VERMONT LAW REVIEW

VOLUME 46 NUMBER 4 SUMMER 2022

ARTICLES

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SAME SONG, DIFFERENT CHORUS: MODERNIZING ENVIRONMENTAL LAW CURRICULUM

Introduction to a Roundtable Series for Environmental Law Faculty on the Future of Legal Education

Jonathan Rosenbloom[*] and Jennifer Rushlow[**]

Environmental law is not what it used to be.[1] Much has changed since the original major federal environmental statutes became law under President Nixon in the early 1970s.[2] The climate crisis, loss of biodiversity, and more public recognition that environmental impacts disproportionately harm (and benefit) different communities according to race, ethnicity, and economic conditions have resulted in a renaissance and evolution of environmental law and policy. In addition, the private sector—or at least portions of it—has become a more active participant in preventing and mitigating environmental impacts.[3] Some countries are learning how to work together to tackle global environmental challenges,[4] and some tribal, state, and local governments are leading the way in developing environmental and climate adaptation policies.[5] Even state courts have shown some signs of willingness to

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[1] *See* Jan G. Laitos & Lauren J. Wolongevicz, *Why Environmental Laws Fail*, 39 WM. & MARY ENV'T L. & POL'Y REV. 1, 4–6, 32–39 (2014).

[2] *See generally* A. Dan Tarlock, *Environmental Law: Then and Now*, 32 WASH. U. J.L. & POL'Y 1 (2010).

[3] *See* Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 170–75, 183 (2013).

[4] *See* Harriet Bulkeley et al., *Governing Climate Change Transnationally: Assessing the Evidence from a Survey of Sixty Initiatives*, 30 ENV'T & PLAN. C: GOV'T & POL'Y 591, 591–612 (2012); *but see, e.g.*, Lisa Friedman, *Trump Serves Notice To Quit Paris Climate Agreement*, N.Y. TIMES (Feb. 19, 2021), https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html.

[5] For examples of local ordinances in the United States, *see What's Challenging*

address environmental matters through novel claims.[6] Meanwhile, Congress and some federal courts have been perhaps the slowest to evolve when it comes to adapting to changing environmental conditions, often getting tripped up by politics and grandstanding, as well as the legal issues of standing and redressability, among other preliminary matters.

As environmental challenges and those seeking to address the challenges have evolved, so too have jobs in environmental law and policy. The opportunities for work in environmental law are more diverse in every way compared to when the field began.[7] Jobs in private environmental governance and sustainability, which hardly existed when many environmental law programs were founded, are now booming.[8] And knowledge of "environmental law" is now a requirement for many jobs that are not traditional "environmental law" positions—such as jobs in real estate, insurance, and corporate law. Some positions are abandoning the "environmental law" label entirely, and instead seeking to hire someone in "sustainability,"

Your Community?, SUSTAINABLE DEV. CODE, https://sustainablecitycode.org/subchapters/ (last visited June 5, 2022) (providing access to local ordinances on a wide variety of environmental challenges facing communities across the United States).

[6] *See, e.g.*, Rhode Island v. Shell Oil Prods. Co., No. 19-1818 (1st Cir. May 23, 2022); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); Mayor & City Council of Balt. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); People by James v. Exxon Mobil Corp., 119 N.Y.S.3d 829 (Table), No. 452044/2018, slip op. 1 (N.Y. Sup. Ct. 2019). *See also* Lesley Clark, *Congress' Climate Inaction Puts Spotlight on the Courts*, E&E CLIMATEWIRE (Dec. 23, 2021), https://www.eenews.net/articles/congress-climate-inaction-puts-spotlight-on-the-courts/; U.N. Env't Programme, Global Climate Litigation Report: 2020 Status Review, U.N. DEL/2333/NA (2020); KOREY SILVERMAN-ROATI, SABIN CTR. FOR CLIMATE CHANGE L., COLUM. L. SCH., U.S. CLIMATE LITIGATION IN THE AGE OF TRUMP (2021).

[7] Sandra Cassotta, *The Development of Environmental Law Within a Changing Environmental Governance Context: Towards a New Paradigm Shift in the Anthropocene Era*, 30 Y.B. INT'L ENV'T L. 54, 56–58 (2021).

[8] Sarah Fecht, *How Have Careers in Sustainability Evolved over the Past 10 Years?*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (Mar. 4, 2020), https://news.climate.columbia.edu/2020/03/04/careers-sustainability-evolving/.

"sustainable development," "resilience," "environmental, social, and corporate governance (ESG)," or a related manifestation of the subject to capture a broader understanding of ecosystems, systems thinking, regenerative design, biophilia, inclusive growth, and how the environment directly and indirectly impacts individuals and public and private entities. For these and other reasons, law schools have been shifting or diversifying environmental law teaching to keep up with the times.[9] And yet, there is abundant evidence that law school curricula need to further evolve further to reflect changes.

* * *

Thirty years ago, the American Bar Association (ABA) published the *MacCrate Report*, which illustrated and discussed the need to continually review law school curricula to ensure that law schools are meeting students' academic and professional needs as those needs evolve.[10] The *MacCrate Report* performed an extensive survey of law schools around the country. The Report's findings noted, among other things, that "education in lawyering skills and professional values is central to the mission of law schools," and that students need more exposure to "recognizing and resolving ethical dilemmas" and communication and counseling skills.[11] While the *MacCrate Report* focused heavily on skills training,[12] the Report's research, examination, and recommendations encouraged law schools

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[9] In 2010, Professor Rosenbloom introduced the first experiential law course on sustainability and resilience. For more on that course and others like it, *see* Jonathan Rosenbloom, *Now We're Cooking!: Adding Practical Application to the Recipe for Teaching Sustainability*, 2 PACE ENV'T L. REV. ONLINE COMPANION 21 (2011). *See also* John Dernbach & Jonathan Rosenbloom, *Teaching Applied Sustainability: A Practicum Based on Drafting Ordinances*, 4 TEX. A&M J. PROP. L. 83 (2017).

[10] TASK FORCE ON L. SCHS. & THE PRO., AM. BAR ASSOC. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3–8 (1992) [hereinafter MacCrate Report] (commonly referred to as the "MacCrate Report"—named for then-chair of the ABA Task Force on Law Schools and the Profession, Robert MacCrate).

[11] *Id.* at 235, 330,

[12] *Id*. at 4.

and the ABA to regularly review and/or modify law school curricula.[13]

Since the *MacCrate Report*, several influential reports have highlighted the need for law schools to continue evaluating their own curricula. The 2007 *Carnegie Report*, for example, again analyzed the gap between law school curricula and the skills and tools needed to succeed as a lawyer.[14] Specifically, after visiting 16 American and Canadian law schools, the *Carnegie Report* found that helping students better prepare for practice requires law schools to "help[] students develop practical 'lawyering' skills and understand[] . . . ethical and moral considerations."[15]

On the heels of the *Carnegie Report* was the Clinical Legal Education Association's *Stuckey Report*.[16] While more directed and critical than the *MacCrate* and *Carnegie* Reports, the *Stuckey Report* again highlighted the need to constantly evaluate law school curricula and whether courses are adapting to changing needs and norms.[17] The *Stuckey Report* specifically advocated for more skills-based courses to develop problem-solving and professionalism skills. In the forward to the *Stuckey Report*, Bob MacCrate—principal author of the *MacCrate Report*—stated that the "central message in both [the *Carnegie* and *Stuckey* Reports] . . . is that law schools should broaden the range of lessons they teach, reducing doctrinal instruction that uses the Socratic dialogue and the case method; integrate the teaching of knowledge, skills and values, and not treat them as separate

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[13] *See, e.g.*, COMM. ON THE PRO. EDUC. CONTINUUM, AM. BAR ASSOC. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 3, 25 (2013) [hereinafter TWENTY YEARS AFTER THE MACCRATE REPORT].

[14] William M. Sullivan, AFTER TEN YEARS: THE CARNEGIE REPORT AND CONTEMPORARY LEGAL EDUCATION, 14 UNIV. ST. THOMAS L.J. 331, 336–37 (2018).

[15] *Id.* at 333.

[16] *See generally* Roy Stuckey et al., BEST PRACTICES FOR LEGAL EDUCATION (1st ed. 2007) [hereinafter Stuckey Report].

[17] *Id*. at 55.

subjects addressed in separate courses; and give much greater attention to instruction in professionalism."[18]

These three reports have since been followed by several others evaluating law school curricula and identifying ways to bridge the gap between the classroom and practice.[19] For example, since the publication of the 1992 *Carnegie Report*, there has been discussion about having an integrated curriculum in which law schools: (1) teach legal doctrine to establish a foundation; then (2) introduce several facets of practice to build on that foundation; and finally (3) explore identity and values consistent with the purposes of the legal profession.[20] Further, there has been a continual attempt to refine law school curricula to better prepare students and respond to changing circumstances once they enter the profession.[21]

In 2020, the ABA Commission on the Future of Legal Education echoed this call for regularly revisiting curricula needs.[22] The Commission published a report focusing on access to legal services and justice, noting how onerous and expensive such access is.[23] As the Commission wrote, law schools are "preparing the next generation of legal professionals for yesterday rather than for tomorrow."[24] The Commission pointed to technology, globalization, and mobility as the primary forces compelling changes in the field.[25] Further, it noted that law schools have yet to adapt to these changes.[26]

This could not be more relevant to environmental law curricula and the profession as a whole right now. Environmental law professors have so much to gain from engaging in shared learning

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[18] *Id*. at vii.
[19] *See, e.g.*, TWENTY YEARS AFTER THE MACCRATE REPORT, *supra* note 13, at 3, 25.
[20] Sullivan, *supra* note 14, at 338, 344.
[21] *Id*. at 340.
[22] AM. BAR ASSOC. COMM'N ON THE FUTURE OF LEGAL EDUC., LICENSURE IN THE 21ST CENTURY: PRINCIPLES AND COMMENTARY 3, 13 (2020), https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cflle-principles-and-commentary-feb-2020-final.pdf.
[23] *Id*. at 3.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 8.

around challenges and best practices in evolving our teaching. Many of our colleagues are trying new, exciting, and creative techniques in their classrooms. Yet, environmental law professors rarely convene for the purpose of discussing pedagogy curriculum reform; instead, most of our opportunities to get together focus on scholarship (a worthy endeavor no doubt). To help facilitate a dialogue around teaching practices and courses and the evolution of environmental law, Vermont Law School hosted a series of three roundtables and asked nine leading legal academics whether the findings of the aforementioned law school curriculum reports resonate today with current environmental law curricula.[27] In addition to the nine panelists, the series brought together many leading professors in environmental law from across the United States to discuss how environmental law programs can best prepare students to meet the challenges of the future and advance the evolution of environmental law curricula.

To the nine roundtable panelists, we put forth a series of questions, including: What should our environmental law curricula look like as environmental challenges change? What courses should be in an environmental law core curriculum? Is there a heightened need for exploring identity and values in environmental law curricula? If so, what changes should we make? How does a lack of access to justice play out in environmental law and the environmental law curriculum? What skills do our students need to be suited for this growing professional field? What kinds of assessment should be incorporated into doctrinal, experiential, and problem-based learning to figure out if the students are understanding the core principles?

To explore these questions and to better educate our students, the first roundtable, *The Essential Environmental Curriculum*, was dedicated to discussing the core curricular needs of environmental law programs today. This first session examined the issues a modern curriculum should include to give students a fundamental understanding of current environmental law. The roundtable featured

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[27] *See Emerging Environmental Law Curriculum Workshops*, VT. L. SCH., https://www.vermontlaw.edu/academics/centers-and-programs/environmental-law-center/events/eelc-workshops (last visited June 5, 2022).

Dean and Professor of Law at the University of Utah's S.J. Quinney College of Law, Elizabeth Kronk Warner;[28] Associate Dean and Professor of Law at Albany Law School, Keith Hirokawa;[29] and Professor of Law at the University of Wisconsin-Madison, Steph Tai.[30] These three panelists explored questions concerning the fundamental issues of what courses should law schools be offering for the next generation of environmental lawyers and what administrators and faculty members need to know about emerging environmental law to shape curricular decisions.

The second roundtable, *New Techniques in the Classroom and Beyond*, jumped into the law school classroom to explore whether changing environmental law conditions warranted a change in the way professors deliver educational content today. The roundtable featured Dean and Frank R. Strong Chair in Law at the Ohio State University Moritz College of Law, Lincoln Davies;[31] Deputy Solicitor for Parks & Wildlife at the U.S. Department of the Interior, Sarah Krakoff;[32] and Acting Professor of Law at the U.C. Davis School of Law, Karrigan Börk.[33] The panelists dove into issues exploring ideas beyond traditional lectures to engage students in new and innovative ways. Questions included: What pedagogical

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[28] *Elizabeth Kronk Warner*, THE UNIV. OF UTAH, https://faculty.utah.edu/u6024740-Elizabeth_Kronk_Warner/hm/index.hml (last visited May 28, 2022).

[29] *Keith Hirokawa*, ALB. L. SCH., https://www.albanylaw.edu/faculty/faculty-directory/keith-hirokawa (last visited May 28, 2022).

[30] *Steph Tai: Professor of Law*, UNIV. OF WIS.-MADISON L. SCH., https://secure.law.wisc.edu/profiles/tai2@wisc.edu (last visited May 28, 2022).

[31] *Lincoln L. Davies*, THE OHIO STATE UNIV. MORITZ COLL. OF L., https://moritzlaw.osu.edu/lincoln-l-davies (last visited May 28, 2022).

[32] *Professor Sarah Krakoff Named to Interior Department Leadership Team*, UNIV. OF COLO. BOULDER: COLO. L. (May 12, 2021), https://www.colorado.edu/law/2021/05/12/professor-sarah-krakoff-named-interior-department-leadership-team. This roundtable series took place while Sarah Krakoff was the Moses Lasky Professor at the University of Colorado Boulder Law School, a position from which she is now on leave. The views herein are her own and do not represent those of the U.S. Department of the Interior.

[33] *Karrigan Börk*, U.C. DAVIS SCH. OF L., https://law.ucdavis.edu/people/karrigan-bork (last visited May 28, 2022).

decisions should faculty consider in light of an evolving environmental law curriculum? What materials will be and are relevant for the future and how should those materials be explored in and out of the classroom? What role will technology play in this education? How can we incorporate opportunities for field study and problem-based learning?

The final roundtable, *Preparing for Environmental Practice*, explored the role of skills-based courses and clinics in environmental law education and whether their roles are changing or should change. This roundtable featured Dean and Myra and James Bradwell Professor of Law at Northwestern's Pritzker School of Law, Hari Osofsky;[34] Director of the Environmental and Regulatory Law Clinic at the University of Virginia School of Law, Cale Jaffe;[35] and Professor of Law and Director of the Environmental Law and Justice Clinic at Golden Gate University, Helen Kang.[36] The panelists examined how we can continue to prepare students for their careers beyond law school, and explored questions such as: What skills will the next generation of environmental lawyers need to be prepared to practice? What is the role of clinics and experiential learning? Are there new strategies to addressing emerging environmental issues?

The following transcripts from each of the three roundtables in this workshop series document the roundtable discussions and provide ideas and models for thinking about how law schools can best prepare the next generation of environmental lawyers. We discussed learning opportunities like the role of community-based learning, field studies, interdisciplinary offerings, problem-based learning, and technology. We talked about the importance of teaching deep listening skills as we help our students prepare to represent a

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[34] *Hari M. Osofsky*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/faculty/profiles/HariMOsofsky/ (last visited May 28, 2022).

[35] *Cale Jaffe*, UNIV. OF VA. SCH. OF L., https://www.law.virginia.edu/faculty/profile/caj5f/1176168#:~:text=Cale%20Jaffe%20is%20director%20of,national%2C%20state%20and%20local%20levels (last visited May 28, 2022).

[36] *Faculty: Helen Kang*, GOLDEN GATE UNIV., https://www.ggu.edu/shared-content/faculty/bio/helen-kang (last visited May 28, 2022).

diverse set of clients in their careers. We explored courses, issues, and topics outside of traditional—and in some cases outmoded—forms of federal statutory and regulatory environmental law. And we shared ideas for how legal education can improve in the areas of equity, inclusion, and justice.

Reflecting on this series of roundtables, we are struck by the level of interest and engagement in this topic from professors teaching environmental law. Law professors rarely have the opportunity to gather and focus on sharing lessons learned from their teaching. It was invigorating and encouraging to see how much interest and creativity there is in our professional community for working together to teach our students in the best way possible. We hope this rich discussion from our collective environmental law teaching community serves as a starting place for continuing to share ideas on both how to best educate future environmental lawyers, and how to adopt the recommendations of extensive research on curriculum development and apply them to our field of environmental law.

ROUNDTABLE ONE
THE ESSENTIAL ENVIRONMENTAL LAW CURRICULUM

Keith Hirokawa,[*] Steph Tai,[**] and Elizabeth Kronk Warner[+]

I. IN 2020, THE ABA'S COMMISSION ON THE FUTURE OF LEGAL EDUCATION FOUND THAT LAW SCHOOLS ARE "PREPARING THE NEXT GENERATION OF LEGAL PROFESSIONALS FOR YESTERDAY RATHER THAN FOR TOMORROW."[1] WHEN IT COMES TO LAW SCHOOL ENVIRONMENTAL LAW CURRICULUM, DO YOU THINK THIS IS TRUE? AND IF SO, IN WHAT WAYS?

Dean Kronk Warner:

I think the answer is yes and no. Traditionally, the focus in environmental law—at least how I was taught when I was in law school—was this focus on litigation-based strategies and also on federal environmental law. I think that, when we solely focus on those two issues, that goes to the critique we saw from the ABA.[2] Any time you are talking about litigation, oftentimes that means that there's been a failure to find a way forward through collaboration, although certainly litigation has its relevant place. Of course, as we all know, the federal government has not had any significant innovation in the environmental space since 1990.[3] So, to continually refer to federal environmental statutes, I think, really limits us in the field.

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[**] Professor of Law, University of Wisconsin-Madison Law School; J.D. 2000, Georgetown University Law Center; Ph.D. 1997, Tufts University; B.S. 1992, Massachusetts Institute of Technology.

[+] Dean and Professor of Law, University of Utah S.J. Quinney College of Law; J.D. 2003, University of Michigan Law School; B.S. 2000, Cornell University.

[1] Commission on the Future of Legal Education, *Principles for Legal Education and Licensure in the 21st Century*, AM. BAR ASS'N 3 (2020), https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cflle-principles-and-commentary-feb-2020-final.pdf [hereinafter ABA Principles].

[2] *See id.* (criticizing the American system of legal education and its failure to respond to modern challenges).

[3] *See* Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101–13109 (1990); *see also 1990 Clean Air Act Amendment Summary*, U.S. EPA (last updated Dec. 8, 2021),

In response—and what we are starting to see in law schools—is a focus on alternative skills; no longer focusing solely on those litigation-based skills, but also things like collaboration. At the University of Utah Wallace Stegner Center for Land, Resources and the Environment, we have the Environmental Dispute Resolution Center where we have been working on developing those skills and helping students to understand that oftentimes, although certainly not always, environmental challenges can be looked at and addressed through collaboration.[4] For example, in Utah, one of our big challenges in 2020 was the rise of "Zoom Towns." Zoom Towns in Utah have been on the rise because everybody wants to come to Utah because they can telework, and they want to be right outside of Zion National Park.[5] This puts huge environmental stresses on many of our communities around these beautiful natural places. We have been working on collaborating with the relevant stakeholders in the existing townships to come up with some solutions.

Legislative solutions are another option. That is something I always talk to my students about when I teach at the intersection of Indian and natural resources. State legislatures and Congress have been our friends in many instances. Sometimes going to the legislature, whether that means the state or the federal legislature, can be really helpful.

I think we also need to focus and shift our curriculum to consider state and local government solutions. I, too, am really excited about what the Biden Administration is doing—but certainly we have learned from the past four years that we cannot rely on the federal

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https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary (describing the "progressive and creative new themes" that the CAA was amended to include in 1990).

[4] *Wallace Stegner Center: Environmental Dispute Resolution Program*, S.J. QUINNEY COLL. OF L., https://sjquinney.utah.edu/stegner-center/edr/ (last visited May 19, 2022).

[5] *See* Stacy Young, *The Slovenly Wilderness: Anatomy of a Zoom Town*, CANYON CNTY. ZEPHYR (Mar. 31, 2021), https://www.canyoncountryzephyr.com/2021/03/31/the-slovenly-wilderness-anatomy-of-a-zoom-town-by-stacy-young/; *see also* Lisa Potter, *The Rise of 'Zoom Towns' in the Rural West*, UNIV. OF UTAH: @THEU (Oct. 14, 2020), https://attheu.utah.edu/facultystaff/the-rise-of-zoom-towns-in-the-rural-west/.

government and that there is a lot of great work to be done. Tribes, for example, have been hugely innovative in the area of environmental law.[6] There is a lot that we can learn from tribes that can be helpful to other communities.

We also, of course, need to make sure that our students are familiar with rulemaking processes and know how to engage in those processes. I know that when I was in practice, the comment period was as important as the litigation period because if you did not set up that excellent record in the comment period, you were doomed to fail in the litigation period.

Last, but not least, I want to emphasize the importance of race and environmental justice. I have been overjoyed by the recent executive orders recognizing the importance of race and the intersection between race and the environment.[7] I applaud the Administration for that, but we need to talk more openly about race and how, especially in our environmental and natural resources communities, these two things really intersect. I think it is important that we acknowledge that our community, those of us who teach in this field, is overwhelmingly not diverse. And so, talking about how we can bring diversity into the community and the classroom is really helpful. Overall, I think it is about how to incorporate skill-building into our classes.

Professor Tai:

I want to also emphasize skills training. I think that the way the pandemic has forced many of us to teach—which is online—has actually opened me up to different possibilities in terms of teaching skills. I have shortened my lecture period. I have added breakout rooms where the students come up with issues and they negotiate positions with each other through negotiation and collaboration exercises.

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[6] Amber Aumiller, *The Intersection of Tribal and Environmental Law*, UNIV. OF UTAH: SUSTAINABILITY (Jan. 6, 2020), https://sustainability.utah.edu/the-intersection-of-tribal-and-environmental-law/.

[7] *See* Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) (creating, in part, an interagency council to promote the Biden Administration's policy of securing environmental justice); *see also* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021) (stating that racial inequity is persistent in the nation, and actions must be taken to systematically remove barriers to equal opportunity).

I have also had students revise group documents. For example, I recently did a drafting exercise addressing changes to the Clean Air Act's New Source Review permitting program.[8] The exercise asked them, "what would you do if you wanted to more deliberately address climate change?" The students had a lot of different kinds of things to say, such as "modify[ing] the list of considerations available in establishing NAAQS to include 'combating climate change' and 'creat[ing] a new Title VII that addresses it specifically and explicitly so that the current Supreme Court cannot miss the intention.'"[9] I think taking into account all these different types of technology can help us incorporate some of the skills training, even in the context of a regular sort of lecture-type classroom.

Professor Hirokawa:

Building on Dean Warner's and Professor Tai's comments, I think one of the interesting things is how the pandemic, in an unanticipated way, made a lot of us have to learn the technology that a lot of these students have grown up on. In line with the ABA Commission's idea,[10] we have to start teaching with the resources we have, not the resources we used to have. There's been this sort of fortunate adaptation with our technology, which I think is great.

I think there are a couple of additional things—that maybe we were not thinking about before—that we can think about now. One of them is that federal environmental law does not need to be thought of as a foundational or prerequisite course for the rest of our environmental courses. Given how broad and diverse the practice of environmental law is[11] and how environmental law has become and is

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[8] *See* 40 C.F.R. §§ 51.160–51.1314 (2020) (identifying the various changes in the New Source Review Program).

[9] Kelly Meyerhofer, *UW-Madison Professors Consider Urging UW Foundation to Divest from Fuel Companies*, WISC. ST. J., (Feb. 1, 2021) https://madison.com/news/local/education/university/uw-madison-professors-consider-urging-uw-foundation-to-divest-from-fossil-fuel-companies/article_514e881b-a8f2-57cf-b950-5ff12d1cc5fa.html (demonstrating student concerns about climate change).

[10] ABA Principles, *supra* note 1.

[11] *See e.g.*, Ashley Harvey, *Could You Already Be Practicing Environmental Law?*,

becoming something a little more pervasive throughout practice rather than a specialty,[12] it is something we are thinking about.

We can also rethink what counts as environmental law. There are different players that find environmental laws relevant, and there are the different ways that common law and statutory law have become central to the practice of environmental lawyers. In addition, there are unanticipated ways that we find environmental issues arise. And, of course, our job is to open up the students' eyes to see those issues, whether it is financial planning and tax or recognizing that a lot of land-use lawyers can be practicing environmental law for their entire careers without even breathing federal environmental statutes.[13] In sum, rethinking the different subject matters that go into an environmental law curriculum might not be a bad idea.

The other thing I would add is that for our future environmental lawyers, we might think about more education in science. What are the core issues future environmental lawyers need to know to be more effective than we have been? Some of those things include a better understanding of how to communicate with experts and a better understanding of why certain policies might work and might not.

II. WHAT ARE THE THREE OR FOUR ENVIRONMENTAL LAW COURSES YOU WOULD OFFER AT YOUR LAW SCHOOL? HOW WOULD YOU CHOOSE THEM AND WHY?

Professor Tai:

This is a difficult question because we have these fundamental courses that cover established environmental law and natural resources law. They cover the Environmental Protection Agency, Department of Interior, Department of Agriculture, and possibly others. I think it is

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AM. BAR ASS'N, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/environmental-law/could-you-already-be-practicing-environmental-law/ (last visited May 19, 2022).

[12] *Id.*

[13] *See e.g.*, *Zoning and Land Use*, JUSTIA, https://www.justia.com/real-estate/home-ownership/owning-a-home/zoning-and-land-use/ (last visited May 19, 2022) (detailing different areas of land-use law including state- and municipal-level laws).

helpful to know these core statutes.[14] But, I agree that they could be reformulated. I can imagine a school that has some kind of synthesized course that keeps these core statutes as part of the curriculum.

But I also once saw a survey of mid-career practicing attorneys in terms of subject areas that they encountered in their work.[15] Environmental law was actually one of the top ones; not the primary core subject area, but peripheral to many of the things that people were doing.[16] I think having that foundational environmental law introduction is something that would be great in terms of exposing students who might not be intending to be core environmental lawyers, but might come across it in practice in terms of disclosures or in terms of real estate transactions.

Thus, I also think some kind of environmental transactions course would be really useful. This course could help synthesize some of the things that Dean Warner raised,[17] which includes starting to collaborate. I teach a class in Advanced Contracts where students write research papers based on different types of areas on contracts. Many of the students have written about sustainable contracting, and it'd be nice to have a course that teaches methodical approaches for this. It would be especially helpful for students who might end up representing companies that want to make their brand in that area. And so that's another area. So, I guess I'm for definitely including something that covers the core statutes. But I'm also for having a synthesized class that contains some kind of transactional kind of work. And I actually think—and this is a shout out to Hope Babcock here[18]—providing some kind of experiential training is really, really important. And you know it since—I know that you already have

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[14] *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1252 (1948); Clean Air Act, 42 U.S.C.§§ 7401–7671 (1963); Endangered Species Act, 16 U.S.C.§§ 1531–1544 (1963); Federal Land Policy and Management Act, 43 U.S.C.§§ 1701–1787 (1976).

[15] Mike Hammell, *Updated: Growing Legal Practice Areas for Lawyers in 2019 and 2020: From Blockchain to Cannabis Law*, LAWFUEL, https://www.lawfuel.com/blog/growinglegalpracticeareas/ (last visited May 19, 2022).

[16] *See id.* (describing the many different forms environmental law work can take).

[17] *See supra* Part I.

[18] Faculty Profile of Prof. Hope Babcock, GEORGETOWN L., https://www.law.georgetown.edu/faculty/hope-babcock/ (last visited May 19, 2022).

another roundtable to talk about that.[19] But I think experiential training is super important to any kind of environmental law.

Dean Kronk Warner:

Researchers, such as Professor Deborah Merritt at the Ohio State University, studying the bar exam have found that most law school graduates and newer lawyers can learn new areas of doctrinal law.[20] What is really important during their time in law school is to learn legal skills, as it is much more difficult to learn skills after graduation.[21] So, building on this idea of the importance of teaching and assessing skills in law school, all of my suggested classes would incorporate substantial skills components.

I think if we focus on requiring skills-based classes, it matters less what's happening nationally in terms of who's in the presidency, because then our students can pivot—as they're forced to—depending on who's overseeing federal agencies.

Following the importance of developing a cohort of environmental and natural resources classes that focus on skills, I would next go back to the idea that it's also really important to talk openly about the intersection between these issues and race, because for me, all of this comes back to race. It really does. For example, here in Salt Lake City, we have an air pollution problem and it's our Latinx

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[19] *See Vermont Law School to Host Virtual Roundtable Series on the Future of Environmental Legal Education*, VT. L. SCH. (Jan. 19, 2021), https://www.vermontlaw.edu/news-and-events/newsroom/press-release/vermont-law-school-host-virtual-roundtable-series-the-future (announcing a series of roundtable discussions featuring faculty panelists from law schools across the U.S. and addressing "a different phase of student development: from in-class doctrinal courses, to creative and critical thinking skills, to clinical and experiential work").

[20] Deborah Jones Merritt & Logan Cornett, *Building A Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 6 (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (explaining that the research suggests that "new lawyers do not rely upon a static set of legal rules and skills carried into the workplace[,]" instead, knowledge evolves continuously during their early practice years).

[21] *See id.* at 12 (explaining that cognitive skills like communication, research, legal analysis, and critical thinking are critical competencies for practicing law, whereas knowledge of specific legal principles and memorization is much less important).

and lower socio-economic communities that are disproportionately impacted by the air pollution.[22] There's a lot of intersections there and having an understanding of race and how it informs these issues, I think is incredibly important.

Professor Hirokawa:

I couldn't agree more with everything that was said. Picking up on one of the issues raised by Dean Warner, I think it is important to build time into the curriculum to think about perspective and approach. Considerations that we need to take into account include scale and fragmentation, comprehensive schemes, racial disparity, economics, ethics, and cultural values, all of which provide effective framing opportunities. Taking the time for students to work through what some of these different frameworks are helps, because the analysis really changes how we look at environmental law.

I teach a seminar where we think about different constructs of nature.[23] I like to think it pushes the students to frame the issues and injuries differently, which might be especially important in an era of climate change when we are constantly recasting environmental challenges and controversies so we can construct new pathways to justice. I think that is an important course, although I defer to Professor Tai on some of the foundational materials that students need to understand how we have practiced law in the past.

I also think that local environmental law is an important subject for helping students to get their heads around the way things happen on the ground, and the very different conversation that we have when

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[22] *See Salt Lake City Environment Equity Report*, ABC OUR AMERICA, https://ouramericaabc.com/equity-report/salt-lake-city/environment (last visited May 19, 2022) (showing that Latinx and Black communities have higher respiratory and cancer risks caused by air pollution in the Salt Lake City region); *see also* Lisa Potter, *Persistent Inequitable Exposure to Air Pollution in Salt Lake County Schools*, UNIV. OF UTAH (May 15, 2020), https://attheu.utah.edu/facultystaff/persistent-inequitable-exposure-to-air-pollution-in-salt-lake-county-schools/ (announcing a study that explored social disparities in air pollution, and found persistent social inequalities in Salt Lake County).

[23] *See generally Environ Law, Policy & Ethics*, ALB. L. SCH., https://www.albanylaw.edu/programs-courses/courses/environ-law-policy-ethics (last visited May 19, 2022) (describing one of Professor Hirokawa's courses that examines the foundational ideas behind environmental and natural resource law).

we are discussing environmental issues in a community versus on a nationwide scale. It is a different vocabulary and a different set of values that go into it, besides the cultural aspects and the identity and sense of place and community that go into why we do environmental law. We can certainly run our students through a lot of those ideas and have them work through the issues, causes, and effects in a local class.

III. WE HAVE DISCUSSED THE IMPORTANCE OF EQUITY AND JUSTICE AND SKILLS-BASED LEARNING, WHAT OTHER THEMES ARE CRITICAL FOR A CHANGING ENVIRONMENTAL LAW CURRICULUM?

Dean Kronk Warner:

One of my pet peeves is that tribes are rarely included in a discussion of environmental and natural resources. As mentioned earlier, many tribes are developing innovative regulations within this space, but rarely are tribal contributions considered when looking at "solutions" to environmental and natural resource challenges.[24] As separate sovereigns existing within the United States, tribes can be exceptionally valuable partners in addressing challenges facing society today. Tribes have control over approximately 56 million acres.[25] We are a significant portion of the population—especially in the West—and yet we tend to be invisible. Anybody who is going to work in environmental natural resources— especially if you are going to be west of the Mississippi—must know about tribes and tribal environmental law. So that is just my platform, and I'm sticking to it. You probably heard me say it before, but I think in general, a very basic understanding of Indian law is really helpful to anyone who wants to practice environmental and natural resources law.

Professor Hirokawa:

I would like to build on something Dean Warner and Professor Tai said about practice-ready and professional skills. In my

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[24] *See generally* Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUMBIA J. ENV'T L., 42, 43–45 (2014) (explaining the various ways that tribal governments exercise sovereignty in environmental law, and the importance of studying it).

[25] U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., PROCEDURAL HANDBOOK: GRANTS OF EASEMENT FOR RIGHT-OF-WAY ON INDIAN LANDS 87 (2006).

course, State and Local Environmental Law, I have invited wetlands professionals to join the class in the field and show us how to perform wetland delineations. That was pretty interesting stuff, to work our way through the Army Corps Wetlands Manual and see if we can understand how it works.[26] That was a pretty helpful exercise and I think it accomplishes many things. I always like to ask the consultant, "who is the most important person in the room?" And, of course, the students always are surprised when the consultant does not identify lawyers. But, you know, little things like that end up giving a good perspective on the role of the lawyer in the process.

We also do a lot of scenario-based projects, where a developer in the community allows us to use their property and pretend to develop it. Students are assigned "clients" from among the various stakeholders. We work our way through the application and regulatory review process. This requires developing an administrative record that includes public comments, habitat reports, and wetlands reports, so that the students can dig into them and engage both the law and the "facts." We meet for negotiations and hold several hearings. But seeing the different steps of the process gives students opportunities to think about what competency means at different stages. How are they supposed to play a lawyer's role in this process?

I also make sure to get race into the dialogue throughout the curriculum. A lot of people have been doing it for a long time, and some people are just starting. But it is great that the conversation is taking such a central role in how we are designing the curriculum.

Dean Kronk Warner:

If I could just build on that one point and then also address another issue. We all can't be experts in everything. For example, I have never lived in New York City. I do not know what it is like to do environmental justice in New York City. So, for me to be able to teach it, it would be somewhat limited. Conversely, I have all my experience

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[26] *See generally Corps of Engineers Wetlands Delineation Manual, Wetlands Research Program Technical Report Y-87-1*, ENV'T LAB'Y, U.S. ARMY CORPS OF ENGINEERS vii (Jan. 1987) (describing the technical guidelines and methods of a multiparameter approach to wetlands delineation, for purposes of Section 404 of the Clean Water Act).

in Indian country. So, I think one of the things that we keep going back to is this theme of technology—building on Professor Hirokawa's point. We can collaborate a lot more. For example, maybe Professor Tai could come in and teach a class about her appellate experience. One of the things I really love about our environmental and natural resources law community is that we tend to be close; let's rely on each other for each other's skills and try to figure out ways to leverage these new technological skills that we have to build better classes in general, which I think goes to Professor Hirokawa's point. We do not have to all be generalists and experts on everything. We also do not have time to do that.

I'll just raise one more issue and that concerns the question of: "If somebody is going to take one environmental class, what do you want them to take?" One of the things that the University of Kansas School of Law does is a quick and dirty survey class for business organization that is three credits. But then if you want to do a really deep dive, you can do a four-credit business associations class that covers the same material but also goes deeper.[27] We might consider something similar for environmental law. For somebody who just wants to know where the litigation or the compliance pitfalls are, here is your survey class. But for the person who really wants to practice in this area, here is a deep dive.

IV. LET'S SAY YOUR LAW SCHOOL HAD THE GOOD FORTUNE TO BE GRANTED A SMALL AMOUNT OF FUNDS TO IMPROVE THE ENVIRONMENTAL PROGRAM. WHAT WOULD YOU LIKE TO SEE CHANGED TO HELP PREPARE STUDENTS FOR TOMORROW? WHAT WOULD YOU PRIORITIZE?

