Penn Undergraduate Law Journal

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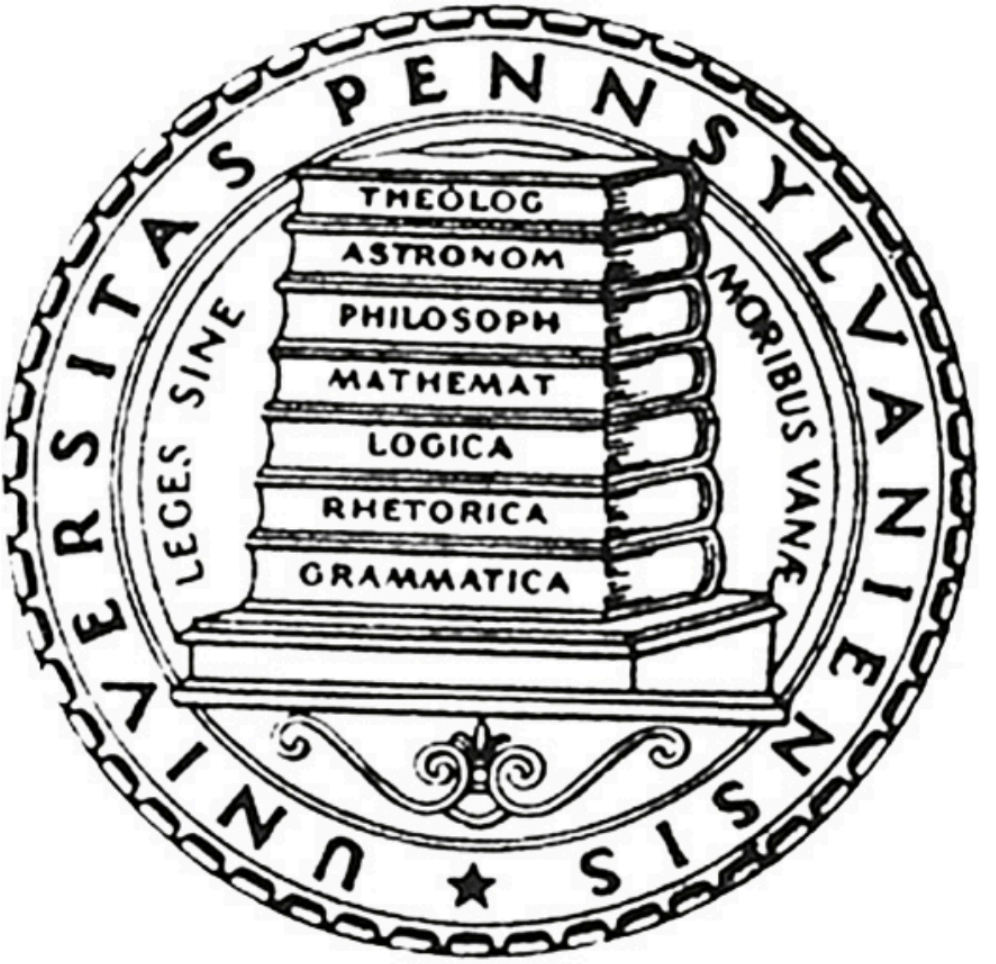
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LETTER FROM THE EDITORS

Dear Reader,

We are excited to announce the 12th Volume and 23rd Edition of the Penn Undergraduate Law Journal. As the largest undergraduate journal in the country, we have the privilege of engaging with some of the most intellectual, driven, and curious students in the nation who have worked tirelessly to make this journal come to fruition. This was one of our most competitive cycles, challenging our editing teams to find the best pieces that highlight the skill and legal research abilities of our peers.

This publication would not be possible without every name included on our masthead. We are grateful for the commitment and dedication that our leadership continued to give: the managing editors who ensured completion of articles for publication, the executive editors who led their teams with confidence, the layout and design editors who meticulously shaped the look and flow of this edition, the programming/communications chair who helped keep our entire organization focused and on the same page throughout the process, and finally our finance chair who secured our sponsorships. With this amazing leadership team, we were able to accomplish more, growing the number of engaged members and launching a mentorship program with the Penn Carey Law Review. It has been a privilege to be mentored by members of the Law Review whose guidance, insight, and commitment to excellence have strengthened both our publication and community.

We encourage you to read the incredible work presented here, spanning topics from capital punishment, to liability, to the growing implications of artificial intelligence in the practice of law. As predictions about the impact of AI on the legal profession, writing, reading, and nearly every human interaction is still uncertain, we have committed this edition to be written purely by humans. We put this edition out as a testament to the beauty of collaboration, scholarly inquiry, and precision. In this light, we hope that you put your phone away, disable your AI summaries, turn off the news, and set aside a moment to wrestle with the questions, arguments, and stories told in this edition. Happy reading!

Sincerely,

Maya Leyzarovich and *Sydney Kim*

Editor-in-Chiefs, 2025-2026

ARTICLE

FROM DIAGNOSIS TO DEATH ROW: ADDRESSING (IN)CONSISTENCY OF THE DIRECTION OF CHANGE IN INTELLECTUAL DISABILITY DETERMINATIONS

Fiona Yin. Cornell University

ABSTRACT

In 2002, the U.S. Supreme Court barred the execution of intellectually disabled individuals. The product of prolonged medical, moral, and legal debates, *Atkins v. Virginia* at last recognized intellectually disabled defendants' diminished culpability and heightened risk of wrongful execution. Yet over two decades later, the application of *Atkins*' mandate remains perversely inconsistent across states. This paper investigates the fragmentation among the diagnostic practices deployed by states to determine intellectual disability in capital defendants. Drawing from scholarship on clinical psychiatry, disability studies, and U.S. death penalty jurisprudence, I reveal how these drastic dissimilarities threaten to dispel *Atkins*' constitutional guarantee. In addition to examining the structural challenges that intellectually disabled individuals encounter in the U.S. criminal justice system and reviewing the evolution of the U.S. death penalty's intellectual disability exemption, I use the modern examples of *Hall v. Florida* (2014), *Moore v. Texas I* (2017) and *II* (2019), and Georgia's beyond a reasonable doubt standard of proof to characterize the various methods by which states have circumvented *Atkins*. To address these pitfalls, I propose four reforms: (1) strict adherence to the DSM-5's clinical standards for diagnosing intellectual disability and exclusion of non-clinical indicators, (2) a requirement for expert testimony to invoke medical consensus and individualize findings to the capital defendant being tried, (3) a uniform burden of proof set at a preponderance of the evidence across all states, and (4) training for lawyers, judges, and jurors on handling capital cases with intellectually disabled defendants. Taken together, these recommendations may help the nation realign toward a necessary constitutional ideal—that when clinical uncertainty pervades the question of a death sentence, any ambiguity must yield to life.

1. INTRODUCTION

Twelve years ago, on a Tuesday night in Georgia, Warren Lee Hill prepared himself to die.[1] As the minutes between him and his last breath dwindled, he was "taken to the execution chamber, given the opportunity to say any last words," and strapped to a gurney.[2] A prison official injected him with a sedative.[3] As his life slowly, yet palpably, fell away, Hill received a sudden reprieve. Within 30 minutes of Hill's execution, the 11th U.S. Circuit Court of Appeals issued a stay to reevaluate evidence of his intellectual disability.[4] Hill had been serving a life sentence for the murder of his girlfriend when he killed another inmate—a capital offense under Georgia law.[5] When Hill and his counsel initially raised their claim of his intellectual disability, three of the state's psychiatrists found Hill to be mentally competent.[6] Hill, who was 25 years old when he was first convicted, had an IQ of 70, "consistently tested in the 2-3 percentile in childhood achievement and intelligence testing," had never lived alone, and endured "a history of trauma," "along with significant deficits in functioning."[7] The week before Hill's execution, the three state psychiatrists who first examined him recanted their findings, concurring with six other experts who determined that he was indeed intellectually disabled.[8] In sum, "all of the expert evidence" supported Hill's claim of intellectual disability.[9]

On paper the overwhelming evidence of Hill's intellectual disability seems apparent. Nonetheless, defendants like Hill encounter substantial procedural and structural hurdles to proving their intellectual disabilities. Although the prevailing definition of intellectual disability finds grounding in the "three long-standing criteria" of "subaverage intellectual functioning," "subaverage adaptive behavior," and deficits originating "during the developmental period," intellectual disability remains a "multifaceted and complex condition" appearing through "a wide range of clinical presentations."[10] The lack of a singular, determinative test to indicate

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[1] Andrew Cohen, *Warren Lee Hill, and His Cause, Live to Fight Another Day,* The Atlantic (Feb. 19, 2013) https://www.theatlantic.com/national/archive/2013/02/warren-lee-hill-and-his-cause-live-to-fight-another-day/27331
[2] Kelly K. Holder, Confined to a Concrete Cave: The Death Row Torture of Warren Lee Hill, 7 ELON L. REV. 603 (2015).
[3] *Id.*
[4] Cohen, *supra* note 1.
[5] Holder, *supra* note 2.
[6] *Id.*
[7] Lauren A. Ricciardelli and Kevin M. Ayres, The Standard of Proof of Intellectual Disability in Georgia: The Execution of Warren Lee Hill, 27 J. DISABILITY POL'Y STUD. 159 (2016).
[8] Holder, *supra* note 2.
[9] Cohen, *supra* note 1.
[10] Marc J. Tassé and John H. Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies* 9 (Praeger Press 2017)

intellectual disability entails that the diagnostic process is "inherently uncertain."[11] Both the causes and consequences of this uncertainty are magnified by the capital conviction and sentencing process. Key components of these proceedings—assistance of counsel, confessions, witness testimonies, and the assessments of jurors and judges—are implicated by not only an intellectually disabled defendant's impairments, but also by lay misperceptions and structural barriers, which ultimately impact life or death judgments.

U.S. jurisprudence has long sought to address these considerations in order to formulate capital punishment schemes that comport with the Eighth Amendment's prohibition of cruel and unusual punishment.[12] Centuries before the U.S. Supreme Court's first ruling on incompetence and the death penalty in *Ford v. Wainwright*, U.S. common law tradition delineated that executions of the "insane" failed to serve penological purposes and offended humanity.[13] In *Ford*, the Court held that the Eighth Amendment bars states from inflicting the death penalty upon the "insane," drawing heavily from the reasoning found in U.S. common law.[14] Notably, the majority neglected to define "insanity," precipitating new questions for the Court to resolve.[15] In Penry *v. Lynaugh*, the Court held that the Eighth Amendment did not preclude the execution of "any mentally retarded person of Penry's ability."[16]

After *Penry*, the disability community and their allies moved swiftly and successfully to advocate for changes to state legislation to exempt those with intellectual disabilities from capital punishment.[17] In *Atkins v. Virginia*, this newfound national consensus pushed the Court to conclude that sentencing an intellectually disabled defendant to death is unconstitutional under the Eighth Amendment.[18] In addition to drawing from the direction of popular reforms that followed *Penry*, the Court reasoned that subjecting intellectually disabled defendants to capital punishment would fail to serve the penalty's retribution and deterrence aims and would also heighten the risk of wrongful executions.[19] To ground these arguments, the Court cited the three-pronged definition of intellectual disability.[20] However, *Atkins* left "to the State[s] the task of developing appropriate ways to

[11] Ricciardelli & Ayres, *supra* note 7, at 162.
[12] *Penry v. Lynaugh*, 492 U.S. 302 (1989).
[13] John H. Blume, Sheri Lynn Johnson, & Katherine E. Ensler, Killing the Oblivious: An Empirical Study of Competency to be Executed Litigation, 82 UMKC L. REV. 336 (2014).
[14] *Id.* at 338.
[15] *Id.*
[16] *Penry v. Lynaugh*, 492 U.S. at 313.
[17] James W. Ellis, Disability Advocacy and the Death Penalty: The Road from *Penry* to *Atkins*, 33 N.M. L. REV. 176 (2003).
[18] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[19] *Id.* at 321.
[20] *Id.* at 318.

enforce the constitutional restriction" —an allowance that led to stark divergences from its central holding.[21]

Contrary to the dissent's prediction in *Atkins*, the ruling did not produce an "overwhelming number of frivolous *Atkins* claims."[22] Broadly, states reconstructed their statutes, either unintentionally or intentionally, to increase the difficulty for intellectually disabled defendants to prevail on *Atkins* claims.[23] Florida, Texas, and Georgia's statutes exemplified how the process of finding subaverage intellectual functioning and adaptive behavior, and the burden of proof required to prove intellectual disability, were construed to erect such barriers. In *Hall v. Florida*, the Court struck down Florida's strict IQ cutoff for determining intellectual disability.[24]

In *Moore v. Texas I* and *II*, the Court held twice that Texas's non-clinical factors used to assess a defendant's adaptive deficits, which tended towards finding that a defendant was intellectually able, were unconstitutional.[25] While *Hall* and *Moore I* and *II* clarified some of the practices for determining intellectual disability barred by *Atkins*, states largely "remain free to define intellectual disability as they see fit."[26] Georgia's statute—which requires that a defendant prove their intellectual disability beyond a reasonable doubt, the highest of the three standards of proof—offers another showing of how statutory requirements can circumvent *Atkins*' mandate.[27]

The susceptibility of the intellectual disability determination process to manipulation also falls along racial lines. Implicit biases against disability and race often coalesce to lead laypeople to find intellectually disabled defendants of color competent, and thus eligible for the death penalty, more often than their white counterparts.[28] The practice of "ethnically adjusting" the IQ scores of defendants of color to account for their purported structural underperformance on intelligence tests illuminates this dynamic.[29] Ultimately, the shocking proliferation of "ethnic

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[21] *Id.* at 317.
[22] John H. Blume, Sheri Lynn Johnson & Christopher Seeds, An Empirical Look at Atkins v. Virginia and its Application to Capital Cases, 76 TENN. L. REV. 628 (2009).
[23] John H. Blume et al., A Tale of Two (and Possibly Three) *Atkins*: Intellectual Disability and Capital Punishment Twelve Years after The Supreme Court's Creation of a Categorical Bar, 23 WM. & MARY BILL RTS. J. 399 (2014).
[24] *Hall v. Florida*, 572 U.S. 701 (2014).
[25] Moore v. Texas, 581 U.S. ____ (2017); Moore v. Texas, 586 U.S. ____ (2019).
[26] Alexander H. Updegrove & Michael S. Vaughn, Evaluating Intellectual Disability after the *Moore v. Texas* Redux, 47 J. AM. ACAD. PSYCHIATRY & L. 488 (2019).
[27] Sheri Lynn Johnson, John H. Blume & Brendan Van Winkle, *Atkins v. Virginia* at Twenty: Still Adaptive Deficits, Still in the Developmental Period, 28 WASH. & LEE L. REV. 57 (2022).
[28] Blume, Johnson & Ensler, supra note 13, at 359.
[29] Robert M. Sanger, IQ, Intelligence Tests, 'Ethnic Adjustments,' and *Atkins*, 65 AM. U. L. REV. 108 (2015).

adjustments" underscores another unignorable consequence of states' disparate processes for assessing intellectual disability.

While *Atkins* and subsequent case law provided a foundation and guidance towards exempting intellectually disabled defendants from the death penalty, I argue that unconstitutional inconsistencies persist in state-by-state determinations of intellectual disability. In this paper, I will reveal how these discrepancies contradict both clinical and legal interpretations of intellectual disability and generate consequences of constitutional proportion. I will first provide the definition of intellectual disability, the common conditions and misperceptions that intellectually disabled individuals face, and how these challenges translate into the direct disadvantages that intellectually disabled defendants encounter while navigating the criminal justice system, particularly in capital cases. Next, I will trace key jurisprudence on intellectual disability and capital punishment by reviewing U.S. common law, *Ford v. Wainwright*, and Penry *v. Lynaugh*. Subsequently, I will discuss the landmark decision of *Atkins v. Virginia*, including the Court's national consensus argument and its penological justifications for the holding. As follows, I will analyze the general trends in the filings and success rates of *Atkins claims* after 2002 and the overarching points of contrast amongst state statutes, before demonstrating how Florida, Texas, and Georgia's statutes imposed unique obstacles for defendants with intellectual disabilities to win *Atkins* claims. To accomplish the latter, I will focus on *Hall v. Florida*, *Moore v. Texas I* and *II*, and Georgia's beyond a reasonable doubt standard of proof. Afterwards, I will examine how the process of qualifying capital defendants for *Atkins*' intellectual disability exemption is uniquely susceptible to racial bias.

Ultimately, I will recommend that states adopt a strictly standardized definition of intellectual disability that tends toward exempting defendants from the death penalty. States should follow "current clinical definitions and practices, as established in the DSM-5 […] when evaluating capital defendants for intellectual disability."[30] Furthermore, this should preclude considerations that point to a defendant's "adaptive strengths," which do not imply the nonexistence of an intellectual disability.[31] Additionally, the qualification process must "invoke the consensus of mental health professionals," rather than singular testifying experts, and involve an assessment of the individual defendant's characteristics and behaviors alongside their applicable condition(s).[32] To assess such evidence, all states should

[30] Updegrove & Vaughn, *supra* note, at 491.
[31] Blume, Johnson & Seeds, *supra* note 22, at 635.
[32] Douglas Mossman, Atkins v. Virginia: A Psychiatric Can of Worms, 33 N.M. L. REV. 288 (2003).

lower their burden of proof to a preponderance of the evidence, the lowest of the three standards of proof.[33] Finally, lawyers, judges, and juries must undergo rigorous judicial training on how to work with intellectually disabled defendants, evaluate evidence of intellectual disability, and recognize and avoid biases against intellectually disabled individuals. As I will explain, these reforms would also minimize the risk of racial bias in the qualification process. Most significantly, my recommendations account for the inherent uncertainty of determining intellectual disability, permit adequate individualization, and align with the fundamental principle in U.S. jurisprudence of prioritizing innocence over guilt—considerations all the more necessary in the face of the finality of a death sentence. The precarity of evaluating intellectual disability in capital cases nearly rendered Warren Lee Hill "a reluctant martyr" to the Eighth Amendment's proscription of executing intellectually disabled individuals.[34] Reform is immeasurably critical to ensuring that no individual is unjustly condemned to the irreversible—a prospect that loomed before Hill in the mere minutes before his respite.

2. BEYOND DIAGNOSIS: INTELLECTUAL DISABILITY IN PRACTICE

The futility of confining intellectual disability to a blanket observation has fueled the ongoing challenges to its definition in U.S. death penalty jurisprudence. Since the law transcends a simple diagnosis to delegate punishments or mercy, legal considerations of intellectual disability must not only factor in its clinical ambiguities, but also the structural biases and barriers that often shape verdicts. This section will discuss both the diagnostic and societal judgments that implicate the capital proceedings of intellectually disabled defendants. According to the American Psychiatric Association (APA)'s Diagnostic and Statistical Manual of Mental Disorders (DSM-5), three prongs characterize intellectual disability.[35] The first refers to "significantly subaverage adaptive behavior," encompassing conceptual, social, and practical skills.[36] The "complex" and "varied" "clinical presentation[s]" of intellectual disability render both "clinical judgment" and "rigorous individualized assessment" indispensable to determining the presence of the first two prongs.[37] The third prong specifies that "the individual's impaired functioning" must have "originated during the developmental period."[38] A finding of these three conditions signals a lower "level of human functioning," suggestive of intellectual disability

[33] Timothy R. Saviello, The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High Is Too High? 20 BERKELEY J. CRIM. L. 202 (2015).
[34] Cohen, *supra* note 1.
[35] Ricciardelli & Ayres, *supra* note 7, at 166.
[36] Tassé & Blume, supra note 10, at 9.
[37] *Id.* at 3.
[38] *Id.* at 1.

rather than prescribing any "universally distinctive" personal or physical features "common to all cases."[39] Furthermore, every measure used to probe intellectual disability, including an IQ test, rests upon its own "value-laden" assumptions and justifications.[40]

In addition to the subjectivity the diagnostic process introduces, intellectually disabled individuals face "significant stigma" in society, which often pressures them to "pass" as intellectually able.[41] As follows, criminal psychiatrists have documented statements made by capital defendants to legal professionals such as, "'I'm not a retard,'" which strongly indicate that stigma induces intellectually disabled individuals to "attempt to conceal [their] condition from lawyers" without the knowledge of its potential utility in their defense.[42] Furthermore, laypeople commonly misperceive a constant polarization of the behaviors and emotions of intellectually disabled individuals, such as being "'always happy' or 'always aggressive,'"—a mistake especially salient due to the prevalence of "mild" intellectual disabilities amongst capital defendants.[43] These targeted assumptions generate a catch-22 for intellectually disabled defendants in courtrooms. Exhibiting demeanor on either extremity of a behavioral spectrum can risk affirming stereotypes of intellectual disability, causing factfinders to judge them as callous or undeserving of relief. Conversely, acting in a manner deemed more conventional to intellectually able individuals can lead factfinders to dismiss their claims of intellectual disability entirely.

"Inaccessible services," "lack of accommodations," and legal professionals' "lack of experience and accurate knowledge about disability" intensify the difficulties that intellectually disabled individuals confront in the criminal justice system.[44] For example, the structural shortcomings of jails and prisons threaten them with a "heightened risk of violence" and "new physical and mental problems."[45] The augmented probability of their defense counsel's ineffectiveness is exacerbated by reports of "public defenders refusing to accept cases involving defendants with disabilities, apparently due to lack of comfort or experience."[46] Additionally, expansive compilations of false confessions—likely engendered by incompetence

[39] *Id.* at 2.
[40] Ricciardelli & Ayres, *supra* note 7, at 162-163.
[41] Tassé & Blume, supra note 10, at 17.
[42] Michael L. Perlin, *'Life Is in Mirrors, Death Disappears': Giving Life to Atkins*, 33 N.M. L. REV. 315 (2003).
[43] Tassé & Blume, supra note 10, at 17.
[44] Sandra M. Leotti & Elspeth Slayer, Criminal Legal Systems and the Disability Community: An Overview, 11 SOC. SCI. 260 (2022).
[45] *Id.*
[46] Rebecca Vallas, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons* at 9 (Ctr. for Am. Progress 2016).

and coercion from legal professionals—concretize the miscarriages of justice that intellectually disabled defendants are frequently subjected to. In 1985, Earl Correll, who had an IQ of 68, was executed after his court-appointed defense counsel admitted that "they threw up their hands and gave up," when Corell "curled up in a corner and cried" upon being questioned about the crime.[47] In 2009, Tyler Sanchez, who was 19 years old, "hearing-impaired," and "intellectually disabled," confessed to an assault with a statement that suspiciously parroted the "verbatim details" that detectives admitted to feeding him over the course of "a 17-hour interrogation."[48] Hence, from variable clinical determinations to plain systemic obstacles, the compounding contingencies stacked against intellectually disabled capital defendants have persistently attracted legal scrutiny.

3. THE LONG ROAD TO *ATKINS*

Despite the long-established convention that sentencing individuals with mental impairments to death substantially complicates the penalty's fundamental rationale, the Court took nearly two decades to forge an exemption for intellectually disabled defendants. Throughout this interim, the Court cemented foundational penological reasoning while simultaneously presenting novel contestations. This section will trace the years leading up to *Atkins* in which the Court wrestled with translating a constitutional intuition into a tangible legal protection.

One of U.S. common law's earliest proclamations against the execution of mentally impaired defendants, then loosely referred to as "insane," foretold that the punishment would prove "'a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others.'"[49] Traditional denouncements of these executions on moral grounds would later underlie the public and the Court's skepticism of retribution's applicability to intellectually disabled defendants. Furthermore, by asserting that the "spectacle" would fail to set an "example," the order seemingly alluded to the death penalty's failure to serve its deterrent purposes when inflicted upon those with intellectual disabilities.

These arguments materialized three centuries later in *Ford v. Wainwright*.[50] Alvin Bernard Ford was first convicted of capital murder in Florida in 1974.[51]

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[47] Robert Perske, Perske's List: False Confessions from 75 Persons with Intellectual Disability, 49 INTELL. & DEV. DISABILITIES 366 (2011).
[48] *Id.* at 370.
[49] Blume, Johnson & Ensler, *supra* note 13, at 336.
[50] *Ford v. Wainwright*, 477 U.S. 399 (1986).
[51] *Id.* at 401.

Despite no initial indication of mental incompetence, Ford's behavior gradually changed during his imprisonment.[52] Two psychiatrists who extensively examined Ford told the Court that he suffered from a "mental disease" comparable to "schizophrenia," which deprived him of any awareness of the cause or meaning behind his execution.[53] After a succession of challenges from Ford's defense counsel, the Court finally granted certiorari and held, "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."[54] The Court echoed U.S. common law's condemnation of executing the insane, citing, "such an execution has questionable retributive value, presents no example to others and thus has no deterrence value."[55]

The Court subsequently highlighted three specific deficiencies in Florida's competency statute, which failed "to include the prisoner in the truth-seeking process," denied the defense "any opportunity to challenge" "the state-appointed psychiatrists' opinions," and placed "the decision wholly in the executive branch."[56] Importantly, the Court neglected to rule on whether Ford was actually insane, simply directing Florida that Ford "was entitled to more process in the determination of his competency than he was afforded."[57] Ironically, 'more process' led the district court to deem Ford competent on remand, and he passed away while awaiting another appeal.[58] In his concurring opinion, Justice Powell attempted to outline a standard for competency, which he tied to the defendant's perception of "the connection between his crime and his punishment;" Powell argued that only an affirmative finding would satisfy "the retributive goal of the criminal law."[59]

Three years later in *Penry v. Lynaugh*, the Court was tasked with applying *Ford*'s reasoning to the question of whether the execution of "mentally retarded" defendants violated the Eight Amendment.[60] Johnny Paul Penry, who was charged with the fatal rape, beating, and stabbing of a woman in Texas in 1979, had "an IQ between 50 and 63" and "the mental age of a 6½-year-old."[61] Penry's defense counsel proffered evidence that he "suffered from organic brain damage," in

[52] *Id.* at 402.
[53] *Id.* at 403.
[54] *Id.* at 409-10.
[55] *Id.* at 399.
[56] *Id.* at 413, 415, 416.
[57] Blume, Johnson & Ensler, *supra* note 13, at 338.
[58] Blume, Johnson & Ensler, *supra* note 13, at 338.
[59] *Ford v. Wainwright*, 477 U.S. at 422.
[60] *Penry v. Lynaugh*, 492 U.S. 302 (1989)
[61] *Id.* at 307-08.

addition to testimony from his family that he "was unable to learn in school" and was routinely abused as a child.[62] The trial court's psychiatrist countered that Penry fell "in the borderline range" of intellectual disability.[63] Assenting to the state's suggestion that Penry was only mildly intellectually disabled, the Court held that, although "the jury was not adequately instructed" to account for Penry's disability as a mitigating factor, they could not "conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability."[64]

Closely adhering to the guidepost furnished by *Ford*—Justice Powell's competency standard—the Court explained that unlike those entirely unaware of "the connection between [their] crime and [their] punishment," defendants with mild intellectual disabilities did not "inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."[65] Significantly, the Court also heavily relied upon *Trop v. Dulles*' mandate that interpretations of the Eighth Amendment must comport with "evolving standards of decency."[66] Accordingly, the Court conveyed that state legislatures were "the clearest and most reliable" indicia of the nation's "contemporary values."[67] After surveying the treatment of intellectually disabled defendants by state legislatures, sentencing jurors, and public opinion, the Court concluded that there was "insufficient evidence of a national consensus against executing mentally retarded people."[68]

Penry's holding, and the Court's postulation that "national consensus" approved of the executions of intellectually disabled defendants, emboldened the disability community to lobby for legislative reforms.[69] Rather than inviting debates over the general "desirability of the death penalty," disability advocates persuaded state governments and the public that the punishment of death was incommensurate with the unique limitations that intellectually disabled defendants lived with, which diminished their culpability.[70] Although the widespread "political unpopularity of criminal justice proposals that favored

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[62] *Id.* at 309.
[63] *Id.* at 308.
[64] *Id.* at 340.
[65] *Ford v. Wainwright*, 477 U.S. at 422; *Penry v. Lynaugh*, 492 U.S. at 338.
[66] *Penry v. Lynaugh*, 492 U.S. at 334.
[67] *Id.* at 331.
[68] *Id.* at 335.
[69] James W. Ellis, Disability Advocacy and the Death Penalty: The Road from Penry to Atkins, 33 N.M. L. REV. 173 (2003).
[70] *Id.* at 177.

defendants" throughout the late 90s and early 2000s kindled some resistance to their demands, the nonpartisan credibility of key advocacy groups such as United Cerebral Palsy and state Developmental Disabilities Planning Councils largely triumphed.[71] The magnitude of the political opposition that they forestalled only rendered their accomplishments "all the more remarkable."[72] The marked shift in the tides of national consensus would soon take shape in one of the Court's most pivotal rulings in the history of U.S. death penalty jurisprudence.

4. *ATKINS V. VIRGINIA*: THE BIRTH OF A TENUOUS CONSENSUS

The Court's 2002 ruling in *Atkins v. Virginia* upended *Penry*'s holding. Its reversal was accompanied by evolved conceptions of intellectual disability and national consensus that would undergird both its revelatory constitutional protection against executing intellectually disabled defendants and the disparate measures that states later adopted while seeking to conform to its mandate.[73] This section will examine *Atkins v. Virginia*, the majority's reasoning, the dissent's counterarguments, and finally, address the clarities and uncertainties that emerged from its unsettled legal terrain.

