she had been fired in violation of the Americans with Disabilities Act because she was terminated after a diagnosis of narcolepsy made it difficult for her to work.[94] The school argued that the claim was judicially barred because the teacher's role fell under the ministerial exception.[95] The Court agreed, holding that the teacher should be considered a minister because her responsibilities included spiritual instruction to her students.

Even though the circuit courts were still using a variety of tests to determine who should be considered a minister,[96] the Supreme Court declined to establish a bright-line rule or endorse any circuit's test.[97] However, it did note that the primary duties test was *not* appropriate and should *not* be used.[98] It also enumerated factors that can be helpful in making a ministerial determination, though not necessarily determinative.[99] These factors included that (1) the employee had the title of minister and had a role separate from most members; (2) the position reflected religious training followed by formal commissioning; (3) the employee held herself out as a minister; and (4) the job duties involved a role of conveying the church's message.[100]

In 2020, the Supreme Court once again granted certiorari to an employment discrimination claim involving the firing of two parochial schoolteachers.[101] *Our Lady of Guadalupe School v. Morrissey-Berru* merged two lower court cases.[102] One plaintiff "alleg[ed] that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer."[103] The other plaintiff claimed that her contract had not been renewed due to her age, which was in violation of the Age Discrimination

---

[93] Rayburn v. Seventh-day Adventist, 772 F.2d 1164, 1169 (4th Cir. 1985).
[94] 565 U.S. 171, 179 (2012).
[95] *Id.* at 180.
[96] *See* Lund, *supra* note 71, at 65–66.
[97] *Hosanna-Tabor*, 565 U.S. at 194.
[98] *Id.*
[99] *Id.* at 193.
[100] *Id.*
[101] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
[102] *Id.* at 2055.
[103] *Id.* at 2059.

in Employment Act.[104] Again, many hoped that the Court would offer more guidance on how to define a minister.

However, the Court again shed little light on how or when to apply the ministerial exception. Instead, it largely mimicked the reasoning from *Hosanna-Tabor*.[105] It barred the plaintiffs' claim because their jobs were ministerial, reasoning that judicial examination would impermissibly encroach into the religious practices of the school.[106] While it applied the *Hosanna-Tabor* factors, it cautioned against using them as *the* determinative factors.[107]

B. Current Status

Today, the ministerial exception is broadly invoked as a defense to many types of discriminatory practices. It has been invoked in claims involving race, national origin, sex, sexual harassment, disability, retaliation, pregnancy, sexual orientation, unpaid wages, and hostile work environments.[108] Lower courts have used it to bar claims involving a hospital chaplain,[109] a Protestant Reverend,[110] a female Elder,[111] a Catholic priest,[112] a parochial schoolteacher, a teacher of Indian spiritual practices,[113] a choir director,[114] a church's press secretary,[115] and a faculty member of a Christian university.[116] However, lower courts have also ruled that the ministerial exception did not apply when used against a church

[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See id.* at 2067 ("In holding that Morrissey-Berru and Biel did not fall within the *Hosanna-Tabor* exception, the Ninth Circuit misunderstood our decision. Both panels treated the circumstances that we found relevant in that case as checklist items to be assessed and weighed against each other in every case, and the dissent does much the same. That approach is contrary to our admonition that we were not imposing any 'rigid formula'").
[108] *See* Lund, *supra* note 71, at 7.
[109] Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2018).
[110] Gomez v. Evangelical Lutheran Church in Am., No. 1:07-CV-00786, 2008 WL 3202925 (M.D.N.C. 2008).
[111] Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994).
[112] Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).
[113] Stately v. Indian Cmty. Sch. of Milwaukee, Inc., 351 F. Supp. 2d 858 (E.D. Wis. 2004).
[114] Miller v. Bay View United Methodist Church, Inc., 141 F. Supp. 2d 1174 (E.D. Wis. 2001).
[115] Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698 (7th Cir. 2003).
[116] Lishu Yin v. Columbia Int'l Univ., 335 F. Supp. 3d 803 (D.S.C. 2018).

receptionist,[117] a minister applying for a lay position,[118] and a synagogue's facilities manager.[119]

The Supreme Court has yet to provide meaningful guidance on how to delineate the exception's boundaries. Though the limits are muddled, it seems that the exception is inapplicable if the employee is "not tasked with performing any religious instruction and [] is charged with no religious duties."[120] However, without clear guidance from the Supreme Court, lower courts are still vulnerable to misapplying the exception.

IV. THE INTERPLAY WITH LGBTQ+ RIGHTS

While the courts have spent nearly six decades attempting to delineate the boundaries of statutory exemptions and the ministerial exception, the past decade has also seen an explosion in cases that explore the tension between religious freedoms and LGBTQ+ rights. The lion's share of these cases "seek to preserve and define . . . religious freedoms in the face of ordinances which prohibit *places of public accommodation* from discriminating based on sexual orientation."[121] The Supreme Court has not yet considered whether anti-discrimination statutes should apply to a religious organization's hiring decisions involving sexual orientation.[122]

When discrimination occurs in the marketplace, courts have generally shown a desire to protect LGBTQ+ rights.[123] In *Bostock v. Clayton County*, the Supreme Court ruled that firing an employee based on sexual orientation is strictly prohibited in the secular workplace.[124] Other Supreme Court cases like *Obergefell*

---

[117] Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).
[118] Shirkey v. Eastwind Cmty. Dev. Corp., 941 F. Supp. 567 (D. Md. 1996); A.L.R. Fed. 2d 445 (Originally published in 2009).
[119] Davis v. Balt. Hebrew Congregation, 985 F. Supp. 2d 701 (D. Md. 2013).
[120] Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132, 1145 (D. Or. 2017); *see also* Alexandra Brown et. al., *Religious Exemptions*, 22 GEO. J. GENDER & L. 335, 345 (2021).
[121] Brush & Nib v. Phoenix, 418 P.3d 426, 434 (Ariz. Ct. App. 2018) (emphasis added).
[122] Lydia E. Lavelle, *Saving Cake for Dessert: How Hearing the LGBTQ Title VII Cases First Can Inform LGBTQ Public Accommodation Cases*, 30 GEO. MASON U. CIV. RTS. L.J. 123, 124 (2020) ("Although *Masterpiece* provided guidance for future cases involving conflicts between public accommodation anti-discrimination statutes and business owners' sincerely held religious beliefs, the constitutional issue is still unsettled."); *see also* Melcon, *supra* note 4, at 290.
[123] *See generally* Lavelle, *supra* note 122, 126–30.
[124] 140 S. Ct. 1731, 1754 (2020).

and *Lawrence* have also upheld the rights of the LGBTQ+ community.[125]

However, both lower courts and the Supreme Court have noted that were the defendant a religious organization, the analysis would be more complex.[126] In his *Bostock* opinion, Justice Gorsuch noted "deep[] concern[] with preserving the promise of the free exercise of religion" in similar cases involving a religious organization.[127] Accordingly, in *Fulton v. City of Philadelphia*, the Court ruled that a Catholic foster care agency did not have to contract with same-sex couples if doing so would violate a tenet of their faith.[128]

The Court has also upheld the rights of for-profit businesses that ascribe to sincerely held religious beliefs. In *Burwell v. Hobby Lobby*, the Supreme Court held both that a corporation can hold religious beliefs and cannot be forced to comply with laws that run counter to those beliefs.[129] Although *Hobby Lobby* was not based on a discrimination claim,[130] there are obvious implications for whether a business with religious affiliations could also seek protection from employment discrimination claims. The *Hobby Lobby* Court also affirmed that it was not for the judiciary to decide whether religious beliefs are "mistaken or insubstantial."[131] Instead, the Court noted that the belief must only be "an honest conviction."[132]

Likewise, in *Masterpiece Cake Shop Ltd. v. Colorado Civil Rights Commission*, the Court narrowly ruled in favor of the defendant, who claimed that a business owner's religious faith should be able to dictate business decisions.[133] In *Masterpiece*, the defendant, a baker, refused to bake a wedding cake for a gay couple's marriage ceremony, claiming that the marriage conflicted with his religious beliefs.[134] The Court warned that a