Dean Kronk Warner:

Money is always the rub, and most of our schools are even in worse situations now after COVID because our universities are bleeding money. But if I had some "extra" money, I would really like to come up with some fellowships or some funding to build on this idea of interschool classes. Dean Hari Osofsky (Northwestern)

[27] *Courses*, UNIV. OF KAN. SCH. OF L., https://law.ku.edu/academics/courses (last visited May 19, 2022).

mentioned this in the comment thread, to talk about issues and how they differ across the country.[28]

For example, in an environmental justice class, we might be able to combine the experiences of someone like, Professor Rebecca Bratspies (CUNY), who could talk about her experiences in New York City,[29] and I could talk about my experiences in Indian country, and maybe Dean Osofsky could come in and talk about her experiences with energy justice. Such a collaborative class could be a wonderful learning opportunity for students. The assessment piece of it would be difficult, but I think such a collaborative class could be very interesting and beneficial to students. So, I would be really interested in investing in that. And then also growing clinical and experiential opportunities. They are expensive because in a good clinical experience, you have no more than eight students per instructor. But I would love to do an environmental justice clinic and focus on that type of work. So, if I had a small amount of money, those are some things I would be interested in doing.

Professor Tai:

If I had some money, I would like to have someone help accumulate deep materials for exercises. I am really, really into negotiation exercises, rulemaking exercises, and others. Part of that takes a lot of research. You need research to develop the core materials to give information to the students in a way that is not overwhelming—edited down, just accessible. It would be really great to have money dedicated to doing that.

The other thing, too, is that money could be used to hire an administrative assistant to host some place for us to crowdsource group exercises. I would love that. I think that we could probably do that in a Google Doc with a lot less oversight and maybe it would be crazy. But, send me an email afterwards and I am willing to put together some Google site that will be haphazardly updated because I am haphazard, and we can put examples of group exercises we have done that have been successful for students. They can be short ones or they could be

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[28] Written comment from Dean Hari M. Osofsky, Nw. Pritzker Sch. of L.

[29] *Rebecca Bratspies*, CTR. FOR URB. ENV'T REFORM, CITY UNIV. N.Y. SCH. L. https://cuer.law.cuny.edu/?page_id=667 (last visited May 19, 2022).

long ones, where people have accessible background documents. This would be a clearinghouse of exercises that include rulemaking, transactional work, and all of this other stuff; it would be fantastic. It would be nice if there was money for someone else to do it, but I can do it haphazardly, administered through Google Docs if we want.[30]

Professor Hirokawa:

I have little to add to those great ideas from Dean Warner and Professor Tai, but I think I saw Professor Karrigan Bork (UC Davis) in the guest list here. I want to give a shout out to him and say, if I had a little bit of money, I might consider a fleet of kayaks or more insurance for the law school to cover more field trips. Professor Bork's field study course covers in-depth issues on the ground. I cannot stress enough the importance of getting out and touching the dirt to really prepare students to practice in this area of law. Students have reported a real feeling of ownership of the learning process from getting out and looking at a pasture, engaging in a dialogue of what has to change to get to a completed development, and thinking about how values are going to be transformed for that land over time. The little bit of money that could cover a fleet of canoes or kayaks could facilitate that.

Dean Kronk Warner:

I love that.

V. LET'S TALK ABOUT ASSESSMENT AND GRADING. DO YOU THINK THAT THERE IS A CORRELATIVE ASSESSMENT AND GRADING THAT SHOULD GO ALONG WITH THE NEW SETS OF COURSES AND PEDAGOGY THAT WE ARE DISCUSSING?

Professor Tai:

I'm just going to say I hate law school grading and especially at our school where the grading curve is in our faculty rules and the faculty rules are part of our regulations. They are basically like regulations that we are subject to because we are a state school and reformulating them is very, very difficult and kind of horrendous. I

[30] Professor Tai created this crowdsourced database through Google Drive. To access or contribute, please email tai2@wisc.edu.

don't know what else to do about this. I think there is maybe a differential kind of thing between state schools, which have less flexibility, and private schools, which have more flexibility in terms of reformulating grading schemes.

I also think the grading schemes can raise difficulties in terms of experiential learning, and in terms of students feeling like they are getting an appropriate grade for the amount of work they put in.

Dean Kronk Warner:

I would say overall, this is not something specific to environmental law professors. On the whole, law schools are really bad at assessment.[31] It is because of, first of all, as Professor Tai alludes to, the grading curve. Our grading curves are not pedagogically sound.[32] They are not there for pedagogical reasons. They are there for employers to help measure students against each other. Second, many of us have never been trained in how to assess and grade—and the ABA has been trying to move us that way, but we still have a lot to learn.[33] But I think a lot of us have never sat down and said: "What are my learning objectives? What do I want the students to come out with? And what assignments and assessment rubrics am I using to accomplish those objectives and/or goals?" So, there is this misalignment. I will admit that this is really hard to do, and I do not have the answer. But I think in order to accomplish that, we need to sit back and have a discussion about the use of the grading curves for all the reasons that Professor Tai articulated, but also to think hard about

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[31] *See generally* Pradeep Dubey & John Geanakoplos, *Grading Exams: 100, 99, 98, . . . or A, B, C?*, 69 GAMES & ECON. BEHAV. 72 (May 2010).

[32] *See generally* Clyde W. Bresee, *On "Grading on the Curve"*, 50 THE CLEARING HOUSE 108 (Nov. 1976) (describing different ways in which the "intellectually indefensible" system of grading on a curve is damaging to students and their teachers).

[33] *See 2020-2021 Standards and Rules of Procedure for Approved of Law Schools*, AM. BAR ASS'N 27 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf (establishing the standard that law school faculty "shall possess a high degree of competence, as demonstrated by academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship" such that the school complies with other ABA standards).

it: what our learning objectives are for each class and how we are using our assessments to accomplish those learning objectives. I think that will also get to Professor Tai's point about student frustrations and grading and our disappointment in grading. If we can really say that this assessment, this assignment, will get you to these learning objectives, then it just becomes much more fulfilling. And you can make that argument to the student because there is this clear connection. But it's hard work and I acknowledge that. And that's something I struggle with personally.

Professor Tai:

I think that's a great discussion. I want to add to that, because now this makes me think about what we just talked about in terms of what would we do if we had an unlimited amount of money to dedicate to this. Other disciplines have teaching assistants (TAs). They can pay for TAs to do this sort of intermediate grading, which we law professors cannot due to other time commitments, which is partly why we in our discipline do not do that. (There are a lot of other reasons why we do not do that, too.) But a large part of why we fail to provide intermediate assessments is that we do not have dedicated money for people to do this kind of review. It would be great to have second- or third-year students who have taken the class to go through and help give comments. Then I could assign, say, a FOIA request, or a comment on a regulation. The upper-level students can take a first crack at providing a review and then I could supervise these reviews. Having money to do that would be great. We cannot do that here, but it would be really wonderful. And I think that would really enhance student learning if that was available.

Professor Hirokawa:

I think we are mired in this very complicated situation where grades are not necessarily used to assess performance so much as to get a job. It is not that different for the Bar exam where testing has to meet a certain standard. But the difficulty there is, it is losing student ownership of performance at some point, where the grade is for the grade itself and sort of disconnected from what the students are learning and how hard they try, how well they prepare, and similar issues.

When we are thinking about how to assess experiential learning, breaking it into different components communicates the kinds of skills we want our students to pay attention to. So, for instance, think about a clinical grading rubric that has, let's say, four components: a pre-performance planning component, a performance component, a post-performance correction, and reflection component, and a component for professional responsibility. Ensuring students understand these types of competencies and how they relate to the various components might allow students to better realize these competencies through the learning process and take more ownership of the assessment process than they're doing right now.

I also think that we need to adapt. As much as grading is bad, if we are going to stick with it, we need to adapt grading to the kinds of skills we communicate through our grading rubrics, the expectations we want the students to meet, and what we consider competency, before letting them go out in the world and cause trouble.

VI. QUESTION AND ANSWER SESSION

The following questions were raised by faculty members in the virtual audience during the roundtable. Each question is followed by the panelists' response. Not all panelists responded to all questions.

A. In bringing skills and collaboration into the classroom, do you raise your own stories from your experience? If so, do you worry about alienating students who do not share those views?[34]

Professor Tai:

I bring up *amicus* brief writing in my classroom. I do it with a lot of caveats. I say, "Look: I participated as an *amicus* in this particular kind of case drafting a particular brief," but I don't judge any students if they hold different views from me, the main thing is that they are able to engage with the topic. And it has worked well. I have had Federalist Society students who are opposed to the position I took in the brief and who still loved my class. So, I think that disclaimer worked.

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[34] Question from Cale Jaffe, Assoc. Prof. of L., Dir. of the Envt'l L. and Cmty. Engagement Clinic, Univ. of Va. Sch. of L. (Jan. 28, 2021).

I also tell them that part of why I do it is to keep my skill set alive. Drafting briefs is fine, but also just going through the hassle of going through the D.C. Circuit system and uploading the things. Just getting into that nitty gritty kind of stuff and remembering how awful it is and how you have to use a certain type of computer and cannot use some browsers. I think it puts me in the practitioner mindset that is mindful of problems that my students are going to have to face. It is this regular day-to-day sort of aspect of lawyering that we as law professors do not often think about. I want to force myself to see that. I do so through the lens of sort of doing repeated *amicus* briefs. So, I do tell those war stories, but I also incorporate things that are just sort of regular lawyering kind of stories that I think are not necessarily directed towards one particular viewpoint or another.

B. Do you have specific thoughts about how to best organize the field studies mentioned earlier in regard to such things as, what gets covered in the classroom versus what is covered in the field, how assessment is undertaken, and other topics along those lines?[35]

Dean Kronk Warner:

I do not necessarily have answers to Jason's excellent questions—our fabulous visiting professor—but I do want to give a shout-out to Dean Osofsky, who was talking about this idea of doing virtual reality field placements because our field experiences can be expensive. It is expensive, for example, to take my students to New York City or to take students from New York City to Utah. If virtual reality field experiences are an option, I would love to hear more. It also addresses some of the cost and disparate racial impacts because some students just cannot simply afford the field placements.

[35] Question from Jason Anthony Robison, Visiting Prof. of L., Univ. of Utah S.J. Quinney Coll. of L. (Jan. 28, 2021).

C. Is anyone at a school which either teaches statistics, policy analysis, or anything that would give students tools to make normative decisions or does anyone incorporate any of those tools into their "regular courses"?[36]

Professor Hirokawa:

So, that would be awesome. I do not have a component on statistics in the class, but we do engage in a lot of critical analyses of policies. It is unfortunate that I do not have the background to give them more tools to do that kind of analysis, but I would love to hear about it if somebody has some kind of process they use to teach that.

Professor Tai:

I do not have a specific process to teach that. I got very preliminary notes from the Ninth Circuit Judicial Conference about basic statistics for judges. I try to talk about different forms of critical analysis for scientific studies, but in a much more general way. That said, there actually is floating around somewhere a much more formulated thing about statistics for federal judges, which I think could be repurposed for this purpose.[37]

Dean Kronk Warner:

Correct me if I am wrong, but I believe George Mason has a program where they pay for you to learn about statistics and how to incorporate statistics into your class.[38] Don't they have a paid

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[36] Question from Howard Katz, Prof. of L., Legal Educator-in-Residence Cleveland-Marshall Coll. of L. (Jan. 28, 2021).

[37] *See* COMM. ON THE DEV. OF THE THIRD EDITION OF THE REFERENCE MANUAL ON SCI. EVIDENCE, COMM. ON SCI., TECH., AND L. POL'Y & GLOB. AFFS, NAT'L RSCH. COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE *xiii–xv* (3d ed. 2011) (describing the Federal Judicial Center's Manual and how it provides tools for "judges to manage cases involving complex scientific and technical evidence" and describes basic principles of major scientific fields).

[38] *See Law & Economics Center*, ANTONIN SCALIA L. SCH., https://masonlec.org/ (last visited May 19, 2022) (explaining the mission of the Law & Economics Center, and the various programmatic and funding opportunities available to legal professionals interested in learning more about law and economics).

workshop that law faculty can go to? I think that might be a good resource too for people who are interested in this type of work.

D. What do we owe the student who takes only one environmental law class in law school? Do we need a separate course for students who intend to practice in other fields compared to students who want to become environmental practitioners?[39]

Professor Tai:

I am going to be a traditionalist and say that is why it is helpful to have that sort of core statute coverage in class, even though it does not really reach everything that is related to the environment. But, if a student is going to take just one class, they are probably taking it because they want to know something about the main regulations or main statutes.

Dean Kronk Warner:

I think that is right. The next question is: How broad and how deep should the coverage go? If the student is taking the survey class, you probably want to be socialized into the world of environmental law, either because you have a general interest or because you want to make sure you are not going to get into trouble somewhere along the line. And so, the goal there can be really to familiarize students with a broad brush of those environmental statutes. Do you stick to just three major statutes, such as the Clean Air Act, Clean Water Act, and NEPA? Or do you broaden it? And that might depend on where you are in the country, and what the needs are.

[39] Question from Noah M. Sachs, Prof. of L., Dir. of the Robert R. Merhige, Jr. Ctr. for Env't Stud., Univ. of Richmond Sch. of L. (Jan. 28, 2021).

E. Do the panelists have any reflections on casebooks or other types of books that you have found valuable assigning, or readings for your students? How do you approach that?[40]

Dean Kronk Warner:

This is something that we have been really looking into at the University of Utah, just who's writing the casebooks, what's presented—not just in the environmental context but also in constitutional law and others—and what cases are being discussed. I think it is something that we should do a deep dive into and looking into doing some open source. We are calling them "anti-racism readers" as compendiums to the major casebooks. So, if anybody has any interest in that effort in your field, please let us know. That is something that we are working through to make available for free to everybody, open source. We are going to focus on anti-racism to start, but I also know that West Publishing has a small series of developing professional skills that they do,[41] which is literally just to do the skills exercises associated with the various doctrinal classes. If you have a casebook you love, and you do not want to redo your prep, but you want to incorporate skills, I found that this series is another good source.

I've been actively thinking about: who's writing the casebook? What are they covering? How can we at a low-cost include these discussions of what I am really focused on, anti-racism and skills? And so, if anybody has any interest, let us know. That's something that we are working on at the University of Utah. This is the topic of the Utah

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[40] Question from James Salzman, Prof. of L., Univ. of Cal., L.A., Sch. of L. (Jan. 28, 2021).

[41] *See e.g.*, *Developing Professional Skills: Environmental Law*, WEST ACADEMIC, https://faculty.westacademic.com/Book/Detail?id=2904#description (last visited May 19, 2022) (identifying one book in the Developing Professional Skills series that contains nine exercises designed to develop skills in drafting, client interviewing and counseling, negotiation, and advocacy in environmental law); *Developing Professional Skills, Constitutional Law*, WEST ACADEMIC, https://faculty.westacademic.com/Book/Detail?id=3263 (last visited May 19, 2022) (identifying another book in the Developing Professional Skills series that includes exercises like drafting client letters, revising legislation, and negotiating settlements over constitutional claims).

Law Review's symposium this year, so we welcome anyone who is interested to please join us on November 5 and 6.[42]

Professor Tai:

Along these lines, I think it is helpful for us as environmental law professors to keep talking to folks whose core teaching is outside —but adjacent to—environmental law. And in these discussions, we should give them easy ways to incorporate environmental law, especially environmental justice, into their curriculum. I find that a lot of students, for example, at Wisconsin, the students who are interested in all sorts of justice issues will go into criminal law, some civil rights law, and some immigration law. And those classes often act in a standalone kind of way. And I think that figuring out, with other faculty members, synergies between our different teaching areas will do a lot of good in terms of integrating these different curricula into a broader pedagogical arc.

Dean Kronk Warner:

I will offer one of the things I have really noticed in a lot of environmental casebooks is the absence of tribes and we are engaged in creating an anti-racism reading project at the University of Utah, not just for environmental law, but for other areas like constitutional law as well.[43] And so if anybody is interested in participating, we want to do it open source. We want to make it free and to provide those kind of anti-racism materials as a complement to your basic casebook.

Professor Tai:

I am going to regret this, but if you all email me, I will add you on the permissions list to create Google Docs that we can all keep editing to just incorporate exercises. I think that, as opposed to readings, exercise is the better way to sort of emphasize environmental

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[42] Univ. of Utah S.J. Quinney Coll. of L., *2021 Lee E. Teitelbaum Symposium - #IncludeTheirStories: Rethinking, Reimagining, and Reshaping Legal Education*, YOUTUBE (Nov. 15, 2021), https://www.youtube.com/playlist?list=PLrfMz_WZNoCYdan3vmmAx9kLLQOBa4o9_

[43] *Becoming Anti-Racist, #SAFEU*, UNIV. OF UTAH, https://safeu.utah.edu/becoming-anti-racist/ (last visited May 19, 2022).

justice and racism concerns. The students can see how this actually applies. I mean, you can read about environmental justice kind of issues in the abstract. I have written papers on them. I'm happy to assign that to them. But I do not think that really gets to them until they actually have to tackle that right in an actual exercise. And so, the more we can incorporate such exercises into their learning, the better. Like I said, I don't know why I am saying this, but, yes, I think it's important to do.

Professor Hirokawa:

I agree with all that. I actually use Professor James Salzman's book,[44] but I teach outside of the book quite a bit to provide different perspectives, starting this semester with some race readings outside of the book. I love this idea of collaboration with open-source publications, particularly with proper materials and activities to nail some of these things.

Dean Kronk Warner:

The price of entry to Professor Tai's Google Doc is to contribute an exercise, unless you are pre-tenure, you can have free access. Anybody who is post-tenure, you need to submit an exercise. I like it.

F. What strategies should we use to create collaborative open-source materials that could be used instead of a casebook? Professor Tai's Google Doc certainly seems like a great effort. It seems like this could include some of the materials that help introduce issues in different regions and maybe we create them for different kinds of courses?[45]

Dean Kronk Warner:

Yes, yes, yes, yes. I have to admit, a year ago, I considered myself a technology Luddite. But, the growth that I have personally

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[44] JAMES SALZMAN, & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY (5th ed. 2019).

[45] Question from Hari Osofsky, Dean and Myra James Bradwell Prof. of L., Nw. Pritzker Sch. of L.

experienced in the last two years, and what I have seen my faculty be able to do, is tremendous. I want to give a shout-out to Dean Osofsky, who is a great leader in the space. She has been organizing a deans' discussion group. So, one thing is to reach out to your dean to make sure that your dean is part of that group, because that group has been kind of brainstorming ways of doing exactly that.

This has just been a fantastic conversation. Let's work together and let's talk about how we can bring each other into our classes. And now that we have got this technology barrier broken down and the ABA is giving us a little bit more flexibility on what we can do online and in online spaces, let's talk it through. Assessments will always be the rub, but I think it's a really exciting time.

Professor Tai:

I am going to create the Google Doc for any kind of exercise that anyone comes up with. But it would be nice to eventually sort of organize in terms of topics. I have been developing a lot of exercises for an international environmental law casebook that I am one of the co-authors for. And so that's much less what we're talking about here, but still relevant in terms of crowdsourced exercises. It would be nice to sort of have key terms for whatever your exercises are about. As time goes on, if I have the bandwidth, I will try to give more guidance on what these things should look like to make things more uniform. I do not know if I have the bandwidth for that now. I do not know why I just said that I am going to do this right now.

Dean Kronk Warner:

Professor Tai, this is something that I think our team can help you with. I will reach out to you, and we can see how, if at all, we help. We can support.

Professor Tai:

Thank you. Thank you. Sometimes you just say things and then it happens. Thank you!

ROUNDTABLE TWO
ENVIRONMENTAL LAW EDUCATION: NEW TECHNIQUES IN THE CLASSROOM AND BEYOND

Lincoln Davies,[*] Karrigan Börk,[**] and Sarah Krakoff[+]

I. YOUR LAW SCHOOL IS GRANTED A SMALL AMOUNT OF MONEY AND IS DEVOTED TO IMPROVING ITS ENVIRONMENTAL PROGRAM AROUND FIELD STUDIES AND EXPERIENTIAL LEARNING. HOW WOULD YOU USE THAT FUNDING TO CHANGE YOUR PROGRAM TO HELP PREPARE STUDENTS FOR AN ENVIRONMENTAL PRACTICE FIVE OR TEN YEARS FROM NOW?

Professor Krakoff:

First, I want to briefly explain our curriculum, as it exists, to help with the context for my answer. At Colorado, we have what I think of as a developmental curriculum. We have a foundations class that is the gateway to the rest of the substantive classes. And then we have pollution law, water law, public lands, climate change—a full suite of doctrinal classes.[1] And then we have the cast of classes that already include the Natural Resources and Environmental Law Clinic and a field seminar that's offered every year either over spring break or at the end of the semester. I explain all that because what I think we *don't* need in Colorado is more courses added, necessarily.

I would use a small amount of money to do the following four things: First, I would provide support for professors across the curriculum to coordinate more between all these classes. For example, I'd just provide a little bit of money to somehow incentivize more work along the following lines: for example, if the clinical program is

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[*] Dean & Frank R. Strong Chair in Law at The Ohio State University Michael E. Moritz College of Law; J.D. 2000, Stanford Law School; B.S. 1997, University of Michigan School of Natural Resources & Environment.

[**] Acting Professor of Law at the University of California, Davis School of Law; PhD Ecology 2011, University of California, Davis Genomic Variation Laboratory; J.D. 2009, Stanford Law School; B.S. 2002, University of Kansas.

[+] Moses Lasky Professor of Law at the University of Colorado Boulder Law School; J.D. 1991, University of California, Berkeley; B.A. 1986, Yale University.

[1] *2021-2022 University Catalog: Law School (LAWS) Courses*, UNIV. OF COLO. BOULDER 3, 8, 12, 19, 23, https://catalog.colorado.edu/courses-a-z/laws/ (last visited May 9, 2022).

working on a case that was directly relevant to what's being taught in pollution or public land law, and the clinic students visit that doctrinal class and talk about a case study from the clinic. This would facilitate more integration throughout the curriculum in the stand-up classes, the clinical and experiential experiences, and the field courses, too. Second, I would encourage more outside visitors from real-life practice contexts to be brought into the full suite of courses. Third, and across the board, I would provide money for the professors in all those classes to do more with writing exercises and more constant assessment and feedback. And then finally, in terms of the field seminars we do offer, it would be great if we had enough money to absolutely guarantee that no student ever had to spend additional money to take a field course due to travel expenses. Rafting the Colorado River ain't cheap,[2] you know, and we raise money for that Colorado field course on a hand-to-mouth basis, pretty much. It would be nice to have a small pot of money to guarantee equitable access to the full curriculum without students worrying about taking on increasing debt. So, thanks—I'll wait for your check in the mail.

Professor Börk:

I would echo Professor Krakoff's comment about the funding for field experiences. There is an eco-geomorphology class here at UC-Davis that rafts the Colorado River, and we're going to start sending law students on that.[3] Funding for a big trip like that is always a challenge. I run a much cheaper four-day trip—a dry-land trip in vans—and this year, for 25 students, two volunteers, and one guide, our total cost for food, transportation, field notebooks, everything all in was about $175 a person to run, so we can run it for the students for less than the cost of a textbook. But people still seem to think of that as different than a textbook expenditure.

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[2] *See One Day Grand Canyon Rafting 2022 Season*, ONE DAY GRAND CANYON RAFTING, https://onedaygrandcanyonrafting.com/ (last visited Apr. 26, 2022); *One Day Grand Canyon Rafting*, RIVERS & OCEANS, https://www.riversandoceans.com/one-day-grand-canyon-rafting-trip/ (last visited May 9, 2022); *Westwater Canyon Full Day Rafting Adventure*, MOAB ADVENTURE CTR., https://www.moabadventurecenter.com/westwater-canyon-rafting (last visited Apr. 26, 2022).

[3] Kat Kerlin & Joe Proudman, *A Grand Adventure*, UNIV. OF CAL. DAVIS (Apr. 5, 2016), https://www.ucdavis.edu/climate/news/grand-adventure.

I do worry about creating barriers for participation for a lot of the people you'd really like to get out in the field, people who haven't had a whole lot of field experience, so funding that trip in a more permanent way is really high on my list.

The other thing that I've had the opportunity to do in some places is put technology into the hands of the students who are on those trips. I had a little technology grant when I was teaching at the University of the Pacific, and we bought five or six Go Pros and microphones, and some computer software to edit the GoPro films, and we had students make movies of the trip. It's a really nice way to keep the students involved, especially some of the techie students who might not be as excited to be out from behind the computer screen. It magnifies the impact of the trip—you can produce videos for public consumption that get other people talking about it, and get other students excited about it, and that can really be an educational opportunity. So, I think that would be a way I'd spend some of the money—on that technology.

And then the last thing, and you see this increasingly with PhD students—they realize they need a skill, but they don't want to take a whole class for it, so they take a short intensive workshop on it. For instance, a Geographic Information System (GIS)[4] workshop for a weekend where students will learn how to do GIS, programming, or statistical analysis. I think those kinds of experiences could be really good for environmental law students who don't have a science background and haven't worked with scientists. What can you do with GIS programming? What can we do with remote sensing?[5] Learning about some of the new statistical methods and what those things mean and the strengths and weaknesses, I think, would be really valuable for environmental law students.

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[4] U.S. Geological Survey *What is a Geographic Information System (GIS)?*, U.S. DEP'T OF THE INTERIOR, https://www.usgs.gov/faqs/what-geographic-information-system-gis (last visited May 9, 2022) ("A Geographic Information System (GIS) is a computer system that analyzes and displays geographically referenced information. It uses data that is attached to a unique location.").

[5] U.S. Geological Survey, *What Is Remote Sensing and What Is It Used For?*, U.S. DEP'T OF THE INTERIOR, https://www.usgs.gov/faqs/what-remote-sensing-and-what-it-used (last visited May 9, 2022) ("Remote sensing is the process of detecting and monitoring the physical characteristics of an area by measuring its reflected and emitted radiation at a distance (typically from satellite or aircraft).").

Dean Davies:

These are all great ideas, and I think I'm going to have to talk to Sarah offline about how to do four things with a small amount of money instead of just one or two.

I've often found that being immersed in a place or an experience really does add to how well one internalizes and learns the material and the context in which it operates.[6] I really like the idea of some kind of short, intensive field study course. I know Bob Adler at Utah has done one in the past on water issues where you go see a dam or a river and do a tour of the state for a week or two and really immerse yourself in the field that way.[7] I thought of doing something similar in Ohio with energy facilities—go to a nuclear plant, a coal plant, a mine, or see some shell methane.

A second idea, sort of alluded to, is doing something that mimics what is done in some of the other fields where you think about a spring break trip that works on immigration issues or some kind of poverty law issue[8]—but to do that in an environmental context where it's learning and service and application all at the same time.

And then this one's maybe in a bit of a different direction, but one thing I've noticed about the legal field is that a lot of students write scholarship. I'm not sure that's as common in other disciplines. For a small amount of money, I wonder about hosting a student-focused scholarship conference.

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[6] *See* Barbara Marras Manner, *Field Studies Benefit Students and Teachers*, 43 J. OF GEOLOGICAL EDUC. 128, 129 (1995) (finding field trips increase student understanding and provide greater retention).

[7] *See The Law Dean Series: Robert W. Adler*, OKLA. LEGAL GRP., https://www.oklahomalegalgroup.com/the-law-deans/robert-w-adler-university-of-utah-s-j-quinney-college-of-law (last visited May 9, 2022) (emphasizing the importance of real-world experiences outside of the classroom).

[8] *See Spring Break Highlights 2019: Immigration*, AM. BAR ASS'N (Apr. 12, 2019), https://www.americanbar.org/groups/center-pro-bono/publications/pro-bono-exchange/2019/spring-break-highlights-2019--immigration/ (providing examples of schools that participate in spring break trips focusing on immigration and poverty issues); *see, e.g.*, *Students Gain Experience in Southern Justice Spring Break Mission Trip*, DUKE L., https://web.law.duke.edu/features/2004/mission/ (last visited May 9, 2022); *Spring Break Pro Bono Trips*, HARV. L. SCH., https://hls.harvard.edu/dept/clinical/spring-break-pro-bono-trips/ (last visited May 9, 2022).

II. HOW WOULD YOUR ANSWER CHANGE IF IT WAS A BIG AMOUNT OF MONEY AND YOU GOT TO DREAM BIG?

Dean Davies:

I mean, that's when you get the dean's eyes really big, you know, an unlimited gift. One of the coolest models I've seen in terms of a really transformative move, as an institution, is a school called the Florence School of Regulation, out of the European University Institute in Italy.[9] They focus on a bunch of different areas of regulation, such as water, transport, and energy markets, and they pull together scholars from a bunch of different disciplines.[10] They're doing research, workshops, outward-facing public activities, and really pulling that all together. I would love to see a school do something like that, where you're bringing in everybody in our field and you're branching out beyond the law. I know there are some collaborations at universities where they're trying to push in this direction, but to build from the ground up would be incredibly cool. One way you might do that is to start with one aspect of our discipline. Maybe you'd start it on water, or land, or energy, and bring in big names and start there. So that becomes the expertise, the clearinghouse for where these conversations are occurring, where the cutting-edge scholarship is being driven forward in a way that's both academic but also public facing. I think that's where I would put the money if I had this giant gift.

Professor Börk:

So first, more clinical experiences. I think clinical experiences are invaluable—the more you have for students, the better.[11] They

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[9] *See generally Advancing Regulation in Europe and Worldwide*, FLORENCE SCH. OF REGUL., https://fsr.eui.eu/ (last visited May 9, 2022) ("The Florence School of Regulation (FSR) is a centre of excellence for independent discussion and knowledge exchange with the purpose of improving the quality of European regulation and policy.").

[10] *Residential Training*, FLORENCE SCH. OF REGUL., https://fsr.eui.eu/training/residential/ (last visited May 9, 2022) (providing examples of different courses offered such as Gas Regulation and Regulation and Integration of Renewable Energy).

[11] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87, 120–22 (Jossey-Bass 2007); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 113, 141, 185

respond to some of the critiques in the Carnegie report on online education, generally.[12] You can really do specialized clinics in an interesting way. We have a water justice clinic at UC Davis, and the students really get engaged with that and love working in that.[13] I'd really like to run a dam removal clinic someday, and that could be kind of what Lincoln's talking about. We have this amazing UC Davis Center for Watershed Sciences with people who study dam removal.[14] So let's create a clinic, where we bring together tech, science, and law, to actually look at the permitting you need to pull these dams out, and get the students involved in that over the two or three years that they are in law school. It's a really rewarding experience for the students and offers an opportunity to make real environmental improvements.

Also, more scholarships for students. In environmental law, students are competing for the top jobs at environmental nonprofits that don't pay very much at all.[15] It's like the lower the job pays, the harder people fight to get that job. And that doesn't work for a lot of our students who come out with a lot of debt. Doing something more to address that would be a good way to use that money. I'd also like to

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(2007) (discussing the benefits students gain from engaging in clinical experiences, such as responsibility, professionalism, and conscientiousness); *see* Jeff Giddings, *Contemplating the Future of Clinical Legal Education*, 17 GRIFFITH L. REV. 2–3, 9 (2008) (comparing clinical experience approaches in other countries); Colleen F. Shanahan et al., *Measuring Law School Clinics*, 92 TUL. L. REV. 547, 572–73 (Feb. 2018).

[12] William M. Sullivan et al., Summary, *Educating Lawyers: Preparation for the Profession of Law*, 9 (2007).

[13] *Water Justice Clinic*, UC DAVIS SCH. OF L. (Oct. 29, 2021), https://law.ucdavis.edu/clinics/water-justice-clinic.html.

[14] *See Projects and Research Programs*, CTR. FOR WATERSHED SCI., https://watershed.ucdavis.edu/research/areas (last visited May 9, 2022) (provides examples of research projects focusing on watersheds like the Central Valley Floodplains and Sierra Nevada Strategies).

[15] *See Environmental Lawyer*, UNITY COLL., https://unity.edu/careers/environmental-lawyer/#salary (last visited May 9, 2022) (showing how entry-level environmental lawyers make less money starting off);Terry Mann, *Salaries for Nonprofit Lawyers*, SAPLING, https://www.sapling.com/12085448/salaries-nonprofit-lawyers (last visited May 9, 2022) (explaining how nonprofit lawyers make far less money than their counterparts in other practice areas); *Nonprofit Lawyer Salary*, ZIPRECRUITER, https://www.ziprecruiter.com/Salaries/Nonprofit-Lawyer-Salary (last visited May 9, 2022) (showing the average salary of nonprofit lawyers is $71,548).

see more of the 3+3 programs where you can get students onto an environmental law track from the undergraduate level.[16] I'd particularly like to get more science students coming through and head them into law school as opposed to heading off to be engineers or to medical school, for example.[17] You can get those students through their degree programs more quickly and help them reduce their debt load.[18] Plus, those programs can actually generate additional revenue for the institution by bringing in students who otherwise wouldn't attend law school.[19] But it takes some money up front to get it going.

And then lastly, I'd provide more of the things that we should be offering. More formative assessments, more practical experience takes more time and more people. So, hiring TAs from upper levels within the law school—third-year students—to help with classes, hiring recent graduates as environmental fellows, getting more support for professors in the classroom, and giving students more feedback is a really good use of funds.

Professor Krakoff:

I already spent my small amount on some of the things that Professor Börk mentioned, which I totally agree with, and I love Professor Davies' vision, too. That's a tremendous vision. So, the thing I could say that's complementary, but different, is picking up on the theme of student debt. If I had a huge gift, I would make our law school cheaper across the board. Because scholarships are important, loan forgiveness is important for the reasons Professor Börk already

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[16] *See* Gabriel Kuris, *What to Weigh About Accelerated B.A.-J.D. Programs*, U.S. NEWS: EDUC. (Nov. 9, 2020), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/accelerated-ba-jd-programs-what-law-school-applicants-should-know (stating how 3+3 programs allow students to earn a B.A. and a J.D. in six years rather than seven).

[17] *See* Mark A. Cohen, *Wanted: STEM Graduates for the Legal Industry—and Some Reasons They're Not Applying*, FORBES (July 24, 2017), https://www.forbes.com/sites/markcohen1/2017/07/24/wanted-stem-graduates-for-the-legal-industry-and-some-reasons-theyre-not-applying/?sh=55e7a7292b72 (recognizing STEM students are turning away from law school and into engineering and technology, but law schools need STEM students because the profession is becoming more digitized).

[18] Kuris, *supra* note 16.

[19] *See id*. (noting the benefits of 3+3 programs to students who may not otherwise be able to afford and attend law school).

articulated, but what seems to be happening with my students is those scholarships are so hit or miss. We can't possibly fund, with scholarships and loan forgiveness, all the students who want to be nimble throughout their careers, about being the kind of environmental advocates that we need today—responding to a range of challenges, the justice and equity issues, and climate change. We need to do that to make the case for all our students that this is important work that you all should be doing without worrying about having to make enough money to pay off your debt load. I would use this unlimited gift to endow the tuition to make the law school cheap across the board and permanently. And that's really changed since I went to law school—that was the structure of tuition at public law schools at UC Berkeley and Davis.[20] And it's just not anymore and seems cheaper than many so-called publics. I think saddling our students for the next generation of environmental challenges with this kind of debt is wrong. So, I would tackle that.

III. WHAT ROLE IS TECHNOLOGY GOING TO PLAY IN THE NEXT FIVE TO TEN YEARS IN ENVIRONMENTAL LAW COURSES AND CURRICULA?

Professor Börk:

There are certain things that technology makes work a lot better, so it's about applying it to those things and not using technology just for its own sake. For example, last fall I had to modify my field course, California Environmental Cases and Places,[21] because of COVID, forest fires, and national forest closures in California. Normally, we travel as a class and visit the locations where famous environmental cases came from, like Mono Lake or Death Valley.[22]

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[20] *See* Howard B. Miller, *A Fresh Look at California's Law Schools*, CAL. BAR J., https://www.calbarjournal.com/August2010/Opinion/FromthePresident (last visited May 9, 2022) (recognizing an increased tuition in California public schools that is comparable to private schools).

[21] Karrigan Börk, *230C California Environmental Cases and Places*, UNIV. CAL. DAVIS (2021), https://law.ucdavis.edu/registrar/courses/230c-ca-environmental-cases-and-places.html.

[22] *See* Nat. Audubon Soc. v. Sup. Ct. of Alpine Cnty., 33 Cal.3d 419, 446 (Cal. 1983) (granting a request for reconsideration after finding California had an affirmative duty to account for public trust when planning and allocating water resources); Cnty. of Inyo v. Dep't of the Interior, 873 F. Supp. 2d 1232, 1246 (E.D. Cal. 2012) (holding that in 1979 the federal Bureau of Land Management intended to preserve Death

But last year, it felt like the whole world caught on fire–too many hurdles for a regular field course. So right before the class started, I switched to a format where each student was able to pick a case and then go on their own to the place where the case happened. I met with them ahead of time to talk about the science and the geology of the place they were visiting. Then they went and shot videos on their cell phones and came home and edited that. Our next class was watching these amazing student-created films of each site,[23] and they presented on their case and introduced the other students to the location. Then, we talked about that as a class and students would answer questions about the film they created. And it was great; it worked really well. The students were happy to be out of their houses and out in the field looking at actual things on the ground and not at a computer screen. I had a student who called in for class from the top of Mount Shasta, from eleven thousand feet—that was wonderful. And the class was much better than a normal class would be. Using technology to augment a normal class, or finding ways to get field experiences, is a good way of using technology.