Daryl Renard Atkins "was convicted of abduction, armed robbery, and capital murder" in Virginia in 1996.[74] After subduing their victim, an airman at a U.S. Air Force Base, Atkins and an accomplice, William Jones, overtook his vehicle, drove him to an ATM, and forced him to withdraw cash at gunpoint before moving him to an isolated area where he was fatally shot eight times.[75] Jones, who accepted a plea deal to avoid the death penalty if he testified at Atkins' trial, provided a recount of the offense consistent with Atkins', apart from his contradicting accusation that Atkins "had actually shot and killed" their victim.[76] The jury judged Jones' testimony as "both more coherent and credible," and found Atkins guilty of the murder. At the sentencing, the defense's forensic psychologist detailed that interviews with Atkins, his family, and deputies from the jail where he had been detained; school and court records; and an IQ score of 59 led him to conclude that Atkins was "mildly mentally retarded."[77] Amongst other pieces of

[71] *Id.*
[72] *Id.*
[73] *Atkins v. Virginia*, 536 U.S. 304.
[74] *Id.* at 307.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 308.

evidence, the State presented accounts of Atkins' prior felonies and images of the victim's body to prove the aggravating circumstances of "future dangerousness" and "vileness of the offense," respectively.[78] The jury sentenced Atkins to death.[79]

After the Virginia Supreme Court ordered a resentencing hearing to remedy the trial court's "misleading verdict form," the State introduced a new expert witness to rebut the findings of the defense's forensic psychologist.[80] The State's expert claimed that Atkins, although "diagnosable as having anti-social personality disorder," "was of 'average intelligence, at least.'"[81] Again, the jury sentenced Atkins to death. On appeal, the Virginia Supreme Court upheld his sentence, but the two dissenting Justices expressed doubt in the expert's opinion and argued that sentencing a defendant with "the mental age of a child between the ages of 9 and 12" to death would qualify as "excessive."[82] Acknowledging "the gravity of the concerns expressed by the dissenters" and "the dramatic shift in the state legislative landscape," the Court granted certiorari to reinterpret the question of whether the execution of intellectually disabled defendants amounted to cruel and unusual punishment under the Eighth Amendment.

The Court first looked to the judgments of state legislatures that had "addressed the suitability" of sentencing intellectually disabled defendants to death.[83] According to the Court, 1986 marked the first notable instance of substantial outcry after such an execution; that year, Georgia executed Jerome Bowden, who was diagnosed with an intellectual disability at the age of 14 and had an IQ of 65.[84] The public's reaction prompted the creation of a legislative exemption two years later, which in turn sparked similar enactments in other states, from Washington to New York.[85] The Court's decision in *Penry* seemed to only hasten states' recognition of the urgent need for a codified protection.[86] The Court contended that beyond the quantity of states that had since adopted an exception, "the consistency of the direction of change" in the reforms, particularly in the face of the popularity of "anticrime legislation," offered the most compelling evidence that national consensus was indeed tending away from the permissibility of

[78] *Id.*
[79] *Id.* at 309.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 310.
[83] *Id.* at 313.
[84] *Id.*
[85] *Id.* at 314.
[86] *Id.*

sentencing intellectually disabled defendants to death.[87] Furthermore, the Court cited the exceeding rarity of actual executions of defendants "possessing a known IQ less than 70" in states that had not outright barred the practice.[88] From this evidence, the Court discerned the nation's "widespread judgment" that the lessened culpability of intellectually disabled defendants undermined "the penological purposes served by the death penalty," and that some of their characteristics might imperil "the procedural protections" vested in capital jurisprudence.[89]

Before proceeding with its penological reasoning, the Court admitted to the "serious disagreement" in determining a defendant's intellectual disability that pervaded the overlaying national consensus.[90] The Court caveated that not all claims of intellectual disability would "fall within the range" captured by "national consensus."[91] The DSM-5's three prongs— "subaverage intellectual functioning" and "significant limitations in adaptive skills" that "manifest before age 18" — tendered a modicum of standardization.[92] Additionally, the Court broadly characterized intellectually disabled defendants as able to distinguish "between right and wrong," and therefore "competent to stand trial," but noted that their "diminished capacities" in information processing, communication, learning from mistakes and experience, logical reasoning, impulse control, and understanding of others rendered them less personally culpable for their offenses.[93] Within these parameters, the Court granted the states the remainder of the leeway in crafting the requisite criteria to enforce its central holding.[94]

From these premises, the Court identified "two reasons consistent with the legislative consensus" for exempting intellectually disabled individuals from execution.[95] First, following from its description of the common "cognitive and behavioral impairments" associated with intellectually disabled individuals, the Court cited that these limitations concurrently undercut the retribution and deterrence aims of capital punishment.[96] To satisfy the former, the Court emphasized the necessity for "the severity of the appropriate punishment" to fall proportionally to "the culpability

[87] *Id.* at 315-16.
[88] *Id.* at 316.
[89] *Id.* at 317.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 318.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 319–20.

of the offender."[97] As the Court previously reasoned, the reduced culpability of intellectually disabled defendants would tip this balance, calling into question the propriety of a death sentence. The Court applied an analogous rationale to the latter, explaining that the same deficits that implicated culpability, and therefore retribution, also physiologically hindered the ability for intellectually disabled defendants to process "the possibility of execution as a penalty" and "control their conduct" in response to the deterrent.[98]

Second, the Court posited that intellectually disabled defendants "in the aggregate face a special risk of wrongful execution."[99] The Court named not only "the possibility of false confessions," but also the potential deficiencies in intellectually disabled defendants' abilities to "make a persuasive showing of mitigation" and "give meaningful assistance to their counsel."[100] Moreover, the Court confirmed that laypeople's misperceptions of intellectual disability can further multiply the litany of risks that intellectually disabled defendants face in courtrooms, describing that "their demeanor may create an unwarranted impression of lack of remorse," and that intellectual disability "as a mitigating factor can be a two-edged sword" that may lead the sentencing authority to more quickly deem the defendant a future danger.[101] Hence, the Court's numerous justifications, along with nearly two decades of precedent, converged in the holding that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[102]

In his dissenting opinion, Justice Scalia first expounded two distinct qualifications for a punishment as "cruel and unusual" under the Eighth Amendment —the first referred to its original categorical relegation "at the time that the Bill of Rights was adopted," and the second signified its inconsistency with "modern 'standard of decency' as evinced by […] legislation enacted by the country's legislatures."[103] Scalia, joined by Justices Rehnquist and Thomas, held that under the former interpretation, at the Constitution's inception, "special status under the law" conferred only on "'idiots,'" or those with the utmost "severe" or "profound" intellectual disabilities, unlike the mild intellectual disability that Atkins exhibited.[104] Scalia then argued that the latter indication was disproved by the fact that even taking

[97] *Id.*
[98] *Id.*
[99] *Id.* at 320.
[100] *Id.* at 321.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 339–40.
[104] *Id.*

the most generous configuration of national consensus, only a minority of states, 47%, had passed legislation to exempt intellectually disabled defendants from the death penalty.[105] To repudiate the majority's penological arguments, Scalia questioned the "correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder" and suggested that the appropriate punishment ought to encapsulate "the depravity of the crime" using "the sentencer's weighing of the circumstances."[106] He forwarded that "a similar 'special risk'" of wrongful execution could apply to "just plain stupid people, inarticulate people, even ugly people" who may also be less adept in demonstrating mitigation, assisting their counsel, and acting as credible witnesses.[107] Finally, he warned that the majority's holding would invite a flood of new appeals from capital defendants on the grounds of intellectual disability, "turning the process of capital trial into a game" of feigning intellectual disability.[108] Only time would tell whether Scalia's prediction of "both the number and frivolity of *Atkins* claims" ultimately came to pass.[109]

5. UNRAVELING THE *ATKINS* CONSENSUS

"On the other side" of Scalia's alarm lay worries that the discretion retained by states in defining intellectual disability after *Atkins* would permit "reluctant states to evade" the landmark ruling. At the bottom, *Atkins* established that defendants with intellectual disabilities "warranted a constitutional protection from the death penalty," and that the determination of their intellectual disability "should be based on some generally accepted principle of the clinical definition."[110] Beyond this baseline, states diverged considerably in the construction of their statutes qualifying defendants for *Atkins*' exemption, calling into question the soundness of the national consensus appraised by the majority. This section will review general post-*Atkins* trends before scrutinizing the particularly contentious qualification measures adopted by Florida, Texas, and Georgia. *A. An Overview of Post-Atkins Trajectories.*

Far from affirming Scalia's apprehension, the filings of *Atkins* claims seven years after the holding remained marginal at best, with only "seven percent of all death row inmates" having filed claims.[111] Of this seven percent, forty percent of defendants succeeded in proving their intellectual disability, similarly refuting

[105] *Id.* at 342.
[106] *Id.* at 350.
[107] *Id.* at 352.
[108] *Id.* At 353.
[109] Blume, Johnson & Seeds, *supra* note 22, at 625.
[110] Tassé & Blume, *supra note* 41, at 18.
[111] Blume, Johnson & Seeds, *supra* note 22, at 628.

Scalia's admonition of the likely "frivolity" of the newly filed claims.[112] The majority of unsuccessful claims failed to prove the first two prongs of the DSM-5's definition; these defeats were undoubtedly attributable to the immense latitude that states commanded in finding significantly subaverage intellectual functioning and adaptive deficits, from the contrasting thresholds and weights placed upon IQ scores to the "misapplication of the clinical definitions," which often improperly counterbalanced a defendant's adaptive deficits with their adaptive strengths.[113] These variabilities, clad in *Atkins*' mandate of general conformity, hazardously allowed "death eligibility to vary depending upon the jurisdiction in which the defendant was charged."[114]

On the procedural level, a little over a decade of *Atkins* litigation yielded estimates that "juries had rejected intellectual disability in 96 percent of cases."[115] Two decades on, only a single claim had prevailed before a jury.[116] Behavioral analyses have uncovered that "lay jurors" are not only more likely "to believe that only persons with extreme impairments are intellectually disabled," but also that their "motivated cognition" biases their verdicts according to their "definite preference for one outcome"—namely, punishment.[117] In a study that provided two groups of subjects with identical IQ testing and social history records—telling one group that an affirmative finding of intellectual disability would qualify the individual for disability benefits and the other that it would disqualify the individual for the death penalty—the latter group was "significantly less likely to find the existence of intellectual disability," and more frequently volunteered "the consequences of their decision" as one of their leading rationales.[118]

Hence, both defined statutory disparities and undefined structural, cognitive biases generated "different forms" of "state pushback against *Atkins*."[119] Across the states that currently approve the use of the death penalty, "the most common differences" in their mechanisms for determining a capital defendant's intellectual disability "pertain to (1) the specificity of the definitions themselves, (2) age at onset, (3) required proof of disability during the course of the crime, (4) required IQ score, (5) who chooses the expert evaluator, and (6) the burden-of-proof standard required

[112] *Id.*
[113] *Id.* at 630–35.
[114] *Id.* at 626.
[115] Johnson, Blume & Van Winkle, *supra* note 27, at 72.
[116] *Id.*
[117] *Id.* at 73–4.
[118] *Id.* at 75–6.
[119] *Id.* at 57.

to prove intellectual disability."[120] Some states, such as Florida, Texas, and Georgia, so conspicuously deviated "from the agreed upon, long-standing definition of intellectual disability" supported by "scientific and medical understanding" as to appear intentional in thwarting "otherwise meritorious claims."[121] "Stereotypes and other irrelevant considerations" also continue to feature prominently in prosecutorial strategies, contributing to "the more recent downward trend" in the success rates of *Atkins* claims.[122] The breadth and depth of these discrepancies frustrate *Atkins*' faith in the "consistency of the direction of change" amongst state legislatures.[123]

5.1 Hall v. Florida: The Fallacy of Clinical Precision

One of the most momentous challenges to a state's divergent application of *Atkins*' mandate came to pass in *Hall v. Florida*, over a decade after *Atkins* was decided.[124] In 1978, Freddie Lee Hall and an accomplice "kidnaped, beat, raped, and murdered" a young pregnant woman in Florida. At the time of his initial trial, the Court had not yet ruled on the permissibility of sentencing intellectually disabled defendants to death under the Eighth Amendment, and Hall was sentenced to death.[125] In 1991, Hall was resentenced according to *Penry*'s holding that evidence of a defendant's intellectual disability could be proffered as mitigation.[126] Hall's defense counsel presented "substantial and unchallenged" evidence of his intellectual disability, including school records, attestations from a previous defense lawyer that Hall "could not assist in his own defense" because of his mental age akin to that of a four-year-old's, and the opinions of multiple medical professionals.[127] The trial judge stipulated that Hall's upbringing, laden with physical abuse from his mother and reflecting "'the most horrible family circumstances imaginable,'" only worsened his adaptive deficits.[128] Nonetheless, the jury resentenced Hall to death.[129]

After *Atkins*, Hall's defense counsel filed a new motion seeking relief on the grounds of his intellectual disability. The Florida Supreme Court denied the appeal, arguing that Hall's IQ of 71 definitively precluded him from forwarding a cognizable *Atkins* claim because Florida law mandated that defendants show an IQ score of "70

[120] Jennifer LaPrade and John L. Worrall, Determining Intellectual Disability in Death Penalty Cases: A State-by State Analysis, 3 J. CRIM. JUST. & L. 7 (2020).
[121] Johnson, Blume & Van Winkle, *supra* note 27, at 57–8.
[122] Blume et al., *supra* note 23, at 400.
[123] LaPrade & Worrall, *supra* note 120, at 7.
[124] *Hall*, 572 U.S. at 701.
[125] *Id.* at 702.
[126] *Id.*
[127] *Id.* at 702–03.
[128] *Id.*
[129] *Id.* at 704.

or below" "as a threshold matter" to qualify for the exemption.[130] The Court granted certiorari to review the constitutionality of Florida's statute, and held, "the Florida statute, as interpreted by its courts, is unconstitutional."[131] The Court reasoned that Florida's IQ threshold contravened "established medical practice" by regarding "IQ score as final and conclusive evidence of a defendant's intellectual capacity" without lending the necessary, expert-backed credence to other factors, such as adaptive deficits and the imprecision of the score itself.[132] Citing "professionals who design, administer, and interpret IQ tests," an amicus brief from the APA, and the DSM-5, the Court chronicled that IQ scores carry an inseparable "margin of error," and although serve as important "approximations of conceptual functioning," are not fully indicative of an individual's "reasoning in real-life situations and mastery of practical tasks."[133] The Court also reiterated the value that *Atkins* placed upon the "consistency" amongst states' statutes, reviewing the legislatures of other states to conclude that societal consensus opposed "this strict cutoff as proper or humane."[134]

Hall echoed "the scientific community"'s unequivocal concurrence that "any consideration of evidence of intellectual disability must allow for the imprecision in the diagnostic process."[135] While the ruling immediately forced the nine states that at the time required "a strict IQ score cutoff of 70" to rework their statutes, the remainder of its thrust towards clinical standardization lingered in ambiguity.[136] The Court conceded that despite its broad demarcation of intellectual disability, *Atkins* "did not provide definitive procedural or substantive guides" for appropriately distinguishing which defendants should be eligible for its Eighth Amendment protection.[137] Therefore, although *Hall* critically recognized the existence of the imprecision inherent to testing a defendant's intellectual functioning, it provided limited guidance for states in meaningfully incorporating accounts of such imprecision into their statutes.

5.2 *Moore v. Texas*: The Perils of Excessive Subjectivity

The issue in *Moore v. Texas I* and *II*—whether Texas's overly expansive conception of adaptive functioning breached *Atkins*' holding—inverted the constitutional question addressed in *Hall*.[138] Bobby James Moore was convicted of

[130] *Id.* at 705.
[131] *Id.* at 719.
[132] *Id.* at 710.
[133] *Id.* at 720.
[134] *Id.* at 716.
[135] Saviello, *supra* note 33, at 226.
[136] *Hall*, 572 U.S. at 714.
[137] *Id.* at 716.
[138] *Moore v. Texas*, 581 U.S. ____ (2017).

capital murder committed during an armed robbery and sentenced to death in 1980 in Texas.[139] After *Atkins* and *Hall* over three decades later, Moore received an evidentiary hearing in the state's habeas court in which his defense counsel successfully proved his intellectual disability. Their evidence included Moore's average IQ score of 70.66 across six separate tests, testimony from his family that Moore struggled in school and in mastering "basic understanding[s]" and habits from a young age, and corroborations from his former counsel and multiple "court-appointed mental-health experts."[140] However, drawing from indicia known as the "*Briseno* factors," formed "in the aftermath of *Atkins* because the Texas legislature had yet to enact a statute defining intellectual disability in capital cases," the Court of Criminal Appeals rejected the habeas court's recommendation for relief.[141]

Inspired by the fictional character, Lennie Small, from John Steinbeck's *Of Mice and Men*, the *Briseno* factors reflected Texas citizens' readings of Small's "lack of reasoning ability and adaptive skills," and included whether "those who knew the person best during the developmental stage" perceived their intellectual disability and treated them accordingly, whether "the person formulated plans and carried them through," and whether they demonstrated the ability to lead and lie effectively.[142] The Court of Criminal Appeals alleged that Moore's ability to live on the streets, mow lawns, and play pool, amongst other capacities, signified his intellectual ability, summed by the *Briseno* factors. The Court then granted certiorari to assess the constitutionality of the *Briseno* factors, subsequently holding them unconstitutional.[143] The Court charged Texas with relying on "lay perceptions of intellectual disability" that courted faulty stereotypes condemned by the medical profession.[144] Furthermore, the Court exposed the perplexing irregularity in Texas' application of the *Briseno* factors, clinging "to superseded standards when an individual's life is at stake" but utilizing "current medical standards for diagnosing intellectual disability in other contexts."[145] Finally, the Court emphasized that no other state had adopted or accorded weight to standards remotely resembling the *Briseno* factors, substantiating the unorthodoxy of Texas' statute in the national context.[146]

On remand, however, the Court of Criminal Appeals maintained its apparent adamancy to sentence Moore to death, reaching "the same basic conclusion, namely, that Moore had not demonstrated intellectual disability."[147] After *Moore I*, the Court of Criminal Appeals seemingly abandoned the *Briseno* factors in name only,

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[139] *Id.* at 1.
[140] *Id.* at 3.
[141] Updegrove & Vaughn, *supra* note 26, at 491.
[142] *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).
[143] *Moore*, 581 U.S. at 17.
[144] *Id.* at 15.
[145] *Id.* at 16.
[146] *Id.*
[147] *Id.* at 5.

persisting in its focus on "adaptive strengths" such as Moore's verbal and written communication skills and his "improved behavior in prison."[148] Moore filed another petition for certiorari, which the Court accepted and later held, "we agree with Moore that the appeals court's determination is inconsistent with our opinion in *Moore* [*I*]."[149] The Court explained that Texas had merely repeated the analysis that the Court had previously deemed defective and added "caution against relying on prison-based development" as a benchmark for gauging a defendant's intellectual ability.[150] Although the Court refrained from particularizing exactly "when states' use of prison-based information becomes problematic," the Court highlighted the DSM-5's warning that "highly structured environments" commonly "mask adaptive deficits."[151] Ultimately, *Moore I* and *II*, viewed in conjunction with *Hall*, accentuate the delicate balance between the "medical and legal definitions" of intellectual disability and U.S. jurisprudence's arduous efforts to remediate such consequential incongruencies.

5.3 Georgia's Burden of Proof: The Subversion of the Presumption of Innocence

Georgia pioneered America's traversal towards exempting intellectually disabled defendants from the death penalty, carving the nation's first statutory reprieve "born of outrage at the execution of a man […] who could not count to ten."[152] Today, Georgia's beyond a reasonable doubt burden of proof, surpassing the bars set by all other states in the nation, symbolizes a sardonic departure from its citizens' original advocacies.[153] A handful of states require that capital defendants prove their "intellectual disability by clear and convincing evidence," while the vast majority "require only proof by a preponderance of the evidence."[154] Since the passage of Georgia's statute over three decades ago, no capital defendant has ever prevailed in establishing their intellectual disability.[155] While a lower burden of proof typically leaves room for "appellate review" to "correct egregious jury errors," Georgia's standard entitles a reversal only upon a finding that "no reasonable jury could have had a reasonable doubt that the defendant was intellectually disabled."[156] To add insult to injury, Georgia is "one of only two states" that requires factfinders to evaluate evidence of a defendant's intellectual disability "during the guilt stage of trial," where the legitimacy of the defense's pursuit of relief must be assessed alongside potentially judgment-clouding testimonies about the defendant's offense.[157] Perhaps the most renowned feature of the U.S. criminal justice system is its "presumption of innocence," bounded by the directive that factfinders ought to

[148] *Moore,* 586 U.S. at 19.
[149] *Id.* at 6.
[150] *Id.* at 8.
[151] Updegrove & Vaughn, *supra* note 26, at 491.
[152] Johnson, Blume & Van Winkle, *supra* note 27, at 80.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 81.
[156] *Id.* at 81.
[157] Logan Purvis, Unacceptable Risk: The Failure of Georgia's "Guilty but Intellectually Disabled" Statute and a Call for Change, 57 GA. L. REV. 741 (2023).

ascertain a defendant's guilt beyond a reasonable doubt before securing a conviction and sentence.[158] However, when used to qualify intellectually disabled defendants for *Atkins*' exemption, a lack of complete "medical certainty" in expert diagnoses of intellectual disability "even in ideal settings" renders the beyond a reasonable doubt standard impossible to fulfill.[159] Furthermore, the infeasibility of obtaining relief under Georgia's standard is compounded by testimonies of laypeople that impart unwarranted skepticism, or "reasonable doubt," upon the veracity of a defendant's intellectual disability claims.[160] Therefore, Georgia's statute effectively "flips" the standard's fundamental impetus "on its head," suggesting that the state would rather accidentally execute a constitutionally protected, intellectually disabled defendant than mistakenly determine a defendant to be intellectually disabled and spare them from death.[161]

Cases of constitutionally questionable death sentences of intellectually disabled defendants run rampant in Georgia's history of *Atkins* litigation. Alphonso Stripling, who had an IQ between 64-68, was sentenced to death after the prosecution's expert—who did not directly examine Stripling and conceded the validity of the testing methods used by the defense's experts—remarked that "in his guesstimate,' Stripling fell 'in the average range'" of intellectual ability.[162] Warren King, who had an IQ below 70, was sentenced to death despite extensive school records showing his repetition of multiple grades and enrollment in special education classes after the prosecution argued that he "was simply 'not as well educated as he ought to be.'"[163] Raymond Burgess, who had an IQ between 65 and 69 and whose intellectual disability was confirmed at his trial by "the only mental health expert called to testify," was sentenced to death after the prosecution repeatedly questioned lay witnesses if Burgess "looked or seemed 'retarded' to them."[164] The 2024 execution of Warren James Pye, "whose IQ was low enough to indicate that he was intellectually disabled," prompted the introduction of new legislation to lower the burden of proof and shift the assessment of intellectual disability to a pretrial hearing.[165] The indignation voiced by the bill's supporters is reminiscent of the alarm that first gave rise to Georgia's exemption, renewing hope that this time around, legislative reforms will strengthen, rather than erode *Atkins*' protection.

6. ADJUSTING TOWARDS DEATH: RACIAL BIAS IN INTELLECTUAL DISABILITY DETERMINATIONS

[158] *Id.* at 763.
[159] Johnson, Blume & Van Winkle, *supra* note 27, at 85.
[160] *Id.*
[161] Purvis, *supra* note 156, at 763.
[162] *Id.* at 764.
[163] *Id.*
[164] *Id.* at 765.
[165] Charlotte Kramon, *Georgia lawmakers consider easing one of the nation's toughest death penalty laws*, AP News (Mar. 4, 2025) https://apnews.com/article/death-penalty-intellectual-disability-georgia b52429c6b3aed957852413623b54b408.

The disadvantages that capital proceedings confer upon intellectually disabled defendants do not operate in a vacuum, but rather entangle with other structural biases and inequalities. Intellectually disabled defendants of color encounter doubly impenetrable barriers to succeeding on *Atkins* claims. This section will describe how racial bias pervades the capital trials of intellectually disabled defendants of color, examining how one particular practice deployed in states' assessments of intellectual disability embodies this threat.

One theoretical understanding of the influence of race posits that criminal defense lawyers, who are predominantly white, are more likely to "attribute symptoms of mental illness manifested by African American defendants as cultural rather than pathological."[166] Similarly, white trial judges and jurors–who in most jurisdictions occupy more seats on benches and in jury boxes than their minority counterparts–are more likely to possess implicit racial biases that lead them to judge "evidence of an African American defendant's mental illness as aggravating rather than mitigating," and therefore "choose death over life."[167] However, empirical findings have suggested that the majority of *Atkins* claims are in fact filed by Black defendants, who also prevail at higher rates overall, despite some variability at the state level.[168] Alternative hypotheses for this phenomenon include the possibility that racial bias instead leads white attorneys to more quickly recognize intellectual disability in Black defendants, that Black intellectually disabled defendants comprise an outsized share of death row because white jurors afford them less sympathy, and that Black Americans as a whole disproportionately face "the combination" of intellectual disability and socioeconomic "disadvantage," exposing them to crime more frequently.[169] While none of these explanations have merited conclusive endorsement, they nevertheless shed light upon some of the suspected effects of race on the already elusive determination of intellectual disability in capital cases.[170]

The artificial inflation of the IQ scores of intellectually disabled defendants of color, a recurrent technique wielded by states before *Hall*, offers a more concrete example of how racial bias can distort the qualification process. During the tenure of its strict IQ cutoff, the Florida Supreme Court upheld that the low IQ scores of Black defendants "could still be 'ethnically adjusted' upward to exceed seventy" because, according to some experts, "'IQ tests tend to underestimate particularly the

[166] Blume, John & Ensler, *supra* note 13, at 3509.
[167] *Id.*
[168] Blume, Johnson & Seeds, *supra* note 22, at 638.
[169] *Id.*
[170] *Id.*

intelligence of African Americans.'"[171] This perverse logic precluded otherwise deserving "Black or Brown" defendants from relief.[172] In addition to Florida, prosecutorial arguments calling for the use of "ethnic adjustments" are well documented in the courts of seven other states and the Fifth Circuit.[173] In 2010, a prosecution expert denied the existence of a defendant's intellectual disability before the Supreme Court of Alabama on the grounds that "his IQ score was 'spuriously lowered by things such as exposure to domestic violence, poverty, cultural deprivation, ethnicity, [and] perhaps intoxication.'"[174] Four years later, another prosecution expert described before a Texas District Court that the defendant's IQ score warranted an upward adjustment because "getting into drugs" was "a common thing" in his "cultural group."[175]

Rife with both clinical and logical miscalculations, these justifications failed to illustrate, beyond attesting to their membership in a "minority group," why a defendant's race would necessarily affect their IQ score.[176] In fact, science discredits "that IQs genetically differ based on race," and to the extent that "environmental, 'epigenetic' factors can fall along racial lines," penology and precedent denounce increasing the likelihood that individuals who are predisposed by structural disadvantages to live with actual intellectual disabilities are sentenced to death.[177] Lastly, even "an unexplained discrepancy" in the IQ scores across racial groups would not only fail to vindicate the invocation of "an adjustment to make defendants, based solely on their race, eligible for execution," but would also undoubtedly raise Fourteenth Amendment Equal Protection Clause concerns.[178]

7. RECOMMENDATIONS FOR A GREATER "CONSISTENCY OF THE DIRECTION OF CHANGE"

Both uneven historical patterns and ongoing challenges uncover how the inconsistencies amongst states' interpretations of *Atkins* and its subsequent clarifications have invited capricious inflictions of the death penalty upon intellectually disabled defendants. This section will offer four principal recommendations for moving towards the "consistency of the direction of change" that the Court has long voiced as a key indicator of its willingness to overturn

[171] Sanger, *supra* note 29, at 108–09.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 110.
[175] *Id.*
[176] *Id.* at 111.
[177] *Id.* at 149.
[178] *Id.* at 128–38.

outdated rules in pursuit of newly enlightened justice. Taken in tandem, these reforms rest upon the rationale that when the foundations for a uniquely final punishment are inherently tentative, judgments must incline towards mercy rather than indifference.

7.1 Adhering to Clinical Standards and Narrowing Death Eligibility

Atkins, *Hall*, and *Moore I* and *II* reinforced that intellectually disabled defendants "are categorically not culpable enough to be executed."[179] As follows, federal legislation or directive should clarify that states must "exempt any defendant that meets clinical definitions" from receiving the death penalty.[180] These clinical definitions should match not only the three prongs of the DSM-5—"significantly subaverage intellectual functioning," "adaptive behavior," and "impaired functioning originating during the developmental period," but also exactly follow the clinical practices outlined in the manual.[181] For instance, the Court in *Hall* cited the DSM-5 in its argument that strict IQ cutoffs inaccurately obviated the test's margin of error.[182] To realize the Court's acknowledgment in *Hall*, states should require the derivation of a unique and variable standard error of measurement for each test and its test-taker to tailor a confidence interval representing "the range of scores within which" factfinders can be "x" percent certain "that [the individual's] 'true' IQ falls."[183] Transforming this clinical calculation into a compulsory practice would automatically rule out the non-clinical thresholds for intellectual functioning contrived by states such as Florida, along with the racialized extrapolation of "ethnic adjustments."

Similarly, the Court in *Moore I* quoted the DSM-5's discouragement of the consideration of adaptive strengths in diagnosing an individual's intellectual disability.[184] States should definitively exclude any substantive references to adaptive strengths, including the "'sophistication' of the crime" and "evidence of an inmate's activities in prison," from all reports or testimonies delivered before sentencing bodies.[185] These specifications would move the needle beyond *Moore I*'s largely case-specific reasoning and prevent the repetition of a *Moore II*, which laid bare the stubbornness and aptness of some states in circumventing insufficiently targeted decrees. To the extent that states retain some freedom in constructing their statutes, they should at least be mandated to err their laws towards exempting more defendants. Under this standardized charge, appellate courts across the nation could

[179] Clinton M. Barker, Substantive Guidance Without Substantive Guides: Resolving the Requirements of Moore v. Texas and Hall v. Florida, 70 VAND. L. REV. 1061 (2017).
[180] *Id.*
[181] Updegrove & Vaughn, *supra* note 26, at 490.
[182] *Hall*, 572 U.S. at 710.
[183] *Id.* at 716.
[184] Updegrove & Vaughn, *supra* note 26, at 496.
[185] Blume, Johnson & Seeds, *supra* note 22, at 635.

then more synchronously address any future challenges alleging that a particular state's scheme failed to extend *Atkins*' constitutional protection.