---

[125] *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); *see generally* Lawrence v. Texas, 539 U.S. 558 (2003).
[126] *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351 (7th Cir. 2017) ("We close by noting that we have decided only the issue put before us. Additional complications can be saved for another day, when they are actually involved in the case. Ivy Tech did not contend, for example, that it was a religious institution and the positions it denied to Hively related to a religious mission.").
[127] 140 S. Ct. 1731, 1754 (2020) (noting "how these doctrines protecting religious liberty interact with Title VII are questions for future cases").
[128] Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021).
[129] 134 S. Ct. 2751, 2775, 2785 (2014).
[130] Instead, the claim was based on a RFRA violation. *See id* at 2759.
[131] *Id.* at 2779.
[132] *Id.*
[133] 138 S. Ct. 1719, 1734 (2018).
[134] *Id.* at 1726.

ruling "cannot be based on the government's own assessment of offensiveness,"[135] nor should the government play any role "in deciding or even suggesting whether the religious grounds for [] conscience-based objection is legitimate or illegitimate."[136]

However, the Court's reasoning in *Masterpiece* centered on the perceived hostility by the Civil Rights Commission towards the plaintiff and his religious beliefs.[137] It cautioned that the ruling was not a broad declaration regarding LGBTQ+ rights and religious freedoms.[138] In fact, the Court affirmed that sexual orientation should be constitutionally protected. Thus, the outcome would likely have been different had the Court not found that the governmental commission exhibited hostility towards the defendant.

In lower courts, the rights of the LGBTQ+ community have largely been upheld, even when a business's religious beliefs are implicated. In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,[139] *State v. Arlene's Flowers, Inc.*,[140] and *Brush & Nib Studio v. City of Phoenix*,[141] lower courts ruled in favor of LGBTQ+ rights over religious freedoms. In fact, in *Arlene's Flowers*, the fact pattern was nearly identical to *Masterpiece Cake Shop*, except there was no perceived, governmental hostility towards the defendant's religious beliefs.[142] As such, the lower court ruled that the defendant had violated the plaintiff's constitutional rights by refusing service.[143]

Given the varied rulings, it is difficult to predict how the Supreme Court might rule if the employment rights of the LGBTQ+ community conflicted with a religious organization's sincerely held beliefs. Even though cases like *Fulton* and *Masterpiece* evidence that the Supreme Court is generally supportive of religious freedoms, other cases like *Obergefell*, *Lawrence*, and *Bostock*, evidence that the Supreme Court is also concerned with preserving LGBTQ+ rights.

---

[135] *Id.* at 1731.
[136] *Id.*
[137] *Id.* at 1732.
[138] *Id.* at 1728.
[139] 884 F.3d 560 (6th Cir. 2018).
[140] 441 P.3d 1203, 1237 (Wash. 2019).
[141] 418 P.3d 426 (Ariz. Ct. App. 2018).
[142] *Arlene's Flowers*, 441 P.3d at 1210.
[143] *Id.* at 1237.

V. *WOODS V. SEATTLE'S UNION GOSPEL MISSION*

Recently, in *Woods v. Seattle's Union Gospel Mission*, the Washington Supreme Court heard a case that explores this tension between LGBTQ+ rights, employment discrimination, and religious freedoms and also evidences the complexities between statutory exemptions and the ministerial exception.[144] While the U.S. Supreme Court denied certiorari, Justice Alito clarified that the denial was only because of the interlocutory nature of the claim.[145] He noted the seismic implications that the case could have on religious organizations, remarking that "the day may soon come when we must decide whether the autonomy guaranteed by the First Amendment protects religious organizations' freedom to hire coreligionists without state or judicial interference."[146] He also gave a glimpse into what might be the Court's reasoning, noting that

> [t]o force religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only the autonomy of many religious organizations but also their continued viability. If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most vigorously. Driving such organizations from the public square would not just infringe on their rights to freely exercise religion but would greatly impoverish our Nation's civic and religious life.[147]

A. Case History

Open Door Legal Services (ODLS) is a branch of Seattle's Union Gospel Mission (SUGM) that provides free legal services to Seattle's homeless population.[148] Its mission statement describes the legal clinic as a "[p]assionate community of people who follow Christ in his relentless, redeeming love for all

---

[144] *See generally* 481 P.3d 1060 (Wash. 2021).
[145] Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1097 (2022) (Alito, J., concurring).
[146] *Id.* at 1094.
[147] *Id.* at 1096.
[148] Petition for a Writ of Certiorari at 2, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144) [hereinafter Petition].

people."[149] Staff members also share their faith and pray with clients.[150]

While attending the University of Washington School of Law,[151] Plaintiff Matt Woods frequently volunteered at ODLS.[152] After graduation, Woods met with one of ODLS's staff attorneys to inquire about an open staff attorney position.[153] During this meeting, Woods discussed his bisexuality and inquired whether his sexual orientation would conflict with the clinic's beliefs.[154] The ODLS attorney said she did not think it would be an issue, but she would further investigate the matter.[155]

The next day, the attorney sent Woods excerpts from the Mission's Employee Handbook.[156] Included in the handbook was a prohibition on "homosexual behavior."[157] As such, the attorney recommended that Woods schedule a meeting with the clinic's director to further discuss the matter.[158] Woods followed up with the director, who confirmed that the Mission's "code of conduct excludes homosexual behavior."[159]

In November 2017, Woods filed a lawsuit against SUGM in Washington state court.[160] Despite the fact that the Washington Law Against Discrimination exempts religious organizations from the definition of employer,[161] Woods argued that the Mission had violated the WLAD by refusing to hire him because of his sexual orientation.[162]

The claim centered on whether the Mission refused to hire Woods exclusively because of his sexual orientation apart from any religious convictions, which would seemingly violate the WLAD, or whether his lifestyle was evidence that he did not

---

[149] *Id.* at 6.
[150] *See* Petition for Certiorari app. at 64a–65a, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144).
[151] Brief in Opposition at 2, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144).
[152] *Id.*
[153] Brief in Opposition, *supra* note 151, at 2–3.
[154] *Id.* at 3.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 4.
[160] *Id.*
[161] Wash. Rev. Code Ann. § 49.60.040(11) (West 2020) ("Employer includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.").
[162] The Washington Law Against Discrimination prohibits employers from discriminating against employees based on sexual orientation. *Id.*

espouse the same religious values as the Mission, which would likely implicate the WLAD's exemption.[163] Woods did not contend that the Mission was not a religious organization.[164] Indeed, the Mission is classified as a church by the IRS.[165] Additionally, neither Woods nor the court disputed whether the Mission's beliefs concerning sexual orientation were either sincerely held or religious in nature.[166] Furthermore, Woods did not seek to strike down the entire statutory exemption as unconstitutional; he only brought an as-applied challenge.[167]

Woods claimed that he was not hired solely because of his sexual orientation, not his religious beliefs.[168] He evidenced his religious beliefs by noting that his application stated that "his worldview is shaped by the ministry of Jesus Christ" and that he had been involved in various Christian groups while in college.[169] Furthermore, Woods argued that the court should look to the staff attorney's job description to determine if it was necessary for him to ascribe to a particular religious persuasion.[170] In doing so, he advocated for a "job duties" test like the one disfavored in *Hosanna-Tabor*[171] that "would . . . undertake an objective examination of the job description at issue as well as the employee's responsibilities within the organization."[172]

---

[163] *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1062 (2021), *cert. denied*, 142 S. Ct. 1094 (2021). Specifically, the Mission defined the issue as whether the Washington Constitution requires a religious organization "to hire someone who would publicly reject the organization's sincerely-held religious beliefs." Petition, *supra* note 150, at 8 (quoting Brief of Respondent at 1, Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (2021).

[164] *See* Petition, *supra* note 148 at 7.

[165] Petition for Certiorari app. at 163a–68a, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144).

[166] *See* Oral Argument at 14:33, Woods v. Seattle's Union Gospel Mission, 197 Wash. 2d 231 (2021) (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/?eventID=2019101014 ("[T]his is not a question of testing beliefs at all.").

[167] *Id.* at 5:59.

[168] Brief in Opposition, *supra* note 151, at 7.

[169] *See* Brief of Respondent in Opposition at 2, Seattle's Union Gospel Mission v. Woods, 531 U.S. __ (2021) (No. 21-144), https://www.supremecourt.gov/DocketPDF/21/21-144/198398/20211101140359012_21-144_Woods%20Brief%20in%20Opposition.pdf; *see also* Oral Argument at 8:10.