I do want to sound a cautionary note on the idea of using technology to substitute for experiences. There's a big push that you see now for virtual field trips.[24] Geosciences is wrestling with this quite a bit, where people are taking virtual field trips, even virtual reality field trips, and there's a lot of research at the undergraduate level in particular about how well this works.[25] It shows similar learning outcomes to an actual field experience—you get similar learning and retention of knowledge that you would get by going to the place, both of which are better than normal classroom-based instruction.[26] And

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Valley's unique biological resources by restricting vehicle activities; thus, county-claimed 19th century rights-of-ways could not be paved or upgraded).

[23] *See*, *e.g.*, *Where the Mountain Was: The Story of Woodruff v. North Bloomfield Mining Co.*, YOUTUBE (Oct. 22, 2020), www.youtube.com/watch?v=kyQgGsph97A.

[24] *See* Holly Duskin, *Why Teachers Want Virtual Field Trips to Stay*, AM. ALL. OF MUSEUMS (Aug 18, 2021), https://www.aam-us.org/2021/08/18/why-teachers-want-virtual-field-trips-to-stay/ (showing teachers' continued interest in virtual field trips because they are cheaper and more efficient).

[25] *See* Chris Mead et al., *Immersive, Interactive Virtual Field Trips Promote Science Learning*, 67 J. OF GEOSCIENCE EDUC. 1, 2–8 (2019).

[26] *See id.* (concluding retention rates following virtual field trips were higher than in class teaching).

you can get the interdisciplinary pieces that you want from a field experience, which is great, but it's just not as good as actually being there. There are certain student learning outcomes that we look for from a field trip–attitudes, emotions, identity, values, sense of place, and the things that you really want to serve with a field trip. It's clear to me that the virtual field trips don't have those same outcomes.[27] So I think technology is great, but it's not a substitute for the real thing. It's really important to keep an eye on that overall goal and not lose that to an embrace of technology that ultimately doesn't serve it.

Dean Davies:

I would make two points. First, I think it's clear that technology is changing the practice of law.[28] That's something that law schools have to address systematically and across the curriculum, not just within the environmental law curriculum. For instance, the ways that research is done, or how we can make the delivery of services more efficient, like wills and trusts.[29] Artificial intelligence is going to

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[27] *See* Min Wang et al., *The Effect of Emotional Experiences in Fieldwork: Embodied Evidence from a Visual Approach*, J. OF GEOGRAPHY IN HIGHER EDUC. (Nov. 26, 2021), https://www.tandfonline.com/doi/full/10.1080/03098265.2021.2005002; Victoria Beth Sellers, Assessment of Affective Responses to Classroom, Outdoor, and Virtual Geology Field Experiences (May 2020) (Ph.D. dissertation, Clemson University) (ProQuest) (explaining that careful course design using VR and integrating individual outdoor experiences can mitigate some of these losses); Alexandra I. Race et. al., *A Comparative Study Between Outcomes of an In-Person Versus Online Introductory Field Course*, 11 ECOLOGY AND EVOLUTION 3625, 3625–30 (2021) (showing the field study outcomes of community building, self-efficacy, and connection to the field were lower in virtual trips than in field trips).

[28] Erin Degregorio, *Webinar Explores How Technology is Changing the Legal Profession*, FORDHAM L. NEWS (Oct. 20, 2020), https://news.law.fordham.edu/blog/2020/10/20/webinar-explores-how-technology-is-changing-the-legal-profession/; *Technology in the Law is the New Norm*, THOMSON REUTERS: LEGAL (Aug, 3, 2021), https://legal.thomsonreuters.com/blog/technology-in-law-is-the-new-norm/.

[29] David Lat, *How Artificial Intelligence is Transforming Legal Research*, ABOVE THE L. https://abovethelaw.com/law2020/how-artificial-intelligence-is-transforming-legal-research/ (last visited May 9, 2022) (explaining how artificial intelligence is making legal research faster and more reliable); GERRY W. BEYER, TECHNOLOGY'S IMPACT ON THE CHANGING FUTURE OF THE TRUSTS AND ESTATE PRACTICE 16 (2020) (suggesting that because wills and trusts are now allowed to be created a signed remotely, they are easier and more efficient to provide).

change how we practice law, and some of that will creep into this discipline as well as into others.[30]

The second point is that one of the core things I want any of my students, in my environmental and energy courses, to take away is the understanding that one of their fundamental roles as an attorney in this field is to be a translator. Whether you're translating what an economist, a scientist, or an industry specialist has to say, that has to be your role. Just like you have to become a specialist in an area that you're practicing in a case, whether it's litigation, tort, contract, or whatever. I want my students to take away that you have to really absorb that knowledge and understand that you have to immerse yourself in the way that science works or that market works in a particular case or area of law. Some of that is technology, and you can also use technology to help them grasp that concept. That is something you have to make explicit but then also deliver on, in terms of how you structure a course and how you're helping students integrate in that way.

Professor Krakoff:

I would echo the importance of GIS mapping skills and understanding for a lot of our work. A lot of the people who will be our witnesses or experts are going to be using those kinds of skills and remote sensing.[31] I feel like one of the things we've learned in the pandemic are the limits of technology substitutions and the idea of a simulated field. All the research that's come to light lately, because of the amount of depression among young adults, shows very clearly how important it is just to be in a room with other people.[32] Even just how

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[30] *See* Avaneesh Marwaha, *Seven Benefits of Artificial Intelligence for Law Firms*, L. TECH. TODAY (July 13, 2017), https://www.lawtechnologytoday.org/2017/07/seven-benefits-artificial-intelligence-law-firms/ (providing seven ways in which artificial intelligence can help law firms save time and money while producing better work); Rob Toews, *AI Will Transform the Field of Law*, FORBES (Dec. 19, 2019), https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/?sh=c9a84f67f01e (identifying how AI has made contract law, litigation prediction, and legal research easier and more reliable).

[31] *GIS for Law Enforcement*, ESRI (Mar. 2012), https://www.esri.com/content/dam/esrisites/sitecore-archive/Files/Pdfs/library/whitepapers/pdfs/gis-for-law-enforcement.pdf.

[32] Timothy Matthews et al., *Social Isolation, Loneliness and Depression in Young*

students like to study in libraries and coffee shops. It is apparently true that just being next to other bodies is good for your mental health.[33] We should keep in mind the importance of both brick and mortar learning together and live field trips. I don't care how good the artificial intelligence gets to be, there's no substitute for going to lava falls with your 15 students.

IV. WHAT THREE CLASSES DOES EVERY LAW SCHOOL NEED TO OFFER TO PREPARE STUDENTS TO PRACTICE ENVIRONMENTAL LAW IN THE UPCOMING DECADES?

Dean Davies:

I'm going to give an answer that may not be popular, but I'm going to give it anyway because it's the one I believe in. The three courses I would identify are: Administrative law, because to a large degree, that's all our field is—applied administrative law. Second, I'd suggest business associations or business organizations, whichever your school offers, and I say that as someone who took that class in law school and felt like I was drinking Metamucil every morning. But I just don't think you can interface with environmental law without having some of the knowledge from that course, whether it's in a litigation context or a regulatory context. Third, I'd promote some version of environmental law, natural resources law, or energy law. I'm somewhat agnostic on whether it even matters which one. I haven't seen any school that's tried to create a hybrid. That might be interesting.

Although we have these defined conceptions of what those courses are and what they try to cover—like the environmental law course is the pollution law course, the natural resources course is the land course—but at some level, what all those courses are really teaching are modes of interfacing with the environment from a legal or regulatory perspective. If you think about environmental law, it is all different ways to control or regulate pollution. Same thing in energy

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Adulthood: A Behavioural Genetic Analysis, 339 PSYCHIATRY PSYCHIATRIC EPIDEMIOLOGY 339, 340 (2016); Stephanie L. Mayne et al., *Covid-19 and Adolescent Suppression and Suicide Risk Screening Outcomes*, 148 PEDIATRICS 1, 6 (2021).

[33] *See* Matthews et al., *supra* note 32; Mayne et al., *supra* note 32.

law—it is different ways to control markets or to moderate negative externalities. Part of what we're trying to do in those courses is to give students an introduction into how to see those mechanisms conceptually, and how to compare and navigate them.

Professor Krakoff:

We've all been agreeing so far, and that's boring, so I'll take a different tack from Professor Davies, but not because I think there's anything wrong with that conception. I think that a foundational course that teaches students the historical, intellectual, and political origins of how and why we have an environmental regulatory state is a key part of my ideal curriculum, and it is a core course in our curriculum. In recent years, I've amended it to include the history of the field's exclusions—how at its origins and throughout it excluded Native Americans and incorporated the structural discriminations against Black and other People of Color.[34] So that is meant to provide a broad context for understanding how we came to have an environmental regulatory state and how it's situated in our larger structural systems of law and political economy. That's a good course as a core course, I think, because a lot of students will take it even if they're just sampling, right? If they never take another environmental law course again, they'll take our foundations course and have some sense of big issues driving the origins of the field and the political and historical context. I agree with Professor Davies about any of the statutory classes—pollution law, energy law, or any of the statutory administrative state

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[34] *See* Van R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, ATLANTIC (Feb. 28, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/ (discussing the disproportionate effects of pollution on people of color); Rachel Jones, *The Environmental Movement Is Very White. These Leaders Want To Change That*, NAT'L GEOGRAPHIC (July 29, 2020), https://www.nationalgeographic.com/history/article/environmental-movement-very-white-these-leaders-want-change-that (discussing disproportionately high cancer rates in majority Black communities); Jenny Rowland-Shea, *The Nature Gap: Confronting Racial and Economic Disparities in the Destruction and Protection of Nature in America*, CTR. FOR AM. PROGRESS (July 21, 2020), https://www.americanprogress.org/article/the-nature-gap (discussing the effects of pollution and coronavirus related hospitalization rates of Black, Indigenous, and Latinx communities).

classes. Once you learn how to learn those, they're pretty interchangeable, assuming students have taken something like a legislation and regulation or administrative law course. (I wanted to say they absolutely have to take American Indian Law and Climate Change Law and Policy, but notice I'm just mentioning them.) The third course would be a field seminar where you can incorporate different substantive areas in a place-based way. I'll refer back to our earlier conversations about the importance of that kind of learning—the impression it makes on students, the ability for them to cover multiple substantive areas at once and see the effect of law on people and how people interact with people who know about law.

Professor Börk:

I assume all law students know how important it is to take an administrative law or a legislation and regulation-type class, so I won't use that as one of my three, because I think it is self-evidently important that they have that. I'm not entirely convinced that the first half of administrative law is really necessary for everyone—all the stuff about balance of power and the sword of Damocles.[35] Most of my second-or third-year students haven't previously looked at the actual Federal Register publications by the time they take an environmental class, and looking at those and figuring out where that comes from in the statute is pretty key. Those are essential practice-related elements of administrative law.

First, the introductory environmental law class is key for a lot of the reasons: historical background and grounding, the problems we're trying to solve, and to recognize how bad things were before we had environmental laws.[36] Professor Robin Craig's got a great paper

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[35] Polett v. Pub. Commc'ns Inc., 126 A.3d 895, 918 n.13 (Pa. 2015) ("[This phrase] originated from a Greek fable in which King Dionysius suspended a sword by a hair over the head of Damocles, . . . to illustrate the grave danger that all rulers are constantly under. . . . [T]his expression has, thus, colloquially come to be understood to signify a threat of imminent danger.").

[36] *Milestones in EPA and Environmental History*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/history/milestones-epa-and-environmental-history (last visited May 9, 2022); Andrea Thompson, *How the Environment Has Changed Since the First Earth Day 50 Years Ago*, SCI. AM. (Apr. 22, 2020), https://www.scientificamerican.com/article/how-the-environment-has-changed-

on creeping baseline syndrome that talks a lot about the importance of that historical grounding; I recommend that to all of you.[37]

But one of the problems in environmental law education is that students come in and they're all excited about environmental law and want to do it because they camp and hike and then you crush them with all of the readings and all of the administrative law stuff. It's brutal. So, the field course is a necessary tonic to restore their spirits after you've crushed them in Introduction to Environmental Law. I will self-promote; I wrote a paper with a geosciences colleague on the importance of field courses and the role they can play, and a little bit about how we run ours.[38]

The third course, just to have something a little bit different here, would be mental health courses because they have a really important role in law schools. This is something that that a number of schools have started to offer for mindfulness—a general introduction to mental health maintenance and how we take care of our brains.[39] I do some mindfulness exercises in my field class and the students seem to get a lot out of those. But given our track record in law as a profession,[40] and especially given the challenges that these students are

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since-the-first-earth-day-50-years-ago/; Marina Koren, *Before and After: America's Environmental History*, SMITHSONIAN MAG. (Apr. 22, 2013), https://www.smithsonianmag.com/science-nature/before-and-after-americas-environmental-history-38622578/.

[37] Robin K. Craig, *Perceiving Change and Knowing Nature: Shifting Baselines and Nature's Resiliency*, *in* ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 87, 88 (Keith H. Hirokawa, ed., 2015).

[38] Karrigan Börk & Kurtis Burmeister, *Cases and Places: A Field-Based Approach to Teaching Natural Resource and Environmental Law*, 68 J. LEGAL EDUC. 338, 339 (2018).

[39] *Tom Fenner, JD '76, Leads Mindful Meditation Class for Students*, 98 STAN. LAW. (June 2, 2018), https://law.stanford.edu/stanford-lawyer/articles/tom-fenner-jd-76-leads-mindful-meditation-class-for-students/.

[40] *See New Study on Lawyer Well-Being Reveals Serious Concerns for Legal Profession*, AM. BAR ASS'N (Dec. 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/secrecy-and-fear-of-stigma-among-the-barriers-to-lawyer-well-bei/; Scott Mitchell, *Mental Health in the Legal Profession*, MINORITY CORP. COUNS. ASS'N (Sept. 2007), https://www.mcca.com/mcca-article/mental-health-in-the-legal-profession/; Scott Field, *Mental Health in the Legal Profession*, JDSUPRA (May 24,

facing; inheriting this world with a rapidly changing climate, with a huge loss of biodiversity,[41] it's a stressful thing. Some of these papers I've written are so dark that it's hard to get through them, and I feel so bad for the students who are living this every day.

Dean Jennifer Rushlow:

I want to call attention to Helen Kang's great comment in the chat: "Much of what we do in the Environmental Justice Clinic covers administrative law, but matters are so dynamic that it would really take two teachers who can move with the docket to create a hybrid."[42] I've thought about such a creature.

V. HOW DO YOU SEE ISSUES OF INCLUSION, JUSTICE, AND EQUITY BEING INCLUDED IN THE ENVIRONMENTAL CURRICULUM MOVING FORWARD?

Professor Krakoff:

There are a number of ways to make the issues of racial and gender justice woven into the curriculum instead of adding them on. One way is the foundation class I talked about earlier. Ours is called Foundations of Natural Resources and Environmental Law.[43] The idea is to make social justice and its legal aspects central to the course, rather than "here's Environmental Justice Day." For instance, when

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2021), https://www.jdsupra.com/legalnews/mental-health-in-the-legal-profession-2108878/.

[41] *UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating,'* U.N. (May 6, 2019), https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/; *Loss of Biodiversity Poses as Great a Risk to Humanity as Climate Change*, ECONOMIST (June 15, 2021), https://www.economist.com/technology-quarterly/2021/06/15/loss-of-biodiversity-poses-as-great-a-risk-to-humanity-as-climate-change.

[42] Question from Professor Helen Kang, Professor of L., Env't L. and Just. Clinic Dir., Golden Gate Univ. Sch. of L., Roundtable Talk at Vermont Law School, Environmental Law Education: New Techniques in the Classroom and Beyond (Feb. 25, 2021).

[43] *Natural Resources, Energy, and Environmental Law*, COLO. L. (2021), https://www.colorado.edu/law/academics/degrees/llm-degree/natural-resources-energy-and-environmental-law.

we're teaching about public lands, to also teach about how all public lands were once traditional Aboriginal lands and how the story of Indian law is intertwined with the story of both the emergence of private land and public land.[44] Also, the moments of possibility that get erased; the moment in the early 1970s where a broader environmental justice conception of environmental protection got left by the wayside.[45]

Also, I think it's time for most schools that *can* have an expanded curriculum to have a specific environmental and/or climate justice class. There's a lot of student interest and demand for that as part of the upper-level class curriculum.[46] Also, integrating field trips as we have discussed. Those are terrific ways to make those issues real for students and to incorporate students into classes who don't otherwise see themselves in the field or in the curriculum. If you make a class centered around the experience of the Latinx population in Colorado, for example, you're going to help show that the field is a place where everyone can see themselves. That's one important way we can start to shift. We also need to do a lot more so that the field itself presents as something that isn't just white and privileged. We know that's only part of the story, but it's not an insignificant part of the story of environmental law.[47] So, to counter that in every way we

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[44] *See* Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.–C.L. L. REV. 213, 215–16 (2018) (describing the "dark side" of conservation history when the United States displaced Native Americans and violated their rights).

[45] *See* Jedediah Britton-Purdy, *Environmentalism Was Once a Social-Justice Movement*, ATLANTIC (Dec. 7, 2016), https://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831/.

[46] JUAN C. GARIBAY ET AL., NAT'L COUNCIL FOR SCI. AND THE ENV'T, THE INCLUSION OF ENVIRONMENTAL JUSTICE CURRICULAR CONTENT IN INTERDISCIPLINARY ENVIRONMENTAL AND SUSTAINABILITY DEGREE PROGRAMS 6 (Jan. 2016), https://www.gcseglobal.org/sites/default/files/inline-files/2016%20EJ%20Partner%20Report.pdf; Madison Roth, *MSA Pushes for Environmental Justice Liberal Education Requirement*, MINN. DAILY (Dec. 16, 2021), https://mndaily.com/270297/news/msa-pushes-for-environmental-justice-liberal-education-requirement/.

[47] *See* Andrew Cohen, *The Intersection of Race and the Environment*, BERKELEY NEWS (Aug. 10, 2020), https://news.berkeley.edu/2020/08/10/race-the-environment/ (explaining a weakness of mainstream environmental law is the deracialized context

can in terms of how we present to students, we do outreach to different student groups so they all see themselves and feel welcome in those courses and in the curriculum. Finally, we really have to face the question of the cost of legal education across the board. If we don't make it affordable, it will not be equitable. Our field in particular will not be equitable because of the difficulty of getting jobs after law school that pay enough. That issue has to be addressed to get at the issue of racial equity and exclusion.

Professor Börk:

One of the things I've really enjoyed since I've come to UC Davis is that we have the Aoki Center for Critical Race and Nation Studies.[48] The Center brings in professors who are teaching first year law courses and does a lecture focused on the critical race perspective for the class topic. This is great because you have these students who are coming to law school really excited about justice and they get thrown into this first year curriculum and that focus gets lost a little bit. I did the one on Property this year and walked them through a mapping exercise in California, looking at the environmental justice disparities in California through a really excellent environ-mapper that California puts out.[49] This integration of justice and equity across the board into everything you do is really effective because it becomes an expected part of a lot of classes that you will consider the disparate impacts and distributive justice issues really. By starting that in the first year, a school can really set the foundation that you need to bring that perspective into other classes. I've tried to do that in my environmental law course too, using a variation on that mapping exercise and asking the students to look at their own community and patterns of education, language, poverty, and environmental harm

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in which it is presented); Jedediah Purdy, *Environmentalism's Racist History*, NEW YORKER (Aug. 13, 2015), https://www.newyorker.com/news/news-desk/environmentalisms-racist-history (detailing the racist history of American environmentalism, beginning with Madison Grant and persisting through the present).

[48] *Welcome to the Aoki Center for Critical Race and Nation Studies*, UC DAVIS SCH. OF L., https://law.ucdavis.edu/centers/critical-race/ (last visited May 21, 2022).

[49] *CalEnviroScreen*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, https://oehha.ca.gov/calenviroscreen (last visited May 9, 2022).

using the mapping exercise. Then they do a worksheet that they submit to reflect on the exercise.

If you joined the first workshop in this Emerging Environmental Law Curriculum series, I do some of the same things that Steph Tai described—working with worksheets and with exercises that students do as part of class.[50] I have a series of five or six of these and I was just blown away by the students' responses to that environmental justice exercise; they tied it to their lives, they were able to integrate their lived experience in their communities with this data they were getting, the language they were learning around environmental justice, and the origins of some of these harms. It was startling to me, really, to see how well and how clearly they saw these connections. It's powerful. I learned a lot from them, actually. It's so helpful because the students are pushing us on this constantly. If you don't teach it, they're on your case and asking for more of it. And I find that super helpful in terms of making sure I'm doing as much as I can to address these concerns.

Dean Davies:

It's really a duty of ours as educators to try to make sure that we're bringing this out in every aspect, right? I mean, if you think about environmental law, you can teach cost-benefit analysis without ever talking about race or justice. If you think about natural resources, you can teach about land preservation without ever talking about Aboriginal or Indigenous impacts. If you think about energy law, you can teach markets and economic regulation without ever talking about energy justice or energy poverty. But that's not the right way to teach those classes. The right way to teach them is to highlight those issues and force students to grapple with them. In everything we do, we need to be thinking about how to bring those issues to the fore. You can do that across the curriculum, and it's just our duty to do that.

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[50] Keith Hirokawa et al., *Roundtable One: The Essential Environmental Law Curriculum*, 46 VT. L. REV. 552, 553 (2022) (describing, in conversation with Keith Hirokawa and Steph Tai, interactive approaches to legal education).

VI. SOMETHING WE'VE KNOWN FOR A LONG TIME IS THAT ACCESS TO LEGAL SERVICES AND JUSTICE IS ONEROUS AND EXPENSIVE. HOW DOES THAT LACK OF ACCESS PLAY OUT IN ENVIRONMENTAL LAW AND THE ENVIRONMENTAL LAW CURRICULUM?

Dean Davies:

You heard a bit of silence because this is a hard question, right? In some regards, a lot of environmental law occurs at a level that is decently well-financed. You've got corporations that have in-house and external counsel.[51] You have at least decently well-funded NGO groups that have arms devoted to litigation.[52] And you have mechanisms available to allow the recoupment of attorneys' fees that can promote litigation in this context.[53] But at the same time, there are

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[51] *See Corporate Outside Counsel Policies—Who Do You and Who Can You Represent?*, AM. BAR ASS'N (June 15, 2016), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-2/corporate_outside_counsel_policieswho_do_you_and_who_can_you_represent/ (describing the professional responsibility limits on and protections for attorney-corporate client relationships for outside counsel); Ruiqi Chen, *Companies Prepare for In-House Lawyer Hiring Surge, Survey Says*, BLOOMBERG L. (Jan. 26, 2021), https://news.bloomberglaw.com/business-and-practice/a-third-of-law-departments-to-hire-in-house-in-2021-survey-says (explaining a recent uptick in hiring of in-house counsel for corporate clients).

[52] *See, e.g.*, *Legal Advocacy & Investigations*, ASPCA, https://www.aspca.org/investigations-rescue/legal-advocacy-investigations (last visited Apr. 30, 2022) (describing ASPCA's Legal Advocacy & Investigations department's support of law enforcement investigations and prosecutors pursuit of animal cruelty and animal cases in New York City and nationwide); *Everytown Law Fund*, EVERYTOWN, https://everytownlaw.org/fund/ (last visited May 9, 2022) (launching the Everytown Law Fund to support "impact litigation to advance the right of every person to be free from gun violence and to speak, work, learn, pray, assemble, protest, and vote without fear or intimidation."); *Advocacy & Litigation*, NAACP, https://naacp.org/issues/advocacy-litigation (last visited May 9, 2022) (initiating lawsuits on behalf of plaintiffs to "ensure equitable treatment and opportunities when it comes to voting rights, education, economic empowerment, criminal justice, and health, including environmental justice," and partnering "with other civil rights organizations, law firms, and law schools to secure the resources necessary to assess and prosecute cases.").

[53] *See* Nicholas N. Nierengarten, *Fee-Shifting: The Recovery of In-house Legal Fees*, 39 WILLIAM MITCHELL L.R. 227, 227–29, 234, 238, 239–44 (2012) (identifying

disparities in terms of access to these services, and there are certainly ways in which that manifests in society to the detriment of people who are underserved.[54] An obvious answer in part is clinics that provide additional services, although obviously those are expensive to run and don't fully fill the services gap.[55] There are also other ways that the academy can help fill that gap in terms of advocacy. I'll mention one of the coolest examples I've seen, which is using courses to have students do work that provides legal advice to the world through sort of quasi-clinical experiences. I know Hari Osofsky has done this in the past using some of her courses.[56] And another one of my co-authors, Penny Crossley, who teaches the Sydney Law School in Australia, has done this as well.[57] One thing Penny does is have her students complete research papers that can be shared with less developed countries' governments to help them work on law reform. I know that Hari's done something similar with having the students do work that might advise the World Wind Energy Association or other NGOs on issues they're

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exceptions for and methods of recouping attorneys' fees–via the lodestar, market-rate, or cost-plus approach–and providing tips for pursuing such methods).

[54] *See Access to Justice: 2010–2018*, U.S. DEP'T OF JUST. https://www.justice.gov/archives/atj (last visited Apr. 30, 2022) (indicating the U.S. Department of Justice established the Office for Access to Justice in 2010 to address inconsistencies in fair and accessible criminal and civil outcomes depending on wealth and status); Gillian K. Hadfield, *More Markets, More Justice*, 148 DÆDALUS: J. AM. ACAD. ARTS & SCIS. 37, 38–39 (2019) (arguing access to the justice is not affordable because of complex rules and procedures and promoting optimized complexity to better serve the underserved).

[55] *See* Jeff Selbin, *Defending Law School Clinics from Political Interference*, L.A. DAILY J. (Apr. 13, 2010), https://www.law.berkeley.edu/article/defending-law-school-clinics-from-political-interference/ (stating that law school clinics help fill the "justice gap," but have been vulnerable to industry and legislative attacks on their funding sources); *see also* Rebecca Nieman, *Down But Not Out! How Law School Clinics Can Help Bridge the Small Claims Court Access to Justice Gap*, 35 BUFF. PUB. INT. L.J. 119, 120, 124, 154 (Sept. 1, 2016) (addressing the pervasive "justice gap" targeted by law school clinic work and advocating for expanding these non-cash-cow clinic services for small claims disputes).

[56] *See* PENN ST. L., LEGAL EDUCATION FOR A CHANGING SOCIETY 1, 11–12 (2019), https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Admissions/viewbook_2019_small.pdf (detailing courses and clinical opportunities with international reach).

[57] *Associate Professor Penelope Crossley*, UNIV. SYDNEY L. SCH., https://www.sydney.edu.au/law/about/our-people/academic-staff/penelope-crossley.html (last visited Apr.30, 2022).

grappling with. If you can help foment that work, I think it's an additional way that you can fill some of this gap of access to legal advice.

Professor Börk:

I mentioned the Water Justice Clinic here at UC Davis—a lot of our students participate in that and I encourage it. That's focused on mostly Central Valley communities that don't have access to good drinking water as required by the California human right to water, and figuring out how we can fulfill the promise the legislature made when they recognized a human right to water.[58] So clinics can be one way to do that.

I also find that a lot of my students are here at law school because they recognize that access to legal services is a huge problem. Environmental law students in particular recognize that access to legal services and justice is hard and that it's not evenly distributed and that it does drive a lot of the environmental justice problems that we see. So, they're here because they want to work on that exact issue, and we should encourage and enable their participation. In particular, we need to reduce their debt burden so that job path is a real option for them—so they don't end up getting pulled into the big firm gristmill or something similar where they need to be to make money to pay off the loans they've taken to get there in the first place. The financial aspect is really a key to recognizing that vision.

Professor Krakoff:

Law schools can play a powerful role in encouraging Bars that aren't typically associated with pro bono work to get involved in it. In my version of a water justice project, we have a public service project called the Acequia Project.[59] We provide free water rights

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[58] *See The Human Right to Water in California*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT (Jan. 28, 2021), https://oehha.ca.gov/water/report/human-right-water-california (affirming Assembly Bill 685 recognized Californians' right to clean, safe, and affordable drinking water and providing the Human Right to Water Framework and Data Tool to measure State progress toward realizing the right).

[59] *Acequia Assistance Project*, UNIV. OF COLO. BOULDER, https://outreach.colorado.edu/program/acequia-assistance-project/ (last visited Apr. 30, 2022).

representation to low-income farmers in the San Luis Valley.[60] It's mostly my students and I, but in order to cover all the cases, we recruit water law attorneys to help pro bono by supervising my student attorneys. It's not a clinic, it's a public service project, but it's functionally equivalent. We can staff it on the cheap because I just asked water law attorneys to do pro bono work, and they are so excited to do that because a lot of them went into water because they were idealistic environmental law students. There are a lot of jobs in water in my region, but there aren't that many opportunities that present themselves to water law practitioners to do pro bono work. You know, they're not trained as civil rights attorneys, they don't always feel comfortable taking a pro bono legal aid case. So we've had a lot of success at cultivating a pro bono aspect of the water law Bar in Colorado. I suspect that could be true more widely of environmental law and property law practices. Professor Börk mentioned too, as a way to help expand low income or at least sliding scale services for client needs.

VII. HOW DO YOU APPROACH ASSESSMENT AND GRADING IN YOUR FIELD COURSES AND EXPERIENTIAL LEARNING?

Professor Krakoff:

It's about the importance of multiple ways of assessing, whether in field courses or other courses. It's been an important addition to the way all law teachers think about what we're doing—to pay attention to the question of whether students are learning and obviously multiple ways of interacting with and evaluating them is the way to do that. For me, the more I can get my law students to write, the better. So, if it's a field seminar, we're meeting weekly building up to the trip, and I have them do weekly reflection pieces on what we're reading, just to get students writing regularly. They're limited to a page or two at the most so that I can give really detailed feedback on their critical analysis—like do they know how to read some complicated article or legal decision or whatever at this point, and also line-by-line micro editing, which they typically don't get from us. This is in addition to their big research paper, which is the core requirement of

[60] *Id.*

the class. I tell them all the time how important good writing skills are even in this day and age, and that those will carry them throughout their careers, no matter how much law practice changes.

Professor Börk:

When I was at the University of the Pacific, I was co-director of the Environmental Studies Program, and we had to do curriculum mapping for the program. It was a burdensome process, but ultimately it was really useful. We took the five outcomes that students were supposed to graduate with and mapped those back through the courses where they would master those particular learning objectives or particular outcomes. And then the assessments in those classes were supposed to track with the outcomes we expected from the courses. It sounds like, Sara, from what you were describing, you have something like that with your environmental law courses. And I'm curious, Lincoln, if there's something similar that you all do across the curriculum. I know law schools tend to have less control over what teachers are teaching in specific classes. But it can really guide how you choose what to assess and it seems like a useful thing to think about in the law school context.

Dean Davies:

Yes, we have that across the curriculum. I think a lot of schools are working on that to implement ABA accreditation requirements. One thing I've seen with that is it's tempting to say that every class meets every objective when in fact, that can't possibly be the case. An element of honesty and transparency there in terms of figuring out which courses are actually introducing, developing, or mastering those skill sets or those learning objectives is really important. I think you have to be honest with yourself about what it is you want the students to come away with and then try to assess it appropriately. If it's a skill set, then you're doing that in a formative way, and what you're trying to measure is progress toward a certain level of excellence. Whereas, in my courses in this field, what I'm often trying to do is to make sure students are participating in some way and getting some immersion in some of the information. In energy law, for instance, we run a simulation of markets, either electricity markets or oil markets, where what I'm really trying to get them to do is apply and get a feel for some

of the theoretical material we've been learning. In that context, I just measure the participation, but if they're writing a paper, like Sara said, then it's how they are improving over time and getting the work to the level of excellence we expect in that skill set. And so I think, you know, A) tying those things to what you're trying to measure and B) being clear and transparent to students about what it is you're trying to measure.

Professor Krakoff:

What I call our "developmental curriculum" in our natural resources environmental area, is deliberate and preceded the whole discussion about outcomes-based assessment and all that. But I do want to acknowledge the reality of some of law professors and the degree of independence and academic freedom they want in their course offerings. There's a limit, I think, to how well you could map it if only one person had control. The second thing I would say is to some extent, the bureaucratic recordkeeping of the mapping exercise is a challenge. The administration of trying to figure out if our students are learning, I really worry sometimes, displaces our ability to teach students and make sure they're learning. So for me, it's a fine balance between taking that question seriously, but frankly, not taking all the bureaucratic exercises that some of our accrediting bodies impose on us, you know? Seriously enough to do the job and know we're doing it right, but not so seriously that they interfere with our ability to actually do the core aspects of our teaching jobs.

Professor Börk:

Writing a curriculum map is terrible, but having thought through a curriculum map, I think is helpful. It's kind of a catch-22, but I totally get it. I hated doing it, but it did make us realize we were missing certain things or certain types of experiences. It makes for a better program overall.

VIII. QUESTION AND ANSWER SESSION

The following questions were raised by faculty members in the virtual audience during the roundtable. Each question is followed by the panelists' response. Not all panelists responded to all questions.

A. "What do you think about things to do in the absence of additional funds? What would be some of the things you would start to shift under the existing budgetary restraints you have?"[61]

Professor Börk:

We all talk about limited resources and we understand trade-offs as part of our discipline. That doesn't mean there aren't other resources you can find or leverage, right? One resource that I've seen is that alums often are eager to be engaged with their alma mater, and to share their expertise and their experiences. Whether that's using them in practice rounds for the moot court competitions, or as guest lecturers or adjuncts—maybe that's something you can talk to your academic dean about to offer an additional course. Or maybe it's something that's net neutral in terms of the law school's budget to rotate courses over time. I think taking a fresh look at the curriculum is something that can be done. There's lots of opportunities there in terms of bringing in additional alumni engagement: you can think about career panels, et cetera, and there's lots of ways you can do this to enrich the student experience.

One of the things that I've really enjoyed with teaching remotely and on Zoom is that it's so much easier to bring people into the classroom to speak. I brought in practicing lawyers, some of my law school classmates from way back when . . . We're having a property career day this spring, because my property students keep asking me: what do you do in property? How is this an actual thing beyond, like, future interests? People are excited to talk about their research, so if there's an article your students are interested in, try to

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[61] Question from Heidi Gorovitz Robertson, Professor of L., Dir. of Student Success, Clev. State Univ. Clev.-Marshall Coll. of L., Address at the Roundtable Two Law Education: New Techniques in the Classroom and Beyond (Feb. 26, 2021); *see Heidi Gorovitz Robertson,* CLEV.-MARSHALL COLL. L., https://www.law.csuohio.edu/meetcmlaw/faculty/robertson (last visited Apr. 30, 2022).

bring in the people who wrote that article. Using Zoom in that way is great and it's something I plan to keep doing after the pandemic.

Also, I'm dedicated to field experiences, and I think they are the best experiences I've ever had. I think clinic is a close second and it's the best experience that I've had both as a teacher and as a student. I think there are ways to pay for those that don't put costs on the students. I'm trying right now to build a CLE model where firms donate money and then they get to send along a lawyer or two on the trip and they knock out a year's worth of CLE over a four-day weekend. If you get three or four firms to put in money, that covers the cost of the trip. But I also do self-directed field trips like the one I talked about this year, and I've run that a number of times. I did that for a water law course. You give the students 20 or 30 options that they can choose from and they go on their own. They shoot some video to show that they're actually there and come back and write a reflection afterwards. And that's free. It gets them out into the field to actually see how things are working. It could be: "Go to a hatchery and see what a fish hatchery looks like"; "Go find an easement or no trespassing signs. Are those real? Why can't you trespass there? Is that enforceable?" So that's something you can integrate into classes across the whole curriculum. That ties classes which can tend to be a little esoteric to real changes on the ground and the world as we experience it. I think that's a really important key to give students as part of this educational process.

B. "I didn't hear anyone mention local environmental law as a critical course in the environmental curriculum. But many of our students will address environmental issues in local matters before practicing under federal laws. What role could/should local governance play in the curriculum?"[62]

Dean Davies:

I think that Professor Hirokawa's right, and one of the failings of law schools or maybe a blind spot of law schools is that we don't

[62] Professor Keith Hirokawa, Professor of L., Albany L. Sch., Address at the Roundtable Two Law Education: New Techniques in the Classroom and Beyond (Feb. 26, 2021).

pay very much attention to local and state law.[63] In part, some of our schools are serving national markets. But also, in part, we don't always have experts on staff that understand local law as well. Some of that gap gets filled through clinics or other experiential opportunities. But I think Keith is absolutely right to point that out as an area where we can all improve.

Professor Börk:

I try and do that a little bit through my worksheet exercises. I'll spend three days lecturing on the Clean Air Act and then have a kind of implementation of the Clean Air Act day where I give them a bunch of links that they need to use to track down things like: how do you get a permit in California under the Clean Air Act? Who's actually making those decisions? And that goes all the way down to county or multiple counties under an Air Quality Management Region or District. So it brings in the state law piece and then tries to help them nest that within the federal law. Some of the other more local environmental law stuff gets covered in our zoning class area or in some of the other classes that are kind of traditionally outside of the core environmental curriculum. But you're right, it's a key space. And it's going to be even more key dealing with adaptation to climate change and any kind of a viable future that we have.