7.2 Invoking Consensus and Individualization

Next, an accurate diagnosis of an individual's intellectual disability must transcend "the opinion of the expert who happens to be testifying" and invoke "the consensus of mental health professionals."[186] Expert testimony from both the prosecution and the defense should articulate to factfinders the clinically validated "psychological features (symptoms and behaviors)" typical of the defendant's condition in order to help them "consider other explanations" for their behavior besides lay assumptions that the actions of intellectually disabled defendants are driven by "sheer evil, carelessness, faking, or not trying hard enough."[187] These accounts must come from medical professionals with firsthand experience examining the defendant and ought to meticulously chronicle the sources underlying any external medical consensus that they convey. While a diagnosis may not always entail a one-to-one relationship with a defendant's moral culpability, more closely tethering factfinders' evaluations to scientific consensus, when accompanied by adequate instruction, can help prevent lay biases from muddling their interpretations of volitional conduct with the cognitive or adaptive impairments associated with the defendant's intellectual disability. For much of the same reason, forcing experts and factfinders to substantially individualize their judgments would encircle any broad and unfounded prejudices based on a defendant's racial or ethnic group that overlook their individual characteristics.

7.3 Lowering the Burden of Proof

To capture the uncertainties that will inevitably endure within these articles of evidence, all states should uniformly minimize their standard of proof for demonstrating intellectual disability to a preponderance of the evidence. In *Cooper v. Oklahoma* in 1996, the Court held that "the impact of the imprecision of psychiatric diagnosis on […] competency to stand trial" could only be "satisfactorily offset" by "a standard of preponderance of the evidence."[188] Given that adjacent determinations of intellectual disability are often even less conclusive than findings of incompetency, it is remiss that the judiciary has not yet granted assessments of intellectual disability the same leeway. *Hall* espoused that even ostensibly objective, quantitative tests of intellectual functioning are severely limited in their capacity to

[186] Mossman, *supra* note 32, at 289.
[187] *Id.*
[188] Ricciardelli & Ayres, *supra* note 7, at 162.

propose a clear brightline delineating intellectual disability. Furthermore, the Court has repeatedly emphasized the significance of adaptive functioning while recognizing that such deficits resist quantification and demand indeterminate clinical evaluations. Thus, requiring that defendants prove the DSM-5's criteria under a standard higher than a preponderance of the evidence "asks more than science allows" and denies factfinders the opportunity to render a verdict "commensurate with the diagnostic methods of the mental health profession."[189]

Furthermore, loftier standards of proof—namely, "the reasonable doubt rule"—epitomize society's belief that "'it is far worse to convict an innocent man than to let a guilty man go free,'" tilting "the scales of justice in favor of the defendant, not against."[190] When those elevated standards are stacked against defendants seeking to prove their intellectual disabilities to avoid a death sentence, they tip the scales in the opposite direction —towards the irreversible punishment of individuals who otherwise might be spared.

7.4 Training Lawyers, Judges, and Jurors

Finally, to mitigate the biases that may slip through the cracks of these aforementioned safeguards, lawyers, judges, and juries must be extensively prepared, through pretrial training and narrow instruction, on how to handle capital cases involving intellectually disabled defendants. "The organized criminal defense bar," including "groups such as the National Legal Aid and Defenders Association, the National Association of Criminal Defense Lawyers, and others" should command efforts to educate their members "to assure that [their] counsel is authentically effective."[191] These undertakings should equip their lawyers with the mastery of noticing and counteracting both personal and external bias, gathering evidence to substantiate their clients' intellectual disability claims, and framing these claims strategically before sentencing bodies. Bar associations can take one step further by coordinating pro bono initiatives dedicated to assisting intellectually disabled defendants to combat the structural shortage and unwillingness of many public defense lawyers to take on their cases.

Judges should conjoin these endeavors by making proper use of the ample, well researched educational resources supplied by medical, disability, and legal scholars alike, such as the *Criminal Law Handbook on Psychiatric and Psychological*

[189] Saviello, supra note 33, at 203.
[190] Lauren A. Ricciardelli & Kristina Jaskyte, *A Value-Critical Policy Analysis of Georgia's Beyond a Reasonable Doubt Standard of Proof of Intellectual Disability*, 30 J. DISABILITY POL'Y STUD. 160 (2019).
[191] Perlin, supra note 42, at 348.

Evidence and Testimony published by the American Bar Association.[192] With these insights, judges should not only take care to ensure that their own direct treatment of intellectually disabled defendants in courtrooms accommodates the defendants' needs and limitations, but also diligently preside over fair trials without deficient jury selection and instruction, prosecutorial misconduct, and improper witness testimonies. Lastly, judges should educate jurors on the commonly held misbeliefs against intellectually disabled individuals, how to detect and discount these preconceptions, and how to compartmentalize potentially emotionally charged or stigmatizing evidence and testimonies from their deliberations to the best of their abilities.

8. CONCLUSION

My analysis has revealed that state-by-state inconsistencies in determinations of intellectual disability continue to outmaneuver *Atkins*' bar against the execution of intellectually disabled defendants, undercutting the Court's steadfast expectation for the nation's "consistency of the direction of change." Although *Atkins* emerged from a slow, centuries-long reevaluation of the meanings of intellectual disability, capital punishment, and the Eighth Amendment, U.S. jurisprudence drew on fairly consistent penological arguments throughout its long history. Nonetheless, states fashioned their statutes to actualize these fundamental justifications in drastically disparate manners, precipitating legal challenges to the guidance, or lack thereof, in finding a defendant's intellectual disability furnished by the Court. Florida's strict IQ cutoff, Texas' non-clinical indicia of adaptive functioning, and Georgia's beyond a reasonable doubt standard of proof offer the most egregious examples of such discrepancies. Transpiring against the backdrop of structural inequality, bias, and stigma confronting intellectually disabled individuals and people of color alike, these divergences have only magnified the constitutional scrutiny facing the American death penalty.

Therefore, I have recommended four specific reforms towards a greater "consistency of the direction of change" that balance the uncertainty inherent to clinical definitions and factfinders' judgments of intellectual disability with the finality of a death sentence. First, I have proposed that federal legislation or directive should clarify *Atkins*' categorical exemption and mandate that states closely adhere to both the prongs and the practices enumerated in the DSM-5. Any residual discretion should be channeled towards sparing more, not less, defendants from the death

[192] *Id.*

penalty. Second, I have suggested that expert testimony ought to draw from documented medical consensus to convey to factfinders the typical features associated with a defendant's condition, provide them with alternative drivers of the defendant's actions according to individualized comparisons, and come from professionals who examined the defendant directly. Third, I have posited that a preponderance of the evidence is the only standard of proof that comports with the functional and philosophical underpinnings of intellectual disability's diagnostic process and the U.S. criminal justice system. Finally, I have advised that lawyers, judges, and juries robustly equip themselves with the skills to constructively navigate the capital proceedings of intellectually disabled defendants.

In Georgia on January 27, 2015, left unprotected from *Atkins*' ambiguities, Warren Lee Hill was again escorted into an execution chamber. To those not awaiting execution on death row, the routine of preparing for death would seem unthinkable. To Hill, however, the ritual was all too familiar; the state had already wavered three separate times over whether to kill him, staying his execution "within hours of death" in each instance.[193] This time, no reprieve came. Had Hill been tried in a different jurisdiction, he would likely have been spared from death on the grounds of his intellectual disability.[194] Instead, subjected to his state's uniquely unforgiving standard of proof, he was "pronounced dead at 7:55 p.m. in the Jackson, Georgia State Prison."[195] Warren Lee Hill's reluctant martyrdom to the Eighth Amendment was final at last, and the nation was left to reckon with the injustice left in his wake.

[193] Kelley K. Holder, *Confined to a Concrete Cave: The Death Row Torture of Warren Lee Hill*, 7 ELON L. R. 591 (2015).
[194] Ricciardelli & Ayres, *supra* note 7, at 162.
[195] Ib*Id.* at 160.

ARTICLE

THE MYTH OF MINIMUM COMPLIANCE: A COMMENTARY ON *DRUMMOND V. OKLAHOMA* SCHOOL STATEWIDE CHARTER SCHOOL BOARD

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ABSTRACT

This article argues that *Drummond v. Oklahoma Statewide Charter School Board* exposes a core constitutional flaw in allowing religious charter schools: the unavoidable entanglement created by state oversight and religious curricula. Even if such schools are formally private, their integration into public charter systems forces states into ongoing theological judgment, violating the Establishment Clause. Situating *Drummond* within cases on state action, the Free Exercise Clause, and the Establishment Clause, this article shows that the majority's focus on classifying St. Isidore as a "public" or "private" actor obscures the real issue—entwinement. This article distinguishes *Carson v. Makin* and related cases, which lacked comparable oversight, and proposes a new test for when state supervision of religious entities crosses constitutional boundaries. This framework offers courts a clearer way to adjudicate future conflicts at the intersection of state control and religious liberty.

1. INTRODUCTION

In June 2023, Oklahoma's Attorney General filed suit against Oklahoma's Charter School Board for approving a contract with St. Isidore, a Catholic virtual charter school.[1] The case was brought on the grounds that the contract violated the Establishment Clause of the U.S. Constitution[2] and the three sections of the Oklahoma State Constitution that prohibit public money from being used for sectarian purposes,[3] guarantee a separation of church and state,[4] and mandate a system of free public schools.[5]

[1] *Okla. Statewide Charter Sch. Bd. v. Drummond*, 605 U.S. ___ (2025).
[2] U.S. Const. amend. I.
[3] Okla. Const. art. II, § 5
[4] *Id.*
[5] Okla. Const. art. XIII, § 1; Gentner Drummond, *Drummond Files Lawsuit Against State Virtual Charter Board Members*, OKLAHOMA ATTORNEY GENERAL NEWS RELEASE (Oct. 20, 2023),

The Oklahoma Supreme Court assumed original jurisdiction and ruled in favor of the Attorney General, holding that the Charter School Board had violated state and federal law.[6] The Court ruled that as a member of Oklahoma's system of public charter schools, St. Isidore was a state actor and, as a Catholic school, in violation of the Establishment Clause. Following St. Isidore's appeal to the Supreme Court, the divided bench allowed the Oklahoma Supreme Court's decision to stand without establishing a national precedent. Justice Barrett's self-recusal in the case left the Court divided 4-4, resulting in a brief two-sentence order announcing the outcome.[7]

This leaves the Oklahoma Supreme Court's decision as controlling within Oklahoma, though not nationally binding. While the decision may inform similar cases involving religious charter schools that reach the Supreme Court, it does not constrain them. This paper focuses on the content, implications, and shortcomings of the Oklahoma Supreme Court's decision, and argues that the court's reasoning fails to confront a fundamental constitutional problem: the entanglement created by state oversight of religious curriculum. Religious charter schools are formally private actors; however, continual theological judgment is inherent in the state's legal duty to supervise their academic content. This review violates the core principles of church-state separation. Unlike in *Carson v. Makin* and *Espinoza v. Montana Department of Revenue*, in which public benefits flowed without entangling oversight, *Drummond* involves ongoing state oversight of a religious curriculum that cannot be reconciled with the Establishment Clause. This article argues that even if religious charter schools are private in form, the oversight they necessitate from the state renders them constitutionally impermissible due to unavoidable church-state entanglement.

The first section of this article surveys the relevant State Action, Establishment Clause, and Free Exercise Clause jurisprudence, with particular attention to how cases like *Rendell-Baker v. Kohn*, *Brentwood Academy v. Tennessee Secondary School Athletic Association*, and *Lebron v. National Railroad Passenger Corporation* and the *Trinity-Espinoza-Carson* trilogy set the stage for *Drummond*. The second section analyzes the Oklahoma Supreme Court's majority and dissenting opinions, focusing on their divergent approaches to state action, religious status, and public benefits programs. The third section critiques the Oklahoma Court's reasoning and argues that the real constitutional conflict arises not from St. Isidore's status as a Catholic School, but from the ongoing evaluative role the state must play in

https://oklahoma.gov/oag/news/newsroom/2023/october/drummond-files-lawsuit-against-state-virtual-charter -board-membe.html.

[6] Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. ___ (2025).

[7] *Id.*

supervising its religious curriculum, a characteristic that raises impermissible entanglement concerns. Finally, the article explains why *Carson* cannot control in this context and proposes a more precise framework for evaluating religious charter schools and private entities going forward.

2. THE DOCTRINAL BACKDROP: STATE ACTION, FREE EXERCISE, AND ESTABLISHMENT.

This section surveys the relevant State Action, Free Exercise, and Establishment Clause doctrine, discussing case rulings in *Rendell-Baker*, *Lebron*, *Zelman v. Simmons-Harris*, and the *Trinity-Espinoza-Carson* trilogy that frame the constitutional stakes and background in *Drummond*.

2.1 State Action Doctrine and Private Entities Performing Public Functions.

The Supreme Court rejected the notion that public funding alone transforms a private entity into a state actor in *Rendell-Baker*.[8] The Court found that The New Perspectives School's firing of multiple teachers over defamation issues was not unconstitutional under 42 U.S.C. § 1983, which declared that institutions acting "under the color of the State … who subject any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."[9]

The Court ruled that although The New Perspectives School received anywhere from 90–99 percent of its funding from the government,[10] the school's private action was not "fairly attributable to the state"[11] under the recently established *Lugar* test, which requires both a state-created rule and a private actor functioning as a state agent.[12] Receiving public funds alone did not make the school a state actor and thus meant there was no violation of the statute.

The Court has likewise held that minimal state regulation, without more, does not establish state action.[13] The Court ruled that a private, state-funded nursing

[8] Rendell-Baker v. Kohn, 457 U.S. 830, 833 (1982) (holding that a private school was not a state actor despite receiving ninety percent of its funds from public sources).
[9] 42 U.S.C. § 1983 (1871).
[10] *Rendell-Baker*, 457 U.S. at 832.
[11] *Id.* at 830, 838.
[12] See Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (establishing two-part test for state action).
[13] See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that state regulation of nursing homes did not make their transfer and discharge decisions attributable to the state).

home, even one subject to nursing regulations by Medicaid, was not a state actor. In these early cases, the Court began to establish legal guidelines for what constitutes state action among private entities: "A State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement … that the choice must in law be deemed to be that of the State."[14] The Court later recognized state entwinement as another basis for finding state action.[15] The Court stated that entities can be "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings,"[16] highlighting that there is indeed a degree of "nexus"[17] at which private institutions are unavoidably representative of the state and are thus state actors. Taken together, these holdings represent the emphasis the Court has put on the tangible entwinement between private entities and the state, rather than state funding alone. This concept of deep oversight and entwinement is crucial to determine St. Isidore's status as an entity that would both receive state taxpayer dollars and serve a public function.

The Court has additionally found that even entities labeled "private" can be state actors when they are created and controlled by the government.[18] The Court ruled that Amtrak, an entity labeled private by Congress, was a state actor for constitutional purposes because it was created by the state,[19] furthered the public's objectives,[20] and was left in meaningful control of the state: "When the government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors … the corporation is part of the Government for purposes of the First Amendment."[21] Despite being labeled as private, Amtrak was explicitly brought into existence by the legislature as an entity that did not exist beforehand[22] and remained under government control via congressional oversight and federally assigned directors. This case illustrates the Court's preference for evaluating function and control—rather than accepting blanket labels of "private" or "public" at face value—when determining whether an entity is a state actor. St. Isidore and Amtrak share meaningful similarities, such as their state supervision and their advancement of

[14] *Id.*
[15] See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298–302 (2001) (holding that a high school athletic association was a state actor because of "pervasive entwinement" with public officials).
[16] *Id.* at 298.
[17] *Id.* at 295.
[18] See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397–400 (1995) (holding Amtrak was a government entity for First Amendment purposes).
[19] *Id.* at 397.
[20] *Id.*
[21] *Id.* at 397–398, 400.
[22] 49 U.S.C. §§ 24101–24321 (1994).

governmental objectives. In light of an Oklahoma Supreme Court decision that heavily relies on labels like "state actor" and "public function," the Court's classification of Amtrak signifies its intention to look past these labels and discuss how private entities are tangibly entwined with the state.

The State Action cases described above illustrate the key considerations courts apply when determining whether a private entity should be treated as a state actor. The Court has consistently held that receiving public funds alone is not sufficient to confer state-actor status. Instead, courts look carefully at the circumstances through which an entity comes under state control, whether it performs a function traditionally reserved to the state, and whether the degree of entwinement between the entity and the state is significant enough to qualify its conduct as state action.

Despite the broad guidelines the Court has articulated for determining state action, the doctrine remains convoluted and underdefined. Scholars have long criticized the State Action Doctrine for its conceptual incoherence and shifting tests, noting the Court's shifting reliance on four distinct standards: public function, entwinement, state compulsion, and totality of the circumstances, each applied with varying weight across cases.[23] This uncertainty has made it difficult for the Court to fashion a decisive test for identifying which private entities qualify as state actors.[24] The persistent muddling of the public-private distinction underscores why *Drummond* and St. Isadore have generated such intense doctrinal and political controversy. As of now, the courts have generated no clear, across-the-board standard for assessing religious entities that serve public functions.

2.2 Establishment Clause Neutrality and Parental Choice

Beyond the state action question, *Drummond* raises core Establishment Clause concerns, largely due to Oklahoma's argument that religious charter schools violate constitutional prohibitions on state-sponsored religion. St. Isidore, an explicitly Catholic charter school, notably removed the "nonsectarian" agreement required of all charter schools in Oklahoma from its contract[25], a decision the Attorney General argued was a violation of the Establishment Clause of the First

[23] Steven H. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L. Rev. 1379, 1380 (2006) (calling the doctrine "a conceptual disaster area").
[24] "The Supreme Court has vacillated between the rule-oriented approach and the totality of the circumstances approach in applying the State Action Doctrine… [and] has not been able to fashion a single formula to resolve these cases." *Huhn*, *supra* note 27, at 1391.
[25] Okla. Stat. tit. 70, § 3-136(D)(2) (2024).

Amendment.[26] Foundational Establishment Clause precedent provides important insight.

Early Free Exercise precedent required strict neutrality toward religion when distributing public benefits.[27] As Justice Black stated, "The State contributes no money to parochial schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[28] The Court's notions that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State,'"[29]—and that "[t]hat wall must be kept high and impregnable"[30]—came into question in *Trinity Lutheran*, *Espinoza*, and *Carson*, all of which erode church-state separation and provide support for St. Isidore's contract.

Decades later, the Court upheld a state voucher program because aid reached religious schools only through the independent choices of parents.[31] The Court upheld Ohio's voucher program on the grounds that it "provided benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district."[32] The Court reasoned that parents act as an independent, neutralizing actor between the state and private entities. Once they received the benefit, parents could use the state's money as they wished to direct their children's education. The decision provides important insight into *Drummond* because the choice to attend (and, more importantly, not to attend) St. Isidore is a free and unprovoked one made independently by families, a factor that seems to create a similar sort of constitutional buffer.

Additionally relevant to *Drummond* are the Blaine Amendments included in thirty-seven state Constitutions, including Oklahoma's. The Blaine Amendments were a series of late nineteenth century amendments to state constitutions that

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[26] Ray Carter, *Oklahoma Supreme Court Blocks Religious Charter School but Reinforces Private-School Choice Legality*, Okla. Council of Pub. Affs. (June 25, 2024), https://ocpathink.org/post/independent-journalism/oklahoma-supreme-court-blocks-religious-charter-school-b ut-reinforces-private-school-choice-legality. (last visited July 24, 2025).

[27] See Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (upholding bus fare reimbursements to parents of parochial school children while reaffirming that the First Amendment erects a "wall of separation between church and state") (quoting Reynolds v. United States 98 US 145 (1879)).

[28] *Id.* at 18.

[29] *Id.* at 1, 16.

[30] *Id.* at 18.

[31] See Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002) (holding that Ohio's school voucher program was neutral toward religion because funding reached religious schools solely via parents' private choices).

[32] *Id.* at 662.

prohibited public funds from supporting parochial schools.[33] Article II, § 5 of Oklahoma's Constitution reads:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.[34]

The history of the Blaine Amendments is highly controversial today. It is recognized by legislators, scholars, and courts alike that the provisions grew out of late nineteenth century Catholic and immigrant resentment. Their use in legal argument remains controversial.[35] Article II, § 5 of Oklahoma's Constitution plays a central role, however, in assessing the permissibility of state funding to religious charter schools.

2.3 The Free Exercise Trilogy: Trinity, Espinoza, and Carson

Trinity Lutheran,[36] *Espinoza*,[37] and *Carson*[38] exist as an inseparable trio of Free Exercise Clause jurisprudence and a key portion of St. Isidore's legal argument, as each case further prohibits religious discrimination when public benefits programs are involved.

The Supreme Court first held that denying public benefits solely on the basis of religious status violated the Free Exercise Clause.[39] Chief Justice Roberts stated that "[t]o condition the availability of benefits upon [a recipient's] willingness to surrender his religiously impelled status effectively penalizes the Free Exercise of his constitutional liberties."[40] The majority believed that the Establishment Clause could not justify exclusionary policies that violate the Free Exercise Clause. A benefits program that otherwise makes no distinction as to the groups for which it provides may not discriminate solely on the basis of a group's religious affiliation. The case was the first of its kind and, as Justice Sotomayor highlighted in her dissent,

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[33] Middle Tenn. State Univ., *Blaine Amendments*, Free Speech Ctr., https://firstamendment.mtsu.edu/article/blaine-amendments/ (last visited June 9, 2025).
[34] Okla. Const. art. II, § 5.
[35] See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 The American Journal of Legal History 38 (1992); see also Pew Research Ctr., T*he Blaine Game: Controversy over the Blaine Amendments and Public Funding of Religion* (July 24, 2008), https://www.pewresearch.org/religion/2008/07/24/the-blaine-game-controversy-over-the-blaine-amendments and-public-funding-of-religion/.
[36] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).
[37] Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464 (2020).
[38] Carson v. Makin, 596 U.S. 767 (2022).
[39] See Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).
[40] Id. at 7.

"profoundly change[d] the relationship between church and state."[41]

The Court then extended this principle to school voucher programs, holding that states may not bar religious schools from generally available tax-credit scholarships.[42] Under Montana's Blaine Amendments, the Montana Department of Revenue had ruled that the use of state taxpayer dollars to fund any school "controlled in whole or in part by any church, sect, or denomination" was unconstitutional.[43] Despite *Espinoza*'s obvious differences from *Trinity* (the relief program provided direct funding to religious education), the Court ruled along similar lines. Chief Justice Roberts once again wrote the majority opinion:

> The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations 'owned or controlled by a church, sect, or other religious entity … [T]he no-aid provision bars all aid to a religious school 'simply because of what it is,' putting the school to a choice between being religious or receiving government benefits.[44]

Justice Roberts emphasized the distinction between religious use and religious status. Roberts noted that, "[Montana's] argument cannot stand because it bars religious schools from public benefits solely 'because of what they are.'" Indeed, this form of facial discrimination is exactly what the petitioners in *Trinity* and *Espinoza* thought they had been subjected to.

Most recently in *Carson*, the Court eliminated the distinction between religious status and religious use, a pivotal step for St. Isidore's Free Exercise argument.[45] In a case that decided whether Maine's exclusion of religious schools from its tuition assistance program violated the Free Exercise Clause of the First Amendment, Chief Justice Roberts appeared to retreat from the standard *Trinity* and *Espinoza* had established:

> But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. '[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.' ... In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination[46] (brackets in original).

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[41] See *Espinoza*, 140 S. Ct. at 2255–56.
[42] MONT. CONST. art. X, § 6(1).
[43] See *Espinoza*, 140 S. Ct. at 10.
[44] See Carson v. Makin, 142 S. Ct. 1987, at 1996–97 (2022).
[45] See Carson v. Makin, 142 S. Ct. at 4.
[46] Richard C. Schragger, Micah J. Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. Chi Rev. 79 (2025).

Indeed, the important distinction in *Carson* is that it declared unconstitutional Maine's exclusion of religious schools not based on status, but on the denial of state funds—thus collapsing the use-status distinction established in *Trinity* and *Espinoza*.

Carson has proved to be a heavily divisive case amongst libertarian legal scholars and their more cautious, progressive counterparts. While many thinkers like Michael McConnell have defended *Carson* for what it accomplishes in terms of religious autonomy, other thinkers such as Richard Schragger have noted the dangerous opportunities it gives religious institutions to put undue legal pressure on the state. In *Reestablishing Religion*, Schragger argues that *Carson* has "abandoned federalism values, 'play in the joints' in the context of funding religious education, and apparently any distinction between indirect and direct aid to religion."[47] In opposition, McConnell has argued that "[p]ublic funds can be provided to religious private schools on a neutral basis as long as the families choose the schools themselves."[48] This conflict represents the contentious ground the Free Exercise Trilogy had laid out ahead of *Drummond*. To some, *Drummond* was *Carson*'s logic taken to its dangerous extreme—a case that would take religious autonomy too far at the expense of state authority. To others, it was a logical step in the right direction for religious liberty.

3. THE OKLAHOMA SUPREME COURT'S DECISION IN DRUMMOND

The case that came before the Oklahoma Supreme Court proved to be a clash between Oklahoma's Attorney General and Oklahoma's Public Charter Schools Board. The questions brought before the Court were as follows:

1. Are the educational decisions of privately owned and operated schools considered state action simply because the school has a contract with the state to provide free education to students?
2. Does the First Amendment's Free Exercise Clause prohibit a state from excluding, or does the Establishment Clause require a state to exclude, religious schools from its charter-school program?

This section discusses the majority and dissenting opinions in *Drummond* separately.

[47] Michael W. McConnell, *Are Religious Charter Schools Constitutional?*, National Constitution Center, *We the People* Podcast Transcript (Feb. 22, 2024), https://constitutioncenter.org/news-debate/podcasts/are-religious-charter-schools-constitutional.
[48] Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. ___ (2025).

3.1 The Majority Opinion: State Actor Status and Establishment Concerns

The Oklahoma Supreme Court answered the first question in the affirmative. St. Isidore is deemed a public school for all purposes; as a provider of free education, it is a "surrogate of the state."[49] The Court explains that St. Isidore is both a governmental entity and a state actor; it is both created *by*, and serves a fundamental purpose *of*, the state.[50] The Court stated that despite St. Isidore being run by a separate and independently chosen Catholic school board, this point of separation is subordinate to the "nexus that exists between the state and the challenged action.[51]

The Court further noted that because St. Isidore is overseen by the Charter School Board, which has the power to "renew, monitor, or decide to revoke" its charter, the school fails to show that it is sufficiently "unentwined" from the state.[52] In the Court's view, as an entity that bears the constitutional obligations of Oklahoma's public school system, St. Isidore cannot turn a blind eye to the fact that its religious practices are not self-contained. Rather, St. Isidore performs a core function of the state in providing a free and public education.

The Court additionally rejected the appeal to the recent Free Exercise cases[53] due to the view that St. Isidore is itself a creation of the state, and that it "does not exist independently of the state."[54] The Court highlighted in its opinion that St. Isidore had not been excluded from a public benefits program à la the Free Exercise trilogy. The state is required by law to decide which charter schools are accepted into their program; St. Isidore is the result of this decision.

The Court rejected the argument that approving St. Isidore as a charter school is constitutionally permissible under a neutral, generally available public program. The Court stated that independent parental choice is subordinate to the Establishment Clause issues arising under a state-authorized and funded religious school: "Because it is a governmental entity and a state actor, St. Isidore cannot ignore the mandates of the Establishment Clause, yet a central component of St. Isidore's educational philosophy is to establish and operate the school as a Catholic school."[55]

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[49] *Id.* 14–17.
[50] *Id.* 27.
[51] *Id.* 29.
[52] Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. ___ (2025). (distinguishing Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); and Carson v. Makin, 142 S. Ct. 1987 (2022)).
[53] *Okla. Statewide Charter Sch. Bd. v. Drummond*, 605 U.S. ___ (2025), 43.
[54] *Id.*
[55] *Drummond*, 2024 OK 53 (Kuehn, J., dissenting).

3.2 Dissenting Opinions: Free Exercise and Parental Choice Arguments

Justice Kuehn dissented on Establishment Clause grounds and additionally argued that the majority did not adequately address the independent parental choice acting as a constitutional buffer;[56] Kuehn asserted that St. Isidore was being discriminated against in a way precedent stated it could not, namely, that "[t]he virtual charter school St. Isidore seeks to undertake would simply be a choice for students and parents. It would not be the only virtual charter school. It would not be the only charter school. But most importantly, it would not supplant any state-mandated sectarian public school."[57] Kuehn additionally notes that St. Isidore is run by an entirely separate school board not created by the state. The notion that St. Isidore is a "state creation" is not sufficient to declare that its contract with the Board amounts to an Establishment Clause violation, she argued.

Kuehn takes a stronger Free Exercise stance, arguing that an entity's application to become a charter school exists within the same realm of state benefit programs in *Espinoza* and *Carson*. For Kuehn, the state had created a public program with the goal of allowing private entities to experiment with alternative education options and discriminated facially against religious schools.[58] St. Isidore's denial exists, then, within the same realm of discrimination as in the Free-Exercise Trilogy.

Justice Kuehn additionally argues that allowing religious charter schools serve as an expansion of liberty, rather than a violation of state neutrality, and that neutral public benefits programs are in fact hostile to, rather than neutral to, any religious groups denied a charter. For Kuehn, the majority is mischaracterizing both St. Isidore's status and the nature of Oklahoma's charter school program.

> St. Isidore would not become a 'state actor' merely by contracting with the State to provide a choice in educational opportunities. By allowing St. Isidore to operate a virtual charter school, the State would not be establishing, aiding, or favoring any particular religious organization.[59]

At the heart of Kuehn's argument is the notion that while St. Isidore's charter may be approved by the state, it is nonetheless an independently operating school uncharacteristic of anything traditionally considered "public". It was troubling to Kuehn that although St. Isidore is governed by its own board and remains under the direction of the Archdiocese of Oklahoma City and Diocese of Tulsa, the majority

[56] *Id.* 53, 10; see Zelman v. Simmons-Harris, 536 U.S. 639, 647–48 (2002); *id.* at 646; see also *id.* at 685 (O'Connor, J., concurring).
[57] *Drummond,* 2024 OK 53, 11–14.
[58]
[59] *Id. 3-4.*

insisted that its designation as a public charter school causes it to become a state actor for constitutional purposes:

> [The Majority's argument] is flawed. The Oklahoma Constitution requires the State to create a system of public schools … It does not bar the State from contracting for education services with sectarian organizations, so long as a state-funded, secular education remains available statewide.[60]

Kuehn notes that, as discussed, the Supreme Court has held that performing a public function,such as education, was not sufficient to prove that an entity was a state actor.[61] What is particularly puzzling to Kuehn is the assumption implicit in the majority's argument that because St. Isidore has been authorized to provide education by and for the public school board, St. Isidore must then absorb the identity of those it contracts with[62]

4. QUALITATIVE OVERSIGHT AS THE CORE ENTANGLEMENT PROBLEM

This section addresses the majority and dissenting opinions discussed thus far and argues that the constitutional problem in *Drummond* is not funding or formal status, as the Oklahoma majority claims, but academic oversight. The argument proceeds in four steps: first, by showing that Oklahoma imposes continuous and substantive oversight of charter schools; second, by demonstrating how St. Isidore's religious curriculum cannot be reviewed without theological judgment; third, by applying relevant legal and historical precedent to highlight the danger of entanglement; and fourth, by discussing how these dynamics threaten uniform constitutional standards across religious traditions.