[170] *See* Brief in Opposition, *supra* note 151, at 6; Oral Argument, *supra* note 166, at 14:30 (explaining that Woods did concede that some of his job duties would be religious in nature).

[171] Brief in Opposition, *supra* note 151, at 6; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194 (2012).

[172] Brief in Opposition, *supra* note 151, at 6; Oral Argument, *supra* note 166, at 14:50 ("There isn't really a factual dispute over the religiosity over the job duties.").

SUGM argued that because their full-time employees serve as the "hands, feet, and mouthpieces"[173] of the Mission, it was essential that their employees' beliefs align with the Mission's sincerely held beliefs.[174] It argued that Woods' lifestyle manifested that he did not adhere to the Mission's beliefs concerning homosexuality.[175] It further alleged that Woods also did not adhere to the Mission's broader beliefs because he admitted in his employment application that he was not a member of a church and was unable to clearly articulate his beliefs.[176]

The Washington Superior Court granted summary judgment to the Mission and dismissed the claim, finding that the court lacked jurisdiction because the claim fell under the WLAD's statutory religious exemption.[177]

B. Washington Supreme Court's Reasoning

Woods then petitioned the Washington Supreme Court for direct review.[178] Again, he advocated for using a primary job duties test to determine whether he could "legally be denied employment under Washington State law by a religious organization because of the person's sexual orientation."[179] He further argued that he had a fundamental right to sue for discrimination under the Washington Constitution's Privileges and Immunities Clause,[180] and thus the WLAD's exemption unconstitutionally granted the Mission immunity from discrimination legislation.[181]

---

[173] *See* Petition, *supra* note 148, at 7.
[174] *Id.* at 8–9.
[175] *Id.* at 3, 10.
[176] *Id.* at 3; *see also* Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1095 (2022) (Alito, J., concurring).
[177] Woods v. Seattle's Union Gospel Mission, No. 17-2-29832-8 SEA, 2018 WL 11318472, at *1 (Wash. Super. Ct. July 9, 2018) rev'd, 197 Wash. 2d 231 (2021); *see also* Brief in Opposition at 2, Woods v. Seattle's Union Gospel Mission, 197 Wash. 2d 231 (2021) (No. 21-144), https://www.supremecourt.gov/DocketPDF/21/21-144/198398/20211101140359012_21-144_Woods%20Brief%20in%20Opposition.pdf.
[178] Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (2021).
[179] Brief in Opposition, *supra* note 151, at 6; Oral Argument at 26:13, Woods, 197 Wash. 2d 231 (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/?eventID=2019101014 ("It's really a primary job function test that the court should look at . . .").
[180] *See* Oral Argument at 51:43, Woods, 197 Wash. 2d 231 (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/?eventID=2019101014.
[181] Brief in Opposition, *supra* note 151, at 7.

The Washington Supreme Court disagreed with the lower court's view that the statutory exemption should preclude Woods from bringing a claim.[182] Instead, the court adopted Woods' argument that the exemption should trigger an analysis under the state's Privileges and Immunities Clause.[183] The court used a two-part test in its determination. Part one of the test asked whether a fundamental right had been implicated.[184] Part two asked if there were reasonable grounds for limiting the fundamental right.[185]

However, to satisfy the first prong, the court did not agree with Woods' position that he had a fundamental right to sue for discrimination.[186] Instead, it cited *Obergefell* and *Lawrence* and reasoned that Woods' fundamental rights to practice his sexual orientation and marry were implicated.[187]

When examining the second "reasonable grounds" prong, the court affirmed that there *were* reasonable grounds for the "WLAD to distinguish religious and secular nonprofits."[188] Indeed, the court acknowledged that in another Washington Supreme Court case, *Ockletree v. Franciscan Health Systems*, it had rightfully held that the statutory exemption was constitutional, applicable to non-ministerial employees like security guards, and that religious organizations "sometimes must[] be treated differently than nonreligious organization[s]."[189] It further affirmed "that religious organizations have a right to religious liberty guaranteed by the [state's] Free Exercise Clause," which "provides *greater* protection for the free exercise of religion than the First Amendment" prescribes[190] and also noted the importance of protecting religious liberties from state interference.[191]

However, the *Woods* court then held that "because [the] WLAD contains no limitations on the scope of the exemption provided to religious organizations," it should instead look to the

---

[182] *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (2021).
[183] *Id.* at 1065.
[184] *See id.*
[185] *See id.*
[186] *See id.* at 1067.
[187] *Id.* at 1065–66.
[188] *Id.* at 1066.
[189] In *Ockletree*, a Black security guard sued his hospital employer for terminating his employment following a stroke. The guard argued that he was fired on the basis of race and disability. *See* 317 P.3d 1009, 1018 (Wash. 2014).
[190] *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (Wash. 2021).
[191] *See id.* at 1067.

First Amendment's ministerial exception for guidance.[192] In sum, the court superimposed the boundaries of the ministerial exception upon the statutory exemption. The court then reversed the lower court's ruling and remanded the case back to the trial court to determine whether the staff attorney position was considered ministerial.[193] While the trial court had not ruled on whether Woods was a minister in its dismissal, it had noted that staff attorneys did not receive any specialized spiritual training, nor were they expected to "to nurture their converts' development in the Christian faith."[194]

C. Misapplication of the Ministerial Exception

There are several errors with the Washington Supreme Court's ruling. First, the court did not show any deference to the legislature's intent in adopting the WLAD's exemption. Instead, the court acknowledged the existence of the statutory exemption and then disregarded it because the legislature had not enumerated any restrictions on its application.[195] In doing so, it failed to consider whether the legislature intended for the exemption to be broadly applied or why there would even be a need for a statutory exemption if it only provided protection that was already afforded by the First Amendment.

Further, the court ignored its own precedent established in *Ockletree* that held the statutory exemption applies to employees who fall outside the bounds of the ministerial exception.[196] Instead, the court assumed that the only permissible interpretation of the statutory exemption was the narrowest view offered under the Constitution.[197]

Next, the court's Privileges and Immunities analysis was weak. In satisfying the first prong, the court did not present any explanation for how Woods' right to marry had been implicated or whether the fundamental right established in *Lawrence* should extend to religious organizations' hiring practices. Also, despite

---

[192] *Id.* at 1070; *see generally id.* at 1067 ("Because WLAD contains no limitations on the scope of the exemption provided to religious organizations, we seek guidance from the First Amendment as to the appropriate parameters of the provision's application.").
[193] *Id.*
[194] *Id.* at 1070.
[195] *Id.*
[196] *See* Ockletree v. Franciscan Health Sys., 317 P.3d 1009, 1020 (Wash. 2014); *see generally Woods*, 481 P.3d at 1069–70 (failing to consider that the U.S. Supreme Court intended the exemption to be read broadly).
[197] *See generally Woods*, 481 P.3d at 1069–70 (adopting a narrow view of the exemption that likely would not include a staff worker at a nonprofit).

the fact that it found there were reasonable grounds to apply the statutory exemption and thus satisfy the second prong, the court held the exemption failed the second part of the test.[198] To reach its conclusion, the court purported to balance the fundamental rights guaranteed in the Free Exercise Clause with one's rights to both marry and practice their sexual orientation but submitted no evidence as to how the balance was reached or why the free exercise rights were found lacking.

Also, at least one Washington Supreme Court Justice acknowledged that by allowing the court to consider whether the job's duties were ministerial, there were entanglement issues.[199] However, the court disregarded those concerns and held that it was up to the trial court to determine if the attorney position should be considered ministerial.

Additionally, the Washington Supreme Court ignored the U.S. Supreme Court's ruling in *Amos*, which not only upheld the constitutionality of statutory religious exemptions but established such exemptions should be interpreted to include employees not covered by the ministerial exception, noting "that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'"[200] The Washington Supreme Court instead ruled it was ministerial exception or nothing at all.

Finally, the Washington Supreme Court ignored U.S. Supreme Court precedent concerning the ministerial exception. Neither *Hosanna-Tabor* nor *Morrissey-Berru* imply that the ministerial exception outlines the limits of protection for statutory exemptions. In fact, in *Morrissey-Berru*, the U.S. Supreme Court clarified that the ministerial exception "serves an entirely different purpose" from the statutory exemption.[201] The Supreme Court rulings asserted only that the hiring and firing of ministerial employees is protected by the First Amendment, not that ministerial employees are the only employees subject to statutory protections.[202]

---

[198] *Id.* at 1066.
[199] Oral Argument at 19:48, *Woods*, 481 P.3d 1060 (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/.
[200] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (citation omitted).
[201] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2068 (2020).
[202] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171,190 (2012).