Professor Krakoff:

I agree that it's important and we couldn't list every class that is really crucial. One way to incorporate local government in core environmental classes is to send students on one of those self-guided field trip experiences to a local planning or zoning board meeting. In my town of Boulder, environmental issues are sort of the nexus of environment and housing, which get right to the core of the justice and

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[63] Most law schools do not offer courses in state law; rather, students often get exposure to the state laws if they work in a clinic setting. *See Course Descriptions*, N.Y.U., https://its.law.nyu.edu/courses/ (last visited Apr. 30, 2022) (listing course offerings in broader federal and international issues, but not New York state law); *Courses: Spring 2022*, YALE L. SCH., https://courses.law.yale.edu/courses/term/27 (last visited Apr.30, 2022) (listing no courses focused on Connecticut state law); *Course Catalog*, MICH. L. SCH., https://michigan.law.umich.edu/course-catalog (last visited Apr. 30, 2022) (listing no courses focused on Michigan state law).

environment nexus.[64] They're going to be talked about in any one of those meetings. And even if it's not, *per se*, a local government course, you could incorporate an element of it to just plant the seed in the student's mind that this is an important level of lawmaking for them to think about.

Professor Börk:

That's another one of those places where I think it's key that they're physically there. There's nothing as uncomfortable as watching the public interact with elected officials, all emotional and fraught as it is. And if you're watching on a screen, it's really easy to turn that off and start watching cat videos because it gets too difficult to sit through. So I think being there and feeling all the tension in the air is super key. Right on, Professor Krakoff.

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[64] *See Boulder-Based Green Energy Group Makes Case for Density to Meet City's Climate Goals*, BOULDER BEAT. (Aug. 11, 2019) https://boulderbeat.news/2019/08/11/boulder-based-green-energy-group-makes-case-for-density-to-meet-citys-climategoals/ (discussing how Boulder needs to change its zoning laws to allow for density to combat climate change); Mark Gelband, *Boulder Agrees on the Problems. Scholars Agree on a Simple Solution*, COLO. NEWSLINE (Sept. 14, 2021), https://coloradonewsline.com/2021/09/14/boulder-agrees-problems-scholars-agree-solution/ (arguing for "abundant, compact, dense housing" to achieve a more diverse and sustainable community) (emphasis omitted).

ROUNDTABLE THREE
ENVIRONMENTAL LAW EDUCATION: PREPARING FOR ENVIRONMENTAL PRACTICE

Cale Jaffe,[*] Helen Kang,[**] and Hari Osofsky[+]

I. HOW CAN NEW STRATEGIES FOR ADDRESSING EMERGING ENVIRONMENTAL ISSUES BE INCORPORATED INTO THE LAW SCHOOL CURRICULUM?

Dean Osofsky:

First of all, I just wanted to say a big thank you to all of you for including me in today's dialogue and putting together this really interesting series. I've gained so much from hearing everybody's insights. I think when we start talking about new strategies for addressing environmental issues to be incorporated into the law school curriculum, in many ways the first question is how do we want to envision a law school and its role within a university?

Many of you have heard me say before, I think we are in a moment of profound social change in which technology, globalization, the importance of crosscutting knowledge, and the need for progress on diversity, equity, and inclusion are foundationally changing the practice of law and the nature of legal services. All of those changes have profound implications for access to justice, social and racial justice, and the environmental issues that we are talking about here. The intersectional crises of the past two years—a global pandemic, racial justice reckoning, and deep polarization in our society—have in many ways only hastened these transitions and exacerbated inequality.

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[**] Professor of Law, Director, Environmental Law and Justice Clinic, Golden Gate University School of Law.

[+] Dean and Myra and James Bradwell Professor of Law, Northwestern Pritzker School of Law; Professor of Environmental Policy and Culture, Weinberg College of Arts and Sciences. At the time of this event, Dean Osofsky served as Dean, Penn State Law and Penn State School of International Affairs; Distinguished Professor of Law; Professor of International Affairs; and Professor of Geography at The Pennsylvania State University. This Article updates the content to reflect developments since the roundtable talk and adds examples from Northwestern Pritzker School of Law.

These transitions are not new, but they are accelerating as a consequence of our pivots. And I think they should cause us to ask whether law schools can be less siloed from their universities, because fundamentally, the emerging, knotty environmental problems that so many of us work on are not just law problems. One of the profound challenges for law right now is that it often struggles to regulate fast-moving science and technology. There are many dimensions to this problem, which Professors Wendy Wagner and Holly Doremus, among others, have analyzed insightfully in their scholarship. But one aspect that we could help address in law schools is that people making law and policy sometimes do not understand science and technology very well and people working on science and technology often do not fully understand the regulatory environment.[1]

And so, the first piece of my answer to your question is that part of the strategy law schools should take in addressing emerging environmental issues is about developing an environmental curriculum that is more deeply embedded in their universities. That can be through interdisciplinary opportunities and joint degrees. Northwestern Pritzker Law's Center for Law, Business, and Economics, for example, brings together experts across disciplines to address energy and climate change issues.[2] Its Master of Science in law program trains

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[1] Professors Wendy Wagner and Holly Doremus have both extensively analyzed the interface with law and science. *See, e.g.*, Wendy Wagner et al., *Misunderstanding Models in Environmental and Public Health Regulation*, 18 N.Y.U. ENV'T L.J. 293 (2010) (exploring misperceptions of computational models in regulation); Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEXAS L. REV. 1601–53 (2008) (analyzing issues of scientific integrity and political integrity). Dean Osofsky has analyzed these issues in the context of climate change together with Professor Jacqueline Peel. *See* JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY? 249–63 (2015, Cambridge University Press); Hari M. Osofsky, *The Intersection of Scale, Science, and Law in* Massachusetts v. EPA, 9 OR. R. INT'L L. 233 (2008) *reprinted in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C.G. Burns & Hari M. Osofsky eds., 2009).

[2] *Northwestern University Center on Law, Business, and Economics*, NW. PRITZKER SCH. OF L., BUSINESS, & ECON., https://www.law.northwestern.edu/research-faculty/clbe/ (last visited May 22, 2022).

STEM professionals on the interface of law, business, and technology,[3] and it also has interdisciplinary courses, joint degrees, and concentrations.[4] And we have important opportunities at this moment of transition to build on our longstanding interdisciplinary strengths. In order to foster new collaborations, I established an Associate Dean for Innovation and Partnerships soon after arriving and the law school is working across the University and with external stakeholders to develop new partnerships, including on environmental, energy, and climate change issues.

When I was a dean at Penn State, we explored the innovation that could result from breaking down the silos between law and other disciplines, which was assisted by my being dean of both Penn State Law and an interdisciplinary international affairs school. The Center for Energy Law and Policy that we launched intentionally brought in the full breadth of disciplines from across the university, in addition to all sorts of stakeholders and in its work.[5] The law, policy, and engineering initiative that we developed, and the new masters in engineering that will contribute to it, included environment and energy as a key aspect.[6] I think that we have to be very collaborative across our law schools and universities and with external stakeholders in order to solve these problems.

A secondary piece of that is about technology and, in particular: How should we be using technology in our legal classrooms

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[3] *Master of Science in Law*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/academics/degree-programs/msl/ (last visited May 22, 2022).

[4] *Law and Technology*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/academics/curricular-offerings/law-technology/ (last visited May 22, 2022); *NUvention*, NW. FARLEY CTR. FOR ENTREPRENEURSHIP & INNOVATION, https://farley.northwestern.edu/academics-resources/nuvention/ (last visited May 22, 2022); *Environmental Law*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/academics/curricular-offerings/concentrations/environmental/ (last visited May 22, 2022).

[5] *See About the Penn State Center for Energy Law and Policy*, PENN STATE CELP, https://celp.psu.edu/about-us/ (last visited May 8, 2022) (outlining Penn State Center for Energy Law and Policy's interdisciplinary approach to science, law, and policy).

[6] *See Law, Policy, and Engineering*, PENN STATE, https://www.lpe.psu.edu (last visited May 8, 2022) (proposing comprehensive master's program designed to bridge disconnect problem between science, law, and policy).

and practice? Northwestern Pritzker Law's Law and Technology program and Penn State Law's Legal-Tech Virtual Lab both have been experimenting with ways of doing so.[7] Some of these technological issues are not environmentally specific. But, for example, the manner in which artificial intelligence (AI) powered tools are going to be used in legal practice will influence the way our students will practice environmental law, but also can provide opportunities for what we do in our classroom. One technology experiment we were in the process of launching a pilot for at Penn State Law as COVID-19 hit—and it got delayed as a consequence—is how could we bring immersive technology into the legal classroom? I particularly think about this in the environmental and energy context. For instance, I found it profoundly useful to go visit a fracking site. We could virtually take our students to a fracking site, to a power plant, or to a microgrid in ways that could really help them understand the technology that they will be interacting with in this field. I hope to move this pilot forward at Northwestern as we emerge from COVID-19.

And that is intertwined with the third piece of it, which is that all of these speak to the need for multimodal problem-solving. We need to teach our students multimodal problem-solving skills both in the way we teach experientially and doctrinally.

And our field has to think really long and hard about how we work together strategically to make progress on diversity in our profession and how we make sure that we are dealing with profound inequity and justice issues. I was so thrilled, for example, to see that the Biden Administration appointed energy justice expert Shalanda Baker as Senior Advisor in the Office of the Secretary of the U.S. Department of Energy.[8] But we all have work to do in this space to think about how we improve diversity of faculty, students, and

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[7] *See Legal Technology*, PENN STATE L., https://pennstatelaw.psu.edu/penn-state-law/legal-technology (last visited May 2, 2022) (highlighting Penn State Law's Legal-Tech Virtual Lab, an opportunity for law students to learn legal technology programs and skills); *Innovation Lab: Law and Technology Demos*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/student-life/events/innovation-lab/ (last visited May 22, 2022).

[8] *Shalanda H. Baker*, U.S. DEP'T OF ENERGY, https://www.energy.gov/person/shalanda-h-baker (last visited May 8, 2022).

practitioners in the environmental field, and how we make sure that justice issues get centered in our environmental work.

Professor Kang:

What I see emerging is a more ambitious framework for defining environmental problems, a vision that encompasses social and economic justice as part of environmental law issues. This significant change comes as a result of a convergence of at least three movements or developments: a year of intense reflection over centuries-long racial injustice;[9] the economic challenges that have developed as a result of the pandemic;[10] and the deepening climate crisis[11] that's the impetus

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[9] *See* Jennifer D. Roberts, *Pandemics and Protests: America Has Experienced Racism Like This Before*, BROOKINGS (June 9, 2021), https://www.brookings.edu/blog/how-we-rise/2021/06/09/pandemics-and-protests-america-has-experienced-racism-like-this-before/ (examining historical cycles in public outrage against systemic racism after pandemics in 1919 and 2020); Alisa Chang et al., *Summer of Racial Reckoning*, NPR: AMERICA RECKONS WITH RACIAL INJUSTICE, (Aug. 16, 2020), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit (documenting a new civil rights movement addressing consistent and systemic racial injustice rising in the United States); Juliana M. Horowitz et al., *Amid National Reckoning, Americans Divided on Whether Increased Focus on Race Will Lead to Major Policy Change*, PEW RSCH. CTR. (Oct. 6, 2020), https://www.pewresearch.org/social-trends/2020/10/06/amid-national-reckoning-americans-divided-on-whether-increased-focus-on-race-will-lead-to-major-policy-change/ (asserting that many Americans are concerned about systemic racism, but a smaller percentage is convinced that new movement will inspire policy change).

[10] *See* LAUREN BAUER ET AL., TEN FACTS ABOUT COVID-19 AND THE U.S. ECONOMY 7–16 (Brookings: The Hamilton Project ed., 2020), https://www.brookings.edu/wp-content/uploads/2020/09/FutureShutdowns_Facts_LO_Final.pdf (documenting economic impacts of COVID-19 on the U.S. economy, including effects on business development and revenue, unemployment and labor shortages, and food and housing insecurity); Eduardo L. Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19* 4–9 (Brookings: Glob. Econ. & Dev., Working Paper No. 158, 2021), https://www.brookings.edu/wp-content/uploads/2021/06/Social-and-economic-impact-COVID.pdf (evaluating three stages of COVID-19's impact on the global economy, including macroeconomic impacts, governmental fiscal status, and slow economic recovery from lockdowns).

[11] *See generally IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE,

for conceiving the Green New Deal.[12] And, so specifically, take the new Environmental Justice for All Act being introduced in Congress right now.[13] It establishes what is essentially a just transition fund to support communities and workers transitioning away from fossil fuel development or dependent industries.[14] The Act also calls for cumulative impact analysis for clean air and clean water permitting,[15] recognizing what clients of clinics like ours have said for decades—we don't breathe one pollutant at a time.[16] It sort of conceives a different vision of the Clean Air Act and the Clean Water Act.[17] Another example of a more expansive view of what environmental law implicates is the Biden-Harris Administration's approach to

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https://www.ipcc.ch/report/ar6/wg2 (last visited June 15, 2022) (presenting key findings of the IPCC's Sixth Assessment Report and noting increased climate hazard risks since the last report). *See also* Jeffrey D. Sachs, *The Deepening Crisis: When Will We Face the Planet's Environmental Problems?*, SCI. AM. (Sept. 1, 2010), https://www.scientificamerican.com/article/the-deepening-crisis/; Seth Borenstein, *'Code Red': UN Scientists Warn of Worsening Global Warming*, AP NEWS (Aug. 10, 2021), https://apnews.com/article/asia-pacific-latin-america-middle-east-africa-europe-1d89d5183583718ad4ad311fa2ee7d83 (guaranteeing that the climate crisis and its impacts will continue to increase because of global warming).

[12] *See* Jarrell Dillard, *Ocasio-Cortez, Progressives Push Anew for Green New Deal*, BLOOMBERG (Apr. 20, 2021) https://www.bloomberg.com/news/articles/2021-04-20/ocasio-cortez-progressives-push-anew-for-green-new-deal (documenting the Green New Deal's goals, including net-zero greenhouse gas emissions, investments to reduce pollution, and environmental justice impacts of climate change).

[13] *See generally* Environmental Justice for All Act, H.R. 2021, 117th Cong. (2021), https://www.congress.gov/117/bills/hr2021/BILLS-117hr2021ih.pdf (addressing environmental justice impacts on communities of color and prohibiting further disparate impacts through new enforcement mechanisms).

[14] *Id.* at §§ 28–29.

[15] *Id.* at § 7.

[16] *See* Press Release, World Health Org., 9 out of 10 People Worldwide Breathe Polluted Air, but More Countries Are Taking Action (May 2, 2018), https://www.who.int/news/item/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action (asserting that 90 percent of the global population breathes in ambient and household pollutants); Taylor McNeil, *The Toxic Air We Breathe*, TUFTS UNIV: TUFTS NOW (Sept. 20, 2018) https://now.tufts.edu/articles/toxic-air-we-breathe (asserting that ultrafine particles called "particulate matter" cause most pollution-related health risks in humans).

[17] *See* H.R. 2021, *supra* note 13, § 7 (amending the Clean Air Act and Clean Water Act to define "cumulative impacts" and creating enforcement mechanisms to further environmental justice principles).

environmental justice (referred to as EJ at times in this discussion) and recognizing that addressing it doesn't just require tinkering at the edges; it's a systemic problem that requires systemic solutions.[18] In particular, the Biden-Harris Administration is looking at multiagency collaboration.[19] In light of these developments, it wouldn't be at all surprising to see changes being proposed in housing, jobs, education, and transportation policy, as all of those things address environmental injustice; potential solutions call for unparalleled opportunities.[20] What

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[18] *See* Press Release, White House, What They Are Saying: Biden Administration Lays Out Path to Reach Justice40 Goal: Earns Praise from Administration Officials, Environmental Justice Leaders, Advocates, and Congressional Leaders (July 21, 2021), https://www.whitehouse.gov/ceq/news-updates/2021/07/21/what-they-are-saying-biden-administration-lays-out-path-to-reach-justice40-goal-earns-praise-from-administration-officials-environmental-justice-leaders-advocates-and-congressional-leaders/ (outlining Justice40, an executive program facilitating collaboration between federal agencies, state agencies, and local communities on environmental justice issues); Memorandum from Shalanda D. Young, Active Director Office of Management & Budget et al. on Interim Implementation Guidance for the Justice40 Initiative (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf (presenting President Biden's commitment to Justice40 to ensure environmental justice, economic development, and opportunities for disadvantaged communities); Helen H. Kang, *Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification*, 26 MICH. J. RACE & L. 23 (2021) [hereinafter Kang, *Looking Toward Restorative Justice*].

[19] *See* Press Release, White House, Fact Sheet: A Year Advancing Environmental Justice (Jan. 26, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/26/fact-sheet-a-year-advancing-environmental-justice/ (explaining the Biden Administration's commitment to developing policies to address negative health, environmental, economic, and climate effects on disadvantaged communities by involving a broad range of federal agencies, including the Environmental Protection Agency, Department of Labor, Department of Interior, and Department of Health and Human Services).

[20] *See, e.g.*, *AB 3121: Task Force To Study and Develop Reparation Proposals for African Americans*, ROB BONTA: ATT'Y GEN., STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/ab3121 (last visited May 22, 2022). The task force examined environmental racism as an aspect of the study to develop proposals. *AB 3121 Task Force To Study and Develop Reparations Proposals for African Americans: Meeting Notice and Agenda*, STATE OF CAL. DEP'T OF JUST. (Oct. 2021), https://oag.ca.gov/system/files/media/task-force-notice-agenda-101221-101321.pdf. *See also* Sammy Roth, *Why Communities Fighting for Fair Policing Also Demand Environmental Justice*, L.A. TIMES: CLIMATE & ENV'T (June 4, 2020),

I really push for in my article, *Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification*, is that what we once thought was unrealistic, restorative justice, appears to be on the menu.[21] A side note: a recent report from the Lancet Commission evaluating the Trump era actually recommends legislative action to compensate Native Americans, Native Hawaiians, Puerto Ricans, and African Americans for the wealth denied and confiscated from those groups in the past.[22]

So what does this mean for us teachers? It means that we need to change our concept of what environmental law really is. In some ways, our textbooks will need to be rewritten. In your first Emerging Environmental Law Curriculum Workshop, on the Essential Environmental Law Curriculum, Professor Steph Tai spoke about open-source textbooks.[23] That's such a great idea to make environmental law courses affordable to students who can't afford textbooks. These open-source textbooks could be designed to recognize this emerging expansive vision of environmental law. Or as a first step in the next semester, at least design one lecture exploring the question of what environmentalism really means in the twenty-first century.

Professor Jaffe:

To pick up on what both Hari and Helen were saying, the interdisciplinary nature of it may be what defines how we think about environmental law and environmental law teaching going forward. I think about it primarily from the clinician perspective, and it's interdisciplinary in least two different ways. First, there are interdisciplinary opportunities outside of the law school but across a university setting. For instance, right now I've got our clinic students

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https://www.latimes.com/environment/newsletter/2020-06-04/why-communities-fighting-for-fair-policing-also-demand-environmental-justice-boiling-point.

[21] Kang, *Looking Toward Restorative Justice*, *supra* note 18.

[22] Steffie Woodlhandler et al., *Public Policy and Health in the Trump Era*, 397 LANCET 705, 719 (2021).

[23] *See* Keith Hirokawa et al., *Roundtable One: The Essential Environmental Law Curriculum*, 46 VT. L. REV. 552 (2022) (discussing a conversation between Professor Tai and Dean Kronk Warner on the value of open sources for students in compendiums to major casebooks and exercises).

working on a historic preservation case with two different groups of graduate students in the architecture school—one looking at health impact assessments, another looking at more traditional historic preservation issues.[24] Getting the architecture and law students working together is absolutely what legal teaching should be about, because that's what practice is going to look like. As an environmental lawyer, you are going to need to know how to work with expert witnesses and other non-legal partners or clients. There's no reason to wait until after you graduate from law school to begin developing the skills to be successful in those kinds of collaborative environments.

And, second, there are interdisciplinary opportunities within the law school itself. When I was a law student, if you wanted a career in environmental law you took a traditional environmental law survey class covering Clean Air Act, Clean Water Act, Endangered Species Act, NEPA sections.[25] But now, if you're working on a Clean Air Act case, you're also thinking about zoning issues.[26] And you need to be mindful of how this interacts with local government law. And you're thinking about—and this is certainly true if you read Hari's textbook on energy law—public utility commissions and public service commissions and how these issues come to the fore.[27] So it is no longer enough to enter the workforce with just administrative law and environmental law under your belt. You also need to be conversant in a wide array of legal topics that might come up if you're working at an environmental nonprofit and trying to identify legal tools to address the environmental concerns created by an existing coal-fired power

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[24] Mike Fox, *Historic Designation Boosts Clinic's Efforts to Save Schoolhouse*, UVA TODAY (June 10, 2021), https://news.virginia.edu/content/historic-designation-boosts-clinics-efforts-save-schoolhouse (discussing collaborations with Professor Schaeffer Somers in the schools of architecture and medicine, Professor Genevieve Keller in the school of architecture, and Professor Cale Jaffe in the school of law).

[25] *See generally* Robert Percival et al., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY (2d ed.1996) (providing an example of a text Professor Jaffe used as a law student).

[26] *See generally* Kevin Perron, *Note: 'Zoning Out' Climate Change: Local Land Use Power, Fossil Fuel Infrastructure, and the Fight Against Climate Change*, 45 COLUM. J. ENV'T. L. 573, 577 (2020) (analyzing whether climate change mitigation sufficiently justifies local zoning law and whether "zoning out" ordinances can withstand legal challenge).

[27] Lincoln L. Davies, et al., ENERGY LAW & POLICY (3d ed. 2022).

plant. You've got to think about your advocacy in a very cross-cutting way in terms of just the legal issues, let alone engineering and other disciplines.[28]

II. WHAT SKILLS WILL THE NEXT GENERATION OF ENVIRONMENTAL LAWYERS NEED TO BE PREPARED FOR PRACTICE?

Professor Kang:

I had just said that the vision of environmental law really is broadening. And maybe this is not contrary, but the other trend that's been in the works for quite a while now is the specialization that's required to practice environmental law. Cale mentioned environmental lawyers in the U.S. who are specializing in the PUCs or FERC or in other highly specialized fields. So, my answer to this question about the skills that we need to teach our next generation relates to that, as well as the broadening vision of environmental law. And there are, I think, two essential skills. The first is the skill of learning how to learn. The clinic is really a place where we teach this skill. The skill is as important as ever because of what I talked about, both highly specialized and, at the same time, broad knowledge that we environmental lawyers actually have to gain.[29] We can't teach every

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[28] *See, e.g.*, *About the Project*, SUSTAINABLE FERC PROJ., https://sustainableferc.org/about-the-project/ (last visited May 10, 2022) (describing how the Sustainable FERC Project's advocacy works to expand clean energy resources on the grid and eliminate carbon pollution in the U.S. power sector); TRIP POLLARD, S. ENV'T L. CTR. SUSTAINABLE COMMUNITIES: BUILDING FOR THE FUTURE OF THE GREATER RICHMOND REGION 2 (2010), https://www.southernenvironment.org/wp-content/uploads/legacy/publications/Sustainable_Richmond_042010_Final.pdf (exploring potential government policies to promote sustainable communities, including reducing regulatory barriers and providing incentives).

[29] *See* YALE L. SCH. CAREER DEV. OFF., ENVIRONMENTAL LAW (2018), https://law.yale.edu/sites/default/files/area/department/cdo/document/cdo_environmental_law_public.pdf (explaining types of law that environmental lawyers generally practice, including regulatory, transactional, litigation, and public policy advocacy); *Environmental*, WHITEMAN OSTERMAN & HANNA LLP, https://www.woh.com/practice-areas/7/Environmental-Practice-Group/ (last visited May 8, 2022) (asserting that because no attorney can master all aspects of environmental law, attorneys specialize in specific fields and should be familiar with key federal and state regulations on issues outside their areas of expertise).

skill in our doctrinal or experiential courses, but we can and do teach how to learn what you don't know: problem-solving skills—identifying the actors and causes of a problem, potential solutions, alternatives, weighing the benefits and costs, and advising clients on issues that don't have "2+2=4" answers. By the way, we had a very nice moment yesterday in the clinic when a student said, "I thought I wasn't really ready to work on cases, but I see now that I'm very ready." That's partly because we throw them in with guidance and they're learning the skill of how to learn. They're teaching themselves in these very complicated cases that we bring in our clinics how to master terms they've never heard, technologies they've never heard about, and so on. That was a very nice moment.

The second skill that I want to talk about is something environmental clinics generally don't teach, but traditional legal services or anti-poverty law clinics do teach: the skill of deep listening and what that involves.[30] More and more clinics are developing environmental justice cases and even environmental justice programs.[31] Students have demanded that clinics bring environmental justice cases, even in traditional natural resource law clinics—particularly in the last year, as a result of racial reckoning.[32] Outside

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[30] *See* Helen H. Kang, *Respect for Community Narratives of Environmental Injustice: The Dignity Right To Be Heard and Believed*, 25 WIDENER L. REV. 219, 253 (2019) [hereinafter Kang, *Respect for Community Narratives*].

[31] *See* Seema Kakade, *Environmental Law Clinics not Only Persevere but Flourish in 2020*, JD SUPRA (Feb. 3, 2021), https://www.jdsupra.com/legalnews/environmental-law-clinics-not-only-8783376/ (explaining growing number of clinics have begun focusing on environmental justice cases, specifically energy justice, food access, and cultural competency); Rick Mullin, *The Rise of Environmental Justice*, CHEM. & ENG'G NEWS, https://cen.acs.org/environment/pollution/rise-environmental-justice/98/i32 (Aug. 28, 2020) (discussing environmental racism and growing awareness of this problem following COVID-19 outbreak and killing of George Floyd); Kang, *Respect for Community Narratives*, *supra* note 30, at 254 n.133.

[32] *See* Kelsey Landis, *Environmental Law Students Are Behind a Movement to Protect Underrepresented Communities*, INSIGHT INTO DIVERSITY (June 24, 2019), https://www.insightintodiversity.com/environmental-law-students-are-behind-a-movement-to-protect-underrepresented-communities/ (highlighting students' significant role in environmental justice clinic cases and the change they bring for underrepresented communities through legal expertise). *See also* Cydnie Golson &

academia, large environmental groups are increasingly incorporating public health and environmental justice into their dockets,[33] which is really great because the need is great.[34] But there is a potential trap because doing environmental justice work doesn't just involve announcing that you're suddenly now open for business for environmental justice. Rather, it involves developing really deep relationships with the client communities that we want to represent.[35] To give you an example, Marianne Engelman-Lado (who just left for

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Jasmyn Noel, *How Students Are Leading Environmental Justice Initiatives on Grounds*, UNIV. VA.: UVA SUSTAINABILITY (June 24, 2021), https://sustainability.virginia.edu/how-students-are-leading-environmental-justice-initiatives-grounds (describing environmental justice initiatives at the University of Virginia and important role students play in making sustainability spaces more safe, equitable, and dynamic).

[33] *See* Alejandro C. Perez et al., *Evolution of the Environmental Justice Movement: Activism, Formalization and Differentiation*, 10 ENV'T RSCH LETTER 1, 9 (2015) (concluding legal advocates are better positioned to incorporate other fields, like public health, geography, sociology, and medicine in confronting environmental damages for vulnerable populations); Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANN. REVIEWS PUB. HEALTH 103, 103–04, 111, 116 (2006) (arguing for integration of environmental inequality and its health impacts in research on health disparities and finding that many civil rights and community organizations have begun to address environmental issues such as toxic contamination, locally unwanted land uses, unsafe and substandard housing, and natural-resource extraction).

[34] *See It's Time for Public Health to Prioritize Environmental Justice*, NAT'L NETWORK OF PUB. HEALTH INSTS. (Apr. 8, 2021), https://nnphi.org/its-time-for-public-health-to-prioritize-environmental-justice/ (stating environmental justice is a public health priority and encouraging public health professionals and organizations to address inequalities produced by unfair environmental practices); *Addressing Environmental Justice to Achieve Health Equity*, AM. PUB. HEALTH ASS'N (Nov. 5, 2019), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/14/addressing-environmental-justice-to-achieve-health-equity (describing environmental injustice as a human rights issue and arguing that a health policy should encompass social, economic, and political factors and include affected communities in the process).

[35] MILAN GLOB., THE ROLE OF RELATIONSHIPS AND TRUST-BUILDING IN ENVIRONMENTAL JUSTICE AND PROTECTION (2021), https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/7/61579/files/2021/12/TrustbuildingEnvironmentalJusticeReport.pdf (discussing how strong relationships can be helpful when addressing water access and food security issues and providing ways to achieve these relationships); Kang, *Respect for Community Narratives*, *supra* note 30, at 254–60.

the Biden Administration and worked at Yale first and then Vermont Law School), when she developed her EJ clinic at Yale, she spent about a year, I believe, developing relationships.[36] As for Golden Gate University's clinic, we have decades-old relationships and an understanding of the clients' or the community's racial history, redlining practices, and the consequences those practices have had on land use and public health. For example, in San Francisco, there were redevelopment efforts in the 1960s that displaced Black residents into another area that was also redlined.[37] And now, because of mega-developments happening there, Black residents are being displaced again.[38] An understanding of all this history, and understanding our own biases toward people without economic means and toward people of color—those are areas where clinic directors and staff may actually have more to learn than some of our students. Students nowadays are quite savvy about racial injustice and inequality.[39] Some of us began our legal careers in civil rights law, and that helps, but I think that we need to recognize that EJ requires deep work from clinic directors.

Professor Jaffe:

I absolutely agree. Just to underscore what Helen said about teaching the skill of listening, or deep listening as she referred to it, it's absolutely something that is an essential legal skill for students going out into the world. It's also an essential skill if you're a clinic director or staff clinician and you're just trying to build those relationships with your students or community partners. In our pre-session, this group

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[36] Anna Merriman, *Vermont Law School Launches Environmental Justice Clinic*, VALLEY NEWS (Dec. 15, 2019), https://www.vnews.com/Vermont-Law-launches-Environmental-Justice-clinic-31262306.

[37] *See* Kang, *Looking Toward Restorative Justice*, *supra* note 18.

[38] *Id.*

[39] Alexi N. Freeman & Lindsey Webb, *Positive Disruption: Addressing Race in a Time of Social Change Through a Team-Taught, Reflection-Based, Outward-Looking Law School Seminar*, 21 U. PENN. J. L. & SOC. CHANGE 121, 123–24 (2018), (arguing to implement a race-focused course (CRRS) in law school curriculum as approved by students); Mary Wood, *Law Students Play 'Vital Role' in Report on Ways to Reduce Racial Inequities in State*, UVA TODAY (Feb. 12, 2021), https://news.virginia.edu/content/law-students-play-vital-role-report-ways-reduce-racial-inequities-state (detailing how students played a vital role in recommending policy changes to reduce racial inequities in Virginia).

talked about some of the challenges that clinicians face as they wade into politically contentious issues. One way to insulate yourself from some of the criticism while wading into those controversies is to make sure you're doing your due diligence through listening. I'll share one anecdote that was especially useful for me. Our clinic is working on an EJ-related case involving a historic African American school that was built in the early 1900s and is currently threatened by a proposed landfill project. In February 2020, shortly before the pandemic put the brakes on in-person client meetings, our clinic caravanned to Cumberland County to tour the two-room schoolhouse and meet with former students and leaders of the AMMD Pine Grove Project.[40] Following that meeting, I had a back-and-forth email exchange with Muriel Miller Branch, President of the AMMD Pine Grove Project.[41] I had misreported one detail of the school's history; she corrected me. I apologized for my error and told her, "I pledge to keep listening." Branch then responded with a message that continues to inform all of my attorney-client relationships:

> The most powerful words spoken in this entire thread are, "I pledge to keep listening." That's all my community has ever asked, to be heard, to be valued and to have equal access to resources. We don't mind doing the work, but when our two centuries of hard work is overshadowed and/or devalued, it is incumbent upon me, as one of the community's storytellers, to correct the record. Thank you for giving my community that platform.[42]

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[40] *About Us*, AMMD PGP, https://www.ammdpinegroveproject.com/about-us (last visited May 10, 2022) (describing the AMMD Pine Grove's Project objective "to protect, restore, and repurpose Rosenwald Pine Grove Elementary School" as a cultural center in Cumberland County).

[41] Sydney Trent, *An Educational Haven for Black Children During Segregation Makes Endangered Places List*, THE WASH. POST (June 3, 2021), https://www.washingtonpost.com/history/2021/06/03/endangered-historic-places-list-pine-grove-virginia/ (describing President Branch's motivation and efforts to save Pine Grove Elementary, one of the most endangered historic places of 2021).

[42] Redacted email from Muriel Miller Branch to Cale Jaffe (June 3, 2020) (on file

Dean Osofsky:

If there's anything I have taken away from almost five years as a dean and my prior work, it is that people need to feel heard and inclusive leadership is incredibly important. I honestly believe that emotional intelligence is probably 90 percent of the skill needed in so many jobs.[43] I just want to put a fine point on a couple of things that that both Helen and Cale said. As a dean, I have gone around and talked to practicing lawyers a lot about what it means to give them prepared lawyers to employ. And the number one thing that they feel like people lack coming out of law school are problem-solving skills. By that, they mean a combination of deep listening, emotional intelligence, cultural competence and a whole set of other things, but it is also about, how do they approach a problem when it comes up? How do they break down the problem areas?

For environmental lawyers, I think specific scientific and technical knowledge can help with problem solving. I ran a joint degree program at Minnesota before I was a dean, and an important part of my leadership at both Penn State and Northwestern has focused on interdisciplinary partnerships, research, and education.[44] I have seen students gain great value from getting a STEM degree together with their J.D., for instance if they wanted to go into toxics.

I completely agree with everything Helen and Cale said about community-based relationships. Part of why the deep listening to clients is so important is that different clients have varying needs.

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with Professor Jaffe) (unredacted email protected as confidential by attorney-client privilege and work-product doctrine).

[43] Dean Osofsky has found TRAVIS BRADBERRY & JEAN GREAVES, EMOTIONAL INTELLIGENCE 2.0 (2009) to be a particularly helpful resource.

[44] During her deanship at Penn State, Dean Osofsky made numerous joint hires and the law school built many new interdisciplinary partnerships, including with the College of Medicine, College of Engineering, College of Earth and Mineral Sciences, Institute for Computational and Data Sciences, Rock Ethics Institute, and Institutes of Energy and the Environment. *Innovative Legal Education: Legal Education for a Changing Society*, PENNSTATE LAW, https://pennstatelaw.psu.edu/penn-state-law/innovative-legal-education (last visited May 22, 2022). At Northwestern, Dean Osofsky established an inaugural Associate Dean of Innovation and Partnerships to explore new opportunities for interdisciplinary collaboration. *New Leadership Appointment at Northwestern Pritzker Law*, NW. PRITZKER SCH. OF L. (Jan. 4, 2022), https://news.law.northwestern.edu/professor-sarah-lawsky-appointed-vice-dean/.

Addressing environmental justice and energy justice problems requires multiple types of law and legal strategies, including among others, civil rights, torts, environmental, and energy law.[45] There are different legal areas involved, and so part of what our students need to practice in that space is legal knowledge beyond environmental law. For example, community leaders like Jamez Staples in North Minneapolis have worked to address the fact that clean energy jobs were not coming to North Minneapolis because there was no training facility that would allow people to get those jobs within an hour of this neighborhood.[46] Our University of Minnesota students thought through a different set of legal issues when a community in Northern rural Alaska wanted help developing a solar ordinance. Or in the aftermath of BP's Deepwater Horizon, when a lot of the things that were initially coming out were not EJ-focused enough, our class provided an extensive report on those issues to the Commission.[47] So I think it is also about teaching our students the skills of listening to clients to understand the problem and then exploring the different types of applicable law. The kinds of things that matter to clients, which should drive the work, are going to vary in a context specific way.

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[45] CLIFFORD VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (3d ed. 2020); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STANFORD ENV'T L.J. 71 (2005).

[46] For more recent efforts to address this issue, *see* Andrew Hazzard & Sahan Journal, *Minnesota Clean Energy Jobs Rebounded—but Workers of Color Need More Opportunities*, ENERGY NEWS NETWORK (Aug. 27, 2021), https://energynews.us/2021/08/27/minnesota-clean-energy-jobs-rebounded-but-workers-of-color-need-more-opportunities/ (detailing how a lack of training centers for clean energy causes a lack of these jobs for people of color); Yasmine Askari, *North Minneapolis Renewable-Energy Training Center to Get a Boost from the State*, MINNPOST (May 7, 2021), https://www.minnpost.com/environment/2021/05/north-minneapolis-renewable-energy-training-center-to-get-a-boost-from-the-state/ (explaining how community member planned to build community training center to increase jobs).