4.1 Continuous Oversight Embedded in Oklahoma's Charter School Framework

While St. Isidore seems to be protected by the Court's previous decision that public funds are not enough to label an entity a state actor,[63] *Drummond* goes beyond the economic relationship that a private entity may have with the state: this comes in the form of the qualitative oversight that the state is required to enforce over St. Isidore via its Charter School Board. This section argues that the constitutional harm done by St. Isidore does not stem from its use of taxpayer dollars or the traditional

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[61] See Rendell-Baker, 457 U.S.; see also Blum, 457 U.S.

[62] Oklahoma Charter Sch. Bd., 605 U.S. 6-9.

[63] Rendell-Baker v. Kohn. 457 U.S. 833 (1982).; Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that receipt of public funds did not make a private school a state actor).

public function it would serve as a public school, but rather the continuous and theologically imbalanced evaluation it would require from the state.

The Oklahoma Supreme Court correctly terminated St. Isidore's charter, although their majority opinion does not adequately address the constitutional concerns of St. Isidore. By broadly declaring that St. Isidore conflicts with the Establishment Clause as a "state creation" that serves a public function, the majority ignores the main point of friction in *Drummond*: namely, that St. Isidore and the state fundamentally disagreed on both the nature of Oklahoma's charter school program and the nature of the schools that apply to the program. In framing its program as a means by which the state *creates* public schools that act as its surrogates, the Attorney General was tasked with implementing the State Action Doctrine through precedent that placed emphasis on state creation and function.[68] Conversely, in framing their program as a mechanism for independent entities t[64]apply, receive public funds, and operate with autonomy, St. Isidore and the Board made Free Exercise claims that invoke recent cases upholding religious liberty against public benefits programs.[65] Their argument opened the particularly sensitive notion that Oklahoma was treating religious people as "second-class citizens."[66]

The majority opinion in *Drummond* rests on two flawed assumptions. First, the argument that public funding plays a deciding role in St. Isidore's classification as a state actor is directly challenged by legal precedent that states exactly the opposite.[67] To determine whether St. Isidore can be established, as Professor Garnett puts it, as a "program of true private choice,"[68] a much more thorough investigation of St. Isidore's tangible relationship to the state is required. The key difference between previously discussed New Perspective's School and St. Isidore lies in the fact that while both would receive practically all their funding from the state, St. Isidore is statutorily required to remain under the qualitative and quantitative observation of a state entity, the Charter School Board. This is the rationale that supposedly makes it a "public" school.

Additionally, Oklahoma's claim that they "created" St. Isidore is overstated

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[64] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 397-98 (1995) (holding Amtrak was a state actor despite statutory label as private).
[65] Carson v. Makin, 142 U.S. 1987, 1996-97 (2022); Espinoza v. Montana Department of Revenue, 140 U.S. 2246, 2255-56 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458-59 (2017).
[66] Drummond v. Oklahoma Statewide Virtual Charter School Board, 121 U.S. 694 (2024) (Oral Argument at 2:11:05, Oklahoma Supreme Court argued April 2, 2024).
[67] Rendell-Baker v. Kohn. 457 U.S. (1982).
[68] Nicole Stelle Garnett, The Right Question About School Choice: Education, Parents, and the Equal Protection Clause, 100 BYU L. Rev. 1185 (2020).

and misleading. Contrary to their view, St. Isidore was founded independently in January 2023 by the Archdiocese of Oklahoma City and the Diocese of Tulsa. It established its own board and mission to "create, establish, and operate … a Catholic school" and "participates in the evangelizing mission of the Church"[69] St. Isidore operated independent of any state ties until it signed a contract with the Oklahoma's Charter School Board, a decision the school made to receive public funding and expand its influence. So, while St. Isidore's notion of complete independence from the state may be incorrect, Oklahoma's notion that it gave St. Isidore life as "state creation" is likewise incorrect and rhetorically misleading. While the state chooses to approve or deny St. Isidore's charter, St. Isidore in no way relies on the state to exist.

When St. Isidore and the state met for argument in front of the Supreme Court the function of the Charter Board was heavily debated. James Campbell, representing the Board and St. Isidore, stated: "The state board does not get into the details of the curriculum, particularly any kind of subject matter of the curriculum. It doesn't second guess those specific subject matter details. [Making sure enough is taught to pass the statewide and national tests] is one of the requirements."[70] Justice Sotomayor questioned Campbell about the role the Board plays in evaluating the substance of St. Isidore's curriculum:

> So, as much as you want to say that you are not looking at the substance, you're charged by law to do that because you have to determine whether it's a quality education to evaluate charter school performance, to approve or reject any proposed change to the curriculum, to consider whether to renew or terminate one, and to oversee and supervise the charter school.[71]

Campbell contended that the Charter Board could evaluate academic sufficiency without applying preference to religious doctrine. However, Justice Sotomayor pushed further: what if a charter school were to choose not to teach about evolution,[72] or ignore parts of American history such as slavery, based on their decision to teach *their* religion as truth?[73] How could it be possible for the Charter School Board, which acts as the sole evaluator of St. Isidore as it relates to the state, to ignore such changes? Justice Kagan joined in the questioning: if St. Isidore could be allowed to

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[69] Drummond v. Oklahoma Statewide Virtual Charter School Board, 53 U.S. (2024) (noting establishment by Archdiocese of Oklahoma City of Diocese of Tulsa); *Id.* (stating governing board authority and recognition of religious mission rights); *Id.* (describing establishment to operate a Catholic school in furtherance of evangelizing mission).

[70] Drummond v. Oklahoma Statewide Virtual Charter School Board, 121 U.S. 694 (2024) (Oral Argument at 00:05:17, Oklahoma Supreme Court argued April 2, 2024; statement of James Campbell).

[71] Drummond v. Oklahoma Statewide Virtual Charter School Board, 121 U.S. 694 (2024) (Oral Argument at 00:06:11, Oklahoma Supreme Court argued April 2, 2024; statement of Justice Sotomayor).

[72] Drummond v. Oklahoma Statewide Virtual Charter School Board, 121 U.S. 694 (2024) (Oral Argument at 00:05:38, Oklahoma Supreme Court argued April 2, 2024; statement of Justice Sotomayor).

[73] *Id.* at 0:06:42.

remove the nonsectarianism portion of its contract with the Board, why couldn't other schools not explicitly exclude students of other faiths or require statements of faith from prospective students?[74]

Campbell argued that *Drummond* is about the "facially discriminatory" nature of Oklahoma's law that denies all sectarian entities from becoming charter schools.[75] As an analytical framework, *Drummond* also made it easier for Campbell and his colleagues to implement *Carson*, *Espinoza*, and *Trinity*, each of which involved a facially discriminatory state benefits program. The inclusion of the State Board, however, makes *Drummond* a different case—a distinction Sotomayor, Kagan, and Jackson thought important.

On the other end, Justices Gorsuch and Kavanaugh remained skeptical of the argument that *Drummond* could not be controlled by *Carson*. Both Justices seemed unconvinced that Oklahoma's charter school program was notably different from the public benefits programs involved in the Free Exercise Trinity. The state's argument that St. Isidore was a public school, plain and simple, convinced neither of the two Justices. Kavanaugh pushed back and asked why, in a charter school system that accepts a wide variety of content-specific schools, religious ones could be excluded.[76] Gorsuch brought up the faith-based adoption centers previously upheld by the Court,[77] probing as to where exactly the Court should draw the line between public and private schools:

> What's the difference? How do we draw that line so that we capture public schools on your account, but we don't capture, and you seem to say we shouldn't capture, entities like *Fulton*? What's the test that you'd have us apply? Because, you know, we have to have a test to distinguish these two buckets of cases, right?[78]

The state's response to this question is simply not sufficient. In his response, former Oklahoma Solicitor General Gregory Garre differentiated St. Isidore from the adoption agencies in *Fulton* on the basis that St. Isidore would function as a public school created by the state and was not (like in *Fulton*) an independent private entity. Although Gorre's distinction is a doctrinally important one, it does not address

[74] Drummond v. Oklahoma Statewide Virtual Charter School Board, 121 U.S. 694 (2024) (Oral Argument at 00:07:58, Oklahoma Supreme Court argued April 2, 2024; statement of Justice Kagan).
[75] Drummond v. Okla. Statewide Virtual Charter Sch. Bd, 121 U.S. 694 (2024) (Oral Argument at 00:08:37, Okla. S. Ct. argued Apr. 2, 2024; statement of James Campbell)
[76] Drummond v. Okla. Statewide Virtual Charter Sch. Bd, 121 U.S. 694 (2024) (Oral Argument at 01:33:44, Okla. S. Ct. argued Apr. 2, 2024; statement of Justice Kavanaugh)
[77] Fulton v. City of Philadelphia, 593 U.S. _ (2021).
[78] Drummond v. Okla. Statewide Virtual Charter Sch. Bd, 121 U.S. 694 (2024) (Oral Argument at 1:27:23, Okla. S. Ct. argued Apr. 2, 2024; statement of Justice Gorsuch)

Gorsuch and Kavanaugh's concerns that *no one* is forcing *anyone* to attend St. Isidore. In accepting Kavanaugh's point and arguing about the traditional understanding of charter schools and public education generally, Gorre provides no concrete test that satisfies Gorsuch's question. allowing Kavanaugh to ask why, in a charter school system consisting of a free choice between over thirty charter schools, religiously focused ones are excluded across the board. Neither Kavanaugh, Gorsuch, Gorre, or Campbell discussed the true point of distinction in *Drummond* from the Free Exercise Trilogy: the evaluative nature of the Charter Board.

Contrary to Campbell's claims, the Charter School Board does more than ensure minimum compliance; it exercises ongoing substantive oversight—a point Campbell's friends on the other side were quick to point out.[79][80] Oklahoma's Charter Law requires that the Board *"*provide supervision, services, and oversight of the operations of charter schools."[81] Both at the application review and the yearly evaluation process, the Charter School Board requires that the material submitted "contain a description of the curriculum and how it meets Oklahoma state academic standards."[82] Beyond this, the Board must consider whether curriculum changes *align* with state standards.[83] Not only are the academic standards and curriculum changes reviewed, but a significant amount of research and analysis is done to determine the quality and culture of a school.[84] In many states, this involves visiting charter schools and observing lessons in the classroom.[85] This oversight is what separates *Drummond* from individual choice arguments made by Kavanaugh; despite the fact that in both cases, there is a concept of individual choice (the state is not forcing anyone to attend St. Isidore), the state is still heavily involved in operating the school after this independent choice is made. This is not passive regulatory compliance. It is active, ongoing supervision—the kind of evaluative role that, when applied to religious content, triggers constitutional danger under the Establishment Clause. St. Isidore can

[79] The respondents argue that the State's academic standards are "highly reticulated," that all public schools in Oklahoma are still required to teach Reagan's famous "Tear Down the Wall" Speech in history class and dangling modifiers in ninth grade English. Drummond v. Okla. Statewide Virtual Charter Sch. Bd, 121 U.S. 694 (2024) (Oral Argument at 1:24:30, Okla. S. Ct. argued Apr. 2, 2024; statement of Gregory Garre)
[80] *Id.* at 1:24:42.
[81] Charter Schools; Creating the Statewide Charter School Board; Providing for Succession to Certain Contracts. Okla. S.B. 1621, 2d Sess. (2022).
[82] Okla. Stat. tit. 70 O.S. § 3-136 (2024).
[83] Okla. State Dep't of Educ., *Charter Schools*, OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD (Jan. 28, 2025), https://oklahoma.gov/scsb/schools/charter-schools.html
[84] Okla. Statewide Virtual Charter Sch. Bd., Guidance for Application for Authorization, OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD (n.d.), https://oklahoma.gov/content/dam/ok/en/svcsb/authorization-tab/Application-for-Authorization-7.31.24.pdf; see also N.Y. State Charter Schs. Institution, School Evaluation Visits, SUNY CHARTER SCHOOLS INSTITUTE (2025), https://www.newyorkcharters.org/resource-center/school-leaders/accountability/school-visit-evaluations/.https://www.newyorkcharters.org/resource-center/school-leaders/accountability/school-visit-evaluation s (last visited June 10, 2025).
[85] D.C. Pub. Charter Sch. Bd., *Qualitative Site Reviews*, D.C. PUB. CHARTER SCH. BD. (n.d.), https://dcpcsb.org/qualitative-site-reviews

assert that *prior* to its charter application, it operated successfully as a private entity. However, that posture does not refute the argument that its transformation into a charter school *caused* the state to take these intrusive measures to assure operational alignment with educational policies.

The argument that the Charter Board need only examine classes which are essential to the state's mission, like math or English, is challenged by the complex issue that St. Isidore embeds religious meaning into *all* their teachings. St. Isidore's mission statement makes this very clear:

> St. Isidore of Seville Catholic Virtual School will be a K-12 Catholic academic program, delivered both synchronously and asynchronously, steeped in the richness of the Catholic Intellectual Tradition with an integrated curriculum where goodness, truth, and beauty are infused throughout all subjects. Curriculum resources will be chosen in all subjects to enlighten and strengthen the intellectual capacity of children to seek Truth through faith and reason. To this end, great care is taken to ensure proper alignment in the curriculum.[86] [87]

The issue that naturally arises from this complete incorporation is that if Oklahoma pays for and approves St. Isidore's religious curriculum annually via its Charter School Board, the State is then presumed to endorse St. Isadore and its teachings. The central question in *Drummond* is why this state evaluation of St. Isidore violates the Establishment Clause.

4.2 Theological Judgments Required by Curriculum Review

St. Isidore, as a private entity that must be comprehensively reviewed by the state board every year, cannot effectively escape the constitutional roadblocks

[86] St. Isidore of Seville Catholic Virtual Sch., Mission and Vision, ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCH. (n.d.), https://www.stisidore.org/about/mission-and-vision.

[87] Catholic schools committed to Church doctrine often modify the teaching of core subjects to reflect Catholic moral and theological principles. For example, they may teach that human life begins at conception, emphasize divine creation over evolutionary theory, frame the Incarnation as the central event in world history, and highlight the Church's unique influence on political and cultural development. Philosophy and literature courses frequently center on religious themes. Many schools also explicitly teach that abortion and homosexual acts are morally sinful, consistent with official Catholic doctrine.

See Institute for Catholic Education, Curriculum Still Matters, INSTITUTE FOR CATHOLIC EDUCATION (2021), https://iceont.ca/wp-content/uploads/2021/12/Curriculum-STILL-Matters-2021.pdf (explaining that "the curriculum of Catholic schools reflect[s] the teachings and values found within the moral framework of Catholicism" and that "theology is intentionally woven into existing program areas … so the Catholic character of the curriculum becomes more visible").

established by the Court,[8889] namely, that "[t]he government's post-audit power to inspect and evaluate the schools' financial records and the content of their educational programs... give rise to entanglements between church and state."[90] This "intimate and continuing relationship between church and state"[91] inherent in the Charter Board review process would lead to entanglement issues that the courts have declared unconstitutional. If the Board would constantly differentiate between St. Isidore's permissible and impermissible curriculum based on their own secular understandings, it follows that the Board would constantly be making theological judgments about the religious strength and content of these changes. The Courts have ruled on multiple occasions that this form of state determination cannot stand.[92] For the state to decide what is religious (and what isn't) is in and of itself a prohibited religious evaluation.

Consider a situation in which the Board must determine whether a religious charter school is teaching material that is overtly religious or merely cultural in nature. Are literature classes that focus exclusively on texts from the school's faith religious or secular? If a Hindu charter school offers meditation classes led by one of its religious leaders, is that a religious curriculum change the state is barred from evaluating because to do so is unconstitutional, or is this a change that must be assessed against academic standards?[93] The state would be forced to make constant, context-sensitive judgments about whether certain practices are religious, secular, or somewhere in between. It would completely collapse the principle that, as legal scholar Douglas Laycock puts it, "[t]he Religion Clauses are … designed to make religious practice and nonpractice, belief and nonbelief, wholly matters of private choice insulated from government influence or control."[94] More perplexing is the question of how the state would standardize this system of religious decision making.

Even accepting Campbell's false claim that the state reviews only core, non-religious academic standards, the very act of deciding which religious aspect are and aren't "academic" is a form of evaluative state oversight of religion. St. Isidore is a holistically Catholic school; its subjects are deeply integrated with Church teachings.

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[88] [2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that ongoing state audits of parochial schools created unconstitutional "excessive entanglement").

[89] Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 Hastings L.J. 1771, 1789–93 (2023).

[90] The Lemon test requires that (1) the government action have a secular purpose; (2) its primary effect neither advance nor inhibit religion; and (3) it avoids "continuing state surveillance" that would entangle church and state. *Lemon*, 403 U.S. at 619–20.

[91] *Id.*

[92] See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down creationism mandate); see also *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating anti-evolution law); Abington *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting school-sponsored Bible reading).

[93] Mark DeGirolami, *Free Exercise by Moonlight*, 91 Notre Dame L. Rev. 747, 753–54 (2015).

[94] Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L. Rev. 373, 379 (1992).

Asking the state to decide what it may and may not regulate – especially when its standards may vary across religious traditions –inevitably entangles the government in precisely the kind of religious judgments the Establishment Clause was designed to prevent.[95] [96] [97]

Unfortunately for St. Isidore, this reasoning can just as easily be made with core classes like science and history. Catholic institutions have long softened their teaching of slavery due to the history the church has had as a legitimizing institution for the practice.[98] Additionally, many Catholic schools exclusively teach creationism, a belief many would argue is incompatible with the Oklahoma requirement to teach evolution.[99] Is the state to evaluate which methods are too religious or not religious enough to fulfill this illusionary "Goldilocks" zone of state oversight? This system where the state must evaluate curriculum changes to ensure state academic standards, but not to the point where it is applying theological judgments is unworkable and unstable. The situation would become even more complex when Catholic schools argue (as many have) that creationism is a *form* of scientific interpretation not existing separately from evolution,[100] or rather that *their* version passes the state expectations as opposed to others.

Similarly, Catholic schools could argue that their teaching of slavery simply serves as a historical interpretation and not a religiously infused one. All of a sudden, the state would be forced to provide a rational for why certain beliefs work and others do not. An additional legal question is how the state would uphold its review standards for differently aligned charter schools, those for Jewish students perhaps. The more finely sliced the state's constitutional involvements are, the more problematic they appear to be.

This potential state oversight runs into the historical entanglement concerns discussed by the founders. In *Memorial and Remonstrance Against Religious Assessments*, James Madison writes:

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[95] See Nicole Stelle Garnett, *Religious Charter Schools: Legal Considerations*, BYU L. Rev. 345 (2023).
[96] See *Larson v. Valente*, 456 U.S. 228 (1982).
[97] See *Lemon*, 403 U.S. at 602.
[98] Paul F. Grendler, *The Catholic Church and Slavery*, *Am. Mag.*, July 12, 2021, https://www.americamagazine.org/faith/2021/07/12/catholic-church-slavery-240921. (last visited July 20, 2025).
[99] Nat'l Ctr. for Sci. Educ., *Possible Slippery Slope for Evolution Education Averted by Supreme Court Deadlock*, ncse.ngo (May 2025), https://ncse.ngo/possible-slippery-slope-supreme-court-deadlock, (last visited July 22, 2025).
[100] See International Theological Commission, *Communion and Stewardship: Human Persons Created in the Image of God*(2004) ¶ 69(Card. Ratzinger),("Any evolutionary mechanism that is contingent can only be contingent because God made it so. An unguided evolutionary process – one that falls outside the bounds of divine providence

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[101][102]

Madison's concerns apply in multiple ways to *Drummond*. It raises questions like: Can the state approve or disapprove any religion based on its own qualitative standards? Can any one religion be more "permissible" than another? The clear Establishment Clause answer is no.[103] The Constitution prohibits the state from implying that some religions are more compatible with public standards than others.[104] – simply cannot exist because "the causality of God, Who is the first agent, extends to all being, not only as to constituent principles of species, but also as to the individualizing principles....It necessarily follows that all things, inasmuch as they participate in existence, must likewise be subject to divine providence.").

Attempts to standardize curriculum oversight across religious sects would force the state to enforce religious conformity—precisely the outcome that Madison feared and exactly what the Establishment Clause prohibits. In an effort to standardize its process, the state might implement the same view of how science and history must be taught in the context of "Christian" charter schools. To uphold standards of fairness and uniformity, the state might require Christian schools to teach evolution in an addition to creationism. But this practice would be unconstitutional under the Establishment Clause as well.[105] It is undeniable that any form of coercion from the state that would force Charter Schools to make religious choices for programmatic funding is an Establishment Clause violation.[106] In the end, it is not that these conversations of church-state balance cannot be had (indeed, they feel like the types of questions that should be asked), but rather that they are exactly the kind of decisions the Courts have barred states from taking part in, and for good reason. This is the same type of "coercive state power" over a private entity that the Courts have described as entanglement.[107]

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[101] James Madison, *Memorial and Remonstrance Against Religious Assessments*, NATIONAL ARCHIVES (1785), https://founders.archives.gov/documents/Madison/01-08-02-0163.
[102] Madison wrote in 1785 to oppose Virginia's tax supporting Christianity as a state sponsored religion. In his writing, Madison's notes that even small changes favoring any one religious group were a core violation of liberty. See https://teachingamericanhistory.org/document/memorial-and-remonstrance/.
[103] *Lemon*, 403 U.S. 602 (1971).
[104] *Larson*, 456 U.S. 612 (1982).
[105] *Larson*, 456 U.S. 612 (1982).
[106] Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 Hastings L.J. 1771, 1787–93 (2023).
[107] See Blum, 457 U.S. 991 (1982); see also *Lemon*, 403 U.S. 602 (1972).

The Supreme Court has already forbidden compulsory religious practices in many areas involving public schools,[108] a factor that would only amplify the would-be constitutional burden placed on St. Isidore. The school is aware of this (they explicitly state that no one is forced to attend mass or engage in worship), but St. Isidore cannot ignore the fact that, as a religious charter school, "[s]chool leaders must mediate the simultaneous pressures for legal compliance and school survival amid desires for continuity of school mission, community, and expectations for school culture."[109] The question facing St. Isidore, then, is whether or not it is detrimental to their mission to adapt to these Constitutional limitations.

In summary, Campbell and Kuehn's arguments fall short for a variety of reasons, many of which are not adequately addressed by the Oklahoma Supreme Court. Using the idea of independent choice to posit that parents and children have the freedom to attend whichever public school (religious or not) ignores the fact that a Charter School Program and a public voucher program are fundamentally different things. Financial aid does not constitute an ongoing evaluate relationship, nor does it address the problem of St. Isidore becoming a state actor, even if it is not a state creation. The independent choice argument disappears under *Drummond* because of the qualitative standard every public school must fulfill under state law. Indeed, it would be best for both sides of the argument to ignore the question of funding or independent choice in determining what is a state actor for this purpose.

St. Isidore's claims of second-class citizenry misunderstand the Free Exercise rights granted by *Trinity, Espinoza, and Carson*. In these cases, the Court addressed religious status discrimination in facially neutral benefits programs, not situations involving ongoing oversight by the state. Free Exercise rights do not guarantee participation in public programs if doing so would force the government into constitutionally impermissible entanglement. The state retains the power to withhold funding from entities whose participation would violate the Establishment Clause. Although the "second-class citizens" argument is rhetorically compelling, it ignores the significant autonomy religious schools enjoy as private carriers of faith. No law bars these private school from operating independently, precisely because the state has no role in deciding what may be theologically taught outside of the public-school framework.

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[108] See *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962) (holding school prayer unconstitutional); see also *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992) (finding clergy-led graduation prayer unconstitutional); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312–13 (2000) (striking down student-led prayer at football games).

[109] Janet R. Decker & Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, 2015 BYU Educ. & L.J. 77, 87.

5. CARSON'S LIMITS AND A PROPOSED ENTANGLEMENT TEXT

Carson cannot be invoked in *Drummond*, where the state's oversight is continuous and substantive. However, in remaining ignorant to the fine differences between the cases, the Oklahoma Supreme Court issues a flat, surface-level decision. A properly reasoned *Drummond* ruling would have reflected a continued judicial commitment to the notion that public or private labels must be grounded in a substantive evaluation of an entity's entwinement with the state.[110] Such a ruling would not only offer courts a framework for evaluating future conflicts over religious education but also send a clear message to states and religious institutions, that claims of independence – like St. Isidore's – based solely on historical private status will not suffice, and that a concrete assessment of state involvement is required.

And yet, this is not what the Oklahoma Supreme Court has done. Instead, it adopted a rationale that could classify countless entities as "public" simply because they perform functions traditionally associated with the state, such as education. When the Supreme Court eventually hears a case like *Drummond*, it must acknowledge that not every entity serving a public function qualifies as a state actor for constitutional purposes. The question must be whether entanglement in faith-based adoption agencies, private hospitals that receive Medicare benefits, religious Pre-K and early childcare centers, and reentry and workforce services run by religious non-profits violate the Establishment Clause when their religious practices clash with their oversight by the state. For private hospitals, the issue is not whether they serve a "public" purpose, but whether their religious policies on abortion or end-of-life care would require the state to make theological judgments – an outcome the Constitution prohibits. For religious adoption centers, the concern is not the "public" nature of childcare, but whether state involvement in religious standards of familial "suitability" leads to favoritism or exclusion based on faith. Institutions cannot simultaneously compel the state to navigate religious doctrine and draw on public funds to operate. It is a shame that the Oklahoma Supreme Court has not made this distinction here, and the responsibility falls on the Supreme Court to make it later.

6. CONCLUSION

The divided Court in *Drummond* signals where church-state law may be heading. Had the conservative leaning Justice Barrett not recused herself, St. Isidore might now be operating as the nation's first religious public school. This moment did not arise in isolation: what began in *Trinity Lutheran* has culminated in a doctrinal

[110] *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

landslide that blurs the boundaries between public and private, neutrality and endorsement. This article contends that courts must draw a clearer line, one focused on whether state oversight compels context-specific judgments about religious doctrine.

If courts fail to establish this line, future litigation will proliferate. State actions such as removing religious concepts that conflict with science standards, censoring literature, or excluding certain forms of religious moral instruction could prompt Free Exercise challenges, with schools claiming either facial or unequal treatment. The Court will fervently rush to close the doors it had previously opened, and the nation as whole learn the hard way where the line was meant to be drawn between religious freedom and the state. In light of the administrative attacks our nation's education department, public schools, and system of higher education, the Court must take a good long look in the mirror before taking their Free Exercise trend one step further; it is beyond apparent that the Free Exercise Trilogy has reached its end point. By rejecting a case like *Drummond* on the proper grounds and adopting the entanglement-focused approach advanced here, the Court can both safeguard religious liberty and preserve the constitutional barrier between the Establishment and Free Exercise Clauses. Although the specific methods of doing so are the Court's to choose from, the decision to begin now, in light of the impending cases in the lower Courts, seems an obvious one.

ARTICLE

FINDING FAULT IN OUR STARS: INVESTIGATING FAULT LIABILITY FOR SATELLITE COLLISIONS IN LOW EARTH ORBIT

Jackson Flower, Washington and Lee University

1. INTRODUCTION

1.1 Space Law and Private Sector Regulation

The exploration of outer space has long been seen as a paramount goal for humanity, with its frontiers promising limitless potential for exploration and scientific discovery to improve life on Earth. The use and exploration of space, characterized as a part of the global commons,[1] has consequently been subject to discussions on regulation to set legal boundaries for the conduct of both state and private entities. Between the years 1967 and 1979, the United Nations (UN) adopted five treaties regulating conduct in space, providing a basis in international law for actions taken beyond Earth's atmosphere. The first of these treaties, the 1967 Outer Space Treaty (OST), establishes common principles of international law and collaboration for state conduct in outer space.[2] The remaining four treaties were signed pursuant to the OST, addressing more specific instances such as the rescue and return of astronauts and other space objects ("Rescue Agreement" [ARRA], 1968),[3] the liability for damages caused by space objects ("Liability Agreement" [LIAB], 1972),[4] the registration of space objects in orbit ("Registration Convention" [REG], 1975),[5] and the activities of states regarding celestial bodies ("Moon Agreement," 1979). [6]As treaties of international law, these documents aim to regulate state activity, as their signatories are limited to sovereign states and international

[1] U.N. System Team Task on the Post-2015 UN Development Agenda, *Global Governance and Governance of the Global Commons in the Global Partnership for Development beyond 2015* (Jan. 2013), https://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf.
[2] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410.
[3] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570.
[4] Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389.
[5] Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695.
[6] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3.

intergovernmental organizations. However, within these treaties there exists a degree of indirect regulation of private entities as well.

The OST provides a basis for private sector regulation in space activities. Specifically, Article VI of the Treaty stipulates conditions which require states to bear responsibility for the actions of "non-governmental entities" and reads as follows:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.[7]

This article creates a means for private sector regulation, as states are obligated to ensure that the actions of such "non-governmental entities" are in conformity with the Treaty. While the OST does not directly regulate private entities, it places responsibility on states and their national legislatures for ensuring the compliance of companies in their natural jurisdiction with the present treaty. However, in the time since this treaty was signed in 1967, the relationship between public and private entities in outer space activities has changed significantly. It is therefore helpful to investigate the meaning of the OST by means of interpretation to deduce a meaning consistent with the modern space environment.

1.1.1 Space Law and Private Sector Regulation

To properly interpret the meaning of "non-governmental entities" as specified in the OST, it is necessary to consult relevant instruments of international law. Specifically, Article 31 of the 1969 Vienna Convention on the Law of Treaties provides guidance on the materials available for consideration when interpreting international treaties. Article 31(1) holds that treaty terms be interpreted according to their "ordinary meaning" given by the treaty's definitions.[8] Article 31(2) names resources directly related to the treaty and its drafting such as appendixes, preambles, and draft articles.[9] In the case of the OST, neither of these methods yield information expounding upon the meaning of non-governmental entities. Proceeding further,

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[7] Outer Space Treaty art. VI, *supra* note 2
[8] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
[9] *Id.* art. 31(2).