D. Implications from the Ruling

While it is possible to view the outcome from *Woods* as a positive step for LGBTQ+ rights, the reasoning employed could have devastating implications for both the First Amendment and statutory exemptions. By asserting that only ministers fall within the boundaries of both the Free Exercise Clause and statutory exemptions,[203] the court ignored decades of jurisprudence, disregarded the religious safeguards established by the legislature, and utilized an ill-fitted First Amendment doctrine. The misapplication could have wide-ranging implications for all religious organizations that have relied on the statutory right to hire only coreligionists for sixty years. Additionally, since the court found the rights guaranteed in the Free Exercise Clause lacking when balanced against another fundamental right, courts could now mandate that other types of rights outweigh the right to practice religion, which would substantially weaken the religion clauses.

V. CONCLUSION AND RECOMMENDATION

Given the confusion in *Woods*, the U.S. Supreme Court needs to clarify the differences between the ministerial exception and statutory exemptions. In contrast to the ruling in *Woods*, the U.S. Supreme Court has never asserted that the boundaries of statutory exemptions should mimic the boundaries of the ministerial exception. Until the Court provides clarity, lower courts can continue to misapply the law, which could have catastrophic consequences for religious organizations. Religious world-relief organizations could be forced to hire aid workers who fundamentally disagree with their value systems. Even LGBTQ+ friendly churches could be forced to hire people who hold homophobic beliefs.

Also, the Supreme Court needs to provide a brighter line for which positions qualify for the ministerial exception. In both *Hosanna-Tabor* and *Morrissey-Berru*, the Court refused to provide a clear test for determining when someone should be considered a minister.[204] As a result, lower courts have both broadened and narrowed the definition depending on the jurisdiction.[205]

While the Court could adopt the *Hosanna-Tabor* factors as a dispositive test for determining whether an employee is a

[203] *See Woods*, 481 P.3d at 1070.
[204] *Hosanna-Tabor,* 565 U.S. at 194–96; *Morrissey-Berru*, 140 S. Ct. at 2055.
[205] Reply Brief for Petitioner at 8–9, Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094 (2022) (No. 21-144), 2021 WL 5364522, at *8–9.

minister, this Note proposes that the definition of minister should be tightened. By allowing a broad array of positions to fall under the ministerial exception, from elementary school teacher to church secretary, the court has opened the floodgates to allow all kinds of potentially invidious discrimination in the name of the Free Exercise Clause, even when the discrimination is completely unrelated to a group's religious beliefs. By narrowing the definition of minister, the sweeping protection offered by the ministerial exception would be limited to only a few positions, and the statutory exemption would still be available to allow religious organization to hire only coreligionists.

This Note does not argue that when religious views collide with discriminatory practices, religious freedoms should always prevail. Nor does it suggest that broad discrimination against LGBTQ+ persons should be permissible. Instead, it argues that statutory exemptions to anti-discrimination statutes should continue to allow religious organizations to hire only coreligionists, regardless of the employee's role or whether the religious beliefs adhere to the mainstream view.

It is simply beyond the purview of the judiciary to assess the legitimacy of a religious organization's stated beliefs or their discretion in hiring only coreligionists.[206] By their very nature, religious beliefs are often unpopular and misunderstood by those outside of the religion. Some religions require animal sacrifice;[207] others advocate for drug use.[208] Even more mainstream religions require certain members to remain celibate, restrict the role of women, or forbid consuming foods like pork and caffeine. And yet our country has time and again reaffirmed that, however unpopular or backwards a religion's beliefs are perceived to be by the majority, the freedom to practice these beliefs is a

---

[206] *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *see also* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) ("In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government-whether it be the legislature or the courts-out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

[207] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) ("The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice.").

[208] *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 874 (1990).

fundamental American right. Indeed, if everyone agreed with a religion's beliefs, there would be no need for First Amendment protections. As Justice Brennan once wrote, "[W]e must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies."[209] As such, it is imperative that our courts continue to preserve the integrity of religious freedoms. However, without guidance from the U.S. Supreme Court, lower courts will still be free to misapply the ministerial exception, discount statutory exemptions, and jeopardize the protections guaranteed by the First Amendment.

[209] Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Breyer, J., dissenting).

A Study of *State v. Mylett*: North Carolina's Juror Harassment Statute Violates the First Amendment Right to Free Speech

Sydney D. Welch[*]

I. Introduction

After the trial and conviction of his twin brother, Patrick Mylett, a college student living in North Carolina, was arrested.[1] Patrick was upset after his brother's conviction, and spoke against the conviction to several of the jurors in the courthouse lobby.[2] Patrick did not touch any of the jurors, nor did he issue any threats of violence.[3] However, Patrick was arrested and charged with violation of the North Carolina juror harassment statute, N.C.G.S. § 14-225.2(a)(2),[4] for addressing the jurors as they left the courthouse.[5] Though the North Carolina Supreme Court ultimately overturned his conviction on other grounds, Patrick raised a strong argument that the statute is unconstitutional because it unduly restricts free speech.[6]

This Note will analyze the argument that individuals have a right to protest decisions made by jurors, and therefore, that the North Carolina juror harassment statute is unconstitutional under the First Amendment. To that end, this Note will proceed in four Parts. Part I outlines *State v. Mylett* and provides the legislative history and background of the statute. Parts II and III analyze the speech implications of the statute. Part II argues that the statute violates the First Amendment as a content-based restriction on speech. Part III discusses procedural protections under the First Amendment and argues that the statute is vague and overbroad. Part IV addresses counterarguments, outlines policy reasons for finding the law unconstitutional, and recommends how the judiciary should address this issue.

II. Case Study and Law Background

A. State v. Mylett

Dan and Patrick Mylett were students at Appalachian State University.[7] The two brothers were attending a party near

---

[*] J.D. Candidate, University of North Carolina School of Law.

[1] State v. Mylett, 374 N.C. 376, 377 (2020).

[2] State v. Mylett, 822 S.E.2d 518, 552 (N.C. Ct. App. 2018).

[3] *Mylett*, 374 N.C. at 377.

[4] N.C. Gen. Stat. § 14-225.2(a)(2) (2021).

[5] *Mylett,* 374 N.C. at 377.

[6] *Id.* at 378.

[7] *Mylett*, 822 S.E.2d at 552.

campus when things turned violent.[8] Dan was involved in an altercation with a fellow student in which he was severely beaten, to the point of being hospitalized.[9] When police arrived to control the situation, Dan supposedly spat blood from his mouth, and it accidentally hit a police officer.[10] Dan was arrested and charged with intoxicated and disruptive behavior and assault on a government official.[11] Dan was tried before a jury at the district court level and received a guilty verdict regarding the assault on a government officer.[12] Dan was sentenced to 60 days in jail suspended for 12 months' probation.[13] At his new trial after appeal, Dan was sentenced to 10 days of active jail time and was ordered to pay around $1,600 in fees and costs.[14]

Standing in the lobby of the courthouse after his brother's trial, Patrick was troubled.[15] He felt strongly that his brother was innocent and was justifiably disturbed about the severe consequences the conviction would have on his brother's life.[16] While still experiencing the intense emotions stemming from the conviction, Patrick saw several of the jurors leaving the courthouse in front of him.[17] Overcome with grief, Patrick approached the jurors to protest their decision to convict his twin.[18] The jurors testified that Patrick said that "he hoped that [the jurors] could live with [themselves] because [they] had convicted an innocent man," that the jurors "got it wrong, that [they] made a mistake," and told them, "[C]ongratulations, [they] just ruined [his brother's] life."[19]

Court officials arrested Patrick and charged him with six violations of N.C.G.S. § 14-225.2(a)(2), a statute that is intended to guard against juror harassment.[20] Patrick was also charged with conspiracy to commit harassment of a juror under the same statute.[21] The portion of the statute under which Patrick was