[47] Dean Osofsky and her students produced an article that emerged from that work. Hari M. Osofsky et al., *Environmental Justice and the BP Deepwater Horizon Oil Spill*, 20 N.Y.U. ENV'T L. J. 99, 110 (2012) (analyzing how first response to BP oil spill lacked environmental justice concerns).

III. WE'VE BEEN TALKING ABOUT BOTH CRITICAL SKILLS, LIKE PROBLEM SOLVING, AND CRITICAL ISSUES, LIKE INCORPORATING SOCIAL EQUITY AND INTERDISCIPLINARY WORK. WHAT IS THE ROLE OF CLINICS AND EXPERIENTIAL EDUCATION IN INTEGRATING THOSE CRITICAL SKILLS AND ISSUES IN LEGAL EDUCATION?

Professor Jaffe:

From the perspective of a director of a clinical class and program, I'll say that one of the challenges that clinics have faced historically, or at least that clinical law faculty are certainly acutely aware of, is that clinics are resource intensive programs.[48] While you're running a clinic class, you may have or need an additional budget for things like expert witnesses to assist with your cases. So the cost of teaching your class might be higher than a traditional large lecture class. And yet you've got a seminar-sized class, or at least a smaller number of students, rotating through the clinic. Some have assumed that the cost of running a clinical program would be prohibitively expensive, but the data simply does not bear that out.[49]

Still, how do we justify putting resources into these clinical programs? Are they really worth all that investment? Obviously, my view is absolutely. Part of the reason it's so important, especially now, is because of the confluence of a public interest, public service mission of the university, and the pedagogical mission of training lawyers for the future. At the beginning of every academic year at the University

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[48] To say that clinics have faced these challenges "historically" is to acknowledge that the debate over the value of clinical legal education is not new. *See, e.g.*, Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272, 273 (1984) ("When faculties feel pressure to reduce budgets or to restrain rates of increase, they look first to, and often not beyond, the clinical curriculum. The reason given is clinical education's unusually high cost. In making budgetary decisions, however, the relevant figure is not cost but the cost-benefit ratio. Yet, observing that clinical education is expensive says nothing about the cost-benefit ratio. Indeed, defenders of clinical education can make a good cost-benefit case . . . .") (footnote omitted).

[49] Robert R. Kuehn, *Universal Clinical Legal Education: Necessary and Feasible*, 53 WASH. U. J.L. & POL'Y 89, 96 (2017) ("Empirical evidence shows that clinical education can be provided to all law students without additional costs to those students. In fact, many schools have been successfully—and economically—providing such clinical experiences to all their students for years.").

of Virginia School of Law, we'll have a public service event for the clinics, experiential programs, externships, pro bono, etc., to grab anyone else that might be interested in learning about these and bring them together. We've got a 1L class of about 300 in a typical year, and we get about 35–50 people to show up to this event each year.[50] However, the last three years it has been well over 100 people. We've had to move it to one of the largest rooms in the law school because it's packed out the door. Students coming to law school in the last couple of years are particularly interested in public service and public engagement, which we're seeing through greater interest and competition within our Law and Public Service program.[51] And clinics are the perfect vehicle for addressing that desire to participate in public service while also helping students with the traditional task of learning to think like a lawyer. Law students don't want to wait three years to begin work on the issues they care about; they want to begin on day one. Clinical and experiential programs are essential for combining both the public service piece and the pedagogical piece.

Dean Osofsky:

With two clinicians here, I think the way I can add value on this question is talking about quasi-clinical courses. I am an unusual doctrinal faculty member because of what convinced me to go into legal academia. I had been practicing civil rights law with a focus on environmental justice at Center for Law in the Public Interest. I spent a year in China as a Yale-China Legal Education Fellow teaching US civil rights law and collaborating to start a labor law clinic at Sun Yat-

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[50] *See generally Facts and Statistics*, UNIV. OF VA. SCH. OF L., https://www.law.virginia.edu/facts-and-stats/overview (last visited Apr. 29, 2022); *University of Virginia Law School Overview*, U.S. NEWS, https://www.usnews.com/best-graduate-schools/top-law-schools/university-of-virginia-main-campus-03162 (last visited Apr. 29, 2022).

[51] *See Program in Law and Public Service*, UNIV. OF VA. SCH. OF L., https://www.law.virginia.edu/academics/program/program-law-and-public-service (last visited May. 9, 2022) (indicating that the University of Virginia's School of Law Program in Law and Public Service holds 25 slots open for first-year fellows and up to five slots for second-year fellows).

sen University,[52] which was the law school's first clinic and was launched in the second year of clinical legal education in China. 9/11 happened my first day of teaching civil rights in China, which really impacted my experience. Because I started my career with those experiences, when I entered doctrinal teaching, it was important to me important to teach classes in which we did projects for NGOs and government because I thought it could help make a difference in the world and support student learning. I thought rather than do a simulation, let's do something that actually helps an NGO or a governmental organization in the class. It is better learning for the students, because when you are working with real clients, it is different than a simulation—things evolve and get complex sometimes. And so from the very beginning of my academic career, when I was a junior professor at Whittier Law School, I started doing this work with Earthjustice, for example, where we were helping them with environmental rights reports.[53] And then my classes at the University of Oregon worked with the Western Environmental Law Center and at Washington and Lee worked with the Southern Environmental Law Center, helping those organizations bring climate change litigation into their environmental practices. At the University of Minnesota, I taught a number of energy and environmental justice project-based classes, as well as a civil rights and social justice project-based course. I think it is important to encourage doctrinal faculty to do that kind of teaching, and it is incredibly important to support and build clinics. When I was at Penn State, we were extremely grateful for a million-dollar gift from Katie Moussouris through the Pay Equity Now Foundation to start the Anuncia Donecia Songsong Manglona Lab for Gender and Economic

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[52] *Sun Yat-sen University*, ATCHINA, http://www.at0086.com/zhshu/college.aspx?c=491 (last visited May 22, 2022).

[53] For an example of these reports, *see Earthjustice Presents 2004 'Human Rights and the Environment' Report to UN*, EARTHJUSTICE (Apr. 6, 2004), https://earthjustice.org/news/press/2004/earthjustice-presents-2004-human-rights-and-the-environment-report-to-un. Dean Osofsky also assisted Earthjustice and CIEL on the petition to the Inter-American Commission on Human Rights on behalf of the Inuit Circumpolar Conference claiming that the U.S. failure to adequately address climate change violated their rights.

Equity to advance gender equity through litigation and other projects.[54] At Northwestern, the Bluhm Legal Clinic's more than 20 clinics within 13 centers, including its Environmental Advocacy Center, make an important impact on society while teaching our students.[55]

But there is a space in which NGOs need help that is not necessarily like traditional litigation help, and that work might not be a perfect project for a litigation clinic. So, these other experiential courses doing that policy work occupy an important space in the environmental law curriculum. For example, one of my favorite class projects was for the American Wind Energy Association. They were having problems around elevator standards for wind towers. As wind towers get taller, they need elevators and it costs a lot more if you have to meet public elevator standards.[56] So my students worked with them to look at how you make elevator law. I learned a lot about elevator law, and it turns out that how you do it varies a lot from state to state. My students created a guide for the American Wind Energy Association of who to contact, what kind of law applies, and what is the process for all of these different things related to wind tower elevators. That is not really a traditional clinic project, right? But it really helped the American Wind Energy Association advance environmental goals. I think there is real value to building more of those kinds of experiential, project-based opportunities into our broader curriculum.

Professor Kang:

There are standard answers about why clinics matter—students learn by doing and find meaning in the clinic, and different learning modalities in the clinic work reach students that may not have found

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[54] *About*, MANGLONA LAB, https://www.manglonalab.org/about (last visited May 22, 2022).

[55] *Bluhm Legal Clinic*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/legalclinic/ (last visited May 22, 2022).

[56] Kathie Zipp, *Long Overdue: A National Standard for Wind Tower Service Lifts*, WINDPOWER ENG'G & DEV. (Mar. 5, 2012), https://www.windpowerengineering.com/long-overdue-a-national-standard-for-wind-tower-service-lifts/ (describing the problems with elevators in wind towers meeting the same standards and requirements as building elevators).

their place in doctrinal law school classes.[57] Students disaffected by the 1L curriculum find meaning in the clinic.[58] Students discover values and identities and discover dealing with uncertainties in the law in the clinic. Students have the opportunity in clinics to scaffold the skills they've learned in 1L and 2L. These are all valid parts of legal education. I'd like to emphasize two things special about environmental clinics. Environmental clinics, possibly even more so than legal service clinics, offer opportunities for students to lead and manage really complex cases that even senior associates in environmental law firms wouldn't be entrusted to lead.[59] Students argue really big cases in the trial courts, appellate courts, and even the U.S. Supreme Court, as well as before agency decisionmakers. For instance, when the City of San Francisco attempted to demolish Candlestick Park, where the 49ers and the Giants played, without

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[57] *See generally* Colleen F. Shanahan et al., *Measuring Law School Clinics*, 92 TUL. L. REV. 547, 549 (2018), (concluding that clinics effectively prepare law students for real world practice); Stephen R. Miller, *Field Notes from Starting a Law School Clinic*, 20 CLINICAL L. REV. 137, 152 (2013), https://www.law.nyu.edu/sites/default/files/upload_documents/Stephen%20Miller%20-%20Field%20Notes.pdf (explaining importance of different learning methods provided in clinic).

[58] *See What Is a Law School Clinic Like? Students Explain*, NEW ENG. L., https://www.nesl.edu/blog/detail/what-are-law-school-clinical-programs-really-like-students-explain (last visited Apr. 27, 2022) (explaining how much students enjoyed clinic experience and how it prepared them for their legal careers); Deborah N. Archer, *Open to Justice: The Importance of Student Selection Decisions in Law School Clinics*, 24 CLINICAL L. REV. 1, 5 (2017), https://www.law.nyu.edu/sites/default/files/upload_documents/Deborah%20Archer%20--%20Student%20Selection%20in%20Clinics.pdf (detailing how law students benefited from clinic experience).

[59] *See, e.g.*, *Environmental Advocacy Clinic*, VT. L. SCH, https://www.vermontlaw.edu/academics/clinics-and-externships/environmental-advocacy-clinic (last visited Apr. 27, 2022) (providing the types of cases that VLS's environmental advocacy clinic students work on); *Abrams Environmental Clinic*, U. CHI. L. SCH., https://www.law.uchicago.edu/clinics/environmental (last visited Apr. 27, 2022) (describing how Abrams Environmental Law Clinic works to solve some of Chicago's most pressing environmental problems); *Environmental Law Clinic*, STAN. L. SCH., https://law.stanford.edu/environmental-law-clinic/#slsnav-people (last visited Apr. 27, 2022) (describing the types of cases Stanford's Environmental Law Clinic has worked on).

notifying residents,[60] students presented arguments to the planning department.[61] And we prevailed in getting the city to use a different method of demolition that wouldn't cause so many problems for a community that was already suffering from too much particulate matter pollution.[62] And then the more interesting skill to me that clinics provide is the "room to fail." And what I mean by that is that students fail at a task or sometimes they don't even come through with a task for whatever reason; or they are fabulous writers who take a clinic course and discover that persuasive writing is quite different. When they really fail—hopefully mid-semester with time to course-correct—I think that's an opportunity, actually. I don't love failure, but when it happens, it's a unique opportunity for them to learn something they won't forget. If you fail and learn, students won't forget that experience and what made them actually recover. I love that aspect of clinical learning, and it happens almost every semester. I like to say that the clinic is where we want you to fail—"I'm glad you failed" because that really creates room for learning.

Professor Jaffe:

That's such a great point about the room to fail. That's also one of the scariest things about teaching a clinic. You feel like you're driving a car from the back seat and you want them to steer, but you're really nervous. You're jumping forward. I say this as the parent of a

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[60] Lisa Fernandez, *Demolition of Candlestick Park Underway; New Development To Replace Old Stadium*, NBC BAY AREA (Feb. 4, 2015), https://www.nbcbayarea.com/news/sports/demolition-of-candlestick-park-underway-new-development-replacing-stadium/114347/; Lauren Hepler, *New Legal Challenge Revives 'Huge War' over Hunters Point's Toxic Legacy*, S.F. CHRON. (Jan. 25, 2021), https://www.sfchronicle.com/local/article/New-legal-challenge-revives-huge-war-over-16257916.php.

[61] *See, e.g.*, Letter from Golden Gate University School of Law's Environmental Law and Justice Clinic to Sarah Jones & Joy Navarette, S.F. Planning Dep't (Nov. 18, 2014), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1029&context=eljc (discussing why community residents should be involved in the decision making about demolishing the stadium because it directly impacts their air quality and health).

[62] *See* Kang, *Respect for Community Narratives*, *supra* note 30, at 258–59.

16-year-old who just got her license in February and hit a deer two weeks later. She's fine and the car is finally out of the body shop.

The other point that I wanted to touch on in terms of the role of clinics is a value they provide to students, especially those coming straight through from college. Traditional academic training, from grade school through college, can lead students to focus on their own goals. In a traditional setting, the academic project is focused on what the student gets out of it. If the student doesn't do well—if they blow off a paper, for example—that's unfortunate but it's just their bad grade and no one else's. No one else is impacted. But clinics force students to get involved in academic projects where there are a lot of other people relying on you. If you miss a deadline, it is not just the student's failure—it is *our* team's failure if things go poorly. It's our client who suffers.

I teach another class, Professional Responsibility in Public Interest Law Practice,[63] and the standard conception of legal ethics that students have to learn shares something with the principal-agent concept[64]—that it's not your case, it's not your brief that you're working on, it's not your oral argument you're preparing for. It's the client's brief, the client's argument, their voice. You're just helping them get their voice out there. Getting students—who've been students all the way since they were in kindergarten up through until they get to a law school program—to stop thinking about how they are doing in an academic class and get them to realize: oh, it's no longer about me, it's about my role in helping somebody else.

Dean Osofsky:

It is so important that we create a culture in our courses and in our law schools more broadly in which we encourage experimentalism. Now, of course, with clients, we always have to be careful to provide

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[63] *Professional Responsibility in Public Interest Law Practice*, UNIV. OF VA. SCH. OF L.: COURSES, https://www.law.virginia.edu/courses/view/121819294 (last updated May 6, 2022) (listing Professor Jaffe as the instructor for Section 1 of the course in Fall 2021).

[64] GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 16–20 (6th ed. 2017) (discussing role-differentiated morality and the Standard Conception of legal ethics).

them with competent legal service.[65] But I think more broadly, when we try new things, we have to be open to them failing or facing challenges. Who knows how that idea I had about immersive technology is going to work in the classroom. There probably will be glitches. And part of how we advance things is by being open to piloting things, open to trying things when we don't know quite how they'll work and then learning from our experiments.

Dean Rushlow:

From my time directing a clinic at VLS,[66] I totally agree that the clinic is supposed to be the safe space where students can try and fail. I'd much prefer they fail in the clinic than in their externship or summer job, where employer goals will likely come before educational goals. The clinic is supposed to be the place where it's safe for students to try things and evolve to a point where they'll then be able to handle this work when they do ultimately go to an externship or to their first job.

IV. HOW CAN WE TEACH STUDENTS TO AFFECT CHANGE IN AN INCREASINGLY POLARIZING WORLD AND OFTEN INTRANSIGENT LEGAL SYSTEM?

Dean Osofsky:

This is crucial because finding pathways to bipartisanship, to people working together across difference, is really crucial to moving things forward and it is not as impossible as it looks. Jackie Peel and I

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[65] *Rule 1.1: Competence*, AM. BAR ASSOC., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ (last visited May 2, 2022).

[66] Dean Rushlow directed Vermont Law School's Environmental and Natural Resources clinic. She also directs the Environmental Law Center. *Jennifer Rushlow*, VT. L. SCH., https://www.vermontlaw.edu/directory/person/rushlow-jennifer (last visited May 20, 2022); Press Release, *Jennifer Rushlow to Lead Vermont Law School's Environmental Law Program* (Aug. 9, 2018) (*reprinted in* VTDIGGER), https://vtdigger.org/2018/08/09/jennifer-rushlow-lead-vermont-law-schools-environmental-law-program/; *Accomplished Attorney and Innovative Advocate To Lead Nation's Top Environmental Law Program at Vermont Law School*, LAW.COM (Aug. 8, 2018), https://www.law.com/legalnewswire/news.php?id=819120.

did some research work on this issue in our piece called Energy Partisanship a few years ago.[67] And we have been looking at different ways to build on it since. What we found was, first of all, that it is so crucial to recognize—and I also found this in my one-on-one work, I'll give an example from when I was in rural Virginia as well—that it is not just about providing people with more information. I think sometimes people think that if you just tell people enough information, they will agree with you. And, you know, I have seen people shake their heads. I think the last year certainly reiterated that this might not always be a successful strategy. It is about understanding who people trust. How are they framing the world? And are there ways in which people's framing can actually come together in a meaningful way?[68] What we found was, substantively, when there is real economic alignment with environmental goals, you tend to see Republicans and Democrats moving forward together.[69] For example, Tesla received criticism in the 2021 election, but after it became very successful, Republican leaders wanted the battery factory in their state.[70] Republican governors in high wind energy capacity states are supportive of wind energy.[71] There are these places where you can find those win-wins. Another place where we saw this a lot was in the aftermath of disaster. It is temporary, but when disaster strikes, you tend to see people from both parties come together, like after Superstorm Sandy or other major storm events.[72] We also found that scaling down really matters. Local elections often are often less partisan and sometimes do not even list parties on the ballot. And local land use policy can get really practical.[73] We also found, interestingly enough, that you can sometimes find those win-wins with corporations

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[67] Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L. J. 695 (2016) (advocating for an increase in energy regulations through partnerships in the Executive Branch, state and local governments, and private sector).
[68] *Id.* at 710–16.
[69] *Id.* at 724–35.
[70] *Id.* 732–34.
[71] *Id.* 729–31.
[72] *Id.* at 736–47.
[73] *Id.* at 750–58.

because of their incentive structures around economic risk, though of course corporations in this space are a really diverse group.[74]

To give a couple quick examples of the roles that I think law schools and universities can play in fostering this—when I first came to Penn State, I got asked to lead forward a pilot project for our Center for Energy Law and Policy on methane emissions regulation of unconventional oil and gas, which was one of the most contentious energy issues in Pennsylvania at the time.[75] What we did was we brought people into a room together—leaders from industry, major environmental NGOs, Republicans and Democrats—and reframed the question for them. We asked them: if you took the latest science and technology coming out of Penn State and elsewhere, how could you come up with better regulations? Could you come up with regulations that were actually better for both environment and industry in this space? The conversation wasn't always constructive, but it was a lot more constructive than it had been in Harrisburg. As universities, we can play this convening role to have people come together and have constructive dialogue across difference, which is extremely important in our society right now and desperately needed.[76]

I'll share one other example from when I was working on climate change in rural Virginia. Everywhere I have worked, I've occasionally encountered climate skeptics and I always could tell from the look someone got on their face when they heard I was working on climate change—again, trying to use those emotional intelligence skills—that they were a climate skeptic. And what I found worked every single time—I never had it not work—was to say, you know, climate-change science is complex. There are things about which we have greater certainty, and things about which we have less certainty. There is a lot of certainty about the big picture, but these things that we care about, like "will these emissions right here, right now, cause these impacts at particular place and time," that is where the

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[74] *Id.* at 782–92.

[75] *Managing Methane Emissions from Unconventional Oil and Gas Operations*, PENNSTATE CTR. FOR ENERGY L. & POL'Y, https://celp.psu.edu/methane/ (last visited May 22, 2022).

[76] *Id.*

uncertainty is often higher.[77] But the bottom line is, if you think that there is some risk that climate change is happening, then we have to think about how we manage the risk. And once I reframed it as a risk-management exercise, every single climate skeptic was willing to have a conversation with me. This circles back to where I started, which is that I think quoting alarmist things at climate skeptics does not actually move them. But if you acknowledge the complexity of science, something that everybody intuitively knows about climate change science, and then can get into a real conversation with knowledge about the science itself and the state of the science, it actually can often move people along.[78]

Professor Jaffe:

I had an article on melting polarization on climate change politics, which I went back and looked at recently, and it feels a little Pollyannaish, to be honest, in terms of bridging political divides.[79] I think where I've moved on the issue, regarding what we teach students how to cross these divides, builds on exactly what Hari's talking about in terms of getting down to a more local level or at least a state level. An idea I'm hoping to build out into a longer article next summer is on state-centric environmentalism.[80] In other words, let's not get caught

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[77] For a summary of consensus climate change science, *see* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, IPCC SIXTH ASSESSMENT REPORT (2021), https://www.ipcc.ch/report/ar6/wg1/. For a discussion of the continued progress in Climate Science, *see* P.A. Arias et al., 2021: TECHNICAL SUMMARY, *in* IPCC SIXTH ASSESSMENT REPORT, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 47–52 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_TS.pdf.

[78] *See* Osofsky & Peel, *Energy Partisanship*, *supra* note 67, at 710–16.

[79] Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 GEO. ENV'T L. REV. 455, 488 (2018) ("The 'Trump moment' therefore gives environmental advocates the chance to challenge political conventions and break through the intense polarization and partisanship that has blocked progress on global warming in recent years.").

[80] *See* Cale Jaffe, *Federalism and Environmental Advocacy*, REGULATORY REV. (July 23, 2020), https://www.theregreview.org/2020/07/23/jaffe-federalism-environmental-advocacy/ (summarizing the Supreme Court's recent decisions on state-centric environmental regulations); *see also Power Mapping Your Way to Success*, UNION OF CONCERNED SCIENTISTS (Apr. 2018),

up in whether we're going to pass the Waxman-Markey bill and have all the energy go to that, as was the focus in 2009.[81] But instead, think what can we do at the state or local level where politics are not so deeply entrenched.

One way I try to do that from a clinical perspective, in terms of practicing state-centric environmentalism with our students, is I take a concept from the advocacy world called power mapping. If you know anyone who grew up in grassroots advocacy, they know all about power mapping, which is the basic idea that if you want to affect change on a given issue, you first need to figure out who is the decisionmaker that can actually give you the victory you need.[82] And then what are the spheres of influence that can influence that decisionmaker? I think of it in terms of a bridge-building exercise—we want to work on an issue, so who do we need to bring into the discussion? Well, we need to talk to this particular staff person at the Army Corps of Engineers, but we also need to talk to this community group that's feeling left out and make sure that they are part of the discussion. I haven't come up with a good term—for right now I'm calling it legal power-mapping with my clinic students, but it's not so much legal as it is community power-mapping. It is a way to actually get the change that our client wants without driving a wedge. It's a matter of figuring out who needs to be at the table.

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https://www.ucsusa.org/sites/default/files/attach/2018/07/SN_Toolkit_Power_Mapping_Your_Way_to_Success.pdf (describing power mapping as a visual exercise that helps identify levers and relationships one can use to gain access and influence over a target).

[81] Jaffe, *Melting the Polarization Around Climate Change Politics*, *supra* note 79, at 491–94 (2018) (discussing the Waxman-Markey bill); *See* Ryan Lizza, *As the World Burns: How the Senate and the White House Missed their Best ChanceTto Deal with Climate Change*, NEW YORKER (Oct. 11, 2010).

[82] *See, e.g.*, Nate Ela, *Urban Commons as Property Experiment; Mapping Chicago's Farms and Gardens*, 43 FORDHAM URBAN L. J. 247, 254–55 (2016) ("One, power mapping, is an analytical tool familiar to organizers for social change. This form of mapping traces relations of power in order to identify pressure points by which organizers might influence those relations.").

Professor Kang:

Oh, I love what you said—bridge making, power mapping. It sounds like a great exercise to do in a clinic in any case. I do have an example of a collaboration. This is a collaboration between parties that don't traditionally get along: community advocates and polluters. There is a community group called the West Oakland Environmental Indicators Project.[83] West Oakland is a historically redlined community, and the community group collaborated with polluters.[84] A port in West Oakland, which is a significant source of pollution,[85] the regional air district, the City of Oakland, and state agencies had to produce one of the first "community air emissions reduction plans," which the California Air Resources Board approved under a state statute that's just entering its implementation stage.[86] We're helping

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[83] *West Oakland Environmental Indicators Project: Building Resilient Communities*, W. OAKLAND ENV'T INDICATORS PROJ., https://woeip.org (last visited May 22, 2022).

[84] *See* CalEPA, *Redlining and Environmental Injustice in California*, POLLUTION & PREJUDICE (Aug. 16, 2021), https://storymaps.arcgis.com/stories/f167b251809c43778a2f9f040f43d2f5 (noting that West Oakland suffers from bay flat odors and smoke and grime from railroad shop and local industry); Laura Klivans, *West Oakland Environmental Justice Leaders on What's Changed, What Hasn't in the Neighborhood*, KQED (Apr. 28, 2020), https://www.kqed.org/science/1962832/west-oakland-environmental-justice-leaders-on-whats-changed-what-hasnt-in-the-neighborhood (noting that heavy industry and discriminatory policies like redlining in West Oakland have exposed residents, mostly people of color, to more pollution than other Bay Area neighborhoods); *see also* OWNING OUR AIR: THE WEST OAKLAND COMMUNITY ACTION PLAN–VOLUME 1: THE PLAN, W. OAKLAND CMTY. ACTION PLAN STEERING COMM. (2019), baaqmd.gov/~/media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en.

[85] *The Seaport Logistics Complex Story*, OAKLAND SEAPORT, https://www.oaklandseaport.com/development-programs/seaport-logistics-complex/the-seaport-logistics-complex-story/ (last visited Apr. 29, 2022).

[86] *See Community Air Protection Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/capp (last visited Apr. 29, 2022) (explaining that the California Air Resources Board (CARB) established the Community Air Protection Program, which focuses on reducing exposure in communities most impacted by air pollution); *see also Community Air Protection Program; 2020 CARB Board Update*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/resource-center/ab-617-implementation (last visited Apr. 29, 2022) (summarizing overall progress on CARB's Community Air Protection Program).

the group with the implementation part, but we did not help the group with the front part, the collaboration. I actually was very skeptical at first about the collaboration, which all began many years ago, even before this new law came into effect. And that's the acorn that grew into an oak tree. The participants had worked together previously under a grant given by U.S. EPA called, "Ditching Dirty Diesel."[87] So, they started working with EPA Region 9's Environmental Justice Office, the regional air district, and some of the polluters. That process built relationships, which carried over to this new project. And the air district, from what I hear, assigned as reading Richard Rothstein's book, *The Color of Law: A Forgotten History of How Our Government Segregated America*, and the parties had a third-party facilitator who oversaw these collaborations. It's sort of a mini "truth and reconciliation" in some way. I want to write about a truth and reconciliation process that's needed for environmental justice communities. I just recently heard that somebody is actually engaged in a truth and reconciliation effort as it relates to environmental law.88 So anyway, that's a really wonderful example of a collaboration.

Professor Rosenbloom:

Before I go to the next question, Tim Duane, I wanted to just check in with you.[89] We've been talking a lot about local governments and land use and planning. Earlier in the discussion, you had a couple of points that that were made in the chat box. Did you want to put those out to the floor at all before I go to the next question?

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[87] *See National Grants: Diesel Emissions Reduction Act (DERA)*, EPA (Mar. 19, 2021), https://www.epa.gov/dera/national (noting that EPA planned to award about $46 million in competitive grant funding under the Diesel Emissions Reductions Act National Grants Program).

[88] Deborah McGregor, *Reconciliation and Environmental Justice*, 14 J. GLOB. ETHICS 222 (2018), https://philpapers.org/rec/MCGRAE.

[89] Tim Duane is a Professor at University of San Diego School of Law with areas of expertise in climate change, environmental law, and public lands. *Timothy Duane*, U. SAN DIEGO SCH. OF L., https://www.sandiego.edu/law/faculty/biography.php?profile_id=5700 (last visited Apr. 29, 2022).

Professor Duane:

I spent 18 years on the faculty at Berkeley in the planning program, and what I found were two things. One is that we had graduate students who all had really good professional experience, many with relationships to some of the NGOs that are working in this space. And so they were an incredible resource. They typically had an older median age and much more experience than typical law students. And the second is that making that connection to the organizations is essential so that you're not coming to them with a problem that they might have an interest in, but rather they're coming to you with a problem that you can help solve because they're grounded in the communities and they're actually going to be able to help identify something that's really useful to them. And then you could have, as Helen was suggesting, ongoing long-term relationships. But the groundwork for that has to happen well, well, well before you take on the project, you have to have the personal relationships, but also help to frame what the problem is so that your students are actually working on something that that has direct relevance and is grounded in that group. The problem of failure is to some degree mitigated because the group has already identified what the problem is and they own it, too. So if you don't solve the problem in the same way, it's not just you coming in and promising something you couldn't deliver, but they're actually part of it. Thanks.

Professor Jaffe:

Yeah, I see environmental clinics, in particular, do that because environmental law is so resource intensive. A lot of clinics end up having a long-term partnership with the sort of boots-on-the-ground environmental NGOs. I was an attorney at the Southern Environmental Law Center (SELC)[90] before I joined the faculty at UVA, and I still work with SELC on a lot of our clinic projects. They can help us have those long, deep roots with a community on an issue because they've been there for a long time. Other clinics work with organizations like

[90] *About Us*, S. L. ENV'T CTR., www.southernenvironment.org (last visited May 9, 2022) (describing the center as a nonprofit and nonpartisan organization that advocates for and protects the right to clean air, water, and livable climate).

NRDC[91] or Earthjustice, and you can leverage that community partner not just for the legal work that they bring you, but for those deep community connections that they've been developing.

Professor Duane:

I think it's critical to not go to the legal NGOs necessarily. Planning students and planning faculty and related fields have relationships with a lot of organizations, and they're not litigation machines. They're grassroots community organizing. They're dealing with some environmental justice issue. But they could use legal help the same way the American Wind Energy Association could use it on elevators. It's not necessarily about litigation. It's about framing what kind of change we need to have in the local land-use code so we can deal with this problem or the like. It would expand the breadth of the types of problems we teach our students about—which our students really will encounter in the real world—as compared to the ones that we might get from going to groups that primarily litigate.

Dean Osofsky:

I was just going to agree with that as well. I really appreciate the emphasis that you are both giving to client-driven and community-driven work. I think interdisciplinary projects in these courses are extremely important for learning problem solving. Circling back to where I started—we had a project at the University of Minnesota, for example, in which our clients were exploring the idea of creating green space over a highway, which can make a positive difference by decreasing community impact from the highway pollution in addition to creating green space.[92] That was a project in which it was incredibly important for those communities to be involved, but also one in which

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[91] *Environmental Protection Clinic*, YALE L. SCH., https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/environmental-protection-clinic (last visited Apr. 29. 2022) (explaining the NRDC's partnership with the Yale Environmental Protection Clinic, which started in 2022).

[92] *See* Gary Fuller, *How Greener Streets Can Lead to Healthier Cities*, GUARDIAN (Nov. 5, 2021), https://www.theguardian.com/environment/2021/nov/05/how-greener-streets-can-lead-to-healthier-cities (explaining how redesigning towns to prefer walking and cycling can address the climate crisis, air pollution, and urban noise while improving health through daily exercise).

the law students needed to talk to the design students and engineers. At Northwestern, our Innovation Lab provide opportunities for students to learn team-based interdisciplinary problem solving.[93] The PILOT lab at Penn State—Policy Innovation Lab of Tomorrow—which is the first center within its Law, Policy and Engineering Initiative, similarly takes this approach.[94] For so many problems, you need to bring law together with another discipline. For example, law and engineering interface in our efforts to address many environmental issues, emerging biotech, or autonomous vehicles. The list is long.

Dean Rushlow:

I would love to jump in on this, too, and push back a little bit to the idea that that environmental NGOs can be a proxy for relationships with communities. Cale, I know you and I have a similar background, having worked in regional NGOs. And this isn't meant as shade to any particular NGO. But just having been in that world, I know that those groups are equally guilty—if not more so—of parachuting in and kind of imposing their agenda on a community.[95] My experience with some of those NGOs is that they are not the model for developing relationships and letting those relationships and clients

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[93] *Course Details*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/academics/curricular-offerings/coursecatalog/details?CourseID=1717 (last visited May 22, 2022); *How Northwestern Law's Innovation Lab Teaches Students to Think Differently*, NLAW NEWS (Jan. 23, 2018), https://news.law.northwestern.edu/how-northwestern-laws-innovation-lab-teaches-students-to-think-differently/; *NUvention*, FARLEY CTR. FOR ENTREPRENEURSHIP & INNOVATION, https://farley.northwestern.edu/academics-resources/nuvention/ (last visited May 22, 2022).

[94] *Pilot Lab Policy Innovation Lab of Tomorrow*, PENN STATE L. POL'Y & ENG'G, https://www.pilotlab.org (last visited Apr. 29, 2022); *Interdisciplinary Education and Research at the Forefront of Societal Needs*, PENN STATE COLL. OF ENG'G, https://www.lpe.psu.edu (last visited Apr. 29, 2022).

[95] *See* Lauren Durand, *Are NGO Agendas Dictated by Western Assumptions?*, E-INT'L RELS. (Sept. 26, 2012), https://www.e-ir.info/2012/09/26/are-ngo-agendas-dictated-by-western-assumptions/ (noting that NGOs have always been imperialistic despite their altruistic motives); *see also* Juan D. Gomez-Quintero et al., *International Development's Hidden Agenda: Towards a Latent Modernization of "Traditional" Societies*, OPEN ACCESS LIBR. J. (Nov. 2014) 2 (explaining that NGO workers often have subconscious hidden agendas).

determine the pathway forward. There's a lot to be said for relationships with those NGOs, and I'm in favor of it—we have several of them at VLS.[96] But it's something to be cautious about.

Professor Jaffe:

That's a great point. I remember seeing some polling on environmental issues, on which messengers were considered trusted sources of information. And I was disheartened to find out that environmental NGOs had relatively low scores in terms of being a trusted source of information.[97] And other community stakeholders, local farmers, were perceived as more trustworthy.[98] So you're right, environmental NGOs need to own that fact that—for a variety of reasons, some of their own doing, some certainly not their own doing—they aren't necessarily seen as a trusted source of information in some situations.

Dean Osofsky:

To me, this goes to Helen's point about deep listening. For example, if we are going to meaningfully help coal communities with economic development, there has to be deep listening rather than external organizations with ideas for what that would look like for that

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[96] *See U.S.-Asia Partnerships for Environmental Law*, VT. L. SCH., https://www.vermontlaw.edu/academics/centers-and-programs/us-asia-partnerships-environmental-law (last visited Apr. 29, 2022) (describing the VLS clinic that works with NGOs on environmental governance in Asia); *Environmental Advocacy Clinic*, VT. L. SCH., https://www.vermontlaw.edu/academics/clinics-and-externships/environmental-advocacy-clinic (last visited Apr. 29, 2022) (noting that the clinic gives students the opportunity to represent the National Wildlife Federation, a conservation NGO).

[97] ROBERT BONNIE ET AL., UNDERSTANDING RURAL ATTITUDES TOWARD THE ENVIRONMENT AND CONSERVATION IN AMERICA 22, Fig. 12 (Duke Nicholas Inst. for Env't Pol'y Sols., 2019), https://nicholasinstitute.duke.edu/sites/default/files/publications/understanding-rural-attitudes-toward-environment-conservation-america.pdf (noting that "Environmental advocacy groups (like Sierra Club, NRDC)" were seen by only 13% of survey respondents as a trusted source of environmental information).

[98] *Id.* (noting that Local "farmers/ranchers" were seen by 34% of survey respondents as a trusted source, the highest rated category).

community. I think we see lots and lots of examples in different contexts of this need.

Professor Jaffe:

On the coal community just transition work, I serve on Virginia's Coal and Energy Commission, which is sort of a legislative advisory commission.[99] Most of the members of the commission are not from urban centers or the environmental community. They're from the Coalfield Region of the Commonwealth and fossil-fuel related industries. Virginia's landmark clean energy law—the Virginia Clean Economy Act—is set to transition the state to a 100% zero-carbon electricity grid by 2050.[100] Support for the law was built in much of the state by talking about it as a win-win. That the law would help grow the economy and make a meaningful stride towards tackling climate change. So we're going to grow renewable energy jobs, we're going to grow energy efficiency jobs, and we're going to get to zero carbon by 2050.[101] But the message is a harder sell in the Coalfield Region, where the bill was not seen as win-win for Coalfield communities. It was perceived, I think wrongly, as attacking their industries, leaving them out to dry.[102] There are nonprofits like Appalachian Voices that are working very earnestly on what's often called a "just transition" for

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[99] *Coal and Energy Commission,* COMMONWEALTH OF VA., DIV. OF LEGISLAT. SERVS., http://dls.virginia.gov/commissions/cec.htm (last visited Apr. 29, 2022); *see* VA. CODE ANN. §§ 30-188, 30-189 (2021) (empowering Virginia Coal and Energy Commission to study coal as an energy resource and promote energy resources other than petroleum).