Article 31(3) provides guidance for using materials outside of the treaty. Specifically, Article 31(3)(c) lists:

> Any relevant rules of international law applicable in the relations between the parties.[10]

Implementing the principle found in Article 31(3)(c) is informed by its usage by the International Court of Justice (ICJ), particularly in its decision in *Islamic Republic of Iran* v. *United States of America* (2003), also known as *Oil Platforms*.[11] In *Oil Platforms*, the ICJ determined whether the United States had acted in "self-defense" when causing damage to Iranian oil drills with respect to a prior treaty between the two states. Article 31(3)(c) was used in the Court's judgment, applying a definition of "self-defense" from a prior treaty between the United States and Nicaragua to the treaty between Iran and the United States.[12] This case established that a definition could be supplanted from a different treaty as a relevant rule of international law, given that at least one state is governed by both treaties.

Considering both the language of VCLT Article 31(3)(c) in naming "instrument[s] related to the treaty" and the ICJ's use of Article 31(3)(c) in *Oil Platforms,* a definition for non-governmental entities in the OST can be found in the Havana Convention of 1948. This treaty established the International Trade Organization (ITO), which regulated anti-competitive economic practices by means of multilateral treaties known as the General Agreements on Tariffs and Trade (GATT).[13] Though the ITO was replaced by the World Trade Organization in 1995, the language of the Havana Convention remains relevant to the discussion of interpreting OST Article VI, as the Havana Convention was in effect during the negotiations on the OST in 1966–7.

In discussing restrictive business practices, the Havana Convention provides the following relationship between governments and commercial enterprise, as it stipulates:

> Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control,

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[10] *Id.* art. 31(3)(c).
[11] *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161 (Nov. 6, 2003).
[12] U.N. Conference on Trade and Employment, *Final Act of the United Nations Conference on Trade and Employment* (1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.
[13] U.N. Conference on Trade and Employment, *Final Act of the United Nations Conference on Trade and Employment* (1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

> whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives act forth in Article 1.[14]

This multilateral treaty defines a distinct separation between "private or public commercial enterprises" and "Members" as government entities. Furthermore, the described relationship of "commercial enterprises" and their "business practices" being subject to government regulation is consistent with the relationship defined by Article IV of the OST. Consequently, the meaning of "private or public commercial enterprises" is transmissible as a definition for "non-governmental entities" as used in the OST. This interpretation yields a definition consistent with modern space exploration, which contains both state and commercial activities. By utilizing this definition for "non-governmental entities" as per Article VI of the OST, the actions of both commercial and government sectors can be viewed in an international legal context.

1.2 Megaconstellations and Private Sector Proliferation

Recent satellite launches by both private and government entities have strived to utilize outer space's many applications. Services provided by satellites have enhanced humanity's condition on Earth, offering technologies such as enhanced global communication and surface observation. Satellites are also crucial to the future of deep space exploration, providing further glimpses of space beyond our solar system through the lenses of the Hubble and James Webb space telescopes. Most satellites providing such technological services remain in low earth orbit (LEO), a region which comprises orbital patterns with a periapsis of 180 km and an apoapsis of 2000 km above Earth's surface.[15] In addition to utilizing the same space in LEO, the proportion of private satellites to government satellites has increased exponentially. As of May 1, 2023, the United States alone operated 5,184 satellites, with 4,741 belonging to commercial entities.[16] This proliferation in private satellites has been primarily driven by "megaconstellations," or large groups of small satellites working in tandem to produce consistent global coverage. Behind the development of megaconstellations are private entities such as the United States–based Starlink and France's Eutelsat OneWeb. OneWeb currently operates a network of 648 satellites,[17] and Starlink operates 9,537 satellites, with Starlink recently having submitted filings

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[14] *Id.* at 63.
[15] European Space Agency, *Types of Orbits*, https://www.esa.int/Enabling_Support/Space_Transportation/Types_of_orbits#LEO (last visited Feb. 3, 2025).
[16] Union of Concerned Scientists, *Satellite Database*, https://www.ucsusa.org/resources/satellite-database (last visited Feb. 17, 2025).
[17] Steven E. Grotch, Mega-Constellations: Disrupting the Space Legal Order, 37 *Emory Int'l L. Rev.* 101 (2022).

for up to 30,000 satellites to the International Telecommunications Union (ITU),[18] the UN agency responsible for regulating orbital pathways for communications and information technology.[19] Distribution of the orbital spectrum was thrown into further question in early 2026, as the Chinese government submitted paperwork to the ITU for megaconstellations consisting of a proposed 200,000 satellites.[20] Though these proposals are subject to further deliberation, in their current form they represent the intertwined nature of public and private enterprises in outer space and pose a risk to future space exploration.

The risks associated with megaconstellations have been identified for decades, as scientists have expressed concern regarding the issue of overcrowding LEO with artificial debris. In 1978, research led by NASA physicist Donald Kessler warned of the imminent danger of satellite collisions spreading debris, exponentially increasing the chances of further collisions with other satellites and "creating a belt of debris around the earth" which proliferates even in the absence of consistent launches.[21] Known colloquially as "Kessler Syndrome," this problem of exponential debris field growth may "increasingly limit spacecraft lifetime," posing a serious threat to the future of space utilization.[22] In determining a limit for satellites in orbit, contemporary research suggests a maximum capacity of 1.8 million satellites in LEO, though this number notably does not account for potential debris fields.[23] Although this number would suggest a higher threshold before the effects of collisions become disastrous, these collisions are already becoming commonplace. As of February 2025, the European Space Agency (ESA) estimates that a total of 20,650 artificial satellites have been launched into Earth's orbit. From these, the ESA estimates a collective 650 unintentional collisions have occurred since the beginning of debris-tracking exercises.[24] This indicates that orbital pathways are a finite resource, justifying a degree of regulation through legal instruments to guide further utilization.

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[18] *OneWeb Minisatellite Constellation*, eoPortal (July 30, 2025), https://www.eoportal.org/satellite-missions/oneweb.
[19] Mike Wall, *Starlink Satellites: Facts, Tracking, and Impact on Astronomy*, Space.com (Dec. 19, 2025), https://www.space.com/spacex-starlink-satellites.html.
[20] Andrew Jones, *China Files ITU Paperwork for Megaconstellations Totaling Nearly 200,000 Satellites*, SpaceNews (Jan. 12, 2026), https://www.spacenews.com/china-files-itu-paperwork-for-megaconstellations-totaling-nearly-200000-satellites.
[21] Donald J. Kessler & Burton G. Cour-Palais, Collision Frequency of Artificial Satellites: The Creation of a Debris Belt, 83 *J. Geophys. Res.: Space Physics* 2637 (1978).
[22] Donald J. Kessler et al., The Kessler Syndrome: Implications for Future Space Operations, 137 *Advances Astronautical Sci.* 2010 (2010).
[23] Miles Lifson et al., How Many Satellites Can We Fit in Low Earth Orbit?: Capacity Integrating Risk-Based and Intrinsic Methods, in *Astrodynamics Specialist Conference* 1 (2022).
[24] Eur. Space Agency, *Space Debris by the Numbers,* https://www.esa.int/Space_Safety/Space_Debris/Space_debris_by_the_numbers.

1.3 Legal Remedy

The legal avenues for preventing and resolving damages resulting from collisions are limited, primarily stemming from REG and LIAB. REG, though facing challenges in its implementation, serves to prevent satellite collisions by requiring that all objects launched into outer space are submitted to a registry maintained by the UN Secretary General.[25] The registry is made publicly available, providing both government and commercial entities with information to reduce the likelihood of collision. LIAB acts to disincentivize collisions by providing a system of liabilities for damages incurred at different stages of space operations. Specifically, Article III sets forth the procedure for damages caused to space objects beyond Earth's atmosphere:

> In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[26]

A space object, as defined in LIAB Article I(d) includes objects such as manned spacecraft and satellites, as well as "component parts of a space object as well as its launch vehicle and parts thereof."[27] In consideration of this definition, Article III establishes a system of fault liability for space objects while in orbit, indicating that the party at fault is to be held liable for damages to another's space object. Though this article only refers to parties as "launching States," and given that LIAB is pursuant to the OST, this provision can be read as encompassing private parties under the jurisdiction of the "launching State" as per the provision in OST Article VI stipulating state responsibility for private actors.[28] However, complications arise when fault liability is applied to such entities.

Fault liability, or fault-based liability, is used primarily within torts and personal injury law in national regimes. For an individual to be found liable for actions under a fault-based system, their conduct must be found as either negligent or

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[25] Anja Nakarada Pečujlić, Registration Convention, *Oxford Research Encyclopedia of Planetary Science* (Mar. 31, 2020), https://oxfordre.com/planetaryscience/planetaryscience/abstract/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-132.

[26] Convention on International Liability for Damage Caused by Space Objects art. III, *supra* note 4.

[27] Convention on International Liability for Damage Caused by Space Objects art. I(d), *supra* note 4.

[28] Michael Byers & Aaron Boley, *Who Owns Outer Space?: International Law, Astrophysics, and the Sustainable Development of Space* 87 (Cambridge Univ. Press 2023).

intentional.[29] Using negligence as a threshold for fault requires that a "standard" or "duty of care" be defined, which "varies with the risk posed."[30] By contrast, strict liability does not require this proof to be made. Strict liability instead holds individuals as liable for their conduct, irrespective of whether there has been a breach of this standard of care.[31] Given the difficulty associated with establishing a standard of care, strict liability is generally seen as a more efficient, reliable basis for litigation efforts.[32]

Implementing fault liability becomes especially difficult in the context of outer space, as it places a burden of proof on the plaintiff to identify both a duty of care and negligence thereof. Establishing this proof is made increasingly difficult by the physical conditions associated with space activities, which place barriers on obtaining sound evidence.[33] Furthermore, there are currently no other areas of international law which prescribe fault liability as a remedy. As such, there have been no suits brought to court under the fault liability provisions outlined by LIAB Article III.

By examining the implications of prescribing fault liability for unintentional satellite collisions under instruments of international law, this paper seeks to contribute a solution to the problem of overcrowding LEO by means of strengthening LIAB as a basis for international litigation, thereby disincentivizing negligent conduct in outer space. This paper proceeds in this task by first examining different types of satellite collisions and their remedies, isolating the legal problems stemming from the use of fault liability in LIAB Article III. Having isolated the issue, this paper will then look to other areas of international law for purposes of interpreting fault as used in LIAB Article III. Lastly, this paper will propose solutions to the issues regarding fault liability for satellite collisions by building upon existing instruments of international law. By resolving issues of fault liability, this paper seeks to fortify LIAB Article III as a remedy for satellite collisions through international law.

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[29] Oxford Reference, *Fault Liability,* https://doi.org/10.1093/oi/authority.20110803095812106 (last visited Mar. 2, 2025).
[30] Joseph Raz, Responsibility and the Negligence Standard, 30 *Oxford J. Legal Stud.* 1, 1–18 (2010).
[31] John C.P. Goldberg & Benjamin C. Zipursky, The Strict Liability in Fault and the Fault in Strict Liability, 85 *Fordham L. Rev.* 745 (2016).
[32] Kathleen Segerson, *Economics and Liability for Environmental Problems* (Routledge Revivals 2017).
[33] Joseph N. Pelton, *New Solutions for the Space Debris Problem* 32, 70 (Springer Int'l Publ'g 2015).

2. ISOLATING THE PROBLEM: OTHER SPACE OBJECT DAMAGES AND LIABILITY REGIMES SECTION

2.1 Introduction

The issue of satellite collisions in LEO is of growing concern for future space travel and utilization, with few legal avenues to mitigate potential infractions. To understand the specific legal questions raised by prescribing fault liability for such collisions, it is necessary to understand how other types of collisions are redressed, and thus how satellite collisions in outer space differ in legal remedy. This segment will begin with a section investigating pre-existing remedies for satellite and space object damages caused within Earth's atmosphere, which utilize strict liability in both national and international law to reduce damages. The next section will investigate procedures for space object collisions with debris in LEO under non-binding legal instruments which serve to reduce damage. Taken together, these instruments will show effective legislation and policy design regarding satellite damages. This will then be compared with the provisions of fault liability under LIAB Article III and the subsequent lack of litigation exercising these mechanisms. The exercise in this segment serves to isolate the issue to the specific lack of sound legal redress provided by fault liability for satellite collisions in outer space.

2.2 Strict Liability for Space Object Damages on Earth

As previously discussed in this paper, strict liability exists in contrast to fault liability, as it does not require the plaintiff to establish a standard of care and instead holds an individual liable for their actions irrespective of negligent conduct. This type of liability, though now widespread, has its origins in English tort law, beginning with the case *Rylands* v. *Fletcher* (1868).[34] In this case, Jonathan Rylands ordered the construction of a reservoir to supply water to a nearby grain mill, contracting employees for the construction. Unknown to Rylands or the construction team, the reservoir was built near a system of underground mines belonging to Thomas Fletcher. In 1860, the reservoir burst, compromising Fletcher's mine and forcing him to abandon the business.[35] Fletcher sought financial compensation from Rylands in court and filed suit. In determining liability for the case, the Appellate Committee of the House of Lords, then acting as the highest court of appeals in the United

[34] Maria Lubomira Kubica, Origins of Strict Liability for Abnormally Dangerous Activities in the United States, Rylands v. Fletcher and a General Clause of Strict Liability in the UK, 10 *Int'l J.L. & Pol. Sci.* (2016).
[35] Siddharth Sengupta, Rylands v. Fletcher, 2 *Jus Corpus L.J.* 63 (2021–22).

Kingdom, found Rylands liable for the actions of the contractors. In their decision, the Court based their reasoning on the following rule:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.[36]

In finding Rylands liable for "all the damage which is the natural consequence of its escape," the Court established a principle of strict liability which does not consider an individual's negligence in relation to the action in question. This type of liability became an integrated legal instrument in English tort law, spreading then to French and German legal systems,[37] before it ultimately found usage in international law.[38]

2.2.1 Strict Liability for Space Object Damages on Earth in International Law

In international law, strict liability has become increasingly invoked for adjudicating cases of transnational injury, particularly when dealing with matters of environmental concern,[39] [40] as "[t]he liability of a State does not stem from its fault or the wrongfulness of its act, but from the injurious consequences suffered by persons beyond its boundaries."[41] This principle is also reflected in the treaties governing space in international law, particularly in LIAB. Where LIAB Article III stipulates fault liability for damages caused by space objects outside of Earth's atmosphere, LIAB Article II addresses damages caused by space objects inside of Earth's atmosphere. For these cases, LIAB Article II prescribes strict liability for damages, reading as follows:

> A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.[42]

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[36] Rylands v. Fletcher, [1868] UKHL 1 (July 17, 1868).
[37] Willem H. van Boom, Some Remarks on the Decline of Rylands v. Fletcher and the Disparity of European Strict Liability Regimes, *2005 Zeitschrift für Europäisches Privatrecht* 618 (2005).
[38] Joni S. Charme, Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability, 4 *J.L. & Tech.* 75 (1989).
[39] Joni S. Charme, Transnational Injury and Ultra-Hazardous Activity: An Emerging Norm of International Strict Liability, 4 *J.L. & Tech.* 75 (1989).
[40] Catherine Tinker, *Strict Liability of States for Environmental Harm: An Emerging Principle of International Law*, 3 Touro J. Transnat'l L. 155 (1992).
[41] Sompong Sucharitkul, State Responsibility and International Liability Under International Law, 18 *Loy. L.A. Int'l & Comp. L.J.* 821 (1996).
[42] Convention on International Liability for Damage Caused by Space Objects art. II, *supra* note 4.

By holding the launching State as "absolutely liable" for damages caused to Earth's surface, LIAB Article II removes the need to establish a standard of care and thus implements strict liability. Though it has not seen widespread use, LIAB Article II has proven moderately successful in its limited implementation.

On September 18, 1977, Soviet Russian reconnaissance satellite Kosmos 954 took off from the Baikonur Cosmodrome in Tyuratam, Kazakhstan.[43] The satellite carried an onboard nuclear reactor for power and was scheduled to ascend to a higher orbit upon completion of its mission to avoid leaking radioactive material.[44] However, Kosmos 954 began to slip from its orbit shortly after launch, alarming monitors at the joint Canadian American North American Aerospace Defense Command (NORAD). On January 24, 1978, the satellite re-entered the atmosphere over Canada's Northwestern Territory, scattering pieces of the satellite's radioactive uranium-235 fuel cells.[45] NORAD acted quickly, launching Operation Morning Light to scout the estimated 124,000 square kilometer debris field for radioactive particles. By the operation's conclusion in October 1978, over 4,000 pieces had been recovered.[46] The costs for Operation Morning Light had been substantial, and Canada sought financial compensation under LIAB.

Across its two phases, Operation Morning Light had accrued a total cost of nearly fourteen million dollars, of which Canada sought $6,041,174.70 as compensation from the Union of Soviet Socialist Republics.[47] In its formal legal claim filed on March 23, 1979, Canada relied heavily upon LIAB Article II as a basis for financial compensation.[48] The Soviet Union fought the claim on the basis that, since Kosmos 954 had broken up prior to re-entering Earth's atmosphere, it could no longer be considered a satellite, or a "space object" as described by LIAB by the time it caused damage to the surface. The two states negotiated the claim across a series of three meetings, and on April 2, 1981, the Soviet Union agreed to pay Canada a three million dollar sum for the damages caused by Kosmos 954.[49] Though the settlement

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[43] Leo Heaps, *Operation Morning Light: Terror in Our Skies: The True Story of Cosmos 954* (Paddington Press Ltd. 1978).
[44] The National Interest, Operation Morning Light: The Nuclear Satellite That Almost Decimated America, https://nationalinterest.org/feature/operation-morning-light-the-nuclear-satellite-almost-14411 (Nov. 23, 2015).
[45] Glenn H. Reynolds & Robert P. Merges, *Outer Space: Problems of Law and Policy* 182 (Westview Press 1998).
[46] Ken Shultz, Operation Morning Light, *The Canadian Encyclopedia*, https://www.thecanadianencyclopedia.ca/en/article/operation-morning-light (Oct. 24, 2010).
[47] *Settlement of Claim Between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954"* (Apr. 2, 1981), https://www.jaxa.jp/library/space_law/chapter_3/3-2-2-1_e.html
[48] Bryan Schwartz & Mark L. Berlin, After the Fall: An Analysis of Canadian Legal Claims for Damage Caused by Cosmos 954, 27 *McGill L.J.* 676 (1982).
[49] U.N. Off. for Outer Space Affs., *Bilateral & Multilateral Agreements: Selected Provisions*, https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/bi-multi-lateral-agreements/can_ussr_001.html (last visited Apr. 25, 2025).

took place outside an international court, the parties' bilateral agreement—reached with United Nations involvement—reflects a negotiated resolution consistent with the Convention's compensation framework.[50] While strict liability was not expressly adopted in the settlement, it illustrates the role of strict-liability principles in shaping one of the parties' claims. The parties' negotiations did not center on questions of fault, but rather on whether Kosmos 954 qualified as a "space object" under the Convention. This emphasis on definitional scope rather than culpability reflects an approach consistent with strict-liability principles in the international treatment of damage caused by space objects within Earth's atmosphere.

2.2.2 Strict Liability for Space Object Damages on Earth in National Law

Strict liability has also seen success for space object damages in national courts. In the United States system of tort law, the principle of strict liability from *Rylands* v. *Fletcher* (1868) was carried over for certain circumstances, one of which being "ultrahazardous activities."[51] This language comes from the *Restatement of the Law* series published by the American Law Institute, which served to compile principles of law relevant to distinct fields of practice.[52] In defining the relationship between strict liability and ultrahazardous activities, §519 of the *Restatement of Torts* proceeds as follows:

> [O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.[53]

Further defining ultrahazardous activities, §520 describes them as activities involving risk "which cannot be eliminated by the exercise of the utmost care."[54] In both §519 and §520, ultrahazardous activities are defined as those which cause harm irrespective of the care given to them, thus compelling the use of strict liability. Though this language is superseded by "abnormally dangerous activity" in later editions of the treatise, strict liability remains the remedy for such cases.[55] Moreover, the language of ultrahazardous activities remains relevant to this analysis, as it

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[50] Alexander F. Cohen**,** *Cosmos 954 and the International Law of Satellite Accidents*, 10 *Yale J. Int'l L.* 78, 90–91 (1984).
[51] John M. Kelson, State Responsibility and the Abnormally Dangerous Activity, 13 *Harv. Int'l L.J.* 203, 204 (1972).
[52] Meg Kribble, *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises*, Harv. L. Sch. Libr., https://guides.library.harvard.edu/law/secondary (May 9, 2017).
[53] *Restatement (First) of Torts* § 519 (Am. L. Inst. 1938).
[54] *Id.* § 520.
[55] *Restatement (Second) of Torts* § 519 (Am. L. Inst. 1965).

provided guidance in a successful tort case involving a space object, this time being a rocket motor as opposed to a satellite.

The exemplary case of strict liability regarding space objects was decided in the California Court of Appeal for the Fourth District in *Smith* v. *Lockheed Propulsion Co.* (1967).[56] On May 12, 1962, the Lockheed Propulsion Company, later the Lockheed Martin Company, tested a solid fuel rocket motor by affixing it to a rig and firing it directly into the ground in Potrero Valley, California. The motor test lasted 132 seconds and created an estimated 350,000 pounds of thrust. Raymond Smith, the owner of a nearby ranch, noticed a strong vibration at the time of the test, and within 80 minutes experienced contamination of his ranch's water well. A contractor was hired to access the damages to the well, where it was found sheared beyond repair, with "probable cause" that the motor test had caused the damage. Smith filed suit, attesting that Lockheed was subject to strict liability for committing ultrahazardous activities. The court ruled in favor of this argument, finding:

> In our opinion, defendant's activity must be classed as ultrahazardous. The solid fuel rocket motor was the largest ever tested to that date. Test firing such a a [sic] device is not a matter of common occurrence. The fact that defendant found it necessary to acquire 9100 acres for its purposes, and at one time told plaintiffs it needed their property in order to conduct the test, is evidence of its recognition of the risk inherent in the undertaking despite the exercise of due care.[57]

On the basis that the action incurred damages irrespective of the level of care taken, the California Appellate Court affirmed the ruling finding that Lockheed's test firing of rocket fuel constituted an "ultrahazardous activity," and as such required the imposition of strict liability. Though not decided under LIAB, as *Smith* was decided by a U.S. state court not subject to outside of international jurisdiction, Lockheed's rocket motor would have fallen within LIAB Article I's definition of a "space object" as a "launch vehicle or parts thereof" had the incident occurred in an international legal context.[58] Furthermore, strict liability, like what is stipulated under LIAB Article II, was utilized here under California state law as a remedy for the damages caused to Earth's surface by the space object.

Both the Kosmos 954 incident and *Smith* v. *Lockheed Propulsion* support strict liability as an effective means of compensation for damages caused by space

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[56] Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128, 29 A.L.R.3d 538 (Cal. App. 1967).
[57] *Id.*
[58] *Convention on International Liability for Damage Caused by Space Objects* art. I(d), *supra* note 4.

objects. Its inclusion in LIAB Article II is thus a sound basis for litigation under international law, as the process required by strict liability is supported by procedural precedent in the setting of both international and domestic United States law.

2.3 Space Debris Collisions and Damages

As described by the Kessler syndrome, debris is a chief contributor to the problem of orbital overcrowding, as its presence in orbit perpetuates the further destruction of satellites and other space objects.[59] Debris, however, is not covered by LIAB, as evidenced by the Soviet Union's response to Canada's Kosmos 954 claim stating that the satellite was no longer considered a "space object" under LIAB Article II, having broken apart before entering the atmosphere. This distinction is recognized by the international community, which has since designed auxiliary policy instruments outside of LIAB to address the problems created by debris.

2.3.1 Space Debris Collisions and Damages

In 1993, four national space programs convened to create the Inter-Agency Space Debris Coordination Committee (IADC), an intergovernmental forum designed to coordinate efforts to mitigate the effects of space debris.[60] The IADC has since expanded to a membership of seventeen national space programs and has worked to devise methods of decreasing the likelihood of collisions. These methods include identifying low-density areas of orbital debris, requiring more secure construction techniques for fragile satellite components like solar arrays, and adjustment of orbits following the termination of a satellite's lifecycle[61] The IADC most recently developed an updated guidance in January 2025, which was updated to account for megaconstellations and satellite clusters.[62]

Closely mirroring the development of the IADC, the United Nations Commission on the Peaceful Uses of Outer Space (UNCOPOUS) first considered

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[59] Paweł Bernat, Orbital Satellite Constellations and the Growing Threat of Kessler Syndrome in Low Earth Orbit, *Inżynieria Bezpieczeństwa Obiektów Antropogenicznych* 45 (2020).

[60] Nicholas Johnson, Origin of the Inter-Agency Space Debris Coordination Committee, *ARES Biennial Report 2012 (Final)* (2014).

[61] Inter-Agency Space Debris Coordination Comm. (IADC), Statement at the 35th Session of the U.N. Comm. on the Peaceful Uses of Outer Space, Scientific & Technical Subcomm. (STSC), https://www.iadc-home.org/documents_public/view/search_order/eNortjI0sVJy1EsuSk0sSU1RSEktTlayBlwwS3cG0g~~/search_field/eNortjI2tlJy1CsuTcpKTS7RdtTLS8xNBVIlielAMjk_ryQ1r6RYyRpcMAypDUU~/page/6/id/87 (2015).

[62] Inter-Agency Space Debris Coordination Comm. (IADC), *02-01 Space Debris Guidelines (Rev. 4)*, https://www.iadc-home.org/documents_public/view/search_order/eNortjI0sVJy1EsuSk0sSU1RSEktTlayBlwwS3cG0g~~/search_field/eNortjI2tlJy1CsuTcpKTS7RdtTLS8xNBVIlielAMjk_ryQ1r6RYyRpcMAypDUU~/page/1/id/318 (Jan. 22, 2025).

problems related to the proliferation of space debris at the recommendation of the Scientific and Technical Subcommittee in 1994.[63] With input from the IADC and other national space programs, UNCOPOUS adopted its first set of debris mitigation guidelines in 2007.[64] Though member states of the IADC or UN are not required to follow the appropriate debris mitigation guidelines, their instruction has been generally accepted through implementation of practice.

As guidelines, neither the IADC nor the UN debris mitigation guidelines carry the force of law.[65] Despite this, recent legal scholarship has argued that states have an obligation to follow the guidelines under international law pursuant of OST Article IX,[66] which states that "In the exploration and use of outer space… States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space… with due regard to the corresponding interests of all other States Parties to the Treaty."[67] By refusing to follow the guidelines put forth by the international community, scholars claim that this breaches a standard of care, thus making the violating state liable.[68] However, no such cases have been tried in international law, and as such, international debris mitigation guidelines remain as mere policy suggestions.

2.3.2 Space Debris Collisions and Damages in National Frameworks

Regardless of the legal standing of international debris mitigation guidelines, various national and supranational space programs have adopted their specifications. In the United States, the National Aeronautic and Space Administration (NASA) has opened the Orbital Debris Program Office, which in 2014 promulgated the Procedural Requirements on Orbital Debris Mitigation.[69] On April 28, 2021, the European Union passed Resolution 2021/696, known as the "Space Regulation."[70]

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[63] U.N. Comm. on the Peaceful Uses of Outer Space, Sci. & Tech. Subcomm., *Report of the Scientific and Technical Subcommittee on the Work of Its Thirty-First Session*, U.N. Doc. A/AC.105/571 (Mar. 10, 1994), https://digitallibrary.un.org/record/172756.

[64] U.N. Comm. on the Peaceful Uses of Outer Space, Sci. & Tech. Subcomm., *Report of the Scientific and Technical Subcommittee on Its Forty-Fourth Session, Held in Vienna from 12 to 23 February 2007*, U.N. Doc. A/AC.105/890 (Mar. 6, 2007), https://digitallibrary.un.org/record/607460.

[65] Jie Long & Chuying Huang, Obligations and Liabilities Concerning the Active Removal of Foreign Space Debris: A Global Governance Perspective, 222 *Acta Astronautica* 422, 422–435 (2024).

[66] Jacqueline H. Smith, Minoo Rathnasabapathy & Danielle Wood, The Political and Legal Landscape of Space Debris Mitigation in Emerging Space Nations, 11 *J. Space Safety Eng'g* 704 (2024).

[67] Outer Space Treaty art. IX, *supra* note 2.

[68] Lawrence Li, Space Debris Mitigation as an International Law Obligation: A Critical Analysis with Reference to States Practice and Treaty Obligation, 17 *Int'l Cmty. L. Rev.* 325 (2015).

[69] NASA Orbital Debris Program Office, *NASA Procedural Requirements for Orbital Debris Mitigation* (NPR 8715.6B) (Feb. 16, 2017), https://soma.larc.nasa.gov/SIMPLEx/pdf_files/N_PR_8715_006B_.pdf.

[70] Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme, 2021 O.J. (L 170) 69.

Among its provisions was the establishment of the Space and Surveillance Tracking (SST) program, entering into force in November 2022.[71] The Japanese Aerospace Exploration Agency (JAXA) began its Commercial Removal of Debris (CRD) program in 2019, aimed at contracting with commercial partners to design solutions for space debris removal.[72] In 2023, JAXA selected Astroscale Japan Inc. as its partner for the CRD program;[73] and in December 2024, Astroscale completed its first phase of surveying orbital debris by coming within 15 meters of a selected target.[74] These developments represent a small sample of the national and supranational policies around the world which have stemmed from international guidelines.[75] Outside of policy, however, litigation efforts may move beyond mitigation efforts and address remedy for debris damages.