---

[8] *Id.*
[9] *Mylett,* 374 N.C. at 377.
[10] Brief for Defendant-Appellant at 3, State v. Mylett, 882 S.E.2d 518 (2018) (No. COA17-480).
[11] *Mylett*, 822 S.E.2d at 552.
[12] *Id.*
[13] *Id.*
[14] State v. Mylett, 799 S.E.2d 419, 423 (N.C. Ct. App. 2017).
[15] *Mylett,* 374 N.C. at 377.
[16] *Id.* at 377, 383.
[17] *Id.* at 377.
[18] *Id.*
[19] *Id.* at 381–82.
[20] *Id.* at 377.
[21] *Id.*

charged reads: "[a] person is guilty of harassment of a juror if he: . . . [a]s a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse."[22] Under the statute, a person who is convicted under subsection (a)(2), as Patrick was, is guilty of a Class H felony.[23]

Throughout his trial and appeals, Patrick argued that the statute was unconstitutional. At the trial court level, Patrick filed a pre-trial motion to dismiss the charges, arguing that the statute violates the First Amendment since it punishes people for exercising their right to free speech.[24] To cure the constitutional violation, Patrick requested that the trial court instruct the jury to read the statute as requiring either a true threat or intent to intimidate.[25] The court denied that request and the motion generally.[26] Subsequently, Patrick was found guilty of conspiracy to commit harassment of a juror.[27]

On appeal, Patrick again argued that the statute violates the First Amendment. The North Carolina Court of Appeals disagreed, upholding Patrick's conviction and ruling that the statute applied to "non-expressive conduct" and therefore did not implicate the First Amendment.[28] The court further reasoned that even assuming that the First Amendment was implicated, the statute would survive intermediate scrutiny as a content-neutral restriction, because it was not vague, and the trial court did not err in denying Patrick's request for an instruction on true threat or intent.[29] The North Carolina Supreme Court reversed Patrick's conviction on evidentiary grounds without deciding the constitutional issue.[30]

B. Statutory Background

The North Carolina juror harassment statute was originally passed in 1977 and has been amended six times.[31] The content of the statute implies that the legislative intent was to

---

[22] N.C. GEN. STAT. § 14-225.2(a)(2) (2021).
[23] § 14-225.2(c).
[24] *Mylett,* 374 N.C. at 378.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] State v. Mylett, 822 S.E.2d 518, 524 (N.C. Ct. App. 2018).
[29] *Id.* at 544–46.
[30] *Mylett,* 374 N.C. at 379.
[31] N.C. GEN. STAT. § 14-225.2 (2021).

protect jurors from interference and harm.[32] In fact, another case that involved this statute illustrates that intent clearly. In *Burgess v. Busby*,[33] a doctor convicted of malpractice released a list of the jurors who had found him guilty to other physicians in the area.[34] The doctor's intent was to retaliate against the jurors for finding him liable by dissuading other physicians in the area from treating those jurors as patients, making it overwhelmingly difficult for the jurors to obtain healthcare in that area.[35] The North Carolina Court of Appeals reversed and remanded the dismissal of the plaintiff's case against the physician as to his violation of the juror harassment statute.[36] The doctor's actions were both intimidating and threatening under the court's reading of the statute.[37] Specifically, the North Carolina Court of Appeals held that "a citizen who undertakes this public duty should be free from a personalized published harassment" like the one enacted by the physician and that the physician's "communication [was] not protected speech."[38]

III. N.C.G.S. § 14-225.2(A)(2) IS A CONTENT-BASED LAW THAT REGULATES BOTH SPEECH AND EXPRESSIVE CONDUCT, THEREBY MAKING IT PRESUMPTIVELY UNCONSTITUTIONAL.

Within First Amendment jurisprudence, one must first determine whether the law governs protected speech and/or expressive conduct or if it governs non-expressive conduct, which is unprotected by the First Amendment.[39] Second, assuming that the law regulates speech or expressive conduct, the court must determine whether the restriction on speech is content-based or content-neutral.[40] Content-based laws are "presumptively unconstitutional" and automatically trigger strict scrutiny, making it very difficult for the law to pass constitutional muster.[41]

---

[32] *Id.*
[33] 544 S.E.2d 4 (N.C. Ct. App. 2001).
[34] *Id.* at 6–7.
[35] *Id.* at 6.
[36] *Id.* at 13–14.
[37] *Id.*
[38] *Id.*
[39] Katrina Hoch, *Expressive Conduct*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/952/expressive-conduct.
[40] David L. Hudson, Jr., *Content Based*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/935/content-based.
[41] *Id.*

This Part first analyzes whether the North Carolina statute unconstitutionally prohibits protected speech and/or expression. Then, this Part determines whether the statute proscribes certain speech based on its content. Finally, this section analyzes the statute under strict scrutiny and ultimately concludes that the statute is unconstitutional.

A. The North Carolina Statute Regulates Speech and Expressive Conduct, Thereby Subjecting the Law to Strict Scrutiny.

The First Amendment prevents the government from restricting speech, but speech has come to be understood as more than just the spoken or written word—it can also include *conduct* that is inherently expressive in nature.[42] The Supreme Court has delineated categories of activity that amount to speech based on the strength of their relation to communication.[43] The Court has also assigned tests to each of those categories by which laws restricting such activity are scrutinized.[44] The category with the highest level of scrutiny is pure speech, which includes not only actual words spoken or written, but also expressive conduct like burning a flag or burning a cross.[45] Notably, the conduct encompassed by this category must be inherently communicative; it must convey a message that is likely to be understood by its audience.[46] In other words, "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First [ ] Amendment . . . .'"[47] In contrast, the First Amendment does not protect conduct that is purely non-expressive, such as purchasing bananas at the grocery store, which is highly unlikely to be considered communicative of any message.[48]

The U.S. Supreme Court affirmed a two-part inquiry to provide some structure to this expressive conduct question in *Texas v. Johnson*.[49] This inquiry determines whether conduct possesses expressive value so as to make it protected speech

---

[42] Stromberg v. California, 283 U.S. 359, 369 (1931).
[43] *See The First Amendment: Categories of Speech*, CONG. RSCH. SERV., (updated January 16, 2019), https://sgp.fas.org/crs/misc/IF11072.pdf.
[44] *Id.*
[45] Texas v. Johnson, 491 U.S. 397, 400 (1989).
[46] *Id.* at 404.
[47] *Id.* (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).
[48] *See id.* at 407.
[49] *Id.* at 404.

under the First Amendment.[50] First, the Court asks whether the speaker intended to convey a message through his or her conduct.[51] Second, the Court asks whether a reasonable observer would understand that the speaker intended to make that statement.[52] In *Johnson*, the Court held that by burning a flag as a sign of political protest, Mr. Johnson was communicating his disdain for Ronald Reagan's renomination for President while at the Republican National Convention, a message that the Court found would be easily understood by a reasonable observer as Mr. Johnson's intended statement.[53] The Court reasoned further that a law restricting "the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."[54]

The Supreme Court has heard several other cases dealing with expressive conduct as speech. In *Tinker v. Des Moines*,[55] the Court held that students wearing black armbands in protest of the Vietnam War was expressive conduct protected by the First Amendment.[56] The Court reasoned that wearing the armbands was akin to pure speech in that the bands implied a message clearly understood by the school officials who attempted to stop the behavior.[57] In *U.S. v. O'Brien*,[58] though the Court ultimately found that the law at issue in that case was not unconstitutional as applied, the Court held that burning a draft card was "symbolic speech" and was expressive conduct for the purposes of that inquiry.[59] In *Barnes v. Glen Theatre*,[60] the Court held that nude dancing was expressive activity and therefore raised a First Amendment question as to whether a law restricting such activity was unconstitutional.[61] Each of these cases show that

---

[50] *Id.* at 407.
[51] *Id.* at 404.
[52] *Id.*
[53] *See id.* at 405–06.
[54] *Id.* at 406.
[55] 393 U.S. 503 (1969).
[56] *Id.* at 504–05.
[57] *Id.*
[58] 391 U.S. 367 (1968).
[59] *Id.* at 386.
[60] 501 U.S. 560 (1991).
[61] *Id.* at 566 ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

speech is not required to be verbal to be protected by the First Amendment.[62]

Even so, there are other factors a court uses in determining whether the conduct falls within the protection of the First Amendment. For example, the presence of an audience boosts the likelihood that the activity is speech or expressive conduct.[63] Additionally, the activity is less likely to be considered speech or expressive conduct if the message it is supposedly communicating requires explanation to be understood.[64]