[100] *See* VA. CODE ANN. § 30-188 (explaining that non-legislative citizen members should include Commonwealth citizens who represent interests identified with production and conservation of coal, natural gas, and energy); Virginia Clean Economy Act, H.B. 1526 (Va. 2020).

[101] Virginia Clean Economy Act, H.B. 1526 (Va. 2020) (replacing voluntary renewable energy portfolio program with a mandatory program requiring Dominion Energy Virginia and American Electric Power to produce electricity from 100% renewable resources by 2045 and 2050, respectively).

[102] *See* M.J. Mcateer, *Clean Slate: Power Utilities, State Government Looks to Carbon-Free Future*, VA. BUS. (Aug. 30, 2021), https://www.virginiabusiness.com/article/clean-slate/ (noting that coal field businesses in Virginia will have to stop providing power to Virginia unless they employ renewable energy certificates under Virginia's comprehensive legislation).

fossil-fuel dependent towns.[103] But there's some skepticism of just transition work, I think in part because they don't trust the messenger. Maybe the right answer is, I don't know, I can do a better job of sitting and listening.

V. YOU WERE TALKING ABOUT ALL THESE REALLY INTERESTING AND EXCITING WAYS TO INCORPORATE A VARIETY OF ISSUES AND SKILLS INTO THE CLASSROOM AND INTO THE CLINICS. I'M WONDERING, IS IT SORT OF GROUNDED IN WHAT YOU'RE SEEING IN TERMS OF YOUR STUDENTS' POSTGRADUATE CAREER PATHS? ARE YOU SEEING A CHANGE COMPARED TO EARLIER IN YOUR CAREER IN TERMS OF WHAT STUDENTS ARE DOING AND WHAT ISSUES THEY'RE TACKLING AND HOW THEY'RE TACKLING THEM?

Professor Kang:

Part of the problem is that environmental law graduates are not able to get that that first environmental job without two years of experience. I'm seeing that more and more law firms or large environmental organizations require two years.[104]

Dean Rushlow:

I wish that more students that want to go into environmental law and need that first job would become public defenders and prosecutors. I think that often gets dismissed because they think they

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[103] *A New Economy for Appalachia*, APPALACHIAN VOICES, https://appvoices.org/new-economy/ (last visited May 5, 2022).

[104] *See, e.g.*, *Careers for Attorneys: Open Opportunities*, FOX ROTHSCHILD LLP, https://www.foxrothschild.com/careers-for-attorneys/open-positions (last visited Apr. 29, 2022) (advertising for associate positions with at least two to four years of experience); *Attorney Positions*, COLE SCHOTZ P.C.: CAREER OPPORTUNITIES, https://www.coleschotz.com/career-opportunities (last visited Apr. 29, 2022) (advertising for associate positions for two to four years of experience); *Full or Part-Time Employment*, THE MO. BAR: JOBS FOR MO. LS., https://mobar.org/site/content/Lawyer-Resources/Jobs_Space/Full_or_Part-time_Employment.aspx?hkey=3f8bc385-bf81-4a33-b3f0-6c737ca5b893 (last visited Apr. 29, 2022) (advertising for associate positions for two to four years of experience); *Current Openings*, WIGGIN & DANA, LLP: CAREERS AT WIGGIN, https://www.wiggin.com/careers-at-wiggin/current-openings/ (last visited Apr. 29, 2022) (advertising for associate positions for two to four years of experience).

don't want to do criminal law. First of all, there is room for criminal law in environmental law, and I think that's something a lot of students don't know, actually. But regardless of whether they ultimately practice criminal law or not, what a great way to get litigation experience—you would have so much to show for yourself coming from those jobs. I have on rare occasions had colleagues that did that, but it seems to be so rare that students go that route and yet there are jobs to be had there.

Dean Osofsky:

For the most part, I agree with the concern about the experience, though I would say that many of the environmental jobs that that require bar passage don't look that different than they did a decade ago. Our graduates go to environmental organizations, government, et cetera. Where I think we are seeing more evolution is in the area of what are known as "JD advantage jobs." There are many jobs in which legal knowledge is helpful, but a JD or bar passage is not needed. Northwestern's Master of the Science of Law provides STEM professionals with education at the interface of law, science, and business that helps them progress in their current jobs or go into jobs where they can help bridge law and STEM.[105] I think that, to the extent that there is an evolution going on that we really need to think about, it is in that space--areas where legal knowledge is valuable to professional paths, but we are not necessarily preparing students for a traditional law job. And what does it mean to prepare students for that, whether they arre JD students going to JD advantage jobs or master's students who are using their legal knowledge to be more informed scientists or engineers?

Professor Jaffe:

I tell students that if they know what they want to do, they might need to be flexible either geographically or temporally. So in other words, if they want to practice environmental law with a

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[105] *See Master of Science in Law*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/academics/degree-programs/msl/ (last visited Apr. 29, 2022) (explaining that the Master of Science in Law curriculum focuses on intersection of law, business, and technology).

nonprofit organization in the Southeast, then they need to recognize that it could be a multi-year timeline until they get that job doing exactly what they want. If they want to practice environmental law with a nonprofit tomorrow and they don't care where it is, then that's great. They have to be willing to go literally anywhere in the country to get that job. So either temporally or geographically, they are best served if they have some flexibility coming out of law school.

THE COMMON LAW REMEDY TO THE TAX DEED AND TAX LIEN'S DISPARATE IMPACT ON COMMUNITIES

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[*] J.D. 2022, Vermont Law School. I would like to thank Mike Meister, Professor Jonathan Rosenbloom, Ryan Clemens, Andrew Cliburn, and the *Vermont Law Review* Staff for their invaluable direction, reviews, and recommendations.

INTRODUCTION

Gladys Wisner lived on 480 acres of cropland outside of North Platte in Lincoln County, Nebraska, since 1941.[1] At 90 years old and suffering from mini-strokes, Gladys moved from her home of over 70 years to a supervised living facility.[2] Gladys' eldest of four, Roger, handled all of her finances and the farm's.[3] Roger unexpectedly passed away and Gladys' second son, Robin, stepped in to handle all the finances.[4] In the transition, Robin failed to pay the property taxes one year because he misunderstood the family's land trust.[5] The County sold a property tax lien on the land to a third party.[6] Then, the original third-party purchaser sold the property tax lien to Vandelay Investments.[7] No one told Robin or Gladys their taxes were delinquent or that interest in their land moved through so many hands.[8]

After paying Gladys' property taxes for three years, Vandelay sent a letter to Gladys' retirement home telling her that she would lose her family's 480 acres if she did not pay three years-worth of property

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[1] Wisner v. Vandelay Inv., LLC, 916 N.W.2d 698, 709 (2018).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Joe Duggan, *Nebraska Supreme Court Rules in Favor of Firm That Acquired Land of 94-Year Old Who Didn't Pay Taxes*, OMAHA WORLD-HERALD (Aug. 26, 2018), https://omaha.com/news/courts/nebraska-supreme-court-rules-in-favor-of-firm-that-acquired/article_38a0189c-b2b4-5e24-8bde-2b543c0fcce8.html (stating Robin found out about the back taxes from a tenant who farmed the property and immediately offered to pay the debt); *see also Wisner*, 916 N.W.2d at 709 (holding that notice by publication was valid when the local newspaper listed every delinquent property as its legal description).

taxes, costs and fees, plus a 14% interest rate.[9] Gladys never got any notice, and the post office returned Vandelay's notice to them.[10] Vandelay did nothing with the returned notice, they did not try to reach Gladys or Robin.[11] Ninety days after Vandelay sent out the notice, the county transferred Gladys's property to Vandelay, free and clear.[12] When Robin found out about the transfer, he offered to pay the full price of taxes, costs, fees, and 14% interest to keep his family's land, but Vandelay rejected the payment.[13] Vandelay paid roughly $50,000 in delinquent taxes to receive a farm worth $1.1 million. This is the tax lien process.

Two common ways governments can take someone's property for delinquent property taxes is by selling a tax lien or tax deed.[14] A tax lien allows a third party to purchase an interest in an original property owner's land.[15] Once a third-party purchaser has an interest, they pay the property taxes on the land until the government transfers the property to them or the owner pays a redemption fee.[16] In contrast, a tax deed allows a local government to briefly take control of the land to sell the title at a tax deed auction, and allows the highest bidder to purchase and receive the deed to land that day.[17] For the purposes of this Note, the main difference between the two is time of purchase. This Note will use tax sale process to refer to them generally, but differentiate between the two processes where necessary.

The tax sale process is "exceedingly complicated and . . . understood only by investors who profit from the purchase of properties at tax sales."[18] Each local government has the power to enact its own tax sale statutes and coordinate its procedures, sale process,

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[9] *Wisner*, 916 N.W.2d at 710.
[10] *Id.*
[11] *Id*.
[12] *Id.*
[13] *Id.*
[14] JOHN RAO, THE OTHER FORECLOSURE CRISIS, NAT'L CONSUMER L. CTR. 13 (July 2018), https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 8.

and enforcement.[19] There are many steps that due process requires local governments to follow; however, those processes greatly vary by state and methods of enforcement.[20] Broadly, the process follows three essential steps once a property owner misses one property tax payment:

> 1. The government levies the tax lien/deed and provides notification of the pending tax sale;
> 2. The government sells the tax lien/deed;
> 3. The government transfers property to third party purchaser in return of satisfying the original property owner's tax debt, who generally sells property for profit.[21]

Each state has a redemption period in between steps one and three.[22] Once delinquent, the cost to redeem, or take back the original property owner's property rights, is no longer just balancing the property owner's debt.[23] Instead, to regain property rights, the original property owner must pay the balance of their debt, a high interest rate, and additional costs and fees set by the local government.[24]

Property tax payments are important to local governments because they are their primary revenue source for many government programs.[25] Any loss in revenue, no matter the amount, can cause

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[19] *Id.* at 11.
[20] *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 750 (2000) (analyzing the impact of *Mennonite Bd. of Missions v. Adams* on due process standards of the tax lien process); Lorrin Hirano, *Notice in Non-Judicial Tax Sales*, HAW. B. J. 4, 4 (Aug. 2006) (addressing the implications of *Jones v. Flowers* on due process for Hawaii's tax lien process); Daniel Koen, *Trying to Protect Elderly and Mentally Incompetent Homeowners: One Tax Deed Case at a Time*, 14 PUB. INT. L. REP. 10, 15 (2008) (focusing on Due Process Clause requirements and subsequent failures of notice requirements in Cook County, Illinois).
[21] RAO, *supra* note 14, at 12.
[22] *Id*.
[23] *Id*.
[24] *See id.*, app. at 43 (documenting states with tax sale processes having interest rates averaging over 10%, with some as high as 48%).
[25] *The National Tax Lien Association's Response to the National Consumer Law Center's Report*, NAT'L TAX LIEN ASSOC. 1, https://cdn.ymaws.com/www.ntla.org/resource/resmgr/press_kit/the_national_tax_lien_associ.pdf (last visited Apr. 29, 2022) [hereinafter *NTLA Response*].

serious harm to local governments.[26] Local governments use tax sales to cure deficits from delinquent property taxes and to entice tax sale investors by offering steady investment returns.[27] Additionally, local governments entice tax sale investors by offering land for a fraction of its value if the original property owners cannot redeem.[28] In 2012, tax lien investors invested over $1.5 billion into local governments to remedy the losses from delinquent property tax payments.[29] Overall, both parties greatly benefit from the process, because local governments remedy deficits by offering guaranteed returns to investors.[30]

Local governments and third-party purchasers have a symbiotic relationship strengthened by favorable judicial and legislative decisions that subsequently weaken property rights. Court decisions give expansive rights to tax-lien holders that supersede other foundational property rights.[31] The Supreme Court's limited jurisprudence in its few peripherally related cases expanded third-party purchaser rights.[32] Courts and the criminal justice system protect third-

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[26] *See* Georgette C. Poindexter et al., *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in the Era of Urban Distress*, 30 CONN. L. REV. 157, 159 (1997) ("[T]he sheer magnitude of the problem coupled with the pivotal role of property taxes to a healthy city lends urgency to the discussion [of tax lien sales].").

[27] RAO, *supra* note 14, at 8 (explaining the allure of tax sales for investors comes from interest rates ranging between 20–50%).

[28] *See id.* (comparing the stark loss of equity from tax sale auctions to other auction sales, like a mortgage foreclosure).

[29] *See NTLA Response*, *supra* note 25, at 1 (reporting proceeds resulting from tax lien sales, which does not account for sales local governments made in tax deed auctions).

[30] *See* RAO, *supra* note 14, at 13 ("The ability to collect interest and penalties, which can be substantial, makes these sales attractive to purchasers even if the homeowner eventually redeems the property.").

[31] *See* Collier v. Kincheloe, 180 P.3d 1157, 1160 (Mont. 2008) (allowing tax lien sales to create a new title for tax lien purchasers. This subsequently destroyed the remainder interest after life estate holders failed to pay their property taxes).

[32] *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 639 (2008) (allowing standing for treble damages under civil RICO statute when one third-party purchaser sued another); Jones v. Flowers, 547 U.S. 220, 236 (2006) (holding the State provided adequate notice despite the homeowner not living at the address when the post office returned notice); Permanent Mission of India to UN v. City of New York, 551 U.S. 193, 200 (2007) (expanding third-party purchaser rights to defeat a sovereign immunity defense).

party purchasers' rights to fairly bid on delinquent property taxes, like pursuing fraudulent bidding practices.[33] Yet, the original property owners' rights rarely receive equal attention or diligence.[34] Approaching the tax sale process from the original property owner's perspective is not a common analysis—which the lack of jurisprudence determining original property owners' rights reflects. This Note takes a novel approach to the tax sale process by analyzing tax sale rights owed to the original property owner through identifying inherent rights owed to everyone under the Constitution.

This Note explains why the tax sale process qualifies as an unconstitutional taking under the Fifth Amendment when the government withholds surplus proceeds from the original property owner. First, important social and financial incentives motivate local governments to use the tax sale process, despite its high cost to individual community members. Second, courts across the country have yet to conclude on what rights parties have under the tax sale

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[33] *See* OFF. OF PUB. AFF., DEP'T OF JUST., SIX INVESTORS INDICTED FOR THEIR ROLES IN BID-RIGGING SCHEME AT MUNICIPAL TAX LIEN AUCTIONS IN NEW JERSEY (2013), https://www.justice.gov/opa/pr/six-investors-indicted-their-roles-bid-rigging-scheme-municipal-tax-lien-auctions-new-jersey (showing how four people and two entities related to tax-lien investing firms, rigged tax lien bids, which resulted in them receiving more liens from local governments than allowed by statute); Fred Schulte & Scott Calvert, *Witness Says He Rigged Bids in Property Tax Lien Auctions in Maryland*, THE CTR. FOR PUB. INTEGRITY (Mar. 4, 2011), https://publicintegrity.org/inequality-poverty-opportunity/witness-says-he-rigged-bids-in-property-tax-lien-auctions-in-maryland/ (introducing the key witness for a federal criminal case centered around Maryland-based law firm's fraudulent tax lien scheme where they allegedly bid on behalf of a Florida bank).

[34] *See* Johnny Edwards, *Efforts Intensify to Curb Fulton's Tax Lien Sales*, ATLANTA JOURNAL-CONSTITUTION (Jan. 13, 2012), https://www.ajc.com/news/local/efforts-intensify-curb-fulton-tax-lien-sales/NjF5ZIWe2yJF848aRD4t8L/ (reporting how tax lien reform is dying in Fulton County's legislature because experts said that expanding notice and using certified mail is overly burdensome and costly for local governments); Joe Duggan, *'Legal Ripoff'? Nebraska Makes it Easier for Investors to Take Farms, Homes for Unpaid Taxes*, OMAHAWORLD-HERALD (Nov. 17, 2018), https://omaha.com/state-and-regional/legal-ripoff-nebraska-makes-it-easier-for-investors-to-take-farms-homes-for-unpaid-taxes/article_00777ae3-f354-5172-8a8d-629c7614be29.html (reporting that the third-party purchaser that bought Gladys Wisner's house spent $75,000 to lobby the Nebraska Legislature to block a tax lien reform bill).

process, but a common line of jurisprudence incorrectly relies on the only Supreme Court case that addressed the constitutionality of the issue.[35] Third, taxes complicate the legal analysis of a taking, because the government equates taking someone's real property as per se payment for taxes. Fourth, since the government treats taking someone's property as per se payment of taxes, common law principles require the government to only take the amount of tax due and give the surplus back to taxpayer. Lastly, the government employs third-party lien purchasers as tax collectors, those private purchasers qualify as state actors, thus subject to return surplus to original property owners. The tax sale process allows local governments and third-party purchasers to take delinquent property owner's land without providing the surplus owed through just compensation.

I. LOCAL GOVERNMENTS USE THE TAX SALE PROCESS AT THE DETRIMENT OF THEIR CONSTITUENTS

Elderly; Black, Indigenous, and People of Color (BIPOC); and low-income communities face disproportionate loss of equity from the tax sale process, while governments use it to balance budgets.[36] The tax sale process's benefits to local governments are not worth the disproportionate harm suffered by elderly, BIPOC, and low-income populations. During times of financial uncertainty, local governments turn to the tax sale process to ensure they can continue providing important services and programs, like funding public schools and fire departments.[37] For example, local governments turned to the tax sale

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[35] *See* United States v. Taylor, 104 U.S. 216, 221 (1881) (analyzing how the Act of 1862 did not inherently overturn the clause in the Act of 1861 that "allowed owners of lands sold for taxes to . . . receive the surplus proceeds remaining after payment of taxes and charges"); United States v. Lawton, 110 U.S. 146, 146 (1884) (using the Act of 1862 to justify requiring the government to pay the $929.50 surplus resulting from the government's bid for the claimant's property); *infra* Part III.A.

[36] RAO, *supra* note 14, at 8; Andrew W. Kahrl, *Investing in Distress: Tax Delinquency and Predatory Tax Buying in Urban America*, 43 CRITICAL SOCIO. 199, 213 (2017).

[37] *NTLA Response*, *supra* note 25, at 4; *see also* Patrick D. Dolan et al., *Tax Lien Securitization: Opportunities and Risks*, DECHERT ON POINT (Dec. 15, 2010), https://www.dechert.com/knowledge/onpoint/2010/12/tax-lien-securitization-

process to recoup losses during the Great Recession.[38] Since 2008, noticeable tax sale success further encouraged local governments to use the tax sale process.[39] Some local governments fast-tracked the tax lien process by selling tax liens in bulk to large companies[40] and moving the process online to reduce costs.[41] As local governments suffer from COVID-19 losses, like delinquent property tax payments and inflation-related costs, more cities will likely turn to the tax sale process.[42] Despite providing a catalyst to cash-strapped local governments, the tax lien process comes at a dire cost.

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opportunities-and-risks.html (analyzing a National Tax Lien Association report showing how the number of delinquent property taxes greatly increased during the 2008 financial crisis); Poindexter, *supra* note 26, at 172 (explaining the reason municipalities are increasingly turning to the tax lien process to alleviate deficits).

[38] *See* RAO, *supra* note 14, at 10–12 (chronicling the 2008 recession, and its impact on local governments which used tax sales to recover from increased delinquent property taxes).

[39] *See* Auduti Gaha, *Dartmouth to Auction More than $1 Million in Tax Liens*, S. COAST TODAY (Nov. 1, 2014), https://www.southcoasttoday.com/article/20141101/news/141109922?template=ampart (communicating to town of Dartmouth, MA that 153 delinquent property tax payments were for sale at the cities first tax lien auction); Mike Lawrence, *Tax Debt Sale Raises $3.1 Million*, S. COAST TODAY, https://www.southcoasttoday.com/article/20160517/NEWS/160619544 (selling bulk property liens to one company from Boston, MA for $3.1 million in the city of New Bedford, MA first tax lien sale) (last updated June 17, 2016); Carly Cahur, *Property Auction Sale Announced for Land Along Mermentau River*, NAT'L TAX LIEN ASS'N (July 12, 2019), https://www.ntla.org/news/460800/Property-auction-sale-announced-for-land-along-Mermentau-River.htm (opening up 4,000 acres to tax lien purchasers and requiring no minimum bid).

[40] *See* Kahrl, *supra* note 36, at 200 (describing the recent tax lien process where growth arises from both an increased amount of financially distressed communities, and innovations in the process to reduce government costs, such as bulk-lien purchasing to expedite the process); ANGELA C. ERICKSON ET AL., VIOLATING THE SPIRIT OF AMERICA: HOME EQUITY THEFT IN MASSACHUSETTS, PAC. LEGAL FOUND. (2021) (reporting how one company in Massachusetts, Tallage Lincoln, bought at least 154 properties through the tax sale process between 2014 and 2020).

[41] *See* Carly Cahur, *First Ever Online Tax Sale Brings in $115,000*, NAT'L TAX LIEN ASS'N (Dec. 9, 2019), https://www.ntla.org/news/481018/First-Ever-Online-Tax-Sale-Brings-in-115000.htm (reporting on an online bidding, contrary to normal practice of in-person bidding).

[42] *See* Louise Sheiner & Sophia Campbell, *How Much Is Covid-19 Hurting State and*

While the tax sale process provides integral funding for local governments, it disproportionately impacts elderly, BIPOC, and low-income populations.[43] The tax sale process is not inherently biased; instead, it is the product of the larger inequality surrounding housing in America.[44] Tax sales arise from the failure to pay a bill, yet the bill's cost can be inaccurate or have inflated costs due to local government's deficient or absent property assessment,[45] and unethical omitting of escrow accounts,[46] among any other combination of biases and discrimination.[47] Instead of giving people manageable means to repay their debts, local governments offer delinquent owner's land to the highest bidder looking to turn a profit.[48] Essentially, local governments

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Local Revenues, BROOKINGS INST. (Sept. 24, 2020), https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/ (indicating that Covid-19 will cause state and local revenues to decline for the next three years starting at 5.5% for 2021).

[43] *See* Andrew W. Kahrl, *Dignity Takings and Dignity Restoration: Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 CHI.-KENT L. REV. 905, 906 (2017) ("African American homeowners have been and remain more vulnerable to predatory tax buying."); *Tax Lien Sales Put Low-Income, Seniors, and Disabled at Risk for Foreclosure*, AM. BAR ASS'N (Aug. 31, 2011), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_33/issue_1_oct2011/tax_lien_sales_putlow-incomeseniorsandthedisabledatriskofforeclo/ (highlighting the issues facing elderly people that lose their home they lived in for decades over misunderstandings, especially with reverse-mortgage and escrow accounts).

[44] *See* Kahrl, *supra* note 36, at 202 (contrasting how black people's wealth, relative to their homes, makes up a larger percentage of their overall wealth compared to white people's overall wealth).

[45] *See* CARLOS AVENANCIO-LEÓN & TROUP HOWARD, THE ASSESSMENT GAP: RACIAL INEQUALITIES IN PROPERTY TAXATION, WASH. CTR. FOR EQUITABLE GROWTH, 37–38 (2020) (exhibiting the disparate impact of property tax values to BIPOC populations and how that disparate impact is increasing).

[46] *See* RAO, *supra* note 14, at 10 (aligning relationship between escrow accounts, subprime mortgages, and increases in tax sales).

[47] *See id.* at 31 (reporting from the New York City's Comptroller that "the tax liens sold in 2011 were highly concentrated in low-income communities with large populations of African-American and Hispanic New Yorkers.").

[48] *See* Caroline Enright, *Someone To Lien on: Privatization of Delinquent Property Tax Liens and Tax Sale Surplus in Massachusetts*, 61 B.C. L. REV. 667, 689 (2020) (comparing tax sale incentives between participants: local governments want to balance their budget to continue paying for services and programs, while out-of-state tax-lien investors want to maximize profit).

allow corporations to purchase these tax liens, without needing to step foot in their jurisdiction, to expedite repayment of municipal funding at the expense of their community members.[49]

Like Gladys Wisner, Bennie Coleman was a victim of the tax sale process.[50] Bennie was a 76-year-old retired Vietnam Veteran with dementia who lost his home for $134 in delinquent property taxes.[51] Bennie's debt snowballed into an unaffordable $4,999 bill in the two years Embassy Tax Services, LLC (Embassy) owned the lien on his house.[52] The court gave Bennie a mental-health extension to gather the money, however the court granted Embassy's motion for default judgement after Bennie failed to make it to court.[53] Embassy then began the process of removing Bennie from his home worth $197,000, which forced Bennie to move into the homeless shelter down the street.[54] Bennie was a victim of the tax sale process like many others, however given the exponential bill growth, his dementia diagnosis, and identity as a black, retired marine, his story incited national outrage and sparked a full investigation into the tax lien process in Washington, D.C.[55]

Bennie's story led the Washington Post to uncover the tax lien process inequality in Washington D.C..[56] The investigation focused on the D.C. area, and exhibited the multiple out-of-state third-party purchasers taking advantage of D.C.'s tax lien process.[57] The investigation revealed that in the D.C. area alone, over half of the tax lien foreclosures occurred in the two poorest wards in the city, 72% of pending foreclosures were in neighborhoods with over 80% non-white

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[49] *See* RAO, *supra* note 14, at 19 ("Bank of America, JPMorgan Chase, and Fortress Investment Group all have owned or financed tax lien investment firms.").
[50] Coleman v. District of Columbia, 70 F. Supp. 3d 53, 58 (D.D.C. 2014).
[51] Michael Sallah et al., *Left with Nothing*, WASH. POST (Sept. 8, 2013), https://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/?tid=a_inl_manual [hereinafter *Left with Nothing*].
[52] *Id.*
[53] *Coleman*, 70 F. Supp. 3d at 65.
[54] *Id.*
[55] *Left with Nothing*, *supra* note 51.
[56] *Id.*
[57] *See id.* (reporting out-of-state investment firms purchased liens from a 65-year-old on hospice care for $1,025 in delinquent taxes and a 95-year-old suffering from Alzheimer's for $44.79 in delinquent taxes).

populations, and one-third of the houses lost arose from liens worth less than $1,000.[58] The investigation noted these problems were not exclusive to the D.C. area, and reform often fell short.[59] The report concluded by noting most people cannot fight the process when they do not have the funds to endure a long, drawn out legal battle against these third-party purchasers, on top of facing the potential costs of attorneys' fees if they lose.[60]

This issue is a nationwide problem. While some states have recently passed new laws to protect home owners from this process, there are still many states where original property owners lose all their equity for a single missed property tax payment.[61] Across the country, local governments continue to take people's property, even during a pandemic.[62] And due to the circumstances surrounding tax sales, they disproportionately impact the elderly, BIPOC, and low-income communities.[63] Tax sales impact people often too poor to pay their

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[58] *Id.*

[59] *See id.* (listing states and local governments with meager restrictions on the tax lien process, like capping legal fees that third-party purchasers can charge original property owner challengers to $1,500).

[60] *Id.*

[61] *See* ERICKSON ET AL., *supra* note 40 (discussing the bills North Dakota and Montana passed to protect homeowners from losing their equity in the tax lien process); *id.* (explaining how one individual underpaid his Michigan 2011 property taxes by $8.41 and was foreclosed on without notice).

[62] *See* Roxana Hegeman, *Black Neighborhoods in Kansas Hard Hit by Property Tax Sales*, ABC NEWS (Apr. 24, 2021), https://abcnews.go.com/US/wireStory/black-neighborhoods-kansas-hard-hit-property-tax-sales-77286739 (reporting on a black family that lost their home because they could no longer pay their property taxes after losing their job during the pandemic); Andy Barrand, *Tax Sale Features 162 Different Properties*, STAR (Oct. 21, 2021), https://www.kpcnews.com/thestar/article_d50a8719-a349-5269-90b7-6b41b1692587.html (describing the properties that will sell at the Dekalb County, Indiana tax sale in 2021, as well as the $403,359 resulting from 2020's sale).

[63] *See* Hegeman, *supra* note 62 (detailing how one Kansas county with one of the highest BIPOC percentages in the state and 21% poverty rate has substantially more tax sale properties every year than the rest of the state); *see also* CAROL PARK & DAVID J. DEERSON, LOOKING UP: ENDING HOME EQUITY IN THE NORTH STAR STATE, PAC. LEGAL FOUND. (2021) (detailing how a 92 year-old woman in Minnesota lost her home, with $90,000 of equity in it, over roughly $2,000 in delinquent property taxes, which the county then sold for $43,000 and kept the profit).

property taxes, much less pay for legal representation, so relevant case law on the topic is sparse.

II. COURTS HAVE INCONSISTENT TAX SALE JURISPRUDENCE

Courts incorrectly interpret the Supreme Court's only relevant case that challenged a state's tax lien process for violating the Takings Clause.[64] *Nelson v. City of New York* held that original property owners could not receive surplus proceeds because they had not formerly requested surplus proceeds within a reasonable time.[65] Courts incorrectly interpret *Nelson* to wholly preclude takings claims from the tax sale process, unless a statute provides original property owners a recognized interest in the surplus.[66] Other courts noticed the error and correctly interpreted *Nelson* in recent years, which led to challenging the constitutionality of its respective state's tax sale process.[67] Specifically, in *Rafaeli, LLC v. Oakland County*, the Michigan Supreme Court found a common law right to surplus in Michigan's tax sale process.[68]

A. Courts Incorrectly Analyzed Nelson *To Foreclose Unconstitutional Takings Arguments for Disputed Tax Sales*

State and lower federal courts used *Nelson v. City of New York* as the touchstone case for the tax sale process because they misinterpreted *Nelson's* range of applicability. Despite the tax sale process being in front of the Court on multiple occasions, *Nelson* is the only time the tax sale's Fifth Amendment constitutionality was at issue.[69] *Nelson* is the only Supreme Court case that calls for surplus proceeds through an unconstitutional takings claim stemming from the

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[64] *Infra* Part III.A.
[65] Nelson v. City of New York, 352 U.S. 103, 110 (1956).
[66] *Infra* Part III.A.
[67] *Infra* Part III.B.
[68] 505 Mich. 429, 460 (Mich. 2020).
[69] *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 641–42 (2008) (analyzing a civil RICO claim that arose from fraudulent tax lien bidding); Jones v. Flowers, 547 U.S. 220, 223–25 (2006) (examining the constitutionality of the notice provided in a tax lien sale).

tax sale process.[70] New York City took Nelson's property for a delinquent $65 water bill and sold the property for $7,000.[71] When Nelson found out about the sale four years later, they wanted to collect the resulting surplus from the tax sale, which the statute made available to them.[72] The precise issue was whether the Fifth Amendment's Taking Clause can circumvent the statutory requirement for a timely filing to receive surplus proceeds.[73] The Court held the Takings Clause did not permit Nelson to receive surplus proceeds, because they failed to timely exercise that statutory right.[74] Courts often cite to the holding, but not the explanation that narrowed *Nelson*'s precedent.

Since *Nelson* barred surplus under the Fifth Amendment, courts misinterpret *Nelson* to bar any surplus recovery when no statute first provides the right.[75] A few key cases highlight the *Nelson* misrepresentation, and how it built precedent in both federal and state courts completely precluding a Fifth Amendment Takings Clause argument in tax sale cases: *Balthazar v. Mari, Ltd.*, *Auburn v. Mandarelli*, and *Ritter v. Ross*.[76] In *Balthazar v. Mari, Ltd*., the court cited *Nelson* to dismiss the takings argument, and explained that the only constitutional guarantee granted to Balthazar was notice and a

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[70] *See Nelson*, 352 U.S. at 109–10 (distinguishing the other previous tax sale surplus cases from *Nelson* because *Nelson* provided means to get surplus) (citing United States v. Lawton, 110 U.S. 146, 150 (1884); United States v. Taylor, 104 U.S. 216, 222 (1881)).

[71] *See Nelson*, 352 U.S. at 105–06.

[72] *See id.* at 108 (describing the circumstances in which the Nelsons failed to get their bill, including their bookkeeper deliberately hiding the bill from them out of spite).

[73] *Id.* at 110.

[74] *Id.*

[75] Despite the lengthy precedent in some jurisdictions on *Nelson*, courts today are still relying on it to preclude takings claims in the tax sale process. *See* Tyler v. Hennepin Cnty., 505 F. Supp. 3d 879, 891 (D. Minn. 2020).

[76] *See* Auburn v. Mandarelli, 320 A.2d 22, 31 (Me. 1974) (referring to *Balthazar* to draw similarities in calling the city's windfall as acceptable exercise of government power); Ritter v. Ross, 207 Wis. 2d 476, 486 n.7 (Wis. App. Ct. 1996) (citing *Auburn* and *Balthazar* to support holding); Reinmiller v. Marion Cnty., 2006 U.S. Dist. LEXIS 75597 *1, *12 n. 8 (D. Or. 2006) (using *Auburn* and *Balthazar*'s denial of cert to the United States Supreme Court to justify an endorsement of both cases conclusions).

public auction for delinquent taxes.[77] The court held that the defendant's windfall of all "'surplus value' which exceeds the land's tax and interest liabilities" was justifiable when people are delinquent on their property taxes.[78] The court further suggested that Illinois offered a two-year redemption period for property owners who cannot pay their delinquent taxes, so they could sell their land and use the proceeds to balance their debt.[79] The court concluded delinquent land owners selling their property to satisfy their tax debts was a normal remedy because forced foreclosure on tax liens are "often sold for substantially less than it's apparent market value."[80] Despite courts reliance on *Balthazar* to preclude takings arguments, the court only directly addressed the takings claim in a footnote that classified the transfer of land as a tax payment, thus not a taking.[81]

The Maine Supreme Judicial Court concluded in *Auburn v. Mandarelli* that *Nelson* prohibited surplus recovery, unless a statute conveyed that right to the original property owner.[82] There, Samuel Mandarelli claimed an unconstitutional taking occurred because he did not receive any surplus proceeds.[83] The City of Auburn and Androscoggin County took his property for $399 in delinquent property taxes, but sold it for $13,520.[84] The court held that since no statute provided surplus rights, the original property owner had no viable takings claim.[85] The court concluded the loss suffered by the original home owner was just because he failed to comply with the law, but acknowledged the harshness of the statute and need for

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[77] Balthazar v. Mari, Ltd., 301 F. Supp. 103, 105 (N.D. Ill. 1969) (citing Nelson v. City of New York, 352 U.S. 103, 110 (1956)).
[78] *Id.*
[79] *See id.* at 106 ("Two years afford[s] property owners ample opportunity to raise enough money to redeem or canvass for prospective buyers . . . .").
[80] *Id.*
[81] *See id*. at 105 n.6 ("Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue.").
[82] Auburn v. Mandarelli, 320 A.2d 22, 31 (Me. 1974) (citing Nelson v. New York, 352 U.S. 103, 105–06 (1956)).
[83] *Id.* at 25.
[84] *Id.* at 24–25.
[85] *Id*. at 32.

legislative reform.[86] The court in *Auburn* and *Balthazar* draw from the same line of reasoning: *Nelson* barred any claim to surplus if no statute gave this right to the claimant.

The Wisconsin Court of Appeals saw no merit in a takings argument for a tax sale case when there was no statutory right to surplus.[87] The court cited *Nelson* to preclude any claims for surplus.[88] Relying on *Balthazar* and *Auburn*, the court refused to stop the county from transferring property to a third-party purchaser for $17,345, when the original owners only owed $84.43 after paying government over $500 in back taxes.[89] The court's reasoning aligned with the incorrect interpretation of *Nelson*: the original property owner does not have a right to the surplus if there is no statutory right established.[90] The court held there were no statutory surplus rights, but that the legislature could enact such rights at a later date.[91]

The interpretation that *Nelson* bars a right to surplus without a statute to prescribe such right is incorrect. *Balthazar*, *Auburn*, and *Ritter* are examples of tax sale cases that rely on that incorrect interpretation of *Nelson*.[92] However, the Supreme Court never addressed the constitutional right to surplus. Courts generally cite the same quote to preclude the takings argument: "We hold that nothing in the Federal Constitution prevents [denying surplus proceeds] were [sic] the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[93] But courts fail

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[86] *See id.* ("Amelioration of the oppressiveness of this statute must be made."); *see also id.* at 32 ("Thus, upon expiration of the period of redemption the defendant lost all rights which he might otherwise have had in the property.").
[87] Ritter v. Ross, 207 Wis. 2d. 476, 480 (Wis. App. Ct. 1996).
[88] *See id.* at 485 (citing Nelson v. City of New York, 352 U.S. 103, 105–06 (1956) ("[T]he United States Supreme Court rejected a claim under the Takings Clause when the municipality sold the plaintiff's property for $7000—to satisfy a $65 tax delinquency—and retained the proceeds.").
[89] *See id.* at 478 (relying on other cases precluding surplus to original owners because no statute conferred such right).
[90] *See id.* at 486 ("Thus, when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them").
[91] *Id.* at 487.
[92] *Infra* Part III.A.
[93] Nelson v. City of New York, 352 U.S. 103, 110 (1956).

to include the sentence directly before, which constricts the holding's applicability: "What the City of New York has done is to foreclose real property for charges four years delinquent and, *in the absence of timely action to redeem or to recover any surplus,* retain the property or the entire proceeds of its sale."[94] The Supreme Court's holding stopped a party from usurping a statutory time limitation through a Takings Clause argument.[95] The Court does not address whether a property owner has a vested property right to surplus proceeds under the Fifth Amendment. The Supreme Court only analyzed a person's statutory rights to surplus under the New York law. Therefore, courts reliance on *Nelson* is erroneous, because the Supreme Court has yet to answer whether property owners have a constitutional right to surplus in tax sales.