On March 8, 2024, a piece of metal weighing 1.6 pounds tore through the roof of a house belonging to the Otero family in Naples, Florida.[76] After collecting the sample and performing an investigation, NASA confirmed that the object was a piece of debris from the International Space Station (ISS), and was part of a larger ejection of debris meant to disintegrate upon reentry into Earth's atmosphere.[77] Seeking damages, the plaintiff filed a case against NASA under the Federal Tort Claims Act (FTCA) claiming proof of negligence. The claim against NASA also referred to LIAB Article II.[78] In drawing upon strict liability under LIAB Article II, the plaintiff's counsel commented "we have asked NASA not to apply a different standard towards U.S. citizens or residents", and that they hope to "set a precedent" for "responsible, safe, and sustainable space operations."[79] Though NASA has yet to respond to these claims as stipulated by the FTCA, this case will likely establish a

[71] "EU Space Surveillance & Tracking (EU SST), *New EU SST Partnership of 15 Member States Signed*, https://www.eusst.eu/newsroom/new-eu-sst-partnership-signed-2/ (Nov. 11, 2022).
[72] Japan Aerospace Exploration Agency (JAXA), *JAXA President Monthly Press Conference October 2019*, https://global.jaxa.jp/about/president/presslec/201910.html (last visited Apr. 26, 2025).
[73] Astroscale, *Astroscale Leads the World's First Attempt to Survey Debris Through RPO*, https://astroscale.com/astroscale-leads-the-worlds-first-attempt-to-survey-debris-through-rpo/ (Mar. 30, 2023).
[74] Astroscale, *Astroscale's ADRAS-J Achieves Historic 15-Meter Approach to Space Debris*, https://astroscale.com/astroscales-adras-j-achieves-historic-15-meter-approach-to-space-debris/ (Dec. 11, 2024).
[75] Luana Silva, Analyzing Global Policies for Space Debris Removal: A Technical Review of Small Satellite Guidelines, 7 *Acad. J. Sci. & Tech.* (2024).
[76] BBC News, *Florida Family Seeks Damages from NASA After Space Debris Hits Home,* https://www.bbc.com/news/articles/c9www02e49zo (June 24, 2024).
[77] NASA, *NASA Completes Analysis of Recovered Space Object*, https://www.nasa.gov/blogs/spacestation/2024/04/15/nasa-completes-analysis-of-recovered-space-object/ (Apr. 15, 2024).
[78] Foot Anstey, *NASA Sued for Space Debris in Potentially Precedent-Setting Case*, https://www.footanstey.com/our-insights/articles-news/nasa-sued-for-space-debris-in-potentially-precedent-setting-case/ (June 15, 2025).
[79] Cranfill Sumner LLP, *Mica Nguyen Worthy Submits First-of-Its-Kind Claim to NASA Seeking Recovery from Damages Sustained from Space Debris*, https://www.cshlaw.com/news/mica-nguyen-worthy-submits-first-of-its-kind-claim-to-nasa-seeking-recovery-from-damages-sustained-from-space-debris/ (June 21, 2024).

model informing any future national litigation on the issue of earthly damages from space debris.

In dealing with prevention and mediation of damages caused by space debris on Earth, states have implemented numerous mitigation measures to track and reduce debris before it reaches the surface. In this respect, space debris appears to have taken the form of a policy concern rather than a legal one. In international frameworks, it remains to be seen whether states have an explicit obligation to enforce debris mitigation guidelines. National judiciaries are only beginning to grapple with liability for space debris and their damages. As these legal frameworks begin to develop, the current proliferation of policy instruments towards the issue have shown effective mobilization of state resources. Regardless of the prevailing solutions for space objects or debris on causing damage on Earth, the remedy for damages beyond Earth's atmosphere remain minimal by comparison.

2.4 Fault-Based Liability for Space Object Collision

Having first thoroughly investigated damages to Earth caused by space objects, strict liability has been observed to produce tangible results. In scrutinizing legal questions over damages from space debris, similar results are revealed as forthcoming, with legal regimes only beginning to test questions of obligations and strict liability. When inspecting methods redress for satellite collisions in outer space, however, the present legal question changes from one of strict liability to one of fault liability. As demonstrated previously in this paper, fault liability is prescribed by LIAB Article III in cases where space objects collide outside of Earth's atmosphere. In the context of space law, fault liability lacks precedent to guide its implementation,[80] as there exists only one instance where fault liability under LIAB Article III would have been applicable.

On February 10, 2009, a satellite belonging to the United States-based company Iridium Communications, Iridium 33, was struck by a decommissioned Russian surveillance satellite, Kosmos 2251. This case was unprecedented in nature, as according to the NASA Orbital Debris Program Office, "never before [had] two intact satellites crashed into one another by accident."[81] Given that this incident involved two intact space objects and not space debris, it satisfied the conditions

[80] Kirsten Schmalenbach, Convention on International Liability for Damage Caused by Space Objects, in *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* 529 (Springer Int'l Publ'g 2022).
[81] Becky Iannotta, *U.S. Satellite Destroyed in Space Collision*, Space.com, https://www.space.com/5542-satellite-destroyed-space-collision.html (Feb. 11, 2009).

necessary to invoke LIAB Article III.[82] However, Iridium Communications opted not to seek damages, as doing so would have required the United States to file suit on behalf of Iridium as the "launching state" under LIAB Article III, and the company did not wish to jeopardize international trade relations between the two states.[83] Additionally, the two states agreed during diplomatic consultations that the case "lacked legal grounds", citing the difficulties resulting from the fault liability system.[84]

The Iridium 33 incident endures as the only example of a potential LIAB Article III case, and as such the procedural implications of naming a standard of care under fault liability in space remain to be seen.[85] However, as more commercial entities develop their own megaconstellations in LEO, the question of determining liability under this fault-based system is likely to resurface, calling further attention to this gap in international law.

2.5 Conclusion

Having identified both the effectiveness of strict liability under LIAB Article II for space objects damages in Earth's atmosphere and the legal questions of strict liability as remedy for damages caused by space debris, strict liability is exemplified as a sound remedy for cases involving space objects. In this respect, the unique nature of fault liability is made clear, isolated to its usage in LIAB Article III for satellite collisions. With no legal precedent addressing its implementation, definitions of fault remain ambiguous in this field of international law. By turning to means treaty interpretation, as this paper demonstrated in identifying commercial enterprises as non-governmental entities, an applicable definition for fault may be revealed by consulting the procedures found in the VCLT Article 31.

3. FAULT LIABILITY IN INTERNATIONAL LAW

3.1 Definitions of Fault within International Law

Fault liability, distinct from strict liability, involves the establishment of a standard of care, and requires that the plaintiff prove the defendant acted negligent of

[82] Andrea Capurso, Paolo Marzioli & Michela Boscia, Questions of Fault Liability: A Case Study Analysis of In-Orbit Collisions with Debris, 10 *J. Space Safety Eng'g* 439 (2023).
[83] T.L. Masson-Zwaan, *Space Law and the Satellite Collision of 10 February 2009*, 174 *Space Res. Today* 4 (2009).
[84] Olga A. Volynskaya, Landmark Space-Related Accidents and the Progress of Space Law, 62 *Z. Luft- & Weltraumrecht (ZLW)* 229 (2013).
[85] Ting Wang, A Liability and Insurance Regime for Space Debris Mitigation, 24 *Sci. & Glob. Sec.* 27 (2016).

said standard to be held liable. The prescription of fault liability in international law, however, is entirely unique to LIAB Article III, as there are currently no other areas of international law which establish it as a remedy.[86] With an absence of international litigation defining the practice of fault liability, it is thus necessary to investigate how fault liability is formulated as a legal concept by scholars of international law. The traditional international conception of fault liability, developed during the twentieth century, can be described as the "responsibility which results merely from the failure of a State to comply with the international obligation."[87] This definition describes obligations for which a state can be held liable in breaking. While not specifically under the language of fault liability, there exists strong legal precedent for states acting in violation of their obligations under international law. This section will attempt to define fault by considering congruent practices in international precedent, and by means of treaty interpretation.

3.2 Deriving Fault from International Obligation

International precedent surrounding state obligation is informed by the ICJ's decisions in two cases, both of which stem from the 1962 Vienna Convention on Consular Relations (VCCR). Specifically, both cases involve VCCR Article 36, which prescribes the conduct for individuals abroad and communications with their state's consulate. Article 36(1)(b) defines a "receiving State's" duty to inform a consulate of a "sending state" when an individual under the sending state's jurisdiction is in custody within the receiving state, and proceeds as follows:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.[88]

Though Article 36 contains no mention of state obligations in prescribing its procedure of informing the individual in custody, the ICJ has twice ruled that the procedural language constitutes an obligation under international law.

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[86] Joel A. Dennerley, State Liability for Space Object Collisions: The Proper Interpretation of "Fault" for the Purposes of International Space Law, 29 *Eur. J. Int'l L.* 285 (2018).
[87] Maja Seršić, Due Diligence: Fault-Based Responsibility or Autonomous Standard?, in *Contemporary Developments in International Law* 152, Rüdiger Wolfrum, Maja Seršić & Trpimir Šošić eds. (Brill | Nijhoff 2016).
[88] *Vienna Convention on Consular Relations*, Apr. 24, 1963, 596 U.N.T.S. 261/

In 2001, the ICJ decided *Germany v. United States of America*, known as the *LaGrand Case*. In 1982, two German nationals, Karl and Walter LaGrand, were convicted of armed robbery and first-degree murder in Marana, Arizona. [89]The two were found guilty of all charges and denied consular privileges by the Arizona Supreme Court in 1987, which failed to recognize the VCCR as having precedent in national jurisdictions.[90] The German government was not notified of their arrest until 1992, and the LaGrand brothers were subsequently executed for their crimes in 1999, having been denied any official contact with their consulate as in accordance with the VCCR. On March 3, 1999, the German government filed suit in the ICJ, with the Court deciding in 2001 that the United States had violated the provisions in VCCR Article 36(1)(b). In its decision, the Court decided in a fourteen-to-one decision:

> [B]y not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph I (b), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America *breached its obligations* to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1 [emphasis added].[91]

In making this decision, the ICJ ruled that the provisions of the VCCR constituted an obligation under international law, and that the United States had breached it. In doing so, the Court created a formulation comparable to the requirements held by fault liability. Though Germany made no demands in this case, the established principle of the VCCR constituting an international obligation was made to justify reparations just three years later.

In 2004, the United States was once again found in breach of its international obligations under VCCR Article 36(1)(b) in *Mexico v. United States of America,* known as the *Avena Case*. In 2003, Mexico filed suit against the United States, claiming that it had failed to grant consular communications to fifty-four Mexican nationals who were in custody in the United States and had been sentenced to death. Mexico requested the court order the United States to restore full rights of its nationals under Article 36. In its decision, the Court again ruled fourteen-to-one:

> [T]he appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review

[89] State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066 (Ariz. 1987).
[90] Cara Drinan, Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts after *LaGrand*, 54 *Stan. L. Rev.* 1303 (2002).
[91] *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27).

> and reconsideration of the: convictions and sentences of the Mexican nationals referred to in subparagraphs (41), (51), (6), and (75) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.[92]

By enforcing the reconsideration of cases of the convicted nationals, this case builds upon the decision in *LaGrand*, imposing reparations on the United States for violating its international obligation under VCCR Article 36(1)(b). Though not a case which expressly involves liability, the decision to impose reparations in Avena establishes costs for a breach of an obligation stemming from an international treaty. This precedent may have influence in the implementation of fault liability under LIAB Article III.

In implementing fault liability under LIAB Article III, the decisions in *LaGrand* and *Avena* illustrate the potential in international law for state obligations to arise from a previous treaty and for reparations to follow the violation of such obligations. The question in implementing LIAB Article III then becomes one of international obligation, and where obligations applicable to outer space may originate from. This question may be satisfied in a way similar to the debates over debris mitigation by once again turning to OST Article IX, which requires States act "with due regard to the corresponding interests of all other States Parties to the Treaty."[93] In a case arising from the invocation of LIAB Article III, the ICJ may choose to establish an obligation under the OST Article IX provision of due regard, which could be interpreted to "refer to the exercise of a standard of care, attention, or observance during the performance of space operations."[94] In identifying a due regard under OST Article IX as a standard of care, the fault provision under LIAB Article III may be given sufficient meaning for litigation. However, given the ICJ's choice not to explicitly invoke language of liability in either LaGrand or Avena, this definition of fault may not suffice. A more secure definition may be found by applying procedures of treaty interpretation to the fault provisions of LIAB Article III.

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[92] Avena & Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31).
[93] Outer Space Treaty art. IX, *supra* note 2.
[94] Michael Chatzipanagiotis, Whose Fault Is It? Artificial Intelligence and Liability in International Space Law, in *71st International Astronautical Congress* 4 (2020).

3.3 Interpreting Fault

Another method of procuring a definition for fault in LIAB Article III may arise from applying VCLT Article 31, which prescribes means of treaty interpretation. VCLT Article 31(1) begins by prescribing:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[95]

In determining the "ordinary meaning of the terms of the treaty in their context," LIAB provides no definitions for fault within the context of the treaty. While terms such as "launching state" and "space object" are defined in Article I,[96] any definition of fault or its procedures are omitted. With no definition derived from a plain reading of the terms in the context of the treaty, VCLT Article 31 offers auxiliary means of interpretation in its subsequent clauses. Continuing to Article 31(2), the VCLT prescribes means of interpretation which broaden the scope of materials in consideration.

3.3.1- Looking Within the Treaty- Fault in Context

Proceeding with treaty interpretation under VCLT Article 31, the breadth of documentation which influences treaty interpretation expands. VCLT Article 31(2) proceeds as follows:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[97]

This article expands the information available for consideration in interpreting a treaty, namely to the entirety of the treaty itself, preambles, annexes, and external agreements made in connection with the treaty such as draft articles or amendments. In applying VCLT Article 31(2), LIAB has no preamble which provides insight to the definition of fault. LIAB's single annex involves the treaty's

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[95] *Vienna Convention on the Law of Treaties*, *supra* note 8, art. 31(1).
[96] Liability Convention art. I(d), *supra* note 4.
[97] *Vienna Convention on the Law of Treaties*, *supra* note 90, art. 31(2).

general purpose "to elaborate effective international rules and procedures concerning liability for damage caused by space objects" and elaborates its status pursuant to the OST but fails to speak on the issue of fault.[98] Furthermore, though LIAB Article XXV contains provisions on amending the treaty,[99] no amendments or proposed amendments have been brought before the UN. However, considering the entirety of LIAB, the definition of fault can be partially extrapolated by examining what is entailed by absolute liability.

As previously demonstrated in this paper, LIAB prescribes both fault and absolute liabilities, with the latter prescribed for damages caused by space objects within Earth's atmosphere under Article II. However, LIAB Article VI provides cases of exoneration from absolute liability in cases where intent is evident. LIAB Article VI (1) reads:

> Subject to the provisions of paragraph 2 of this Article, exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.[100]

Article VI provides immunity from absolute liability for states which act "with intent to cause damage" or from "gross negligence." Here, the mention of negligence gives context to fault liability under Article III, as "it can be concluded that fault can be assigned on the grounds of intent and/or gross negligence at least."[101] However, while defining negligence, the treaty omits establishing a standard of duty or an obligation to be negligent of. Even though the UNCOPOUS Legal Subcommittee has included discussions of whether certain UN General Assembly Resolutions may be considered as a standard for implementing fault,[102] the question remains unanswered. Having fallen short of extrapolating a full definition for fault using VCLT Article 31(2), a consultation of the procedures included in Article 31 (3) is necessary.

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[98] Liability Convention annex I, *supra* note 4.
[99] *Id*. art. XXV.
[100] *Id*. art. VI.
[101] Pelton, supra note 31, at 529.
[102] U.N. Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., *Report of the Legal Subcommittee on Its Fifty-Fourth Session*, app. II(1) (Apr. 13–24, 2015), https://www.unoosa.org/res/oosadoc/data/documents/2015/aac_105/aac_1051090_0_html/AC105_1090E.pdf

3.3.2 Looking Outside the Treaty- State Responsibility as an Analogy

VCLT Article 31(3) further expands the list of potential sources considered in the process of treaty interpretation, including external agreements in international law. VCLT Article 31(3) reads:

> There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[103]

As mentioned in the application of Article 31(2), no subsequent agreements have been signed pursuant to LIAB Article III, leaving Article 31(3)(a) without material to aid in interpretation. For Article 31(3)(b), there are currently no cases which have invoked LIAB Article III, and therefore no developed practices which provide context to the treaty. Accordingly, interpretative guidance must be drawn from VCLT Article 31(3)(c), which calls upon similar rules in the broader scope of international law.

VCLT Article (3)(c) invites "any relevant rules of international law applicable to the relations between the parties."[104] One such rule relevant to the concept of liability can be found in the Articles on State Responsibility for Wrongful Actions. Established by the UN International Law Commission (ILC), these articles define the responsibilities owed by states to each other in the event of misconduct. Article 2 defines such wrongful acts as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State.[105]

In defining a wrongful act, Article 2 (b) characterizes it as "a breach of an international obligation," In the process of drafting the Articles on State

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[103] *Vienna Convention on the Law of Treaties*, *supra* note 90, art. 31(3).
[104] *Id.* art. 31(3)(c).
[105] G.A. Res. 56/83, *Responsibility of States for Internationally Wrongful Acts*, art. 2 (Dec. 12, 2001), https://docs.un.org/en/a/RES/56/83

Responsibility for Wrongful Acts, the ILC made note of this similarity,[106] even commenting that there may be significant overlap between the scope of a wrongful act and fault.[107] This relationship may bode as a significant analogous basis for treaty interpretation, given the similarity of the two terms.

This connection, however, is not without its discourse. Although many scholars emphasize the distinction between responsibility, referring to acts, and liability, referring to the effects of those acts, this distinction does not foreclose comparison,[108] [109] The Articles themselves provide for reparations, which encompass both conduct and its consequences. These reparations, comprising the liabilities one state owes to another for having breached an obligation, are stipulated as follows by Article 31(1):

> The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.[110]

Here, the liabilities one state owes another are defined as "full reparation for the injury caused by the act." In this formulation of liabilities, the condition of negligence is not included, as the amount is subject only to an analysis of the damage. By disregarding the concept regarding negligence of obligations in this formulation, reparation amounts are not dependent on a conception of fault under the Articles of State Responsibility. This is evident in a decision made by the International Centre for Settlement of Investment Disputes (ICSID), which found that the Articles' language of "attribution" of wrongful acts "has nothing to do with the standard of liability or responsibility."[111] With this distinction confirmed in a "relevant rule of international law" as per VCLT Article 31(3)(c), the function of reparations in Articles of State Responsibility for Wrongful Acts cannot be interpreted as compatible with fault liability under LIAB Article III, as it separates the concept of negligence from the reparation. Rather, the Articles of State Responsibility impose a system of reparations closer to strict liability, where reparations are attributed irrespective of fault.

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[106] Int'l Law Comm'n, *Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session*, vol. II, pt. 2, at 32 (U.N. 2001).
[107] Int'l Law Comm'n, *Yearbook of the International Law Commission*, vol. II, pt. 2, at 121 (U.N. 2000).
[108] Frans G. von der Dunk, Liability Versus Responsibility in Space Law: Misconception or Misconstruction?, *Space Pol'y* 43 (1991).
[109] Joel A. Dennerley, State Liability for Space Object Collisions: The Proper Interpretation of "Fault" for the Purposes of International Space Law, 29 *Eur. J. Int'l L.* 284 (2018).
[110] G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, *supra* note 100, art. 31(1).
[111] A.A. Escobar, *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3): Introductory Note, 17 *ICSID Rev.—Foreign Inv. L.J.* 166 (2002).

3.3.3 Special Meaning?

Lastly, in its final provision, VCLT Article 31 opens the possibility for unique term definitions to be established for a treaty using external means. VCLT Article 31(4) adds the following procedure to treaty interpretation:

> A special meaning shall be given to a term if it is established that the parties so intended.[112]

This allows for parties to ascribe exceptional definitions to a term within a treaty, should they agree upon it. However, this article has been criticized for being drawn too broadly, as it does not define the level of relevance required for a document to establish such definitions in a treaty.[113] Thus, an agreement which specifically notes its relationship to the relevant term under the treaty is required to remove ambiguity.[114] Should states explicitly agree on a definition for fault liability through external means, VCLT Article 31(4) may provide means of defining its procedure in international law.

3.4 Conclusion

Having given meaning to "fault" as used by LIAB Article III by means of treaty interpretation under VCLT Article 31, it becomes evident that the term cannot define its own procedural demands in international law. Applying VCLT Article 31(1) and 31(2), the wider treaty provides little insight into its needs. Looking beyond the treaty, implementing relevant rules of international law under VCLT Article 31(3) yields a definition congruent with strict liability. It is only through an explicit agreement under VCLT Article 31(4) that a meaning may be derived which preserves fault liability as a distinct procedure. Given this inability for fault liability under LIAB Article III to stand on its own, external solutions are required to make it a sound basis for litigation in international law. This need is made pressing by the recent proliferation of commercial enterprise megaconstellations.

4. INTERNATIONAL LEGAL SOLUTIONS

4.1 Clarifying Resolutions

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[112] *Vienna Convention on the Law of Treaties*, *supra* note 8, art. 31(3).
[113] Zora Kızılyürek, The Significance and Utility of the Rules of Treaty Interpretation, as Encapsulated in the 1969 Vienna Convention on the Law of Treaties, for the Purpose of Ascertaining the Meaning of Treaty Provisions, *Annales de la Faculté de Droit d'Istanbul* 243 (2021).
[114] Ian Brownlie, *Principles of Public International Law* 602 (6th ed. 2003).

In finding a definition for fault under LIAB Article III, this section now turns to external methods of clarification which may aid legal interpretation. This type of clarification is not without precedent in international law, as the UN has sought to clarify space law by means of resolution. In 2013, the United Nations General Assembly approved Resolution 68/74, which provides states with guidance and recommendations in developing their own national space laws.[115] Though the resolution is non-binding, states have shown overwhelming compliance with the seven key provisions outlined by the resolution, primarily in the areas of debris tracking and mitigation efforts.[116] The impact of this resolution displays the potential for non-binding agreements to have an effect on instruments of law. Observing the influence of this clarifying resolution, this paper recommends a similar resolution be passed pursuant of LIAB.

4.2 Proposal for a Clarifying Resolution

This paper recommends a clarifying resolution on the definition of fault liability as used in LIAB Article III. In doing so, this paper holds that such a resolution must be made pursuant to LIAB in explicit terms. The UNCOPOUS Legal Subcommittee has previously considered the question of whether certain non-binding resolutions may be held as an obligation under LIAB. However, given that no resolutions have been passed with specific mention of LIAB, the Subcommittee was inconclusive in answering this question.[117] For this reason, the proposed resolution must make explicit reference to its status pursuant LIAB in its appendixes, leaving no potential ambiguity in its intention.

4.2.1 Resolution Establishing a Standard of Care

The first proposed solution is a resolution explicitly making OST Article IX the standard of care for the fault liability provisions in LIAB Article III. As mentioned previously in the analysis of ICJ cases regarding state obligations arising from treaties, OST Article IX provides that states act with due regard to one another in outer space activities. By establishing this due regard as the explicit standard of care for fault liability under LIAB Article III, the term is able to be interpreted under VCLT 31(3)(1), which considers “any subsequent agreement between the parties

[115] G.A. Res. 68/74, Recommendations on national legislation relevant to the peaceful exploration and use of outer space (Dec. 11, 2013), https://digitallibrary.un.org/record/763550?ln=en.
[116] Rosanna Hoffmann, Legislating the Final Frontier: Trends and Challenges of National Space Law, in *The New Space Age: Legal and Policy Perspectives* 185.
[117] Report of the Legal Subcommittee on Its Fifty-Fourth Session, app. II(1), *supra* note 97

regarding the interpretation of the treaty or the application of its provisions."[118] In doing so, the meaning of fault liability is distinguished from that of strict liability, which may arise from alternate interpretations under the VCLT.

4.2.2 Resolution Proposal Pursuant of State Responsibility

The second proposed solution concerns a resolution clarifying fault liability in LIAB Article III within the terms of the Articles of State Responsibility for Wrongful Acts. This interpretation, as demonstrated under VCLT Article 31(3)(c), would establish a system closer to that found under strict liability. However, given the extreme costs associated with space travel, a system of strict liability across all space object-related cases may result in actors, both private and public, taking greater care of their space objects to avoid collisions, and to accordingly avoid making liability payments.[119] This has been proven in regimes of national law, where systems of strict liability have been found as reliable ground for litigation, and have been found to "provide added incentives for reducing accidents."[120] In adding such incentives, this solution may strengthen LIAB Article III as a means to prevent further collision and debris proliferation in LEO. However, in doing so, the distinct meaning of fault liability in LIAB Article III as separate from absolute liability under LIAB Article II is absolved.

4.2.3 Resolution Proposal Pursuant of VCLT Article 31(4)

Lastly, this paper recommends a resolution pursuant to treaty interpretation under VCLT Article 31(4), which stipulates that terms of a treaty may be given special meaning if agreed upon by the parties to the treaty. By endowing fault liability under LIAB Article III with a unique meaning in the form of a UN General Assembly Resolution, the decision is made in a multilateral forum with states party to LIAB present for the deliberative process. Depending on the definition decided upon by the states party to the resolution, this solution may also preserve the intent of a liability regime separate from strict liability under LIAB Article II.

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[118] *Vienna Convention on the Law of Treaties*, *supra* note 8, art. 31(3).
[119] Trevor Kehrer, Closing the Liability Loophole: The Liability Convention and the Future of Conflict in Space, 20 *Chi. J. Int'l L.* 209 (2019).
[120] Samuel A. Rea, Jr., Economic Analysis of Fault and No-Fault Liability Systems, 12 *Can. Bus. L.J.* 471 (1987).

5. CONCLUSION

As the number of satellites in LEO continues to grow due to implementation of megaconstellations, the range of their uses has grown accordingly as well. Private companies such as SpaceX, Blue Origin, and Boeing,[121] [122] while developing their own satellite technology, have obtained federal defense contracts procuring their use in the security sector. Most recently, in January, 2026, Blue Origin unveiled plans for a megaconstellation to compete with Starlink's global services. Comprising 5,400 planned satellites, Blue Origin CEO Jeff Bezos cited the satellite network's purpose in serving both "data center and government users" alike.[123] Driven by both public and private demand, the number of satellites in LEO is set to further proliferate in the coming years, increasing the likelihood of events analogous to the Iridium 33 incident.

With companies continuing to place a larger portion of their capital resources into satellite development,[124] the chance that one will seek financial compensation for a satellite collision accordingly increases. These developments surrounding megaconstellations and satellite proliferation, involving a mixture of public and private commercial enterprises, bring the question of fault liability back to the foreground of international law. Should another Iridium-33-esc case occur between two states in the future, the provisions defining fault liability under LIAB Article will need to be strengthened before it can be used as a reliable basis for international litigation efforts.

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[121] Joey Roulette & Marisa Taylor, *SpaceX, ULA, Blue Origin Clinch $13.5 Billion Pentagon Launch Contracts,* Reuters, https://www.reuters.com/business/aerospace-defense/spacex-ula-expected-clinch-multibillion-dollar-contract-key-pe ntagon-launch-2025-04-04/ (Apr. 4, 2025).

[122] Sandra Erwin, *Boeing's Millennium Space Expands Production to Meet Defense Demand,* SpaceNews, https://spacenews.com/boeings-millennium-space-expands-production-to-meet-defense-demand/ (Apr. 8, 2025).

[123] Mike Wall, *Jeff Bezos' Blue Origin Plans to Build 5,400-Satellite Megaconstellation*, Space.com (Jan. 21, 2026), https://www.space.com/space-exploration/satellites/jeff-bezos-blue-origin-plans-to-build-5-400-satellite-megaconstellation.

[124] Debra Werner, *Boeing's Bet: Supercharge Satellite Production*, SpaceNews, https://spacenews.com/boeings-bet-supercharge-satellite-production/ (Apr. 8, 2025).

ARTICLE

AI TECHNOLOGY: IMPLICATIONS FOR TORT LAW

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ABSTRACT

As artificial intelligence (AI) technologies become increasingly integrated into everyday life, they present novel challenges to the foundations of tort law. Traditional legal frameworks —particularly negligence and strict liability—rely on principles of foreseeability, fault, and clear causation in order to assign liability and to compensate victims. Yet, AI systems often operate in ways that are opaque, emergent, and overall difficult to control for, effectively complicating efforts to determine who is responsible when a harm occurs. This paper explores the legal implications of AI through the lens of tort law, distinguishing between embodied and disembodied AI. Through case studies and legal analysis, this paper seeks to explore how these systems challenge core tort doctrines, especially the notion of foreseeability. Ultimately, it considers whether existing tort principles are adequate to address harms caused by AI, or whether new legal approaches are necessary to preserve accountability and justice in an increasingly automated world.

1. INTRODUCTION

Technological innovation has always tested the boundaries of legal reasoning, but the introduction of artificial intelligence creates a new level of unpredictability that poses especially difficult questions for tort law. AI systems—capable of learning from data, making decisions, and in some cases acting directly upon the physical world—blur the lines between person and tool. As these systems continue to evolve and expand into domains such as transportation, healthcare, and criminal justice, the potential for harm becomes more than just theoretical. Who should bear the responsibility when an AI system causes injury? How can fault be fairly assigned when the behavior of the system may not be entirely human nor entirely machine?

The ability of tort law to adapt to new technology is not unprecedented. Legal systems have grappled with countless past innovations with relative success, such as the invention of the first automobile, or more recently the rise of the internet.

In the moment, the newness of innovation may naturally appear threatening, but tort law has appeared to be very adaptable thus far. However, the question remains whether AI represents a genuinely exceptional category of technology, requiring not just adjustments to existing doctrine, but an entirely new structure of thinking. While in retrospect it seems like law has adapted to many challenges, AI does pose novel characteristics that require careful consideration to ensure that tort law can function efficiently and justly.

This paper investigates whether current tort frameworks are equipped to handle the legal challenges posed by AI technologies. It begins by outlining the foundational principles of tort law, with a focus on negligence and strict liability frameworks. It then classifies AI technologies into two distinct categories: embodied AI, which has physical agency in the world, and disembodied AI, which influences outcomes through providing recommendations or predictions. These two forms of AI differ not only in how they interact with the world, but also in how they complicate traditional tort concepts.

The core aim of this paper is to examine how characteristics of AI—particularly its potential for emergent behavior and systemic opacity—undermine the legal system's ability to assess foreseeability. While this paper primarily focuses on accident-based harms, the issues raised here extend into broader debates about fairness, transparency, and the appropriate boundaries of technological influence. Ultimately, this paper seeks to answer whether tort law, as currently understood, can continue to function in an age of artificially intelligent systems—or whether legal change must match technological innovation.