In the *Mylett* case, the statute explicitly restricts both speech and expressive conduct. First, as to pure speech, since Patrick Mylett was arrested for his spoken words to the jurors, the statute clearly restricts a person's freedom of speech in the most basic manner.[65] In fact, the dissent at the North Carolina Court of Appeals said that "the only 'sustainable rationale for the conviction' was Defendant's 'speech'—his verbal communication of his opinion to the jurors that their verdict constituted an injustice to his brother."[66]

Moreover, the statute restricts expressive conduct protected by the First Amendment. The statute prohibits any threatening or intimidating behavior,[67] which encompasses both expressive actions and spoken or written words. However, this threatening or intimidating behavior must arise as a result of the prior official action of a juror; it must involve the communication of some message related to the official actions of the jurors.[68] Such communication would have to be done either by words or by communicative actions as received by the jurors, both of which are protected by the First Amendment.[69]

Intimidating or threatening actions could include behavior as seen in the *Burgess* case, in which the doctor did not necessarily speak verbally but rather attempted to blacklist jurors

---

[62] *O'Brien*, 391 U.S. at 376; *Barnes*, 501 U.S. at 571.
[63] *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64 (2006) ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.").
[64] *Id.* at 66 ("[T]he point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent.").
[65] State v. Mylett, 374 N.C. 376, 377 (2020).
[66] State v. Mylett, 822 S.E.2d 518, 532 (N.C. Ct. App. 2018) (McGee, C.J., dissenting).
[67] N.C. GEN. STAT. § 14-225.2(a)(2) (2021).
[68] *Id.*
[69] *See* Watts v. United States, 394 U.S. 705, 708 (1969) (explaining that political hyperbole is protected by the First Amendment).

from healthcare providers in his area by distributing their information publicly.[70] His conviction rested on his communication of his disdain for the jury's decision by distributing their information in attempt to restrict their abilities to seek healthcare.[71] Since one cannot violate the North Carolina statute without communicating a message to an audience (in this case, jurors), the first part of the test for expressive conduct, which requires the actor to use his conduct with the intent to convey a message, is satisfied.

As to the second part of the test, it seems equally as evident that the North Carolina statute regulates speech and/or expressive conduct that communicates a message that a reasonable person would likely understand as the intended message by the speaker.[72] The testimony given by the jury members at Patrick Mylett's trial proves that a reasonable person understood the message he was trying to communicate—a message that directly caused him to be arrested under the statute.[73] Not only *would* a reasonable person have understood Patrick's intended message of disdain for his brother's conviction, but a reasonable person at the scene at the time of the incident *did* understand his meaning behind his message. One juror recounted later that he, the juror, responded immediately to Patrick's protests by saying "There was sympathy for your brother on the jury[,] [b]ut we had to follow the law."[74] This demonstrates that Patrick's message caused the juror to respond by defending his decision—the very decision Patrick was protesting. Therefore, the second part of the inquiry, which requires that a reasonable observer understand the message, is satisfied. In sum, the North Carolina juror harassment statute implicates the First Amendment by regulating both pure speech and expressive conduct.

B. The North Carolina Statute is a Content-Based Law and is Presumptively Unconstitutional.

The next part of the overall First Amendment inquiry determines whether the law restricts speech based on its

---

[70] Burgess v. Busby, 544 S.E.2d 4 (N.C. Ct. App. 2001).
[71] *Id.* at 6.
[72] *See supra* notes 55–58 and accompanying text.
[73] State v. Mylett, 374 N.C. 376, 377–78 (2020).
[74] State v. Mylett, Record on Appeal 105, Bates DA000056.

content.[75] Content-based laws are "those that target speech based on its communicative content" and are "presumptively unconstitutional."[76] A law facially discriminates based on content when the language used in the statute draws a line between some communicated subjects as acceptable and others as unacceptable.[77] Content-based restrictions are subject to strict scrutiny and therefore, to be upheld, must be found to serve a compelling government interest and be narrowly tailored to serve that interest.[78] To be narrowly tailored, a law must not be either over- or under-inclusive in the speech it restricts.[79] In other words, the law cannot either include or exclude speech that it should not—it must be the least-restrictive alternative to achieve the compelling interest.[80]

Reed v. Town of Gilbert serves as an example of a content-based law that the U.S. Supreme Court held unconstitutional.[81] In that case, the Court invalidated an Arizona law that imposed more stringent restrictions on political or ideological signs than it did on directional signs.[82] Because the only way of knowing whether a person had violated the statute was by looking at the content of their messaging, the Court deemed the law content-based and therefore presumptively unconstitutional.[83] The Court found that the law furthered no compelling government interest, and even if it did, the law was severely underinclusive in that it prohibited certain signage under the guise of preventing distraction and "clutter," but did not prohibit all signage that would have such an effect.[84] As such, the law was not narrowly tailored and therefore did not pass strict scrutiny.[85] The Court went further to state that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated

---

[75] *See supra* notes 39–41 and accompanying text.
[76] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[77] *Id.* at 156.
[78] *Id.* at 157.
[79] *Id.*
[80] Scott Johnson, *Least Restrictive Means*, THE FIRST AMEND. ENCYCLOPEDIA, (updated June 2017), https://www.mtsu.edu/first-amendment/article/494/least-restrictive-means#:~:text=Least%20restrictive%20means%20test%20applies,be%20weighed%20against%20constitutional%20rights.
[81] *See Reed*, 576 U.S. at 171.
[82] *Id.* at 155.
[83] *Id.* at 164–65, 169–70.
[84] *Id.* at 172, 181.
[85] *Id.* at 171–72.

speech by its function or purpose," but clarified that "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[86]

Moreover, First Amendment jurisprudence largely protects speech even when that speech is "upsetting or arouses contempt."[87] In *Snyder v. Phelps*, the Westboro Baptist Church organized a protest at a soldier's funeral.[88] The protestors shouted at the funeral-goers, including at the soldier's family, that the soldier's death was God's punishment for the government allowing LGBTQIA+ people to serve in the military.[89] Though that speech is nearly universally regarded as heinous and disrespectful to the highest degree, the Supreme Court held that the speech was protected by the First Amendment.[90] The Court reasoned that "[i]f 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."[91]

As with most constitutional doctrine, there are exceptions to the rule of invalidating any law that discriminates based on content of the speech. The U.S. Supreme Court has found several categories of speech that are, as determined by their content, unprotected by the First Amendment and thereby open to government regulation.[92] These categories include things like obscenity, incitement, fighting words, and, pertinently, true threats.[93] The U.S. Supreme Court in *Virginia v. Black* defined true threats as:

> encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . . Intimidation in the

---

[86] *Id.* at 163–64.
[87] Snyder v. Phelps, 562 U.S. 443, 458 (2011).
[88] *Id.* at 447.
[89] *Id.*
[90] *Id.* at 460–61.
[91] *Id.* at 458.
[92] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
[93] Kevin Francis O'Neill & David L. Hudson, Jr., *True Threats*, THE FIRST AMEND. ENCYCLOPEDIA, (updated June 2017), https://www.mtsu.edu/first-amendment/article/1025/true-threats#:~:text=In%20legal%20parlance%20a%20true,acting%20at%20the%20speaker's%20behest.

> constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[94]

True threats are very serious, specific, and believable threats that would lead a reasonable person to fear for their life, health, or safety.[95] Moreover, *Virginia v. Black* added the requirement that the speaker must *intend* to communicate a true threat.[96]

However, this doctrine, as are many others, is nebulous as to the application of the concept to real people and real scenarios. The U.S. Supreme Court has offered little clarification since the inception of the rule regarding the precise standards comprising true threats analysis or the outer bounds of the doctrine.[97] For example, it is unclear whether a speaker must only intend to communicate a threat by speaking, or whether they must also have the subjective intent to commit the harm itself.[98]

Nonetheless, the U.S. Supreme Court offered some guidance about this complicated concept in *Watts v. U.S.*[99] In that case, a young man, Watts, attended an anti-war protest in Washington, D.C., where the crowd divided into small groups to discuss particular topics, and Watts joined a group discussing police brutality.[100] While in the group, Watts talked about his draft status, saying, "I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." and "They are not going to make me kill my [B]lack brothers."[101] Watts was arrested for his statement regarding then-President Johnson and was charged and convicted of a felony for knowingly and willingly threatening the President.[102]

---

[94] Virginia v. Black, 538 U.S. 343, 360 (2003).
[95] *Id.*
[96] *Id.*
[97] *See* O'Neill & Hudson, Jr., *supra* note 93.
[98] *See Black*, 538 U.S. at 366–67 ("As the history of cross burning indicates, a burning cross is not always intended to intimidate.").
[99] Watts v. United States, 394 U.S. 705 (1969).
[100] *Id.* at 706.
[101] *Id.*
[102] *Id.*

The U.S. Supreme Court held that Watts's statement was not a true threat under the doctrine.[103] The Court reasoned that Watts's political hyperbole did not fit within the willfulness requirement, and further stated that the Court "must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and [wide-open], and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[104]

Watts, in light of *Virginia v. Black* as discussed above, demonstrates several important ideas relevant to this discussion of the North Carolina statute. These cases show that true threat, as requiring a knowing and willful state of mind, is a limited doctrine that requires a high standard of intent in order to justify its use in excluding speech from First Amendment protection.[105] As a result of this high standard, the doctrine is applied to only the most egregious instances of threatening words or conduct—a bar so high that even arguable threats against the President of the United States were held as protected speech.[106]

Here, the North Carolina juror harassment statute is a content-based restriction that should be subject to strict scrutiny—a standard it does not meet. The statute only restricts speech or conduct that is considered "intimidating" or "threatening,"—a determination which entirely turns on the content of the speech.[107] The North Carolina statute arguably restricts the speech based on particular subject-matter, as the law contains the language "[a]s a result of the prior official action of another as a juror in a grand jury proceeding or trial."[108] This language arguably governs the subject-matter that is proscribable under the statute—anything related specifically to the juror's official actions in a proceeding or trial is criminalized under the statute.[109] Therefore, the statute would need to survive strict scrutiny to pass constitutional muster.[110]

---

[103] *Id.* at 708.
[104] *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
[105] *See Watts*, 394 U.S. at 708; Virginia v. Black, 538 U.S. 343, 344 (2003).
[106] *Watts*, 394 U.S. at 708.
[107] N.C. GEN. STAT. §14-225.2(a)(2) (2021).
[108] *Id.*
[109] *Id.*; State v. Mylett, 822 S.E.2d 518, 524 (N.C. Ct. App. 2018)
[110] *See* Reed v. Town of Gilbert, 576 U.S. 155, 157 (2015).

However, even assuming that the statute does not restrict speech based on its particular subject-matter, the statute still defines "regulated speech by its function or purpose."[111] Just as the Court stated in *Reed*, defining speech in that way is equally egregious and unconstitutional in First Amendment jurisprudence.[112] The statute separates speech that has a purpose and/or function to threaten or intimidate jurors after they have completed their duties and punishes that speech, as opposed to speech meant for any other purpose or function.[113] Proscription of speech in that way is equally as unconstitutional.

Moreover, the North Carolina statute, by the Court of Appeals' own admission, does not restrict its application to true threats alone, thereby precluding any argument that the law governs only proscribable speech. Both the trial court and the North Carolina Court of Appeals refused to instruct the jury to interpret the statute as only applying to true threats as defined under *Virginia v. Black* and *Watts*.[114] The Court of Appeals thereby encouraged the jury to broadly interpret the terms "threatening" and "intimidating" within the statute to include any and all activity that could subjectively make the listener feel "threatened" or "intimidated."[115] This is plainly against the doctrine and the policies set out in *Virginia v. Black* and *Watts*.[116] In fact, the North Carolina statute, as interpreted by both the trial court and the Court of Appeals, explicitly restricts speech that is not comprised of "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" but rather restricts statements that are simply "caustic" or "unpleasant" in nature, which includes speech (like Mr. Mylett's) that is protected.[117] Just as the Supreme Court held in *Snyder*, the North Carolina courts and legislature cannot prohibit speech simply based on the fact that it is "disagreeable."[118] Therefore, the statute restricts speech that falls squarely outside of the true threat doctrine as articulated in

---

[111] *Id.* at 163.
[112] *Id.*
[113] §14-225.2(a)(2).
[114] *Mylett*, 822 S.E.2d at 530.
[115] *See id.*
[116] *See Watts*, 394 U.S. at 708; Virginia. v. Black, 538 U.S. 343, 344 (2003).
[117] *Black*, 538 U.S. at 359.
[118] Snyder v. Phelps, 562 U.S. 443, 458 (2011).

Virginia v. Black and *Watts* and the argument that the statute is constitutional under true threat doctrine necessarily fails.

Understanding that true threat doctrine offers no protection for the statute and that the law explicitly governs based on content, strict scrutiny must be applied to determine whether the law passes constitutional muster. I argue that the law fails strict scrutiny and is plainly and facially unconstitutional.

Under strict scrutiny, the law must be narrowly tailored to serve a compelling government interest and must employ the least-restrictive means to achieve the same end.[119] The government's interest in protecting jurors from harm and retaliation is arguably compelling. The judicial system relies on the citizens called to serve as jurors being safe to do so.[120] Further, jurors must be able to competently perform their duties within the courtroom while being free from intimidation or threat.[121] However, this statute is not simply preventing the jurors from any sort of interference or intimidation *during* their duties within the courtroom—it also sets forth a blanket ban on any communication that could possibly be perceived as threatening by the jurors even *after* their duties are complete.[122] Of course, the government must keep a strong reputation of protecting jurors generally, or future jurors may be less likely to perform competently and impartially, but the blanket ban on communication after the fact is simply not narrowly tailored enough to serve this interest. Therefore, the law does not survive strict scrutiny.

Overbreadth is one way a law can lack the narrow tailoring required by the Supreme Court in performing its strict scrutiny.[123] A law that is otherwise constitutional in its application to a certain scenario might be unconstitutional based on the fact that "a 'substantial number' of its applications are unconstitutional" as per the doctrine.[124] In other words, statutes

---

[119] Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).
[120] *See How Courts Care for Jurors in High Profile Cases*, U.S. CT. NEWS, (January 24, 2020), https://www.uscourts.gov/news/2020/01/24/how-courts-care-jurors-high-profile-cases.
[121] *See id.*
[122] N.C. GEN. STAT. §14-225.2(a)(2) (2021); State v. Mylett, 822 S.E.2d 518, 539–40 (N.C. Ct. App. 2018) (McGee, C.J., dissenting).
[123] *Mylett*, 822 S.E.2d at 539–40.
[124] U.S. v. Stevens, 559 U.S. 460, 461 (2010) (citations omitted).

must be written in a way so that they do not encompass protected speech within their restrictions.[125]

In *U.S. v. Stevens*, the U.S. Supreme Court addressed the overbreadth issue.[126] In the case, the Court analyzed a law purporting to criminalize animal cruelty, in which the statute outlawed portrayals of living animals being "intentionally maimed, mutilated, tortured, wounded, or killed."[127] The Court reasoned that because depictions of animals being legally killed through permitted hunting, which are legal and protected depictions, would be criminalized, the law is overbroad and therefore, unconstitutional.[128] The Court further clarified that "[t]he first step in overbreadth analysis is to construe the challenged statute" to determine how far the statute actually reaches, and then to determine whether the breadth of the law is "substantial" in its restriction of protected speech.[129]

Here, assuming that the government's interest in protecting jurors from intimidation and retaliatory behavior is compelling enough (an assumption supported by both common sense and *Burgess*), the law is still not narrowly tailored to prevent restricting a substantial amount of constitutionally protected speech. As the law stands now, a person can be (and has been) arrested and charged with a violation of the law simply by addressing jurors in a way that subjectively makes the juror *feel* intimidated or threatened.[130] The law offers no opportunity for mitigation based upon the intent of the speaker, or even the objective words or actions that were communicated.[131] The plain language of the statute, taken with the N.C. Court of Appeals' refusal to constrain the interpretation of that language, paints a clear picture that *any* communication to a juror that subjectively makes that juror feel threatened or intimidated is felonious.[132]

This leads one to conclude that even communication that is objectively unrelated to a juror's personal safety, livelihood, or even privacy, can and will be prosecuted under the statute. Patrick Mylett is the perfect example, and one can conclude that