B. State Courts Identified Surplus Rights in State Constitutions' Takings Clauses

State courts have identified surplus rights arising from the tax sale process through their respective state constitutions.[96] The Supreme Court never addressed the validity of the original property owner's constitutional claim to surplus proceeds from a property tax sale.[97] Yet, some state courts refuted the misinterpretation of *Nelson* by holding the state's Takings Clause covers the tax sale process's surplus.[98] Courts that identified surplus rights distinguished from *Nelson* and exemplified where past courts mistakenly relied on *Nelson*.[99] The most recent identification of surplus rights came from

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[94] *Id.* (emphasis added).
[95] *Id.*
[96] *See* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 457 (Mich. 2020) (establishing surplus rights through common-law origins); Thomas Tool Serv., Inc. v. Croydon, 761 A.2d 439, 441 (N.H. 2000) (holding the tax lien process violated the Fifth Amendment and New Hampshire State Constitution); Bogie v. Barnet, 129 Vt. 46, 49, 270 A.2d 898, 900 (Vt. 1970) (finding the Vermont Constitution enlisted rights to surplus).
[97] *Infra* Part III.A.
[98] *See* cases cited *supra* note 96.
[99] *See* Coleman v. District of Columbia, 70 F. Supp. 3d 58, 77 (D.D.C. 2014) (correcting the government's reliance on *Nelson* by properly parsing *Nelson*'s narrow holding).

the Michigan Supreme Court's holding in *Rafaeli*, *LLC v. Oakland County,* when the court ruled that common law principles established the original property owner's right to surplus in the Michigan Constitution's Takings Clause.[100]

Bogie v. Barnet and *Thomas Tool Services, Inc. v. Croydon* are two state court cases that established their respective state constitution provided original property owners with rights to surplus.[101] While both cases relied on the state constitution to support holdings favoring surplus rights, each came to different conclusions on how their state constitution provided surplus rights. The court in *Bogie* held that the original property owner had a right to surplus under the Vermont Constitution's Takings Clause, thus the government can only take property amounting to taxes due.[102] The court reasoned that the objective of the state's tax sale "is to recover taxes and costs incurred in the process of collection, not operate a real estate business for profit."[103]

Thomas Tool Services, Inc. v. Croydon held the tax lien statute was unconstitutional under the New Hampshire Constitution because there was no statutory avenue to recover surplus.[104] The New Hampshire Supreme Court's decision pointed out the original property owner lost their $65,000 property, for $370.26 in delinquent property taxes, which was "an unduly harsh" loss of surplus.[105] The court reached this conclusion by implying that surplus should subtract the what the original property owner's paid for the property minus the tax lien.[106] The court declared the tax lien statute unconstitutional because

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[100] *Rafaeli, LLC*, 952 N.W.2d at 460.
[101] *Bogie*, 129 Vt. at 49, 270 A.2d at 900; *Thomas Tool Services, Inc.*, 761 A.2d at 441.
[102] *See Bogie*, 129 Vt. at 50, 270 A.2d at 900 (analogizing Vermont's Constitution with *United States v. Lawton* by holding both preclude the government to profit from taking property in pursuit to recover delinquent taxes).
[103] *Id*.
[104] *Thomas Tool Serv., Inc.*, 761 A.2d at 441.
[105] *Id.*
[106] *See id.* (deciding the "unduly harsh punishment" arose from the difference in the $65,000 the plaintiff paid, and the $370.26 the defendant paid for the same property).

the statute does not provide for a " taking of taxable property *only* to the extent of the lien."[107]

The Michigan Supreme Court held that common law principles of taxation established vested property rights in surplus proceeds, thus invoking the State's Takings Clause for the tax deed process.[108] In *Rafaeli, LLC v. Oakland County*, the court ruled Michigan's tax deed process unconstitutional because the government retained the surplus without providing just compensation.[109] Both petitioners lost their property for a tax debt substantially lower than the value the government sold the property for at the tax deed auction.[110] The court's holding specifically relied on the common law principle that taxpayers should only pay taxes owed, not anything more.[111] The court held that since common law established a constitutionally protected right in surplus proceeds, the Michigan statute was unconstitutional without just compensation of the surplus proceeds.[112] The court concluded by declaring the statute was unconstitutional by withholding original property owners' last bit of equity they own in their house.[113]

III. TAKING PROPERTY FOR DELINQUENT TAXES SHOULD BE A TAKING, BUT COURTS CLASSIFY IT AS PER SE PAYMENT FOR DELINQUENCY INSTEAD

Courts should treat the government's taking of real property as an exercise of the eminent domain powers, yet courts attribute taking land for delinquent property taxes as an exercise of the taxing power. The Fifth Amendment requires local governments to pay just

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[107] *Id.* (citing First NH Bank v. Town of Windham, 138 N.H. 319, 332 (1994) (Horton, J., concurring)) (emphasis added).
[108] Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 460 (Mich. 2020).
[109] *Id.* at 461.
[110] *See id.* at 440 (comparing one petitioner's outstanding debt of $8.41, and growing to $285.81, to the government's selling price at auction for $24,500 and comparing the other petitioner's approximate final tax bill equaling $6,000 to government's selling price of $82,000).
[111] *Id.* at 463–64.
[112] *Id.* at 455, 466.
[113] *See id.* at 466 ("[J]ust compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes . . . .").

compensation when it takes a person's property.[114] Specifically, the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[115] The government can exercise its eminent domain-taking powers by meeting two requirements: the taking is for public use and the government provides just compensation.[116] Collecting taxes to fund municipalities is likely a valid public use.[117] However, taking property that has a far greater value than the taxes owed subsequently creates equity instability without just compensation.[118] Since the government does not provide just compensation when it takes property for delinquent taxes, but generally sells taken property for a profit, it should be an unconstitutional taking under the Fifth Amendment.[119] Nevertheless, courts deny Takings Clause arguments and ascribe the loss to a proper exercise of the taxing power.[120] Equating taking real property for delinquent property taxes to a taxing power exercise essentially makes the real property per se payment for the debt.[121]

A. The Tax Lien Process Provides a Simple Takings Claim for the Original Property Owner

The Fifth Amendment allows the government to use its eminent domain powers if it takes property for (1) a public purpose and (2) provides just compensation.[122] The purpose of the Takings

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[114] U.S. CONST. amend. V.
[115] *Id.*
[116] *Id.*
[117] *See* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 514 (1937) ("This Court has long and consistently recognized that the public purposes of the state, for which it may raise funds by taxation, embrace expenditures for its general welfare.").
[118] *See* United States v. Miller, 317 U.S. 369, 373 (1943) ("Such compensation means the full and perfect equivalent in money of the property taken.").
[119] *See* RAO, *supra* note 14, at 13 (clarifying that tax deed proceeds rarely go to the original property owner, and usually municipalities keep the profits).
[120] *See* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 n. 6 (N.D. Ill. 1969) (concluding the government was not taking property for a public purpose, rather collecting unpaid taxes).
[121] *See infra*, Part IV.C.
[122] U.S. CONST. amend. V; *see* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112,

Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole."[123] While an unconstitutional taking can assume many forms, taking one's real property, such as their home, is a classic example.[124] When determining the public purpose validity in a taking, the Supreme Court often defers to state legislatures to determine what the public needs, thus affording a wide latitude to the legislature.[125] Determining just compensation is more straightforward: "compensation must generally consist of the total value of property when taken . . . ."[126] The tax deed process exemplifies a taking since the government transfers property from a private owner to itself without just compensation.[127]

Taking someone's property for delinquent property taxes is likely a public purpose because local governments use the tax sale process to maintain their budget in lieu of timely paid taxes.[128] Local legislatures enact tax sale laws for two reasons: to maintain revenue for important community services and programs, and to incentivize timely property tax payments.[129] The judiciary's role in determining the "public purpose" of a taking is extremely narrow.[130] Within that role, courts defer to the legislature unless the public purpose is irrational, thus setting a high threshold to overturn a taking based on

158, 161, 164 (1896) (broadening the Fifth Amendment's "public use" standard to a "public purpose" standard).

[123] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[124] Horne v. Dep't of Agric., 576 U.S. 351, 357–58 (2015); *see also* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2176 (2019) ("The framers meant to prohibit the . . . government from taking property without paying for it.").

[125] Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[126] *Knick*, 139 S. Ct. at 2170.

[127] *See* RAO *supra* note 14, at 13 (highlighting the government's role in transferring property and selling the deed to third-party purchasers).

[128] *See* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 n.6 ("Rather than taking private property . . . Illinois is here collecting taxes which are admittedly overdue."); *see also* Smith v. SIPI, LLC, 811 F.3d 228, 235 (7th Cir. 2016) (weighing the state's "vital interest in collecting delinquent" taxes as justifying distinction from normal tax delinquency laws to support the state's need for the tax lien system).

[129] *NTLA Response*, *supra* note 25, at 4.

[130] Berman v. Parker, 348 U.S. 26, 32 (1954).

failure to provide a valid public purpose.[131] Since legislatures enacted these laws for the rational reason of retrieving unpaid taxes, it is likely a valid public purpose.[132]

Since there is likely an acceptable public purpose, the government's land grab is a clear example of a taking that requires just compensation.[133] The general standard for just compensation is the fair market value of property.[134] Yet, original property owners rarely receive *any* payment when the government transfers their property to a third party.[135] Instead, local governments take property with no compensation and transfer it to whichever third party bid the most, which is usually a fraction of the property's fair market value.[136] If just compensation "must generally consist of the total value of property,"[137] then many original property owners deserve just compensation for the difference between taxes due and total value of property.[138] The property owner suffers from the stark difference in

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[131] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) ("Thus if a legislature . . . determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public purpose.").

[132] *See id.* at 243–44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.").

[133] Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 450 (Mich. 2020).

[134] Olson v. United States, 292 U.S. 246, 256–57 (1934).

[135] RAO, *supra* note 14, at 13.

[136] *See id.* at 8 ("The structure of tax lien sales also makes it far more likely that a homeowner will suffer a devastating loss of home equity . . . ."); RM & DB, LLC v. Stewart, 2015 MT 327, 328, 381 Mont. 429, 362 P.3d 61, 67 ("Until the tax deed is issued, the tax sale procedure is essentially nothing more than a tax collection device.") (quoting 5 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 39.04 (Michael Allen Wolf ed., 2015)).

[137] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[138] *See* Tallage LLC v. Meaney, No. 11TL143094, 2015 WL 4207424, at *12 (Mass. Land Ct. June 26, 2015) (confirming Tallage's $1,052.84 payment as valid exercise of tax lien statute to acquire property with a fair market value of $270,000); Joe Duggan, *'Legal Ripoff'? Nebraska Makes it Easier for Investors to Take Farms, Homes for Unpaid Taxes*, OMAHA WORLD-HERALD (Nov. 17, 2018), https://omaha.com/state-and-regional/legal-ripoff-nebraska-makes-it-easier-for-investors-to-take-farms-homes-for-unpaid-taxes/article_00777ae3-f354-5172-8a8d-629c7614be29.html (documenting a farmer who lost $60,000 in acreage and his

equity when the government takes their home to balance delinquent property taxes valued substantially less than its market value and gave them nothing in return.

B. Local Governments Use Their Taxing Power To Remedy Delinquent Taxes, Which Precludes a Takings Clause Argument

The tax-sale process is an exercise of the local government's taxing power—which shields it from any unconstitutional takings claims for real property.[139] This confusing distinction in tax-sale cases surfaces when original property owners challenge the government's taking of their homes.[140] Courts justify denying recovery in tax-sale cases by classifying the government's taking of real property as a payment for delinquent taxes.[141] Essentially, this distinction raises the standard from proving a taking occurred, to requiring the original property owners to prove the tax is irrational.[142] This distinction creates a higher burden of proof for original property owners to

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home for $500 in delinquent tax payments); Fred Schulte, *Wall Street Quietly Creates a New Way To Profit from Homeowner Distress*, CTR. FOR PUB. INTEGRITY (Dec. 9, 2010), https://publicintegrity.org/inequality-poverty-opportunity/wall-street-quietly-creates-a-new-way-to-profit-from-homeowner-distress/ (chronicling the process of a Florida woman losing her $62,000 home over $768.25).

[139] *See* Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 239 (1890) (distinguishing taxation and takings by explaining taxing has less restrictions than other government powers like eminent domain).

[140] *See* Speed v. Mills, 919 F. Supp. 2d 122, 129 (D.D.C. 2013) ("However, while the tax sale deprived Mills of title to a portion of property that was lawfully his, it cannot be a 'taking' under the Fifth Amendment. The [taking] took place pursuant to the District's taxing power . . . .").

[141] *See* Indus. Bank of Washington v. Sheve, 307 F. Supp. 98, 99 (D.D.C. 1969) (concluding tax sales do not require just compensation because they are not products of government takings); Sol-G Constr. Corp. v. United States, 231 Ct. Cl. 846, 850 (Ct. Cl. 1982) (classifying original property owner's loss of property as a consequence of legal government action to recover delinquent taxes); Golden v. Mercer Cnty. Tax Bureau, 190 B.R. 52, 57 (Bankr. W.D. Pa. 1995) (specifying true purpose of taking someone's property for delinquent property taxes is to collect taxes).

[142] *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932) (requiring irrational basis for tax to overturn it).

overcome, since the taxing power gives local governments a broader range of powers than the eminent domain powers.[143]

The taxing power distinction thus classifies taking someone's home for delinquent property taxes as per se payment since courts equate tax sales to a form of tax collection.[144] The government's taxing power provides a range of actions to raise funds through taxation.[145] Governments receive a wide range of "enforcement tools available . . . for the collection of delinquent taxes," including the right to take any real property.[146] Legislatures use a "formidable arsenal of collection tools" to ensure timely tax payments.[147] One of these formidable collection tools is taking someone's property and selling it.[148] Since taking someone's house for delinquent taxes becomes a form of tax collection, the taxing power gives a government priority to collect funds and remedy mistakes later.[149] The government's taxing

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[143] *See* Leigh v. Green, 193 U.S. 79, 89 (190) ("The state has a right to adopt its own method of collecting taxes, which can only be interfered with . . . when necessary for the protection of rights guaranteed by the Federal Constitution."); Ky. Union Co. v. Kentucky, 219 U.S. 140, 151 (1911) ("The State is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject . . . to the restricting regulations of the Constitution of the United States").

[144] *See* Wright v. Pappas, 256 F.3d 635, 637 (7th Cir. 2001) (citing Simon v. Cebrick, 53 F.3d 17, 22 (3rd Cir. 1995); Dawson v. Childs, 665 F.2d 705, 710 (5th Cir. 1982) (holding a lien sale is a mode of tax collection); *see also* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 n. 6 (N.D. Ill. 1969) ("Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."); Speed v. Mills, 919 F. Supp. 2d 122, 129 (D.D.C. 2013) (establishing taxing power as source for government to take someone's property for delinquent property taxes as means to pay off delinquency).

[145] *See* License Tax Cases, 72 U.S. 462, 471 (1867) ("It is true that the power of Congress to tax is a very extensive power.").

[146] *See* United States v. Rodgers, 461 U.S. 677, 682 (1983) (recalling the "usual right" remedy for delinquent property taxes have always been taking property and selling it); *see also* Poindexter, *supra* note 26, at 280 (attributing the rise in property tax collection compliance from 78% to 94% to instituting a sale of tax liens to the private sector).

[147] *Rodgers*, 461 U.S. at 683.

[148] *NTLA Response*, *supra* note 25, at 3.

[149] *See* McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 37 (1990) (articulating the government's "exceedingly strong interest in financial stability" requiring "timely payments prior to the resolution of any dispute over the

power prevents the original property owner from recovering under the Takings Clause and the original property owner lacks the means to prove the entire tax is irrational, so they lose their home for pennies on the dollar.[150] However, the original property owner only loses the interest in their real property, they do not lose all interest in their property rights "bundle of sticks."

IV. COMMON LAW REQUIRES LOCAL GOVERNMENTS TO PAY SURPLUS PROCEEDS

Original property owners have a recognized right to surplus through the common law, so the government cannot take surplus without providing just compensation. Early American Colonists used English common law principles to build the legal foundations of our country.[151] Common law influences courts in determining the breadth of property rights, or rephrased, what sticks are in a property owner's bundle.[152] Common law principles and contemporaneous jurisprudence acknowledge that taxpayers should pay their taxes, but should not pay in excess of those taxes.[153] Since courts interpret taking property for delinquent property taxes as per se payment,[154] then surplus proceeds represent the original property owner's excess tax payment.[155] The government's taxing power is not an absolute power that permits keeping excess tax payments.[156] Therefore, when the

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validity of the tax assessment"); Hibbs v. Winn, 542 U.S. 88, 104 (2004) (enunciating the purpose of the Tax Injunction Act was to prevent taxpayers from disrupting state government finances by withholding large sums of money).

[150] Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932) (citing Dows v. Chicago, 78 U.S. 108 (1871)); State Railroad Tax Cases, 92 U.S. 575, 614 (1875).

[151] Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) (noting that Magna Carta principles provided the foundation for future common law principles).

[152] *Infra* Part V.A; *see Bundle of Property Rights*, N.D. ST. UNI. AG. L. & MGMT. (last visited May 1, 2022), https://www.ag.ndsu.edu/aglawandmanagement/appliedaglaw/graphics/bundle1 ("Property rights have been described as a bundle of sticks wherein each stick represents a different property right.").

[153] *See infra* Part V.B.

[154] *See supra* Part IV.B.

[155] *See infra* Part V.B.

[156] *See* Segarra, *infra* note 171.

government retains this excess payment, it is withholding the taxpayer's property and it is an unconstitutional taking.[157]

A. Common Law Established a Property Interest in the Surplus Arising from Tax Collection

English common law recognized that tax collectors could only seize enough property to satisfy the debt payable to the Crown.[158] The Magna Carta limited tax collectors to only take property for taxes due, and identified surplus as a protected property right.[159] This protection arose when tax collectors seized property to pay a decedent's debt, but refused to give any excess proceeds to decedent's heirs.[160] Clause 26 of the Magna Carta required that the property seized should approximately equal the debt.[161] Common law declared that the delinquent decedent's family receive all excess from the sale that satisfied their debt.[162] This principle should apply to property taxes as well, because using property for per se payment should not allow local governments to take in excess of what a taxpayer owes.[163]

Courts and legislatures use the common law to guide their decisions, which can lead to a legislature's adoption or refusal of common law principles in the form of statute.[164] The Constitution does not create property interests; it protects property interests "that stem

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[157] *See infra* Part V.B.
[158] Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 454–55 (Mich. 2020).
[159] Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 47 (2015).
[160] *Id.*
[161] *Id.*
[162] Martin v. Snowden, 59 Va. 100, 136 (Va. 1868); *see* 2 WILLIAM BLACKSTONE, COMMENTARIES *452 (referring to the process of collecting delinquent taxes by the crown as "an implied contract in law" to either return property after payment of debt or use surplus to satisfy other debts).
[163] *See Rafaeli, LLC*, 952 N.W.2d at 454–55 (summarizing the common law property interest in tax surplus resulting from sale of property for delinquent payment).
[164] *See* Munn v. Illinois, 94 U.S. 113, 134 (1876) (describing the process to override common law principles is simply writing legislation proscribing the opposite); Horne v. Dept. of Agric. 576 U.S. 351, 358 (2015) (recalling how the colonists used the Magna Carta's principles to shape colonist statutes and build the foundation of our legal system today).

from an independent source such as state law."[165] Common law provides the government with an independent source of judicially recognized property rights when no statute provides such guidance.[166] Courts recognize adopted common law property rights, unless there is a statute that overrides it.[167] There is no statute barring surplus recovery, so courts should allow original property owners to collect any money in excess of their delinquent property taxes, unless the legislature enacts a statute to bar such recovery.[168]

Additionally, the adoption of surplus rights is commonplace in tax law,[169] and courts recognize the different avenues for taxes refunds.[170] This adoption is so common that the government provides surpluses for overpayment of taxes every spring—which every American recognizes as a tax refund.[171] This principle stretches beyond any single tax.[172] Even in regards to taking property, the federal

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[165] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[166] *See Horne*, 576 U.S. at 358 (chronicling the adoption of Magna Carta principles throughout American History and how courts interpret them similarly today).

[167] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 92–93 (1980) (citing *Munn*, 94 U.S. at 134) (emphasizing that the whole point of legislation is to amend the errors of common law).

[168] *See supra* Part III.A (listing court holdings that barred surplus recovery because there was no statute granting the right).

[169] *See* 26 C.F.R. § 514.9 (2020) (permitting surplus refunds to taxpayers that paid excess in federal taxes during the years of 1952–56); OR. REV. STAT. § 305.270(1) (2021) (providing a procedure for Oregon taxpayers to recover if they overpaid on certain state taxes); STATE OF MICH. DEP'T OF TREASURY, CREDIT OR REFUND OF OVERPAYMENT OF TAXES OR CREDITS IN EXCESS OF TAX DUE AND APPLICABLE INTEREST (1996) (notifying taxpayers of recent court case that changed the procedure for filing for tax refund).

[170] *See* Comm'r v. Lundy, 516 U.S. 235, 242 (1996) (discussing the limitations of "look-back periods" for tax refunds to taxpayers); Graham v. Du Pont, 262 U.S. 234, 256 (1923) (relying on § 252 of the Revenue Act of 1918 to illustrate plaintiff's attempt to capture surplus from taxes related to stocks).

[171] *See* Marielle Segarra, *The History—and Psychology—Behind the Tax Refund*, MARKETPLACE (Feb. 20, 2019), https://www.marketplace.org/2019/02/20/history-and-psychology-behind-tax-refund/ (chronicling the history of the tax refund since its genesis in the 1940's because of an over-expansion of income tax).

[172] *See* Strategic Hous. Fin. Corp. v. United States, 86 Fed. Cl. 518, 523 (2009) (addressing arbitrage tax refunds); Pittston Co. v. United States, 199 F.3d 694, 699, 706 (4th Cir. 1999) (allowing party to collect refund for premium taxes under the

government allows for debtors' redress in bankruptcy law if property transfers for "less than 'reasonably equivalent value.'".'"[173] Courts often decide cases in terms of *how much* time Americans have available to get their refund.[174] This was the very issue in *Nelson,* which remains the only Supreme Court case addressing the Takings Clause in a tax sale proceeding.[175] All these examples of collecting taxes for only the amount owed represent the adoption of the same principles in the Magna Carta: the government can only collect taxes owed and nothing more.[176]

Without a statute advising otherwise, governments have no right to keep excess surplus proceeds after satisfying the original property owner's delinquent property tax debt.[177] Essentially, the taxpayer gives up their property to satisfy delinquent taxes, the taxpayer does not give up their property to increase local government funding.[178] Courts recognize that taxpayers should have avenues to collect surplus tax payments from the government.[179] Forcing people

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Coal Act); U.S. Shoe Corp. v. United States, 296 F.3d 1378, 1382 (Fed. Cir. 2002) (limiting interest provision on refunds from the Harbor Maintenance Tax).

[173] Smith v. SIPI, LLC, 811 F.3d 228, 234 (7th Cir. 2016) (citing 11 U.S.C. § 548(a)(1)(B)).

[174] *See* Georgeff v. United States, 67 Fed. Cl. 598, 603 (Fed. Cl. 2005) (providing the general rule courts identify for refund tax claim submission) (emphasis added); Haller v. Comm'r, 181 T.C.M. (CCH) LEXIS *1, *13 (2010) (analyzing the requirements of refund filing extensions for mental and physical disabilities).

[175] *See supra* Part II.A.

[176] *See supra* text accompanying notes 148–51.

[177] *See* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 439 (Mich. 2020) (calculating surplus as $24,500, the sale price at the tax auction, minus the delinquent taxes as $285.81, equaling the government getting a $24, 214.19 surplus profit); *see also* Nelson v. City of New York, 352 U.S. 103, 106 (1956) (barring recovery because claim fell outside the prescribed statute of limitations); United States v. Lawton, 110 U.S. 146, 146–51 (1884) (allowing the original property owner to recover the $929.50 surplus that the government held, because a statute barred the government from keeping excess payments).

[178] *See Rafaeli, LLC*, 952 N.W.2d. at 472 (putting surplus proceeds into the county's general fund is a taking).

[179] *See* Borenstein v. Comm'r, 919 F.3d 746, 751 (2d Cir. 2019) (interpreting 26 U.S.C. § 6512(b)(3) as expanding the tax court's jurisdiction to provide taxpayers with refunds); Strategic Hous. Fin. Corp. v. United States, 86 Fed. Cl. 518, 523 (2009) (detailing the process for tax refunds when a party overpays taxes due in

to pay in excess of taxes owed conflicts with the very purpose of collecting one's property to balance the local government's revenue loss.[180] Therefore, since courts acknowledge the principle of returning tax surplus, property owners have a valid property interest in surplus where no statute bars them from this common law right. [181]

B. Surplus Property Rights Are Separate from the Real Property Taken

As a threshold issue, surplus proceeds arising from property sold to satisfy delinquent taxes is a separate property interest from the real property sold.[182] Precedent holds that taking property to satisfy delinquent property taxes is constitutional.[183] The government's purpose for taking property through the tax deed process is to supplement funding deficiencies caused by delinquent property taxes.[184] Since the tax sale satisfies the tax debts and dissolves the original property owner's interest in the real property, the original property owner's surplus interest is separate, so any surplus claim is outside the purview of the taxing power.[185] Because the surplus interest

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arbitrage rebate under 26 C.F.R. § 1.148-3); Fidlin v. Collison, 156 N.W.2d 53, 59 (Mich. 1967) (pronouncing the taking of $10,500 in private property to satisfy $629.32 jeopardy assessment tax as unlawful seizure).

[180] *See Rafaeli, LLC*, 952 N.W.2d at 475 (retaining surplus proceeds forces delinquent taxpayers to contribute to government revenues beyond their fair share); *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) (promoting the idea that individuals should not "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

[181] *See Nelson*, 352 U.S. at 110 (holding that no statute precludes an owner from obtaining surplus proceeds).

[182] *See* Coleman v. District of Columbia, 70 F.Supp.3d 58, 69 (D.D.C. 2014) (differentiating between the house used as tax payment and subsequent surplus "indisputably not owed for taxes").

[183] *See supra* Part III.B.

[184] *See* Bogie v. Barnet, 129 Vt. 46, 49, 270 A.2d 898, 900 (Vt. 1970) (holding the government's sale of property for $5,314 of land foreclosed for $848.67 was in direct conflict with the purpose of collecting taxes).

[185] *See Coleman*, 70 F.Supp.3d at 68 (citing Wells v. Malloy, 510 F.2d 74 (2d Cir. 1975)) (comparing a challenge for surplus proceeds to other case law challenging the results of taxation, but not challenging the tax); *id.* at 68–69 (classifying challenge for surplus proceeds as separate from challenge to the act of taxation).

is separate from the taxing power of the government—unlike the analysis behind the taking of real property—a taking analysis applies.[186]

C. Retaining Surplus Proceeds from Original Property Owners Is an Unconstitutional Taking

Local governments retaining surplus from the land sold to satisfy delinquent property taxes violates the Takings Clause. Original property owners have a recognized property interest in keeping tax surplus, thus giving them a vested property right.[187] Original property owners balanced their debt with the government when it took their property.[188] The government sold the land to recoup delinquent taxes; the government did not sell the land to raise its revenue or turn a profit.[189] When the government keeps the excess sale money, the original property owner cannot receive excess tax payments. This is the very conflict that led to enacting Clause 26 of the Magna Carta and is an unconstitutional taking.[190]

A taking is only constitutionally valid if the taking was for a public purpose and the government provided just compensation.[191] The Court generally defers to the legislature that enacted the law to determine if it falls within the purview of public purpose.[192] The tax sale itself is likely for a public purpose.[193] Tax sale statutes are silent on surplus disbursement and fail to give any public purpose to justify keeping them. Despite courts generally giving deference to legislatures

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[186] *See* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 476 (Mich. 2020) (comparing the property interest in surplus proceeds to property owner's interest in personal property on land taken for delinquent taxes).
[187] *See supra* Part IV.A.
[188] *Supra* Part III.B.
[189] *See Bogie*, 129 Vt. at 49, 270 A.2d at 900 ("The objective [of the tax deed process] is to recover taxes and costs incurred in the process of collection, not operate a real estate business for profit.").
[190] *See supra* text accompanying notes 159–62.
[191] *Supra* Part III.A; *see* Kelo v. City of New London, 545 U.S. 469, 483 (2005) (recalling the Court has "afforded legislatures broad latitude in determining what public needs justify the use of the takings power" for over a century).
[192] *See supra* text accompanying note 131.
[193] *Supra* Part III.A.

on public purposes, legislatures still must provide a public purpose for the court to analyze.[194] Without providing a single possible public purpose, it is impossible for courts to determine whether this kind of taking is a valid exercise of the Takings Clause.[195]

Failure to provide the original property owner with surplus proceeds, or an equal sum of money, is a failure to provide just compensation. The original property owner has a vested interest in the surplus.[196] The government withholds their property by retaining the proceeds.[197] Just compensation generally requires market value of the property taken, which here is the amount of surplus proceeds.[198] Therefore, governments must pay original property owners the surplus from the tax deed sale, otherwise they violate the Fifth Amendment by not providing just compensation or providing public purpose.

V. THIRD-PARTY PURCHASERS ARE STATE-ACTORS THUS SUBJECT TO THE TAKINGS CLAUSE

Third-party purchasers should pay original property owners surplus proceeds. Normally, private parties are exempt from constitutional limitations; however, if third-party purchasers are state actors, then they are subject to liability.[199] There are two state-action tests that likely qualify third-party purchasers as government actors: the public function test and the entanglement test.[200] If third-party

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[194] *See* Cincinnati v. Vester, 281 U.S. 439, 447 (1930) ("[T]he municipality is called upon to specify definitely the purpose of the appropriation.").
[195] *See id.* (articulating that a city arguing it can take without a specific public purpose essentially creates a sweeping authority that makes the eminent domain power, or limit, moot).
[196] *Infra* Part V.A.
[197] *See* Rafaeli, LLC v. Oakland Cnty, 952 N.W.2d 434, 474–75 (Mich. 2020) ("Defendants' retention of those surplus proceeds . . . amounts to a taking of a vested property right requiring just compensation.").
[198] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019) ("[C]ompensation must generally consist of the total value of property when taken . . . ."); *Rafaeli, LLC*, 952 N.W.2d at 482 ("the property 'taken' is the surplus proceeds from the tax foreclosure sale . . . . Therefore, plaintiffs are entitled to the value of the surplus proceeds.").
[199] *Infra* Part V.A.
[200] *Infra* Part V.A.

purchasers are state actors under either test, then original property owners have a right to surplus under the same legal principles as the government when third-party purchasers sell the original property owner's land for profit.[201] If there is no statute barring such recovery, third-party purchasers should pay surplus proceeds to the original property owners.

A. The State-Action Doctrine Applies to Third-Party Purchasers When Local Governments Deputize Them as Tax Collectors

The state-action doctrine holds private entities to the same standard as the government when they receive government-like benefits.[202] Essentially, the state-action doctrine applies when a private party engages in joint venture with the government, and the state authorized or encouraged the private entity to engage in regulatory activity exclusively and traditionally practiced by the government.[203] The purpose of the state-action doctrine is "to assure constitutional standards are invoked 'when it can be said the state is *responsible* for the specific conduct of which the plaintiff complains.'"[204] Three tests can determine a state actor: (1) whether a private entity is engaged in a public function; (2) if a private entity is overly "entangled" or "entwined" with the government; or (3) state-coercion test.[205] The state-coercion test likely does not apply here.[206] All three tests require a "fact-bound inquiry"[207] that requires "sifting through [the] facts and weighing circumstances"[208] to draw conclusions within the

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[201] *Infra* Part V.B.
[202] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
[203] JOSEPH G. COOK & JOHN L. SOBIESKI, JR., 2 CIVIL RIGHTS ACTIONS ¶ 7.13[A].
[204] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis in original)).
[205] Gowri Ramachandran, *Private Institutions, Social Responsibility, and the State Action Doctrine*, 96 TEX. L. REV. ONLINE 63, 64–65 (2018).
[206] *See Manhattan Cmty. Access Corp*., 139 S. Ct. at 1928 (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)) (defining the state-coercion test as when the government compels a private company to act, which does not apply here with vast amount of power provided to third-party purchasers).
[207] Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).
[208] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

precedential goal posts of the state-action doctrine.[209] Third-party purchasers become state actors when local governments employ them as tax collectors.

1. Public Function Test

Third-party purchasers perform a duty exclusively and traditionally performed by the government when they collect taxes, even if those taxes are in the form of property as per se payment. The public function test classifies a private entity as a state actor if it performs a duty "traditionally and exclusively" reserved to the government.[210] In analyzing whether the private entity meets the requisite elements, the action must align with Supreme Court's public function test precedent.[211] There are "very few" functions that qualify as state-action since many state-action claims fail to meet the high threshold.[212] Under the public function test, running elections[213] and operating company towns are the only two activities that the Supreme Court found private parties to be state actors.[214]

Tax collection is a duty traditionally and exclusively performed by the government. Courts analyze the history of the duty in question when determining if that duty meet state action's high burden.[215] The

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[209] *See Brentwood Acad.*, 531 U.S. at 296 (using the examples in prior case law for the analysis, since prior examples are prominent in parsing through different factors); *see also Burton*, 365 U.S. at 722 (concluding that creating a precise formula for identifying state action is impossible).

[210] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[211] *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929.

[212] *See id.* (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 158 (1978)) (illustrating the high burden necessary for a private entity to qualify as a public function); *see also Jackson*, 419 U.S. at 351–52 (finding an argument that the monopoly on electrical services constitute state-action as insufficient); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 197 (1988) (concluding the suspension of a coach under national association does not qualify it as a state actor).

[213] Terry v. Adams, 345 U.S. 461, 468–69 (1953).

[214] Marsh v. Alabama, 326 U.S. 501, 505–09 (1946).

[215] *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929–30 (chronicling the short history of public access television to determine if it is a state action); *Terry*, 345 U.S. at 469 (looking through the history of voting and the Jaybird party to determine if

need for taxation appeared in nine of the Federalist Papers when Congress ratified the Constitution, including a near plenary taxing power.[216] Private tax collection is a relatively new practice, beginning in the late twentieth century.[217] The only prior time the government turned to private tax collection was for a tax collection experiment, which employed three men for private tax collection in 1872.[218] Congress repealed the failed program two years later after discovering fraudulent employee practices on a nationwide scale.[219] Congress concluded tax collection was a duty best performed by the government.[220] The federal government did not use private tax collection again until over 100 years later.[221] Since the government relies on itself for tax collection—and its few attempts at delegating to private entities concluded with a resounding repudiation of private tax collection—tax collection is a historically and exclusively performed government duty.

Flagg Bros., Inc. v. Brooks provided a blueprint for third-party taking analysis that could apply to the tax lien process. The Court addressed respondent's injunction claim to stop Flagg Bros. from

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the Jaybird's election practices constituted state action); *see, e.g.*, Evans v. Newton, 382 U.S. 296, 301 (1966) (documenting the history of a park and its impact on the community in deciding if the park's ownership constitutes state action).

[216] *Taxing Federalism*, TAXANALYSTS: TAX HIST. PROJ., http://www.taxhistory.org/www/website.nsf/Web/TaxingFederalism?OpenDocument (last visited May 2, 2022).

[217] Emily Rockwood, *Privatizing Tax Collection: A Case Study in the Outsourcing Debate*, 36 PUB. CONT. L.J. 423, 426 (2007).

[218] *Id.* at 425 (citing Joseph J. Thorndike, *Historical Perspective: The Unhappy History of Private Tax Collection*, TAX HIST. PROJ. (Sept. 20, 2004), http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/fd1f76a4af13135185256f17005d0a57?OpenDocument).

[219] *See* Joseph J. Thorndike, *Historical Perspective: The Unhappy History of Private Tax Collection*, TAX HIST. PROJ. (Sept. 20, 2004), http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/fd1f76a4af13135185256f17005d0a57?OpenDocument (chronicling John D. Sanborn's scheme of receiving payment from the federal government for falsely reporting delinquent taxes).