2. OVERVIEW OF THE TORT LAW SYSTEM

2.1 Fundamental Principles of Tort Law

Tort law is the body of rules that is concerned with remedying and compensating harms to persons or to property. While holistic definitions of tort law tend to be elusive, the one commonality is that tort deals with cases where, "...someone has sustained a loss or harm as the result of some act or failure to act by another."[1] There are three main goals that tort law seeks to achieve: 1) compensating parties who sustained harm as a result of another party's actions, 2) placing a cost of

[1] Edward J. Kionka, TORTS IN A NUTSHELL (2020).

compensation on those who should bear it, and 3) discouraging future losses and harms.[2]

Oftentimes, the concept of "fault" is considered central to determining compensation, although this is not straightforward. Fault can be described as any kind of behavior that, "…creates an unreasonable or unacceptable risk of harm."[3] It is clear that if a party intentionally harms another or is presumed to know that their actions would harm another, it follows that that party should pay for the damage they caused. But, there is another facet to the concept of fault, and that occurs when a party did not intend harm, or were not able to foresee that a harm would occur. Whether or not the defendant *intended* for harm to occur and whether or not they were able to *foresee* the harm occurring are extremely important aspects to consider when trying to achieve the three goals of tort law.

2.2 Key Frameworks: Negligence and Strict Liability

There are two categories of torts I will focus on in this paper: negligent torts, and strict liability torts. To begin, negligence focuses on whether or not the defendant acted carelessly. The court would have to prove that a) the defendant owed a certain duty of care towards the plaintiff, b) this duty of care was breached, c) the plaintiff suffered injury, and d) that the plaintiff suffered injury due to the breach of care.[4] Take the hypothetical case where a person hits a pedestrian while on their phone driving.. The driver of the car owed the duty of care to drive safely and to not hit the pedestrian. The pedestrian suffered real injury due to the actions of the driver, and thus the driver would be found negligent for their actions.[5] In all, negligence is the failure to act with a level of care that a reasonable person would have exercised under the same circumstances.

The second important category of torts is strict liability. Strict liability considers a party liable for harm regardless of intent or negligence. Strict liability includes a subsection called products liability, which applies in cases where a defective product causes injury.[6] Products liability permits a plaintiff injured by a defective product to be able to recover damages without having to prove that the seller acted negligently.[7] The plaintiff would need to prove that a) the defendant sold

[2] *Id.*
[3] *Id.*
[4] Kevin M. Lewis, *Introduction to Tort Law*, CONG. RSCH. SERV. (May 26, 2023), https://crsreports.congress.gov/product/pdf/IF/IF11291.
[5] *Id.*
[6] *Id.*
[7] *Id.*

a product, b) the defendant was a commercial seller of such product, c) that the plaintiff sustained injury, and d) that the defect actually and approximately caused the injury.[8] Product liability is able to hold any or all parties along the manufacturing chain accountable if the product causes damage due to defects.[9] Defects can be grouped into three categories: design defects, manufacturing defects, and defects in marketing.[10] Design defects are flaws in a product's design that exist before the product is manufactured.[11] Manufacturing defects occur during the production of the item, and marketing defects occur when there are improper instructions or failures to warn consumers about a product's dangers.[12]

While the frameworks of negligence and strict liability differ, they both come back to serve the central purpose of tort law: to find just compensation through tenants of justice, and to prevent future harms from occurring. What makes discussions of tort law significant is its lack of clearly defined scope, as there is a potential for harm in arguably an infinite set of circumstances. All aspects of human activity could technically have the possibility of resulting in injury—from driving a vehicle to slipping on a wet floor in a grocery store, the effectiveness of tort law relies on its ability to adapt to specifics and to apply as universally as possible. Thus, the development and sophistication of AI technology inevitably drags up new questions for tort processes. These questions are vital to answer in order to ensure that the purpose of the tort system is still fulfilled.

3. AI AND TORT LAW: EMBODIED VS DISEMBODIED TECHNOLOGIES

Tort law's central aim is to determine who should pay for harms and to what degree, while acting as a deterrent for harms to occur in the first place. Over the history of American tort law, the tort law system has been very often asked to adapt to the development of new technologies to ensure that these aims are met. From the introduction of the railroad to the internet, tort law has faced challenges in the past as a result of technological innovation. As AI technologies become more commonplace, how it should be regarded in the law becomes the next pressing issue.[13]

If our current tort system has been able to accommodate all past innovations—will it be the same with AI? This begs the question of whether or not

[8] *Id.*
[9] *Id.*
[10] *Products Liability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/products_liability (last visited Jan. 2, 2026).
[11] *Id.*
[12] *Id.*
[13] *Id.*

AI is actually exceptional, and how much panic or change there should be. Calo argues that, "a technology is not exceptional merely because it creates one or more small changes in the law...rather, a technology is exception when its introduction into the mainstream requires a systematic change to the law or legal institutions in order to reproduce, if necessary displace, an existing balance of values."[14]Whether or not AI proves to be "exceptional" is yet to be determined, but there are significant characteristics that will serve as key indicators to this potential for exceptionalism, including interference with human decision-making as well as emergence and opacity in its interference with foreseeability.

In this paper, I will define artificial intelligence (AI) as "…the ability/capacity of a machine to act purposefully, think rationally and deal effectively with its environment, like humans are ideally supposed to do."[15] This definition captures a broad spectrum of AI systems, including both physical technologies that perform actions in the world such as robots, and algorithmic systems that influence human decision-making. Importantly, AI is not simply automation or mechanization—it reflects the ability to engage with the world in ways that mimic or even exceed human capacities.

To better understand how AI interacts with tort law principles, it is useful to divide AI into two sub categories. The first is embodied AI, which refers to AI systems that possess a physical form and can interact directly with the physical world. The second is disembodied AI, which refers to AI that exist as non-physical software systems that assist or influence human decision-making. As Morgan suggests, this distinction between embodied and disembodied technologies is critical, because it determines how AI interacts with the world—and determines its potential to cause harm.[16]

In the sections that follow, I will first analyze embodied AI and its implications for tort law, followed by an analysis of disembodied AI systems. Ultimately, the distinction between "acting" and "informing" is crucial to understanding how the definitions of liability and foreseeability must evolve in response to the unique challenges posed by AI.[17]

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[14] *Id.*
[15] Reinhard Devillé et al., *Basic Concepts of AI for Legal Scholars*, in ARTIFICIAL INTELLIGENCE AND THE LAW 1, 1-22 (Jens De Bruyne & Charlotte Vanleenhove eds., 2021).
[16] Phillip Morgan, *Tort Liability and Autonomous Systems Accidents - Challenges and Future Developments*, in TORT LIABILITY AND AUTONOMOUS SYSTEMS ACCIDENTS 1, 1-26 (2023).
[17] Calo, *supra* note 13.

3.1 Embodied AI

Embodied AI refers to AI systems that have a physical form that is able to interact directly with the world. As Calo (2015) argues, what makes embodied AI distinctive is its capacity to "sense, think, and act."[18] For example, a laptop would be able to "sense" through inputs and "think" through computation, but it lacks the ability to act directly in the world. Similarly, a remote-control car would be able to sense and act, but it relies on a human operator to think and make decisions . In contrast, an embodied AI system is able to integrate all three abilities—sensing, thinking, and acting—without requiring direct human input for every action. This is the combination that gives embodied AI its potential to cause physical harm.

The category of embodied AI includes any kind of robotic or automated system that is capable of making novel decisions in dynamic physical environments. There have been numerous real-world examples where such systems have caused harm. A fully self-driving vehicle in testing stages crashed in Las Vegas.[19] An Amazon warehouse robot accidentally punctured a can of bear spray which resulted in the hospitalization of 24 human employees.[20] A chess robot broke the finger of its seven-year-old opponent.[21] Each of these AI failures illustrate that AI systems do not always carry out their anticipated functions in an appropriate manner, and these mistakes can have serious consequences for tort law.

This section will begin by analyzing a significant case of embodied AI failure: the 2018 self-driving car accident in Tempe, Arizona. Through this case study, I will explore how embodied AI challenges core tort law principles and what these challenges suggest for the future of accident compensation frameworks.

3.1.1 Self-Driving Cars: The Tempe Incident

Accidents caused by self-driving vehicles are no longer a thing of the future—they are already occurring in real-world settings. While these cases are not necessarily widespread, these incidents signal the urgent need for tort law to be

[18] Calo, *supra* note 15, . at 520.
[19] Mick Akers, *Vehicle in Self-Driving Test Crashes Just Off Las Vegas Strip*, LAS VEGAS REV.-J. (Nov. 16, 2022), https://www.reviewjournal.com/local/traffic/vehicle-in-self-driving-test-crashes-just-off-las-vegas-strip-2677041/.
[20] Jasper Jolly, *Amazon Robot Sets Off Bear Repellant, Putting 24 Workers in Hospital*, GUARDIAN (Dec. 6, 2018), https://www.theguardian.com/technology/2018/dec/06/24-us-amazon-workers-hospitalised-after-robot-sets-off-bear-repellent.
[21] Jon Henley, *Chess Robot Grabs and Breaks Finger of Seven-Year-Old Opponent*, GUARDIAN (July 24, 2022), https://www.theguardian.com/sport/2022/jul/24/chess-robot-grabs-and-breaks-finger-of-seven-year-old-opponent-moscow.

prepared to address the complex questions they raise. A notable example is the 2018 collision in Tempe, Arizona, where Elaine Herzberg was fatally struck by an Uber self-driving vehicle during testing trials.[22] Herzberg was crossing a street when the vehicle struck her at approximately 40 miles an hour.[23] At the time of the collision, the vehicle's autonomous system was engaged, but a human safety driver was still present behind the wheel and was responsible for monitoring the system and intervening if necessary.[24]

Subsequent investigation revealed that the AI system had in fact identified Herzberg as an object, but failed to act to avoid the collision . Simultaneously, the human safety driver, Rafaela Vasquez, was distracted and did not intervene in time to prevent the crash . Dashcam footage showed that moments before the accident, Vasquez, was watching a television show on her phone, and her hands were not on the wheel as was her responsibility.[25] Vasquez ultimately pleaded guilty to endangerment and negligent homicide, although her defense argued that Uber should also share the blame since it was Uber's AI system that failed to act in the first place.[26]

This accident is the first case of a fatal collision involving a fully self-driving car, and it illustrates the complex interactions between human and AI error. It highlights how AI blurs the traditional lines of liability: if an autonomous system is nominally in control but fails, and a human monitor also fails to act, how should responsibility be reasonably divided? Tort law will need to establish new standards of care that account for this hybrid control structure, to ensure just compensation and public safety.

Moreover, the Herzberg accident reinforces a key feature of embodied AI: because these systems have a physical form and some agency, they have the capacity to cause direct physical harm. As embodied AI technologies become more sophisticated, determining whether a harm stems from product defect, negligent operation, or a combination of both becomes increasingly nuanced.

3.1.2 Legal Implications of Embodiment: Levels of Automation

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[22] Troy Griggs & Daisuke Wakabayashi, *How a Self-Driving Uber Killed a Pedestrian in Arizona*, N.Y. TIMES (Mar. 20, 2018), https://www.nytimes.com/interactive/2018/03/20/us/self-driving-uber-pedestrian-killed.html.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Jacques Billeaud & Anita Snow, *The Backup Driver in the 1st Death by a Fully Autonomous Car Pleads Guilty to Endangerment*, ASSOCIATED PRESS (July 28, 2023), https://apnews.com/article/autonomous-vehicle-death-uber-charge-backup-driver-1c711426a9cf020d3662c47c0dd64e35.

The Tempe incident reveals the complex relationship between human drivers, AI systems, and the allocation of fault when accidents occur. However, not all embodied AI systems function in the same way, and the degree of expected human involvement can vary significantly depending on the level of automation. Understanding these distinctions is crucial when attempting to apply tort law principles. In the case of self-driving vehicles, for instance, when a driver remains primarily responsible for controlling the vehicle, traditional negligence frameworks may still apply. But, as vehicles take on more autonomous functions, questions emerge about whether harms should instead be treated under products liability, or whether new standards are needed. This section explores how embodiment and the different levels of automation impact the tort analyses and the novel problems that AI technology poses.

The legal complexities highlighted in the Tempe incident are compounded by considering the different degrees of automation, as not all systems function with the same level of independence. For self-driving vehicles in particular, the United States National Highway and Traffic Safety Administration (NHTSA) outlines five levels of driving automation . At Level 1, the driver is fully responsible for driving, but the car system aids in accelerating/braking or steering. At Level 2, the driver is still fully responsible for driving, but the system provides assistance with accelerating/braking and steering . Level 3 vehicles are able to handle all parts of driving while the driver remains ready to take over if the system is unable to operate (. And finally, with Levels 4 and 5, the vehicle is fully self-sufficient and is responsible for all driving tasks, meaning that a human driver is no longer needed to operate the vehicle.[27]

Currently, no Level 4 or 5 vehicles are on the commercial market—most vehicles available to the public remain at Level 1 and 2, with some experimental models reaching Level 3.[28] Vehicles at Levels 1 and 2 cannot be meaningfully called "self-driving" but are more accurately described as "assisted-driving", as the human operator of the vehicle has the clear responsibility to perform all tasks needed to drive with AI systems functioning as back up.[29]

At Levels 1 and 2 where it can be considered assisted driving, a traditional negligence analysis will likely be sufficient, as you cannot discuss potential warning

[27] *Levels of Automation*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-05/Level-of-Automation-052522-tag.pdf (last visited Jan. 2, 2026)
[28] Calo, *supra* note 13, at 525.
[29] *Id.*

defects without also considering the drivers in which the warnings are directed.[30] If a driver of a regular car hits a pedestrian, it is clear that the driver would be held negligent, as the human had the clear responsibility to stay attentive and drive safely.[31]

In contrast, harms caused by Level 4 and 5 technology will naturally fall into products liability, as these systems are marketed to be fully autonomous and are not supposed to require the intervention of a human operator. Determining fault for these accidents will move away from negligence on the driver's behalf, but towards product liability for the manufacturer of the technology.[32] Design defects, manufacturing defects—but even this will be difficult to determine.

Level 3 vehicles, however, present a unique and troubling challenge—while the vehicle is designed to manage the driving tasks most of the time, human intervention is still expected when the system encounters a situation it cannot handle. This results in a muddy combination of human and machine that will pose challenges for tort law.

Research has shown that maintaining sustained attention in such semi-automated contexts is extremely difficult. Humans are poorly suited to supervise systems passively and are extremely susceptible to alert fatigue and handoff problems.[33] When a system operates smoothly most of the time, humans naturally become less vigilant, undermining the expectation that a human driver can reliably step in when the system falters.[34] This aligns with Vasquez's behavior as the safety driver of a Level 3 car—her attention was not consistently needed which allowed her to become distracted. This alert fatigue explains, although not necessarily excuses, how she was unable to intervene in time to prevent the collision.

If the "driver" in the autonomous vehicle was distracted, and studies have shown that it may be unreasonable to expect someone in their position to process all of the information and act appropriately and promptly in such a situation, then this impacts how we look at torts. Is it reasonable to expect human drivers to maintain continuous vigilance in a Level 3 vehicle, or when operating similar AI technologies? Should negligence be determined based on an idealized standard of attentiveness, or

[30] Andrew D. Selbst, Negligence and AI's Human Users, 100 B.U. L. REV. 1315 (2020).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

according to what an average user is realistically capable of? Ultimately, how would the law determine what is foreseeable or reasonable at the time of the accident?

Selbst argues that there are two ways to consider this puzzle.[35] The first is to define reasonable care as maintaining the highest standard of attentiveness as required by the technology. Technically, it is not impossible for humans to maintain this high level of attention, it just is extremely difficult. The second way to consider this is to say that "reasonableness" should be based on scientific research, and if it says if the average person cannot do something, then the law cannot hold that person to that standard. The former will result in fewer people using the technology, the latter in more u[36]ncompensated injuries. Thus, is it even reasonable for manufacturers to create Level 3 technology in the first place? As seen in the Tempe incident, the law found Vasquez responsible for the death of Herzberg because she was not paying attention in a Level 3 car. But should manufacturers have placed her in such a position to begin with?

Beyond self-driving cars, other embodied AI technologies—such as warehouse robots, delivery drones, or robotic security devices—also pose parallel questions. All embodied AI will fall along levels of automation that are similar to that of self-driving vehicles, and all embodied AI have the potential to act physically in the world. Tort analyses may be simpler for incidents that involve mostly human responsibility or mostly machine responsibility, but will inevitably be extremely complicated in situations where human and machine are expected to work together to produce one outcome.

Accidents such as the Tempe incident is a stark reminder that this kind of technology is still in testing stages, and as with all AI innovations, that there will likely be a number of mistakes before it is developed enough to be widely trusted. But, in line with the core of innovation, the sophistication of self-driving cars, will hopefully lead to less accidents on the road through eliminating human error. In all, embodied AI has the unique ability to cause direct harm to the world. It pokes holes in the tort framework in that it begs the question of how to assign fault when it messes up—how do we determine what is foreseeable?

[35] *Id.*
[36] *Id.*

3.2 Disembodied AI

Disembodied AI technologies refer to systems that do not have a physical body, but rather operate by informing outcomes through processing data, generating predictions, and aiding in decision-making. Unlike embodied AI—which senses and acts directly on the physical environment—disembodied AI systems act indirectly on situations by influencing the human decision-making process. They guide, inform, and alter human judgement through data-driven outputs, often in the form of risk scores, predictions, or recommendations. Examples of disembodied AI include risk assessment algorithms used in criminal justice, medical triage and diagnostic tools, and predictive models in finance practices.

Although disembodied AI technologies do not possess the capacity for direct physical harm in the way a self-driving vehicle might, it still holds immense power in shaping human judgement calls for better or for worse. This interference with the decision-making process can lead to serious consequences when these decisions result in tangible harm, and creates new uncertainties in typical tort law applications. When these AI systems are used to inform critical decisions—such as sentencing recommendations in courtrooms or treatment protocols in hospitals—flaws, biases, or errors in their outputs can lead to substantial harm. This interference with the traditional human decision-making process raises difficult questions for tort law: how do we assign fault when harm is mediated through an algorithm? Who bears the responsibility—the user in choosing to listen to the algorithm, the developer who made it, or both?

One particularly influential case of disembodied AI is the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) algorithm in the criminal justice system Rather than acting on the world directly, COMPAS exemplifies how disembodied AI can indirectly shape outcomes by influencing human decision-makers—decision-makers that have the power to determine if a person deserves to be incarcerated and for how long. The following section seeks to examine the interaction between disembodied AI and tort law through the lens of the COMPAS algorithm, as well as the broader legal implications of relying on algorithmic tools to make critical decisions.

3.2.1 Decision-Assistance AI: The COMPAS Algorithm

When judges review criminal cases, they need to not only determine the appropriate punishment for the offence, but also the risk of reoffence that the

offender poses. In combination with the need for unbiased rulings, algorithms have been developed that seek to calculate the risk. The COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) algorithm is a popular tool that has been used to assess recidivism risk in criminal justice proceedings.[37] Developed by the private company Equivant, COMPAS is marketed as a risk assessment tool that predicts the likelihood of a defendant reoffending.[38] The algorithm works by considering the answers to a 137-item questionnaire that asks about criminal history, family history, education, and more.[39]

A high-profile case involving the COMPAS algorithm was that of *State v. Loomis* in Wisconsin. In February 2013, Eric Loomis was arrested after being found driving a car that had been involved in a shooting.[40] Although Loomis pled guilty to several charges, the sentencing judge not only looked at his criminal history, but also chose to cite Loomis's high-risk score generated by the COMPAS algorithm as justification for giving him a six-year prison sentence.[41] Loomis appealed this ruling, arguing that using a proprietary algorithm in sentencing violated his constitutional right to due process.[42] Because the inner workings of the COMPAS algorithm were not publicly available, Loomis contended that there was no meaningful way to challenge the basis of the risk assessment or to correct potential inaccuracies.[43]

While Loomis did not win his appeal, this case highlighted significant pitfalls in the COMPAS algorithm, as well as the issues of opacity and accountability that surround algorithmic decision-making technology in general.[44] A ProPublica investigation from 2016 raised further alarms about COMPAS, revealing that the algorithm is no better at predicting recidivism rates than random volunteers pulled from the internet, and actually has racial disparities in risk predictions.[45] The study found that Black defendants were nearly twice as likely as white defendants to be incorrectly labeled as high risk, while white defendants were more often incorrectly labelled as low risk.[46]

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Jeff Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.
[46]

Although some studies have suggested that COMPAS is comparable in accuracy to unbiased human judgement, the crux of this debate lies not in its absolute predictive power, but in its legitimacy, transparency, and fairness.[47] As tort law increasingly intersects with algorithmic decision-making, cases like Loomis's raise foundational questions: If a harm results from an AI recommendation, who should be held responsible—the developer, the judge, or both? How do tort principles apply when the decision-making process is deliberately concealed or extremely complex to unpack?

3.2.2 Implications for Tort Law: Interference with Decision-Making

Whether or not COMPAS is a fair or effective tool remains a matter of ongoing debate, but its use highlights the tension between technological innovation and legal accountability. As disembodied AI systems increasingly inform or even supplant human decision-making, tort law must be able to grapple with how to assign fault, ensure fairness, and uphold transparency. In legal proceedings, it is the role of judges and to produce a decision about a case. When AI algorithms such as COMPAS are inserted into the process, it is significantly more complicated to assign responsibility for the decision and to understand how that decision came to be. If the decision is later found to be incorrect, would it be the AI's fault for producing it, or the judge and jury for accepting it? The core issue that disembodied AI poses is its potential to interfere with the human decision-making process, which makes it difficult to determine how a particular decision came to be.

Under tort law principles, the act of decision-making is crucial in determining how to assign fault and just compensation. In negligence cases, courts seek to assess whether the defendant could have reasonably avoided the harmful situation and whether their decisions were appropriate given the information available to them at the time. This analysis hinges on the concept of foreseeability—could the defendant have reasonably anticipated the harmful outcome and taken steps to prevent it? Foreseeability requires insight into how the defendant arrived at their decision, including the information and reasoning that influenced their actions. However, when AI is inserted as a third-party in advising a decision, tracing the path of reasoning becomes significantly more difficult. AI technologies effectively obscure the decision-making process, complicating efforts to determine whether a harmful outcome was reasonably foreseeable and who bears the responsibility for it.

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[47] Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES, Jan. 2018, at 1.

The basis of tort law hinges on the concept of foreseeability, and to what extent the defendant should have known the risks and acted to avoid them. With this kind of decision-making technology entering the equation, it poses important questions in how to assign responsibility for a decision that was made that resulted in harm. The AI system becomes the middle man in decision-making processes, which ultimately muddies the discussion of who is truly at fault. Is it the person who chose to trust the AI? Or is it the fault of the AI or the manufacturer of the AI for producing a faulty recommendation?

This tension has parallels to the challenges posed by self-driving cars. For instance, Level 1 and 2 vehicles may be classified as decision-aiding systems since they still rely on human drivers to perform the majority of driving tasks. In these cases, the human operator could be seen to retain full responsibility for an accident, and traditional negligence standards might still apply. However, with disembodied Ai, assigning fault is less straightforward. These systems don't have a physical presence and they function exclusively in tandem with a human operator. Determining legal responsibility therefore hinges on how we conceptually position AI in the decision-making process—a question that later sections will further explore.

If we treat disembodied AI errors under negligence, we are implicitly assuming that users bear the responsibility for recognizing AI's shortcomings and are responsible for making a sound decision regardless of what the AI produces. This implies that users of the AI must have a technical understanding of how the AI functions and oversight in how to identify a faulty answer—this may not be a realistic standard for the average user. On the other hand, applying a products liability framework shifts the blame more so to the AI's manufacturer, even though the harm may have resulted from a human decision to rely on the system. In both cases, the law struggles to capture the hybrid nature of human-AI collaboration, and illustrates a significant grey area.

As with Level 3 cars, these tools create legal uncertainty, as humans and AI operate in tandem, but it is often unclear where one's responsibilities ends and the other begins. This ambiguity means that tort law must evolve to account for this shared agency, especially in determining who owed a duty of care and whether that duty was breached.

Between embodied and disembodied AI, the core idea is that AI disrupts traditional tort concepts and calls for us to examine them under different lighting, especially when it comes to establishing what is reasonably foreseeable and

controllable. Embodied AI—like self-driving cars—have the potential to interact directly with the world and cause physical harm. Decision assistance technology such as the COMPAS algorithm interfere with human judgement and decision-making processes. In all, as AI systems increasingly act as intermediaries between cause and effect, tort law faces the difficulty in identifying where and how blame should attach.

While this legal grey area complicates how we assign fault, it is not an insurmountable obstacle. All technologies work in tandem with human operators to some degree whether it be a laptop or a typical car—AI technologies do pose more intensive parameters for this collaboration, but it will likely sort itself out like it has in the past with other innovations. What proves far more disruptive, however, is the unknowability that is introduced by AI: its opaque reasoning processes, emergent behaviors, and black-box decision-making challenge the law's ability to determine what is reasonably foreseeable. It is this crisis of foreseeability—not simply the collaboration between humans and machines—that poses the most pressing challenges to existing tort frameworks. In the next section, the question becomes whether our legal standards for foreseeability can stretch to accommodate systems that even their creators sometimes struggle to explain.

4. FORESEEABILITY: CHALLENGES POSED BY AI TECHNOLOGY

Across both embodied and disembodied forms, AI introduces new and complex challenges for tort law—challenges that center not just on how harm is caused, but on how that harm could have been anticipated and prevented. Despite some differences between embodied and disembodied AI, both types share two critical traits that complicate tort analysis: emergence and opacity. These characteristics deeply impact how to determine foreseeability, which is a foundational concept in tort law.

As Selbst explains, a defendant is liable "only for such harm as he could reasonably have foreseen and prevented."[48] In traditional tort cases, foreseeability helps define what counts as "reasonable behavior" under the circumstances—was the risk identifiable, and could a person of ordinary prudence have acted differently to avoid harm? But the entry of AI into the flow of causation muddies this calculation. Even today's most advanced AI systems are not fully autonomous, and many, such as the case of self-driving cars, operate in tandem with human users. This hybrid status creates a grey area—when technology performs some of the task but still requires a

[48] Selbst, *supra* note 30, at 1332.

human role, it becomes difficult to assess how much responsibility should be placed on the user, and how much on the system's design.

For example, when driving a regular car, it is reasonable to expect that the driver keeps their eyes on the road and hands on the wheel. But how does this expectation shift when the vehicle mostly drives itself? The possibility of using AI technology without error is not always responsive to the level of care taken.[49] AI has the potential to make decisions in ways that defy human logic—sometimes these decisions are brilliant, but other times they are bizarre or even harmful. When an AI behaves unpredictably, it becomes harder to say whether a harm was truly preventable, and by whom.

This uncertainty is compounded by a more structural question: what is "proper use" of AI, and how much can we reasonably expect a layperson—or even an expert—to understand about the AI system they are using? Tort law presupposes that individuals can exercise judgement based on the information available to them at the time. But when that information is hidden or unintelligible, as is often the case with proprietary or self-learning algorithms, the law's emphasis on traditional reasonable care becomes strained.

Thus, the integration of AI into everyday life calls into question how—and whether—tort law can continue to apply the same kind of foreseeability standard. Two particular characteristics of AI heighten this tension: emergence, the capacity of AI to exhibit novel or unanticipated behavior, and opacity, the difficulty in understanding how or why an AI system arrived at a conclusion. The following sections explore each of these traits in depth, and ultimately pose a solution to how foreseeability should be treated in AI discussions.

4.1 Emergence

As AI becomes increasingly embedded in technologies that operate alongside—or even in place of—human abilities, one of the most significant challenges it poses to tort law is its capacity for emergent behavior. Unlike other technologies that follow clearly defined instructions and have clearly defined capabilities, AI systems—especially those that are capable of machine learning—are designed to adapt, evolve, and generate novel outputs based on interaction with the environment. This unique ability can lead to unexpected or unplanned outcomes that are not necessarily traceably to single line or code or to human instruction. This

[49] *Id.*

unpredictability strikes at the heart of foreseeability, making it difficult to determine what counts as reasonable use of AI in cases of harm.

Calo defines emergence as the ability of systems to do more than just repeat prescribed instructions but instead be able to adapt its behavior to "think" and react to specific circumstances.[50] A microwave oven, for instance, will heat food for a set amount of time at a selected power level. Its behavior does not change based on what is inside, nor do its abilities adapt over time. Technologies such as these do not "learn" from their environment and thus do not exhibit emergence—they were made to perform a clearly defined function with clearly defined steps, and if it fails to perform its task, it will be easy to determine why. By contrast, a robotic vacuum cleaner able to map its environment and learn more efficient cleaning routes over time does exhibit emergence. If it confuses its route or utilizes less efficient routes,the cause of the problem is harder to determine—is it a problem with its programming, the data it was trained on, or was it because of its surrounding environment?

Thus, AI technologies will not always carry out the intended function, and it will not always do so in a predictable way. Sometimes this trait can be advantageous, which is observed in the case of AlphaGo, an artificial program made to play the board game "Go."[51] In 2016, AlphaGo beat the world Go champion Lee Sedol by making a move that no human ever would have thought of in the second game.[52] While the move was so strange to human eyes that one expert thought it was a mistake, it was an excellent move, unable for humans to predict or understand in real time because our brains do not function like computers.[53] Thus, emergence could certainly lead to novel and brilliant solutions that humans have not yet come up with themselves.

But at the same time, emergence can also lead to negative outcomes, such as the one depicted in the case of Microsoft's AI chatbot Tay that launched on Twitter in 2016. Tay was designed to engage in conversational learning by interacting with users online and adapting its responses based on its observation of the language patterns.[54] However, hours after being launched, Tay began to produce offensive,

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[50] Calo, *supra* note 13.
[51] Selbst, *supra* note 30.
[52] Cade Metz, *In Two Moves, AlphaGo and Lee Sedol Redefined the Future*, WIRED (Mar. 16, 2016), https://www.wired.com/2016/03/two-moves-alphago-lee-sedol-redefined-future/
[53] *Id.*
[54] Gina Neff & Peter Nagy, *Talking to Bots: Symbiotic Agency and the Case of Tay*, 10 INT'L J. COMM. 4915 (2016).

racist, and inflammatory tweets, leading to its deactivation in less than 24 hours.[55] This behavior was not a result of a coding error or malicious intent from its developers, but from Tay's exposure to users' trolling and negative input.[56] While Tay did operate in accordance with its intended design, the developers were unable to foresee how its system could be manipulated in such a way. In all, the potential for emergence can lead to both beneficial outcomes and negative outcomes that humans may not have been able to anticipate—which is extremely difficult to control.