---

[125] *See id.* at 468.
[126] *Id.* at 474.
[127] *Id.*
[128] *Id.* at 482.
[129] *Id.* at 474 (citations omitted).
[130] N.C. GEN. STAT. §14-225.2(a)(2) (2021); State v. Mylett, 822 S.E.2d 518, 539–40 (N.C. Ct. App. 2018) (McGee, C.J., dissenting).
[131] *Mylett*, 822 S.E.2d. at 537 (McGee, C.J., dissenting).
[132] *See id.*

the law is overbroad, in part, because of his case's circumstances. Mr. Mylett said nothing about what he would do next—he did not threaten to harm any of the jurors, he did not attempt to overpower any of the jurors, he did not address any of the jurors in a way that could be construed as anything other than constitutionally protected protest. In truth, Patrick had a right to protest and speak and was punished for exercising that right. This behavior is contrasted with that of the physician in *Burgess*, who acted in such a way so as to harm the jurors personally.[133] He sent out their personal information as a way to retaliate as he saw fit—he attempted to enact his own version of justice.[134] Mr. Mylett did no such thing. He simply communicated his emotions and reactions to the conviction of his brother.[135]

The statute could also restrict constitutionally protected speech in scenarios that do not mirror Mr. Mylett's. It is arguable (even likely) that a disgruntled defendant who posted on Facebook that he did not agree with his jury's decision, and who tagged several of the jurors in the post, could be prosecuted under the statute. The same goes for the mother of a plaintiff whose jury acquit the defendant if she were to hand out a flyer to the jurors that communicated her disagreement with the verdict. These examples are but a few of the conceivable scenarios in which the North Carolina statute would unconstitutionally restrict protected speech.

Overall, the law offers too much discretion to the government to favor agreeable messages and to discriminate against unpopular viewpoints as expressed toward jury members in the course of their duties. It seems clear that the legislature meant to have the statute guard against true threats, retribution, or harm imparted on jurors for their actions in the course of duty. But the way the statute stands now opens the door wide for too many speakers to be prosecuted. Given the fact that the statute reaches broadly into speech that is historically and consistently protected by the constitution so as to criminalize that speech, the law is not narrowly tailored enough to survive strict scrutiny.

---

[133] *See* Burgess v. Busby, 544 S.E.2d 4, 6 (N.C. Ct. App. 2001).
[134] *Id.*
[135] *Mylett*, 822 S.E.2d at 532 (McGee, C.J., dissenting).

IV. THE NORTH CAROLINA COURT OF APPEALS PUTS FORTH UNTENABLE AND INHERENTLY CONTRADICTORY REASONS FOR UPHOLDING THE LAW.

The North Carolina Court of Appeals wrote its majority opinion in *State v. Mylett* in such a way that it serves as a comprehensive set of counterarguments against this law being unconstitutional. This section will address each of these arguments in turn. First, the court believes that this law regulates non-expressive conduct, and as such, does not implicate the First Amendment in the first place.[136] The North Carolina Court of Appeals seems to confuse the concepts of laws that regulate non-expressive conduct and laws that are content-neutral by nature. The court says that the law "applies to non[-]expressive conduct and does not implicate the First Amendment" *and* that the statute's "language applies to a defendant's conduct" "irrespective of the content."[137] By definition, non-expressive conduct has no content (as the word is understood in First Amendment jurisprudence) on which to base a restrictive law.[138] In other words, non-expressive conduct does not implicate the First Amendment, given that there is no speech or expression to restrict. Significantly, non-expressive conduct is subject to a lower form of scrutiny, as that sort of conduct fails to implicate the First Amendment speech rights, while laws that are content-neutral, but are unreasonably burdensome as to speech and expression do implicate the First Amendment and are subject to strict scrutiny.[139] Further, though it is possible to have a single law that implicates both expressive and non-expressive conduct and thus divide the First Amendment analysis of the law accordingly, the N.C. Court of Appeals makes no such claim regarding the statute at issue here.[140]

By stating that the statute is both restricting non-expressive conduct and is a content-neutral law, the court conflates two separate First Amendment concepts without resolving the issue inherent in that conflation—whether the law actually implicates the First Amendment under their argument. This issue informs the rest of the court's analysis, as this question operates as the foundation for that analysis.

---

[136] *Id.* at 523.
[137] *Id.*
[138] Hoch, *supra* note 39.
[139] *Id.*
[140] *Id.*

The court makes these conclusions all while attempting to contrast this case to another North Carolina case, *State v. Bishop*,[141] in which a statute "outlawed posting particular subject matter, on the Internet, with [the intent to intimidate a minor]."[142] The Court of Appeals contends that somehow this case is distinguishable from *Bishop*; the court says that posting personal information about a minor on the Internet with the intent to intimidate the minor is expressive conduct, but speaking to a juror about his or her actions in the course of being a juror in an intimidating way is somehow not expressive conduct.[143] This is simply an incongruous and nonsensical conclusion. Patrick Mylett could not have violated the statute without expressing some message either through his words or actions. He could not have been arrested and charged with a felony under the statute if he was buying bananas instead of apples at the store—he had to communicate some form of intimidation or threat (assuming that either concept had some sort of concrete meaning that only implicated proscribable speech—a premise for which there is no support) to a jury member about their actions as a juror. The only way one could violate the statute is to express a message—the Court of Appeals' conclusion that the law only covers non-expressive conduct is simply wrong.

The Court of Appeals also puts forth that the law is a content-neutral law (which again, would mean that the statute implicates the First Amendment in a way in which the court first concluded it does not) and that it is a constitutional restriction on the manner in which one may communicate with a juror.[144] Time, place, and manner restrictions are rooted in *Ward v. Rock Against Racism*,[145] in which the U.S. Supreme Court set forth a three-pronged test to determine whether a particular law operates as a constitutional time, place, or manner restriction.[146] First, the law must be content-neutral.[147] Second, the law must be narrowly tailored to serve a significant government interest (as opposed to compelling, which is a higher standard).[148] Finally, the law must

---

[141] 368 N.C. 869 (2019)
[142] *Id.* at 873.
[143] State v. Mylett, 822 S.E.2d 518, 523 (N.C. Ct. App. 2018)
[144] *Id.* at 523–24.
[145] 491 U.S. 781 (1989).
[146] *Id.* at 782–83.
[147] *Id.*
[148] *Id.*

leave open ample alternative channels for communicating the speaker's message.[149]

Here, as argued above, this law is not content neutral. It allows anyone to speak to jurors about any topic they would like, except for things related to their service as jury members. But, assuming for a moment that the law is content-neutral, it still does not pass the *Ward* test. Again, as argued above, the law is not narrowly tailored, even when assuming that the government's interest in protecting jurors is significant, or compelling, for that matter. The law encompasses too much speech without regard for any sort of intent or true threat behind the communication.

Finally, the law does not leave open other channels for communicating the message. The Facebook example in the previous section operates here as well. Because of the broad terms in the statute, it is entirely conceivable that even the Internet would not be a safe haven for a disgruntled defendant or a pained plaintiff to air their grievances against their juries. They could not address the jurors in writing, or in newsprint, or in interviews, or over email. Any of those options would be conceivably felonious under the broad writing and broad interpretation of the statute by the Court of Appeals. Altogether, the Court of Appeals' counterarguments for constitutionality of this law necessarily fail at every turn.

V. CONCLUSION

The North Carolina statute prohibiting communication with jurors post-trial is a content-based restriction on speech and expressive conduct in such a way to be unconstitutional. The law, even assuming it serves a compelling government interest, is overbroad in its prohibition of constitutionally protected speech. It is not narrowly tailored to serving that compelling government interest and would fail strict scrutiny.

The statute should be held unconstitutional. Given the opportunity, either the North Carolina Supreme Court or the United States Supreme Court should hold as such but could also interpret the terms "threaten" and "intimidate" in a way that is clear, understandable, and most importantly, narrowed down to only proscribable speech.

---

[149] *Id.*

Americans place a high value on the freedom of speech, and particularly speech that gets directly at the actions of government and government actors. Protesting the outcome of a governmentally composed and sanctioned jury in a particular trial seems to encompass the exact meaning and intention behind the protection of speech in this country. Patrick Mylett and others like him have a right to be heard by virtue of the United States Constitution.