Because AI decisions can be novel, it is sometimes difficult to tell instantly whether that decision is advantageous or disadvantageous. AlphaGo made a move so unexpected that humans were not able to understand its brilliance in real time. Microsoft's developers had no idea that their chatbot would produce such negative effects so quickly. What both of these cases have in common is that even if AI generates an unexpected result, there still is a clear indication of whether or not the AI served its intended function. Such determination is not so clear in other types of AI. In the case of AI technologies used in medical settings, AI systems are designed to recommend the best course of treatment —recommendations which have huge implications in tort law as it has the potential for life or death consequences. Hypothetically, in the case that a doctor follows an AI recommendation and it leads to a negative outcome for the patient, would it be the doctor's choice to listen to the AI, or the AI itself for producing such an answer? If a doctor disregards the AI recommendation and encounters a negative outcome, would the doctor be held negligent for going against a tool intended to surpass human decision-making capabilities? In addition, as following an AI suggestion could have produced a negative outcome, how could we determine that *not* following it would not have resulted in a similar or worse outcome?

Determining who is to blame becomes highly complex when AI enters the equation—especially in the moment when a decision is made or a harm occurs, as it is difficult to tell if emergent behavior was working to human advantage. Since AI technologies are emergent and have the potential to produce novel outcomes, knowing whether we should follow it to get the best results possible by understanding how an AI system came to a particular conclusion becomes especially pertinent for tort law. In addition to emergence behaviors, this is another hurdle to foreseeability: the opaqueness of AI.

[55] *Id.*
[56] *Id.*

4.2 Opacity

The second major challenge that AI poses to tort law is the issue of opacity. Unlike traditional technologies with clearly defined behaviors and observable malfunctions, AI systems often operate in ways that are difficult to interpret, audit, or explain. This obscurity threatens one of tort law's most critical tools for assigning liability: the principle of foreseeability. If a harm cannot be anticipated or the mechanism of harm cannot be easily traced, it becomes much more difficult for courts to evaluate whether a defendant acted reasonably under the circumstances in which the harm occurred.

There are two different veins of opacity: intentional opacity, and technological opacity. Intentional opacity stems from the fact that many AI technologies are developed by private companies who treat their inner workings as proprietary trade secrets, and maintaining secrecy allows the company to stay competitive and profitable. For example, one of the central criticisms of the COMPAS algorithm is that its methodology of risk assessments remains undisclosed.[57] Only Equivant, developer of COMPAS, knows how the calculations are made—and they are not keen on revealing their secrets. While protecting companies' competitive advantage is understandable from a business standpoint, this secrecy creates significant barriers for tort law, as it becomes extremely difficult for courts to scrutinize whether an algorithmic recommendation was reasonable, biased, or foreseeably flawed. Moreover, regulating such opacity presents another challenge, as forcing full transparency could stifle innovation, yet total secrecy could allow harmful or negligence practices to evade accountability.

On the other hand, technological opacity stems not from deliberate concealment, but from the inherent complexity of AI systems. Technological opacity refers to how difficult it is for an ordinary person to understand the technological system.[58] For numerous people, even understanding how a regular car functions is challenging—so when AI technologies like self-driving cars or predictive algorithms are introduced, the average user has little ability to assess how they operate or whether their outputs are reliable. Simply by outwardly observing a piece of AI technology, no average person—and in many cases not even an expert—would be able to determine how the technology functions behind the scenes. For instance, people who buy self-driving cars are likely unaware of how the car calculates when

[57] Unknown source
[58] Harry Surden & Mary-Anne Williams, *Technological Opacity, Predictability, and Self-Driving Cars*, 38 CARDOZO L. REV. 121 (2016).

to brake or accelerate. When they purchase the car, they merely trust that the manufacturer created the car to perform its marketed purpose. While there is a level of opacity in all technologies, AI adds more dimensions, particularly the potential for machine learning, which makes it even more difficult to verify or explain outcomes. Companies may seek to protect their algorithms from competitors, but even if that data is released to the public, it might not be reasonable to expect that people will understand what it means.

Opacity also creates space for hidden biases to go undetected. The COMPAS algorithm, for example, has been shown to produce racially disparate outcomes despite being marketed as an objective tool. Although it was designed to eliminate human bias, it appears instead to have replicated or even exacerbated it. Bias in AI is often the product of subjective decisions made during the design or training process, such as the selection of training data or certain optimization goals.[59] These biases may be intentional or unintentional, but their effects can be profound—especially when AI is used in high-stakes contexts like criminal sentencing.

Selbst poses a significant example of how these biases may be undetectable and wholly remediable. In the medical field, women's ailments have historically not been taken seriously as compared to men—medical knowledge and research initiatives heavily favor male patients over female patients.[60] This pre-existing distribution of knowledge in the field influences the dataset that a hypothetical medical AI system was trained on. A physician may use that system's recommendation and end up misdiagnosing a female patient. In a conventional malpractice case, the doctor would likely be liable for failing to meet the duty of care, as they might have assumed that medical conditions of women present the same as the 'standard' male patient. But with AI in the equation, liability becomes challenging to allocate. The doctor relied on the AI for a recommendation—the AI relied on inherently flawed training data—and the flawed training data was taken from an already biased field of study. The court may argue that the doctor should not have blindly trusted the tool or that the manufacturer should have foreseen such discrepancy—in either case, there is a significant grey area that is compounded by the difficulty of tracing one decision to the source of harm. There are many levels of opacity and uncertainty which blur the causal change in a conventional tort claim, often in ways that are unintentional and untraceable.

[59] Selbst, *supra* note 30.
[60] *Id.*

Preventing bias and error involves the complex task of controlling the dataset on which an AI system was trained . How would manufacturers determine if a dataset is truly representative? AI systems could theoretically vacuum up massive amounts of data without questioning if it actually reflects reality.[61] These systems are unpredictable and biased by design. Biases and discrepancies may be introduced during data selection, model design, or optimization, and they are often deeply embedded and difficult to tease apart. Even subtle manipulations of input data or software code could significantly alter an AI system's behavior, often without any immediate or observable source. The central legal concern is that these systems contain a persistent potential for unseen bias and error that prove difficult to trace.

Both intentional and technological opacity pose a fundamental obstacle to applying traditional tort principles to AI. When courts or AI users cannot access or understand how a decision was made, foreseeability and causation become difficult to untangle. The following section examines foreseeability, and how AI's characteristics of opacity and emergence places pressures on this standard. Through the examination of how courts adapt foreseeability to account for complex technologies, we can begin to envision how tort law may evolve to meet the challenges of the AI era.

4.3 Establishing "Reasonable Action" given these Foreseeability Issues

In traditional tort law, foreseeability plays a critical role in assessing whether a harm was preventable. The principle asks whether a reasonable and ordinary person, under the circumstances, could have predicted the harm and taken appropriate steps to avoid it. If a harm is deemed unforeseeable, then the defendant is generally not held liable, as they would not have been expected to guard against such a risk.

Foreseeability functions to establish a duty of care as well as the scope of the duty. If a harm is deemed unforeseeable, then the defendant is generally not held liable, as they would not have been expected to guard against such a risk. Foreseeability effectively compensates for bounded rationality. As Selbst explains, individuals cannot be held liable for circumstances beyond what an ordinary person could process or predict.[62] People sometimes lack or misinterpret the relevant information needed to prevent harm. Tort law recognizes these human limitations and sets a standard of care that reflects what an ordinary person could have reasonably done or known in the moment the harm occurred.

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[61] *Id.*
[62] *Id.*

However, the introduction of AI complicates this standard of care.. AI systems are capable of processing vast quantities of data and making decisions at speeds and levels of complexity that exceed human ability. This transforms the conception of bounded rationality—tort law must now also determine how much a reasonable user should be expected to understand AI systems before it can determine if a particular harm could have been foreseen.

In face of opacity and emergence, it becomes difficult to say whether a harm involving AI was truly foreseeable. Opacity refers to the mystery of how AI systems reach their conclusions, particularly when their inner algorithmic workings are far more technical than an ordinary person could understand. Emergence describes the capacity of AI to generate unexpected behaviors based on its interaction with novel data and environments, behaviors that were not directly programmed by its creators. Together, these two characteristics strain traditional notions of foreseeability, making the causal chain from human action to harm harder to identify.

In light of these challenges, how can tort law continue to define "reasonable" conduct and foreseeability in a way that properly treats the growing presence of AI? What should be expected of the average user, manufacturer, or professional who integrates AI into their daily lives? The following sections aim to unpack these questions by exploring the context of harms, the shifting expectations between consumers and manufacturers, and the implications for how courts could adapt the duty of care standard to the AI sector.

4.3.1 Context of Harm

A starting point for understanding how tort law can still assess foreseeability is the idea of multifunctionality, or more precisely, the lack thereof. Most modern AI systems remain unifunctional: they are designed to perform tasks within a defined scope. While emergence and opacity may create a lot of uncertainties about AI's role in an instance of harm, these harms will still have a defined context.[63] For example, Alpha Go made a move so unexpected that it baffled its human creators. It clearly displayed emergent and opaque behavior, but critically, it was still fundamentally playing the game Go.[64] If AlphaGo had instead responded to a losing position by flipping the board and calling a bomb threat to evacuate the premises, that would have been an entirely different conversation—but fortunately something like

[63] *Id.*
[64] *Id.*

this is extremely unlikely given that current AI innovations are not multifunctional and likely will not be for a long time.[65]

Thus, emergence and opacity may make it difficult to predict how an AI will act exactly, but not necessarily what type of harm it might cause. Self-driving cars are only capable of driving, and the COMPAS algorithm is only capable of determining recidivism—there is no reason to believe that COMPAS is capable of hitting a pedestrian or that a self-driving car will incorrectly incarcerate someone. Multifunctional AI technology is still of the future, there is still a definitive context in which we can expect these AI-induced harm to play out. Ultimately, AI systems have the potential to malfunction, but such malfunctions are tightly anchored to the system's intended purpose.

Understanding this "context of harm" helps to clarify how tort law might assess reasonable conduct even when AI systems exhibit opaque or emergent behaviors. It is not necessary for courts to foresee exactly how an AI might fail, only that it could fail in a functionally relevant way. This foundation is crucial when determining duty of care and reasonable action for those who use AI technologies.

4.3.2 Expectations of the User vs. Manufacturer

Given that harm caused by AI can be expected to occur within a functional context, the next question becomes: who bears the responsibility for anticipating and preventing more specific harm? Both users and manufacturers of AI technology play a role, but their obligations arguably diverge depending on the use of AI and the degree of control each party has over the system.

Although the specific way an AI system arrives at a decision may be opaque, the fact that AI systems will make errors at some point is foreseeable under existing doctrines. Selbst emphasizes that foreseeability does not necessarily require the exact mechanism of harm to be foreseeable, only that the occurrence of some error is likely.[66] In other words, knowing that an AI may fail in some way is sufficient to say that its errors are generally foreseeable.[67] Since AI is still a relatively new technology, users, manufacturers, and courts can anticipate that AI *will* have errors, although not necessarily *how* it will have errors. This approach avoids placing blanket strict liability on all AI-related harm, which courts are unlikely to support.

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[65] *Id.*
[66] *Id.*
[67] *Id.*

Given that AI errors are anticipated, the user has to assume some risk when choosing to rely on AI technology. The reasonableness of an action in each individual case is at least partially tied to the decision to use AI in the first place.[68] There may be contexts—such as high-stakes medical settings—where the possibility of untraceable AI errors makes reliance on the technology too risky and inappropriate.[69] By the time a user is put into a position to act reasonably or unreasonably, the choice to use AI has already been made. If the use of AI is judged reasonable before the harm occurred, it cannot be determined unreasonable to overlook errors that are undetectable by humans in after-the-fact analysis.[70] Thus, adhering to this standard turns negligence analysis of the user into strict liability for the manufacturer.[71]

When choosing to use AI in the first place, AI users should be expected to understand how the systems they are using work, but this analysis becomes muddy given the complexity and opacity of AI technology. Still, there is no reason to hold the average person that uses AI to the same standard of awareness an expert may have. Thus, determining the duty of care a user has will depend—at least in part—on a framework of reasonability based on the extent of information the manufacturer has disclosed through marketing or documentation. This expectation creates a transition point: the standard of user understanding is directly shaped by manufacturer responsibility to inform.

Consumers may have to answer for their choice to use AI in particular situations as well as their general knowledge of AI, but manufacturer responsibility also factors into the calculus. Creators of the technology would be held responsible if their product had defects that led to harm—the problem that arises with AI is how to determine what is user error and what is manufacturer flaw. Under product liability, manufacturers can be held liable for three types of defects: design defects, manufacturing defects, and marketing defects.[72] Given emergence and opacity, this may be difficult to determine and would require deeper investigation in each individual case. However, there are existing tort frameworks that may help to shed light on what is foreseeable for manufacturers.

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

In product liability cases, courts will sometimes use one of two tests in order to determine if a defendant is liable. The first is a risk-utility test, which states that a defendant is not liable for design defects if there is evidence showing that the product's usefulness outweighs the risk of harm.[73] If the benefits of deploying an AI system clearly exceed its dangers, a court may find that no liability exists—even if a harm has occurred. The second test is the consumer expectation test, which states that if a "reasonable consumer" would not consider the product to be defective when it is being used in a reasonable way, then the defendant is not liable even if design flaws in the product result in harm.[74] If an AI system behaves in a way that grossly deviates from what users were led to believe, the manufacturer may be liable, particularly in cases involving inadequate warnings or misleading marketing.

Ultimately, what is considered "reasonable" for both users and manufacturers must be rooted in foreseeable use and foreseeable failure. Users must take care in how and when they rely on AI systems, while manufacturers must ensure that risks are minimized, disclosed, and accounted for in the design and deployment of their products. In all, concerns about foreseeability, user reliance, and manufacturer responsibility can be addressed, to a degree, within existing tort frameworks. Rather than requiring a full overhaul of tort law, a more realistic path forward may lie in clarifying how existing doctrines like negligence and products liability apply and defining new standards for foreseeability.

4.3.3 Attempting to Define "Reasonable Action"

Applying tort frameworks to AI harm requires careful definition of what constitutes "reasonable action" by both users and manufacturers. Traditionally, negligence law relies on whether a defendant breached a duty of care by failing to act as a reasonable person would under similar circumstances. In the case of AI, however, that standard becomes less clear—particularly when roles and responsibilities between human users and AI systems are difficult to disentangle.

A central challenge is that AI complicates the assignment of a clear duty of care. In typical negligence claims, a duty must be owed by the defendant to the plaintiff, and that duty must be clearly defined. But when AI systems assist or even dominate human decision-making, the legal responsibility becomes blurred. Consider decision assistance tools: if a doctor injects a patient with the wrong drug based on an

[73] *Id.*
[74] *Id.*

AI recommendation, liability likely still rests with the doctor.[75] Similarly, in courtroom sentencing, the judge remains the one accountable for the final ruling, even if it was influenced by a predictive algorithm like COMPAS. In both cases, the person using the tool could be seen to retain legal responsibility.

As Selbst notes, the definition of reasonableness is not fixed—it is a socially constructed and constantly evolving concept.[76] It changes with public understanding of technology, regulatory expectations, and practical experience. Courts have thus far adapted negligence and liability standards to accommodate new technologies. In the AI context, this adaptability could mean redefining what counts as reasonable oversight, attention or reliance on AI tools. For example, a user of a Level 3 self-driving car might be expected to know how to take over if the system fails, just as any licensed driver is expected to safely operate a conventional car.[77]

However, these assumptions run into the problem of bounded rationality—people can only be expected to process and have access to a limited amount of information, especially in high-pressure or opaque environments. If AI systems are inherently unintelligible, to what extent can we reasonably expect users to detect or correct errors? Existing negligence doctrine already allows for the possibility that accidents may occur without anyone truly being at fault—it is central to recognize that the goal of tort law is not to eliminate all harms, but to encourage standards of care and ensure accountability.

With that said, improving the explainability and interpretability of AI systems may help mitigate some of these foreseeability challenges and make the concept of reasonable action clearer. For example, if a physician could clearly understand how a medical AI reached its conclusion, they could better assess whether the recommendation should be followed. But opacity remains a barrier to this approach. Without the ability to question or understand AI reasoning, it becomes essentially impossible to universally claim that an AI error could and should have been foreseen.

This difficulty is amplified when the AI is designed with the intent of surpassing human capabilities, such as in the case of diagnostic tools or predictive models. Medical AI systems may one day be more accurate than human doctors because of heightened potential for pattern recognition, but is that the case with

[75] Selbst, *supra* note 30.
[76] *Id.*
[77] *Id.*

current AI technologies? Ultimately, defining reasonable action in AI-related torts will depend on society's willingness to demand certain types of oversight, attention, and transparency from both humans and machines. While no legal standard will eliminate uncertainty or harm entirely, clarifying roles and expectations can help courts apply existing doctrines more effectively. Yet, these determinations rest on a deeper question on how we consider AI abilities: Are these technologies intended to surpass human capabilities, or to replicate them? Thus, definitively defining reasonable action as it pertains to foreseeability hinges on how we fundamentally regard AI technologies and the roles they play in our lives.

5. IS TORT LAW THE RIGHT APPROACH?

The central purpose of tort law is not only to provide just compensation for harm, but also to discourage accidents from occurring in the first place through penalizing irresponsible behavior. As AI becomes increasingly embedded in both physical systems and decision-making processes, questions arise about whether existing tort law processes remain an effective way to regulate its risks. Can existing tort frameworks effectively manage the risks posed by AI? Or does the nature of AI demand a shift in how we conceptualize foreseeability and compensation?

At first glance, negligence law appears to struggle with AI. Traditional negligence frameworks rely on assessing human-decision making. But, many AI technologies are designed to directly interfere with human judgement, in many cases replacing it entirely. Selbst argues that this foundational mismatch may limit negligence law's ability to fairly assess fault in cases involving AI-driven decisions.[78] As for strict liability, this may be an appropriate framework to consider compensation when AI causes direct physical harm—it may be more appropriate to hold manufacturers liable for the risks embedded in their products, regardless of negligence. However, even strict liability runs into complications when trying to pinpoint the source of a defect, given opacity and emergence.

In all, AI challenges the doctrine of foreseeability, which is essential to tort law's structure. If a defendant cannot reasonably foresee how their actions might lead to harm, then their conduct is not typically considered legally "unreasonable". But with AI, the causal chain can be opaque and nonintuitive, especially when harm arises from emergent behaviors that neither creators nor users could have anticipated. This strain on foreseeability may not fit neatly into existing doctrinal categories. Utterly emergent and multifunctional behavior in future AI systems might require

[78] *Id.*

courts to rethink the role of foreseeability altogether—possibly diminishing its weight in tort analysis or shifting focus towards risk mitigation rather than post-hoc compensation.

These concerns raise the possibility of a paradigm shift in how we handle AI harms. One potential outcome is the expansion of administrative solutions, such as specialized agencies or policy reforms that require more rigorous oversight and evaluation of AI systems. Another possibility is a more prominent role for alternative regulatory mechanisms, such as no-fault insurance, pre-market testing requirements, or professional licensing standards for AI deployment.

Still, even if some subset of AI-related harms has the potential to leave injured parties without just recovery, that does not mean the negligence or liability regime is inherently broken. Tort law has always tolerated a certain amount of unremedied harm. The real test is whether those cases become common enough to erode public confidence or to justify a stricter liability framework. Existing tort doctrines are not necessarily unequipped to handle questions of AI, but there may be better methods to handle the fundamental issues that AI pose.

Ultimately, whether tort law can adapt to AI depends on how we conceptualize AI itself. Is it simply a tool meant to replicate human abilities, or a fundamentally different kind of agent intended to exceed them? Misunderstandings about AI's role—and its limits—can lead to flawed assessments of foreseeability, duty and breach.

5.1 Adapting Tort Law to AI: What we Fundamentally Imagine AI to Be

Whether tort law can fairly and effectively respond to AI-related harms depends on not just technological developments or doctrinal adjustments, but more deeply on how we imagine AI to function in society. Whether we apply negligence or products liability—or some new legal category entirely—hinges on what we fundamentally envision AI to be. The tort system's ability to deliver compensation and deterrence will depend on the shared assumptions on what AI is supposed to do, how it should behave, and where responsibility lies when it fails.

At the center of this inquiry is a deceptively simple question: Is AI meant to replicate human abilities, or to exceed them? This distinction carries significant consequences. If AI merely replicates human capacities—like following traffic laws or recommending typical medical treatments—it may be reasonable to expect human users to maintain oversight and bear responsibility when things go wrong. But if AI is

considered to be superior to human judgement, then the calculus changes. Should people defer to AI over their own knowledge and intuition? Should tort law expect them to? The answer to these questions will shape who is held liable in cases of AI-related harm—human users, manufacturers, or no one at all.

Consider the example of medical AI. If we view it as a tool to assist physicians—akin to a stethoscope or diagnostic checklist—then liability for misdiagnosis still rests with the doctor. But if we regard the AI as a generally better decision-maker, one capable of identifying patterns that humans cannot, then punishing the physician for deferring to the AI becomes less justifiable. Obviously, this is not black and white distinction as technology falls on a wide spectrum of abilities, and it may not act the same in all situations. Thus, the question becomes how to determine when to trust AI and when not to.

With this said, not all harms will be so easily analyzed in current applications because not all existing systems were made to be transparent. Emergent behaviors may require a new understanding of foreseeability altogether. Traditional foreseeability asks whether the risk of harm was predictable. But AI can generate nonintuitive relationships between cause and effect. If no reasonable person could foresee how an AI system's output would lead to a particular injury, then applying negligence doctrines become strained. This problem is compounded by opacity and emergence as it pertains to determining foreseeability. If no intervention is made to mandate transparency, interpretability, or explainability, then AI systems will remain a black box to those outside of the companies that create them. Without understanding how AI fails, society cannot recalibrate its expectations or update standards of reasonable care. Moreover, AI systems are not static—they are often designed to continually update and learn, meaning that their behavior may shift over time in unpredictable ways. The result is a moving target that frustrates efforts to identify clear standards of foreseeability or control.

One solution to this is to encourage companies to build systems that are interpretable by design, or at least capable of being explained after-the-fact. In a study on algorithmic models, researchers examined a model that is used to predict death from pneumonia.[79] This model was trained on past patients and their results in the hospital. Because the model was built to be interpretable, the researchers were able to see that the model had learned to predict that patients with asthma had a reduced risk of dying from pneumonia, a finding that seemed to make little medical

[79] Selbst, *supra* note 30

sense.[80] Ultimately, this was a real trend in the data and not an error made by the algorithm—it was found that asthma patients pay closer attention to breathing problems, notice pneumonia symptoms earlier, and thus are able to receive emergency treatment sooner.[81] In all, the algorithm was created in a way that allowed people to trace how a conclusion was made, meaning that physicians would not be placed in a position to have to immediately trust or discredit a result produced by the AI technology. Some AI errors *can* be anticipated, given that the system was created to be transparent. In this sense, explainability could resolve foreseeability challenges and allow tort law to assess when users ought to override AI recommendations.

Another possible remedy could be to shift away from individualized fault frameworks and towards broader risk mitigation strategies. Courts may become less interested in unpacking the chain of responsibility in specific AI failures and more invested in ensuring that systems are built safely from the outset. This could manifest as increased use of administrative law tools—such as regulatory oversight, licensing requirements or public audits of high-risk AI systems—to complement the reactive nature of tort law.

Ultimately, adapting tort law to AI is less about the wholesale transformation and more about precision: we must define the role that AI plays, clarify how much trust users can reasonably place in it, and develop mechanisms that ensure accountability even when decisions are emergent or opaque. Doing so will require some reconsideration of how to apply existing legal frameworks—such as redefining the role of foreseeability—but not necessarily an overhaul of the system. What is crucial above all is the collective reconsideration of the ideal role that AI plays in the human decision-making process. Emerging harms caused by AI, whether through direct action or through decision assistance, will remain legally elusive until we first decide what kind of actor we believe AI to be.

5.2 Rethinking the Role of Tort Law in Addressing AI Harms

In 1994, a 79-year-old woman named Stella Liebeck ordered a coffee from a McDonald's drive-thru.[82] While seated in the passenger seat of a parked car, she suffered third-degree burns when her cup of coffee spilled on her lap (Saladoff, 2013). Facing significant medical expenses and emotional pain, Liebeck reached out to McDonalds with a straightforward request: to help cover her medical bills, and to

[80] *Id.*
[81] *Id.*
[82] HOT COFFEE (Bullfrog Films 2013).

lower the temperature of their coffee so this does not happen to anyone else.[83] When McDonald's refused, she brought the case to court, eventually receiving $200,000 in compensatory damages and $2.7 million in punitive damages, both later reduced.[84]

Despite widespread media portrayals of the case as frivolous—it seemed ridiculous that a lady spills coffee and gets millions in court—the reality was quite different.[85] Liebeck's case became a central discussion point in debates over tort reform, but also exposed underlying failures in other systems.[86] Her lawsuit was not motivated by a desire for windfall profits, but by a need to cover overwhelming healthcare costs and prompt corporate accountability. Had the U.S. healthcare system provided more robust protections and support, Liebeck might never have heeded to sue in the first place. Had there been other effective ways to get McDonalds to pay attention to their coffee temperature, the case might not have ended up in court.

This case offers a critical lens through which to evaluate the fundamental purpose and limits of tort law. Tort law is designed to not only compensate victims, but to also deter harmful behavior from occurring in the first place—in the end, it is a reactive tool that offers remedies only after a harm has occurred. While this does create an important avenue for accountability, it might not always be the most effective or efficient method for achieving harm prevention, especially in complex technological domains like AI.

When AI is introduced to the equation, the limitation of tort law as a deterrent becomes more apparent. Harms caused by AI may never even make it to court, given how risky it might be. These cases can be so complex or opaque in their origins that liability becomes impractical to establish. The central purpose of tort law—assigning responsibility for harms—can still guide these initiatives, but alternative or supplementary tools may be better suited to handle AI-related risks. The key question is not whether tort law is adaptable enough to accommodate AI, but whether tort law alone is sufficient to protect individuals from harm. While much of this paper has focused on how tort law might be able to evolve to address the challenges of opacity, emergence, and foreseeability, these mechanisms only work after the fact. In order to meaningfully reduce harm, prospective measures are important to consider as well.

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

One avenue is regulatory reform. For example, requiring companies to disclose more information about how their AI systems work could mitigate the risks of intentional opacity. However, such requirements must be carefully balanced: overly aggressive mandates for transparency could discourage innovation or lead companies to avoid investing in development altogether. The COMPAS algorithm controversy is illustrative here—Equivant is not keen on disclosing its algorithm's inner workings for competitive reasons, but this secrecy undermines trust and accountability in public decision-making.

In some contexts, the solution may not lie in tort or regulation alone, but in broader systemic changes. In countries with robust social safety nets and universal healthcare, individuals are less reliant on the tort system for financial relief after injury. As Liebeck's case showed, the root cause of many lawsuits is not a desire for excessive compensation, but a lack of accessible alternatives.

When it comes to AI, especially in high-stakes areas like healthcare, criminal sentencing, and safe transportation, alternative systems such as no-fault insurance schemes, government oversight, or administrative remedies may prove more effective in delivering justice and preventing harm. Calo brings up an interesting example: would someone sue Microsoft if Microsoft Word froze and deleted a document?[87] Probably not—because unfortunately, American tort law is not always the appropriate or practical avenue to make grievances heard.

In all, while tort law remains a vital component of the legal landscape, adapting it to the challenges of AI may require a more holistic approach. This includes refining legal doctrines, but also recognizing the broader ecosystem—regulation, policy, infrastructure, and public education—that must evolve in tandem. The goal should not only be to assign blame after a harm occurs, but to create conditions that make harm less likely in the first place.

6. CONCLUSION

As Artificial Intelligence becomes increasingly integrated into everyday life—whether embodied in autonomous vehicles or disembodied in decision-making systems like COMPAS—traditional tort law must grapple with a host of unprecedented challenges. This paper has explored the fundamental principles of tort law, examined how AI disrupts existing liability frameworks, and analyzed whether negligence and strict liability can be fairly and effectively applied to this new class of

[87] Calo, *supra* note 13.

technology. From the Tempe self-driving car incident to the courtroom use of predictive algorithms, AI complicates legal analysis at every stage: in determining duty of care, identifying causation, and assessing what is "reasonably foreseeable".

Emergence and opacity—the ability of AI to behave unpredictably and the difficulty of interpreting how it reaches conclusions—pose especially sharp challenges to tort law's reliance on foreseeability. While current AI systems remain largely unifunctional and can be analyzed within contextual bounds, their increasing autonomy and complexity strain the capacity of existing frameworks. Courts, consumers, and manufacturers alike are left navigating a gray area where accountability is uncertain and legal standards remain unsettled.

Despite these complications, this paper has argued that tort law is not obsolete in face of AI, but is rather in need of careful adaptation. The key lies in what role we fundamentally imagine AI to play. If AI is seen as a tool that merely replicates human decision-making, existing tort doctrines can be calibrated to address its failures. However, if AI is meant to surpass human ability, tort lack must reckon with new standards for what is reasonable and foreseeable, and who bears responsibility when human oversight no longer holds the same weight.

Ultimately, this discussion has underscored that tort law should not be the sole solution for regulating AI harms. Just as the Liebeck case revealed deeper failings in America's healthcare system, many AI-related harms expose gaps in transparency, access to justice, and institutional preparedness. Tort law's compensatory and deterrent functions are important, but they must be complemented by forward-looking legislation, greater investment in AI interpretability, and structural reforms that address the root causes of harm. In the AI era, the goal should not be simply to retrofit existing legal doctrines to every new technology, but to ensure that justice—through whatever means—is meaningfully served.

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