[220] *Id.*

[221] *See generally* Rockwood, *supra* note 217, at 425–26 (explaining that Congress discontinued private tax collection programs two years after authorizing them but has attempted to reinstate those programs in the last 26 years).

taking respondent's personal property for delinquent storage space fees.[222] The respondent claimed Flagg Bros., Inc. were state actors because the city used their facilities to store respondent's personal property after the city foreclosed on their apartment.[223] The Court concluded Flagg Bros., Inc. merely threatened to sell respondent's personal property, so no taking occurred.[224] Further, there was no state action because Flagg Bros., Inc's threat and subsequent sale involved no public official participation.[225] The petitioner's failed opportunity to resolve without government involvement conflicted with a foundational element of the public function test—that the state-actor has exclusive power and no outside remedies.[226] The Court concluded by giving examples of state and municipal functions administered with more exclusivity: "Among these are such functions as education, fire and police protection, and *tax collection*."[227] Unlike Flagg Bros., Inc., which had no government role in personal property sales, third-party purchasers benefit from a strong government relationship that upgrades their tax lien to a tax deed, collects their redemption money, and facilitates the sale.[228]

Third-party purchasers are performing an exclusive and traditional function of government, thus making them state actors. Third-party purchasers also enjoy the same exclusivity found in previous public function cases,[229] because once they own a tax lien, the

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[222] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 153 (1978).
[223] *Id.* at 156.
[224] *Id.* at 157.
[225] *Id.*
[226] *See id.* at 159–60.
[227] *Id.* at 163.
[228] *Compare Flagg Bros., Inc.*, 436 U.S. at 166 ("Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale.") *with* RAO, *supra* note 14, at 13 (explaining a third-party purchaser receives property after filing a specific tax deed with government official to receive transfer or initiate a court hearing, depending on the jurisdiction).
[229] *See* Terry v. Adams, 345 U.S. 461, 469–71 (1953) (concluding the Jaybird Association was a state-actor, because "all aspects of these primaries are exclusively controlled" by the private group); *see also* Marsh v. Alabama, 326 U.S. 501, 505 (1946) (indicating the company-owned town had all the necessary municipal functions for it to be a state actor).

only remedy original property owners can seek is paying the third-party purchaser.[230] A private party that cannot meet the exclusivity element is not a state actor, like when government enters into a contract with private party.[231] The third-party purchaser receives fundamentally different treatment than other private parties that just enter into a governmental contract, because third-party purchasers receive priority to deeds over other liens.[232] Third-party purchasers receive exclusive benefits by using the local government to facilitate the only remedy available to property owners with delinquent property taxes. Therefore, third-party purchasers are state-actors because they collect delinquent taxes, thus performing a duty exclusively and traditionally performed by the state.

2. Close Nexus or Entanglement Test

A private entity is a state actor under the entanglement test if their conduct is formally private, but becomes so entangled with government policies or governmental character that they become subject to the constitutional limitations on the state.[233] The issue here is whether a close nexus exists between the state and third-party purchaser of a tax lien, thus making a third-party purchaser's private behavior "be fairly treated as that of the State itself."[234] There is no rigid simplicity to this test, instead it is a matter of normative judgment.[235] The Court's precedent requires the private actor's

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[230] RAO, *supra* note 14, at 13.
[231] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982) (holding that providing education is a traditional function of government, but not an exclusive one because private institutions receiving public funds is similar to any other contract the government enters into).
[232] *See* RAO, *supra* note 14, at 12 ("These laws have been upheld on the grounds that priority [of third-party purchaser tax liens] is essential to the government collecting the revenue necessary to conduct its business."); *Rendell-Baker*, 457 U.S. at 840–41 (describing the nature of nursing homes and providing education to mentally disabled students as "not fundamentally different" than any other private contract the government enters into).
[233] Evans v. Newton, 382 U.S. 296, 299 (1966).
[234] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).
[235] *Brentwood Acad.*, 531 U.S. at 295.

deprivation of a federal right to be fairly attributable to the government to illustrate this close nexus.[236] Fair attribution consists of two key elements: the party charged with the deprivation is a state actor and the deprivation results from the exercise of a right or privilege created by the state.[237] The government's role in facilitating, selling, and transferring land for the liens purchased by third-party purchasers satisfy the first element.

For the first element, state-action doctrine analyses derive from precedent, and it is the other entanglement cases that outline the factors to determine if a private entity is a state actor.[238] The Court's entanglement cases rely on analyzing the factors identified in past cases.[239] The precedential factors guide the Court to its conclusion; however, no one set of facts can lead the Court to decide in favor of state action.[240] Since the Court draws on its precedent to compare and analyze a current state-action claim, the next three cases are the most persuasive in analyzing third-party purchasers' role in the tax sale process.

First, *Evans v. Newton* held that a city cannot segregate a municipal park merely because the park's trustee devised the land to the city for such purpose.[241] In Macon, Georgia a former United States Senator devised his park to the city after the expiry of his family's life estate, but only if the city barred people of color from the park.[242] Launching a fact-based inquiry, the Court found state action through the entanglement test because the City of Macon performed maintenance for the park, the park was exempt from city taxes, and the nature of a park is to benefit the public as a whole.[243] The entanglement of the local government and devisor would cause the government to

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[236] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
[237] *Id.*
[238] *Supra* text accompanying note 196.
[239] *See Brentwood Acad*., 531 U.S. at 296 ("Our cases have identified a host of facts that can bear on the fairness of such an attribution.").
[240] *See id* at 295. ("[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient . . . .").
[241] Evans v. Newton, 382 U.S. 296, 301 (1966).
[242] *Id*. at 297.
[243] *Id.* at 301.

appear as the authority segregating a park, instead of just fulfilling the will.[244] All these factors pointed towards entanglement because the private devisor would appear to hold state powers that were governmental in nature, which would make it subject to the state's constitutional limitations.[245]

Second, *Burton v. Wilmington Parking Authority,* a touchstone case for the entanglement test, established an example of state action between a private party and government entity as joint participants.[246] The joint participants were a state parking authority and its tenant coffee shop that refused to serve people of color.[247] The Court acknowledged different factors leading to its state-action conclusion: the coffee shop enjoyed the Parking Authority's tax exemption; the government owned the land and building; the building was for "'public uses' in performance of the Authority's 'essential government functions'"; and the Authority paid for the upkeep and maintenance out of government funds.[248] The Court acknowledged that the coffee shop's defense—which was serving people of color would harm business—further evidenced the close-nexus relationship, because when the coffee shop loses money, so does the government.[249] The Court narrowed this holding to only apply to governments acting with the same purpose as the Parking Authority.[250] Therefore, anytime the government leases property to fulfill its debt-service requirements, the private lessee is subject to the state-action doctrine.[251]

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[244] *See id.* at 300–01 (explaining that a private individual could discriminate in this situation, but much like other cases, just because a private person donated the land does not allow a local government to break other laws by discriminating).
[245] *Id.* at 301.
[246] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).
[247] *Id*. at 716, 722, 725.
[248] *Id.* at 719, 723–24.
[249] *Id.* at 724.
[250] *Id.* at 725.
[251] *See id.* at 719, 725 (explaining that parking alone could not fulfill its debt service to make bond financing practicable and profitable); *Debt Service*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The funds needed to meet a long-term debt's annual interest expenses, principal payments, and sinking-fund contributions").

Finally, *Lugar v. Edmonson Oil Co.* was the culmination of multiple state-action cases addressing property deprivation.[252] The Court noted that past cases "consistently held that constitutional requirements" apply to garnishment and prejudgment attachment procedures when state officers "act jointly with a creditor" in securing the disputed property.[253] *Lugar* addressed the petitioner's challenge that a private party misused a statute to sequester petitioner's land—with the aid of the state—to settle a debt. [254] Affirming its past holdings,[255] the Court held that a private party is jointly participating with the government when they use state officials to seize disputed property.[256] Since the private party wrongfully took the petitioner's property, and they used the government to facilitate this taking, the private party was subject to the state-action doctrine.[257] Thus, when a private party uses the government to facilitate a taking, such as a prejudgment attachment like a tax lien, the private party and government are working jointly together.

Third-party purchasers are state actors because their formally private behavior exists exclusively from their close-nexus relationship with the government, so they too should be subject to constitutional limitations. A local government facilitates the sale of the tax lien from start to finish.[258] The government's role in transferring property under

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[252] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 927, 933 (1982) (recalling two wage garnishment cases where the court implicitly found private actors to be state actors and another case that fell short of state action because the storage company *only threatened* to take away property for unpaid storage bills).

[253] *Id*. at 922, 932–33.

[254] *Id.* at 941.

[255] *See* Fuentes v. Shevin, 407 U.S. 67, 93 (1972) ("Private parties, serving their own private advantage, may unilaterally invoke state power to replevy good from another."); N. Ga. Finishing v. Di-Chem, Inc., 419 U.S. 601, 607 (1975) (analyzing the impact of a garnishment placed by a private party that greatly limits any remedy outside of that private party); Mitchell v. W.T. Grant Co., 416 U.S. 600, 619–20 (1974) (holding sequestration violated the Due Process Clause because the private party employed the state to take property without first providing notice or opportunity for hearing).

[256] *Lugar*, 457 U.S. at 941.

[257] *Id.*

[258] *See* RAO *supra* note 14, at 13 (selling the tax lien to third-party purchasers,

the tax lien process is the same kind of joint participation seen in cases culminating to *Lugar,* because each case involves the state acting "jointly with a creditor" to secure disputed property.[259] The government has a mutually beneficial relationship with third-party purchasers similar to the relationship identified in *Burton*, because without third-party purchasers the government cannot pay its debts or maintain its budgets.[260] Much like *Newton*, tax collection is inherently governmental by nature.[261] The third-party purchaser and government act jointly together, which is comparable with other private party-government relationships the Court identified as state action.

In addition to the Court's precedent supporting an entangled relationship, third-party purchaser's actions are fairly attributable to the government.[262] By selling a tax lien, which in turn forces third-party purchasers to collect taxes, either through money or property, to recover their costs, the government is employing third-party purchasers to collect delinquent taxes. After purchasing the lien, the third-party purchasers can collect delinquent tax payments from the original property owner with a substantial interest rate or keep their

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collecting taxes from third-party purchasers, collecting redemption payments from original property owners, and eventually transferring property to third-party purchasers).

[259] *See Lugar*, 457 U.S. at 941 (holding joint participation between a private party and state officials in seizing disputed property as sufficient state action); *Fuentes*, 407 U.S. at 85–86 (recognizing state action in situations where a private company employs the sheriff to take merchandise that is not up to date on installment payments); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (identifying collusion between a police officer and store owner as sufficient joint participation for state action).

[260] *NTLA Response*, *supra* note 25, at 1 (justifying that property taxes, through the tax lien process, allows local governments to fund programs like police and fire departments, school districts, and health centers).

[261] *See Tax*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue."); *see also* Evans v. Newton, 382 U.S. 296, 302 (1966) ("Mass recreation through the use of parks is plainly in the public domain, . . . and state courts that aid private parties to perform that public function . . . implicate the State in conduct . . . .").

[262] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

property.[263] Yet, exemplifying their close-nexus relationship, the original property owner must give their redemption payment to the government, who collects it on behalf of the third-party purchaser.[264] After the redemption period expires, the third-party purchaser takes an original property owner's land as per se payment through an almost identical process the government uses for the tax deed process.[265] Employing third-party purchasers to collect taxes, and taking land to satisfy debts by transferring property as per se payment shows the government's entangled relationship with third-party purchasers, and aligns with the Court's precedent on symbiotic and creditor-government relationships.

B. Since Third-Party Purchasers Are State-Actors/Tax Collectors, They Owe Surplus Proceeds to the Original Property Owner

Private parties that take land generally do not violate any constitutional provisions, because constitutional claims attempt to protect private action, while limiting government reach.[266] Determining whether a private party is a state actor is the threshold question that opens to door to constitutional liability usually reserved for government actors.[267] Therefore, a similar analysis to Part IV applies here: common law principles require third-party purchasers pay surplus where no statute precludes such recovery, because withholding surplus is an unconstitutional taking.[268]

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[263] *See* RAO, *supra* note 14, at 8 (detailing the structure of third-party purchasers buying a tax lien and estimating they collect on interest rates up to 20–50%).
[264] *See* NEB. REV. STAT. § 77-1824 (2021) ("Redemption shall be accomplished by paying the county treasurer for use of such [third-party] purchaser . . . ."); ALA. CODE § 40-10-193 ("Property may be redeemed under subdivision . . . by payment to the tax collecting official [in each county] of the amount specified on the tax lien certificate . . . ."); MONT. CODE ANN. § 15-18-113 (2021) ("The county treasurer shall execute a certificate of redemption . . . upon . . . payment to the county treasurer . . . .").
[265] *See* RAO, *supra* note 14, at 13 (comparing the basic steps of the tax deed sale and tax lien certificate sale); *supra* Part III.B.
[266] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
[267] *Id.*; *Brentwood Acad.*, 531 U.S. at 302.
[268] *Supra* Part IV.

As state actors, third-party purchasers are subject to common law principles requiring surplus payment from excess tax payments when there is no statute barring surplus proceeds recovery. Third-party purchasers received title when the original property owner failed to redeem and payoff the third party's interest in their property; redemption can only occur when original property owners pay third-party purchaser.[269] Since, third-party purchasers acquire property for the failure to pay delinquent property taxes, they receive the land as per se payment.[270] Receiving the land for per se payment creates the same property interest structure as the tax deed process.[271] Third-party purchasers receive land to satisfy debt owed, therefore when third-party purchasers sell the property, common law requires original property owners receive surplus proceeds because common law principles protect people from paying more than their fair share in taxes.[272]

Original property owners still keep their vested property interest in surplus proceeds arising from the tax lien process since third-party purchasers are state actors. Just like local governments, third-party purchasers sell recently transferred properties quickly to recover costs from failure to collect.[273] This sale creates surplus proceeds.[274] Common law requires original property owners receive

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[269] *Supra* text accompanying notes 248–51.
[270] *See supra* Parts IV, VI.A.
[271] *Supra* Part IV.
[272] *See supra* Part IV.A; Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d. 434, 454–56 (Mich. 2020) (chronicling the history of common law and its adoption in Michigan, thus requiring people only pay their taxes and not in excess).
[273] *See* RAO, *supra* note 14, at 17–18 (estimating that tax lien purchasers make upwards of 50% returns after expiration of redemption period); Andrew Kahrl, *Another Way Cities Can Protect Homeowners: End Tax Sales*, BLOOMBERG CITYLAB (Apr. 2, 2020), https://www.bloomberg.com/news/articles/2020-04-02/cities-should-end-the-unjust-practice-of-tax-sales (estimating tax lien investors will profit of $10 billion annually); PARK & DEERSON, *supra* note 63 (chronicling the story of Hennepin County, Minnesota selling an elderly woman's condo for $43,000 after taking from her for a $2,000 delinquent tax bill).
[274] *See* Emily L. Mahoney & Charles T. Clark, *Arizona Owners Can Lose Homes over as Little as $50 in Back Taxes*, AZCENTRAL (June 16, 2017), https://www.azcentral.com/story/money/real-estate/2017/06/12/tax-lien-foreclosures-arizona-maricopa-county/366328001/ (documenting a tax lien

surplus proceeds from the sale of their property to satisfy delinquent taxes.[275] Similar to the government's role in the tax deed process, third-party purchasers keep surplus proceeds from a sale meant to satisfy delinquent taxes.[276] This conflicts with the common law principles embedded in tax collection.[277] Without a statute precluding recovery of surplus proceeds, third-party purchasers are subject to the Takings Clause as state actors.

Third-party purchasers that retain surplus proceeds violate the Taking Clause by withholding just compensation from original property owners. The real property used for per se payment is likely for a public purpose, due to the deference given to state legislatures in their pursuit to fund themselves.[278] However, surplus is a separate vested interest.[279] Even as a separate interest, this taking is likely a public purpose. The public purpose definition is very broad, and the only way to prove otherwise is to prove the law promotes an irrational public purpose.[280] Despite meeting the first prong of a takings analysis, third-party purchasers cannot meet the second.

Third-party purchasers fail the second prong of a takings analysis by not providing just compensation to original property owners when they withhold surplus proceeds. Third-party purchasers receive a large surplus as the result of selling original property owner's

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purchaser paying $48.65, and after getting title, selling the home for $43,600); *Left with Nothing*, *supra* note 51 ("Heartwood has taken more than 20 houses through foreclosure and sold them all, including a brick duplex in Northwest Washington with a $535 lien for $169,610."); Chris Burrell, *Tax Lien Law Haunts Massachusetts Property Owners*, GBH NEWS (Jan. 21, 2018), https://www.wgbh.org/news/2018/01/21/local-news/tax-lien-law-haunts-massachusetts-property-owners (stating Boston-based tax lien firm, Tallage Lincoln, sold over 24 properties it received from the tax lien process since 2012 to quadruple its original investment).

[275] *See supra* Part IV.A.

[276] *Left with Nothing*, *supra* note 51 (discussing tax lien investors practices of selling off property quickly after receiving title because they make such a profit).

[277] *See supra* Part IV.A.

[278] *Supra* Parts IV.A, IV.C.

[279] *Supra* notes 196–98.

[280] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984) (setting the standard to disprove a law's public purpose as irrational for all socioeconomic legislation).

land to recoup delinquent property taxes.[281] Since original property owners have a right to excess tax payments through common law, third-party purchasers violated the Fifth Amendment when they keep surplus proceeds without paying just compensation. Just compensation here would likely just be equal to the value of the surplus.[282] Third-party purchasers are state actors subject to constitutional limitations on their ability to take property, and without paying just compensation, their taking of original property owner's land for delinquent property taxes is a violation of the Takings Clause. Therefore, the only remedy is third-party purchasers pay surplus—profit received from sale after satisfying delinquent taxes, costs, and interest—to the original property owner.

VI. RECOMMENDATIONS

As more advocates begin fighting for the rights of property owners, state courts and legislatures are reforming their tax deed programs, and putting an end to the state profiting off tax sales.[283] Reforming or ending tax deed programs is a good first step towards preventing people from losing their homes over a couple of years of missed property taxes. Unfortunately, the tax lien process, where local governments put the onus on corporations to collect property taxes until they can take the property free and clear, is a growing industry.[284]

When courts recognize original property owner's right to surplus, it provides a check on the entire process and is progress to addressing the larger problems embedded in the tax sale process.[285]

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[281] *See supra* Parts IV, VI.A.

[282] *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) ("Fair market value has normally been accepted as a just standard.").

[283] Rafaeil, LLC v. Oakland Cnty., 952 N.W.2d 434, 458–59 (Mich. 2020); *see* Harrison v. Montgomery Cnty., 997 F.3d 643, 649 (6th Cir. 2021) (citing Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019)) (allowing a § 1983 claim to continue on a Takings Clause argument because *Knick v. Township of Scott* expanded the breadth of takings claims); ERICKSON ET AL., *supra* note 40 (describing bills that would end home equity theft in North Dakota and Montana).

[284] *See* RAO, *supra* note 14, at 18 (discussing how counties are selling bulk tax lien to corporations wholesale to balance their budget).

[285] *See Rafaeli, LLC*, 952 N.W.2d at 441(recounting plaintiff's surplus request is still a small percentage of the fair market value of the property).

Third-party purchasers and local governments rely on selling tax sale property for low prices, but still astronomically higher than what they took the property for, which creates a wide profit margin.[286] In practice, this means surplus proceeds will not replenish what the original property owner, but surplus gets original property owners closer to balancing the equity lost.[287] In Gladys Wisner's case, providing her estate surplus rights would not let her keep her family farm of 70+ years or balance the equity lost in their land.[288] Yet, providing surplus rights would give her estate whatever price the third-party purchaser sold the property for (with a fair-market value exceeding $1 million) minus the tax debt of roughly $50,000 and additional fees.[289] While surplus proceeds would cut into third-party purchasers' profit, third party purchasers could still make money from the tax lien process without ruining people's lives in the process.[290] Providing surplus would also allow municipalities to continue using third-party purchasers to balance their budgets.

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[286] *See* RAO, *supra* note 14, at 8–9 (explaining the danger of the tax sale process is the drastic loss in equity because the tax sale process only costs the taxes owed, not fair-market value); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 642 (2008) (contending property acquired in the tax sale process is often "sold at a significant profit" over the amount of taxes due); PARK & DEERSON, *supra* note 63 (calculating the average homeowner in Minnesota during 2014 and 2020 lost an average of $207,000 when they lost their home to the tax lien process).

[287] RAO, *supra* note 14, at 8; *see, e.g.*, David Murray, *Profiting on Misfortune: Tax Liens, Home Loss, and County Finance*, GREAT FALLS TRIB. (Sept. 30, 2016), https://www.greatfallstribune.com/story/news/local/2016/09/30/profiting-misfortune-tax-liens-home-loss-county-finance/91308830/ (documenting the tax lien process taking property worth $139,300 for a $667.20 tax lien payment, but providing the original property owner nothing); Christina Martin & Joshua Polk, *Tax Lien Foreclosures in Massachusetts or Legalized Home Theft*, JURIST (Feb. 5, 2021), https://www.jurist.org/commentary/2021/02/polk-martin-tax-theft/ (losing property worth $276,000 over a $4,300 tax lien and receiving nothing to mitigate loss of equity).

[288] *See generally* Duggan, *supra* note 8 (discussing how the Nebraska Legislature "established strict rules for the payment of real estate taxes and ramifications for the failure to pay those taxes").

[289] *See id.*

[290] RAO, *supra* note 14, at 8, 43 (detailing all the interest rates in tax lien states, ranging from 2% per month, to over 20% in some places).

While surplus proceeds mitigate the tax sale process's harm to original property owners, policy-based solutions would also help homeowners like Gladys avoid the harm altogether.[291] John Rao proposes a two-step foreclosure process that differentiates between abandoned and owner-occupied property to better distribute judicial resources to original property owners that would otherwise rarely see a courtroom before losing their home.[292] With a judge to oversee the process, original property owners receive proper notice, the court can appoint a guardian ad litum preemptively instead of after-the-fact, and there is a layer of protection against the county's priority of balancing their budget.[293] Courts would retain the right to withhold sale confirmation, and if the court approves the sale, then the original property owner would receive surplus.[294] In Gladys's case, providing a judicial hearing before taking her property would solve her notice issue and provide her son the opportunity to pay the county treasurer the tax debt that Vandelay refused to accept.[295]

Rao suggests another approach should focus on protecting at-risk homeowners, like the elderly and disabled, who often fall victim to the tax sale process at higher rates than other groups.[296] The crux of this policy change is that local governments already have systems in place that could ensure notice delivery outside of the formal avenues.[297] By reallocating notice services through Department of Health for the disabled or Department of Elderly Affairs, the local government could ensure notice for such vulnerable classes.[298] Most states have disability or elderly extensions for tax sale redemptions,

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[291] *Id.* at 19.
[292] *Id.* at 39; *see also* Poindexter et al., *supra* note 26, at 161 (explaining the positive public-policy reasoning behind the tax-sale process for taking abandoned property and giving it use again).
[293] RAO, *supra* note 14, at 39.
[294] *Id.*
[295] *See* Duggan, *supra* note 8 (discovering his mom lost the farm from the tax sale process, Gladys' son offered to pay the full debt to Vandelay to keep their family farm).
[296] RAO, *supra* note 14, at 29; *see* Martin & Polk, *supra* note 288 ("Most of these [tax lien] profits come at the expense of society's most vulnerable: the elderly and disabled.").
[297] RAO, *supra* note 14, at 29.
[298] *Id.*

but parties cannot take advantage of these extensions when they are unaware of their debt.[299] If Gladys had these protections, there would be adequate time to pay off her debt, in addition to the ability to preemptively raise a mental health extension.[300]

Many more policy-based solutions could greatly reform the tax sale process to protect original property owners, while allowing local governments to maintain fully functioning budgets.[301] Policy-based solutions would offer more protections to original property owners, however, the current trend is local governments using the tax sale process more than ever.[302] To combat this trend, the court system can be an inhibitor to the third-party purchaser cash flow arising from original property owner debt. Tax sale reform only occurs when the court system showcases the disproportionate costs to the public, who subsequently push for change.[303] Using the courts to provide surplus to original property owners can give the currently victimized a place to start again, while it can also be the spark for change that leads to meaningful reform.

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[299] *See id*. at 29–30 (proposing most states already have social service programs, like a Department of Elderly Affairs, which could navigate giving notice to the homeowners otherwise not able to receive it).

[300] *See* Duggan, *supra* note 8 (detailing the avenues Vandelay Investments used to notify Gladys Wisner and arguing that Gladys did not have the mental capacity to understand the notices she received); *see also* Donald L. Swanson, *A State-Sanctioned Fraudulent Transfer?*, MEDIATBANKRY (Sept. 6, 2018), https://mediatbankry.com/2018/09/06/a-state-sanctioned-fraudulent-transfer/ (posting the competency issues raised in Gladys Wisner's trial that Vandelay's expert testimony persuaded the court a 98-year-old woman with dementia and mini-strokes did not merit the disabled owner statutory extension).

[301] RAO, *supra* note 14, at 31–39.

[302] *See* Kahrl, *supra* note 36, at 200 (chronicling the growth of the tax lien process starting in the 1960s and culminating in tax lien securitization, corporate third-party purchasers, and bulk lien sales).

[303] *See Left with Nothing*, *supra* note 51 (changing D.C. law to preclude tax lien sales under $250 after public outcry resulting from Bennie's story); Kahrl, *supra* note 36, at 920 (discussing reform in Florida tax lien structure after national news documented a family losing their home for a $532 tax lien).

CONCLUSION

When local governments and government actors work in conjunction to keep surplus proceeds to pad their profits, they keep excess tax payments.[304] Selling property to balance tax debts should not allow third-party purchasers or local governments plenary power to profit. Original property owners have a right to the surplus.[305] This right arises from common law principles in the Magna Carta, but is contemporaneously evident in tax law.[306] Returning surplus payments is so common, the IRS gives most taxpayers a refund every year.[307] Property taxes should be no different.

The tax sale process as a whole is not the issue here, the issue is using the process to capitalize on delinquent property taxes for profit. Local communities rely on timely tax payments to fund important programs.[308] The tax sale process is also valuable to local governments because it allows private parties to reform property once condemned or abandoned.[309] Surplus proceeds do not disrupt local government functioning, or prevent third-party purchasers from profiting. Surplus proceeds allow original property owners to have something when the government took everything from them. Surplus can be the difference between people like Bennie Coleman living comfortably somewhere, and living in a homeless shelter two blocks from his home.[310]

The ultimate point of this note is to provide some protections for delinquent property tax owners, in turn mitigating large corporations' participation that is strictly profit driven. People like Gladys and Benny deserved far more protections than they received. People who own their property for decades, should not lose it because they failed to pay one bill. While local governments begin to provide more protections, those protections are not enough to keep people in

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[304] *See supra* Parts V.B, IV.
[305] *Supra* Part V.A.
[306] *Supra* Parts IV.A, IV.C.
[307] Segarra, *supra* note 171 (chronicling the history of the tax refund since its genesis in the 1940s because of an over-expansion of income tax).
[308] *NTLA Response*, *supra* note 25, at 1.
[309] Poindexter, *supra* note 26, at 161.
[310] *Left with Nothing*, *supra* note 51.

their homes and often only reactionary to a tragedy.[311] With the increase in bulk tax sales and cities struggling for money, more municipalities will turn to the tax sale process.[312] Short term solutions to funding deficiencies should not lead to long term problems by removing people from communities they lived most of their life in. The tax sale process is in dire need of reform, but until then, the least local governments and state actors can do is pay surplus proceeds original property owners deserve.

[311] *Id.*; *see also* Kahrl, *supra* note 36, at 200–01.

[312] *See* Kahrl, *supra* note 36, at 212 (noting a trend towards more tax sales and how, in recent years, local governments have turned to online tax auctions to drive up sales).

PANIC! AT THE COURTHOUSE: A NEW PROPOSAL FOR AMENDING ENACTED LEGISLATION BANNING THE LGBTQ+ PANIC DEFENSE

Kijana Plenderleith*

INTRODUCTION

The LGBTQ+ "panic" defense allows "a jury to find that a victim's sexual orientation or gender identity/expression is to blame for a defendant's violent reaction, including murder."[1] Seventeen states have banned the use of the LGBTQ+ panic defense; twelve more have proposed legislation doing the same.[2] However, not all states that have enacted this legislation have placed outright bans on the defense entirely. Rhode Island, Maine, and Connecticut have legislation that includes language specifying the defense may be barred only if it is based *solely* on the discovery of a victim's actual or perceived sex or

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[1] *LGBTQ+ "Panic" Defense*, THE LGBTQ+ BAR, 2 https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/ (last visited May 22, 2022).

[2] *Id*. The state of this legislation is constantly evolving. These numbers will likely become inaccurate, as more states are adopting the legislation.

sexual orientation.[3] In effect, inclusion of the word "solely" has created a loophole and left a way for defendants to still claim the defense.

This Note will discuss closing the gap on the panic defense.[4] Part I will walk through the contemporary use of the LGBTQ+ panic defense generally. The defense's history is limited because there is no official law sanctioning its use; instead, courts allow these arguments without consequence. This defense is rarely used on its own; instead, there are three main ways the defense is brought up in court: (1) provocation; (2) diminished capacity; and (3) self-defense. States are slowly beginning to outlaw the defense through legislation; however, some states leave a loophole in the statutes by only barring the defense if it is the only justification. Part II will discuss the implications of allowing this gap to still exist. Part II will compare state legislation of Rhode Island, Maine, and Connecticut. Part II will also give examples of how, through statutory interpretation, there is a gap in legislation which effectively negates the purpose. Finally, Part III will discuss arguments for leaving the gap open, then suggest compromises or solutions to balance protection in each state's legislation. Nevada's legislation[5] will act as the model of a state that categorically bans all use of the defense.

I. BACKGROUND

A. Use: LGBTQ+ Panic

The "gay panic" or "trans panic" defense is not officially recognized for use by any legislature, other than through legislation that bans it.[6] This defense is most frequently used, according to the LGBTQ+ Bar, as a "legal tactic used to bolster other defenses."[7] The history of its use has changed over time. Originally used as the stand-alone "gay panic" defense, there is a new incarnation: "trans panic."

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[3] ME. STAT. tit. 17-A, § 108(3) (2021); 12 R.I. GEN. LAWS ANN. §§ 12-17-17–12-17-19 (West 2018); CONN. GEN. STAT. § 53a-13 (2020).

[4] Discussions of the panic defense include mild descriptions of the murders and violence committed against members of the LGBTQ+ community.

[5] NEV. REV. STAT. ANN. § 193.225 (West 2019).

[6] Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008).

[7] THE LGBTQ+ BAR, *supra* note 1.

This alternative language is most frequently used when a person transitioning from male to female is assaulted or murdered.[8]

The panic defense is invoked in three main defense strategies: (1) provocation; (2) self-defense; and (3) diminished capacity.[9] When a defendant uses one of these defenses, the panic defense may bolster any original claim.[10] The panic defense would not totally acquit someone of murder or assault, but would instead create a justification pandering to a sympathetic jury. Generally, a provocation defense is a defense to murder or manslaughter.[11] When this defense is successfully invoked, an original charge may decrease in severity (e.g., murder may drop to manslaughter).[12]

Provocation or "heat-of-passion" defense requires four elements be met: "(1) reasonable and adequate provocation; (2) no cooling-off time in the period between the provocation and the slaying; (3) a defendant who actually was impassioned by the provocation; and (4) a defendant who did not cool off before the slaying."[13] The panic defense acts as the catalyst, triggering the provocation element.[14] Here, a non-violent sexual advance is only provocative enough to justify murder when the advance is by an LGBTQ+ individual.[15]

The provocation and panic defenses are commonly linked. Because of homophobia and perpetuated stereotypes of gay men, straight men are considered more justified in their violence when there

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[8] *Id.* The LGBTQ+ Bar now uses the term "LGBTQ+ panic" rather than "gay panic" or "trans panic" so as to encompass the spectrum of panic defenses.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] David A. Perkiss, Comment, *A New Strategy of Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 788, 797 (2013).
[13] State v. Josephs, 803 A.2d 1074, 1109 (N.J. 2002) (citing State v. Mauricio, 568 A.2d 879 (N.J. 1990)).
[14] *See* Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflection on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 731 (1995) ("[A] homosexual advance is considered an affront to prevailing heterocentrist/heterosexist/homophobic norms, and thus may cause passion in the Reasonable Man (*i.e.*, a reasonable heterosexual homophobic man).").
[15] THE LGBTQ+ BAR, *supra* note 1.

is a non-violent homosexual advance because of the general affront to their masculinity that such an advance conveys.[16] Some individuals—or even collective juries—may see violence towards gay men by straight men as more acceptable. When these biases slip in, individuals or juries will be more likely to sympathize with an assailant and accept a panic defense.[17] Here, the court would not be justifying the attack in accepting the defense; but rather, the court would be excusing the act and thus reducing the charge from murder to manslaughter.[18]

The panic defense may also bolster a claim of self-defense. Self-defense requires a party show they believed the victim was about to cause them serious bodily harm.[19] Part of a panic defense would apply here if the alleged victim were about to cause the defendant serious harm *because* of their sexual orientation or gender identity.[20] This version of the panic defense was used as recently as 2016[21]

Sixty-nine year-old James Miller from Texas received ten years probation after killing his 32 year-old neighbor, David Spencer.[22] A jury found Miller guilty of criminally negligent homicide.[23] Applying the panic defense, the court downgraded the defendant's murder charge.[24] Miller was at Spencer's home, where

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[16] *See generally* Dressler, *supra* note 14, at 736 (arguing men and women respond differently "to affronts . . . men are more likely to characterize themselves as victims of injustice, or to think that their self-worth has been attacked, and to act offensively as a result.").

[17] *Id.* at 731, 750 (discussing the direct relationship between the provocation defense and murders of homosexual men); *see* discussion *infra* Part III.A.

[18] Dressler, *supra* note 14, at 737.

[19] *See* MODEL PENAL CODE § 3.04(1) (AM. L. INST. 2020) ("[T]he use of force . . . is justifiable when the actor believes that such force is immediately necessary . . . [to] protect[] [them]self against the use of unlawful force by such other person.").

[20] THE LGBTQ+ BAR, *supra* note 1.

[21] Juliette Maigné, *Trans Woman's Killer Used the "Gay Panic Defense." It's Still Legal in 42 States*, VICE NEWS (July 21, 2019), https://www.vice.com/en/article/a3xby5/trans-womans-killer-used-the-gay-panic-defense-its-still-legal-in-42-states.

[22] Cleve R. Wootson, Jr., *A Former Police Employee Said He Killed a Man in 'a Gay Panic' – an Actual Legal Defense that Worked*, WASH. POST (Apr. 27, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/27/a-former-cop-said-he-killed-a-man-in-a-gay-panic-an-actual-legal-defense-that-worked/.

[23] *Id.*

[24] *Id.*

they were spending the evening together.[25] Miller alleged he felt Spencer was going to hurt him and stabbed him twice, killing Spencer.[26] Miller turned himself in and later claimed self-defense while "in a 'gay panic' after being hit on by [Spencer]."[27]

Diminished capacity is a defense frequently used in popular culture. The defense attacks the intent element of a crime. The Model Penal Code § 4.01(1), Mental Disease or Defect Excluding Responsibility, states, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental . . . defect [they] lack[] substantial capacity . . . to appreciate the criminality . . . of [their] conduct or to conform [their] conduct to the requirements of law."[28] A defendant's invoking of the panic defense pleads their mental capacity was diminished; thus, they were not responsible for their actions.[29] Here, a defendant would claim temporary diminished capacity—or panic—because of an interaction with an LGBTQ+ individual.[30]

Seventeen year-old Gwen (Lida) Araujo was transgender. She was brutally murdered by Jose Merel and Michael Magidson[31] (both 25 years old) and buried in a shallow grave in El Dorado County, California.[32] Merel and Magidson were originally charged with first-degree murder but ultimately found guilty of second-degree murder and not guilty of a hate crime.[33] During their trial, the defense and testimony focused heavily on Gwen's actions prior to her murder.[34]

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2020).
[29] *Id.*
[30] *See* THE LGBTQ+ BAR, *supra* note 1 (highlighting that sexual advances are considered "interactions").
[31] Jason Cazaraes (25 years old) was also implicated in the murder of Gwen, but during his trials the jury was deadlocked both times. Carolyn Marshall, *Two Guilty of Murder in Death of a Transgender Teenager*, N.Y. TIMES (Sept. 13, 2005), https://www.nytimes.com/2005/09/13/us/two-guilty-of-murder-in-death-of-a-transgender-teenager.html.
[32] People v. Merel, No. A113056, 2009 WL 1314822, at *6–8 (Cal. Ct. App. May 12, 2009); Marshall, *supra* note 31.
[33] *Merel*, 2009 WL 1314822, at *9.
[34] *Id*. at *1–5.

She had previous sexual encounters with Merel and Magidson; this was considered the catalyst to her murder.[35]

The night she was killed, Gwen did not have sexual encounters with Merel or Magidson. The two men attacked her because of rumors circulating in their friend group "that Lida might be a man."[36] Gwen was confronted at Merel's home after a night of drinking where, during a game of dominos, Merel "stood up and put his fingers across her throat."[37] While this was happening, the group yelled for her to say "if she was a woman or a man."[38] What followed was Gwen's brutal murder; an autopsy revealed the ultimate cause of death could have been "blunt trauma to the head" or strangulation.[39]

The California Appellate Court's opinion in *People v. Merel* discussed at length the heat-of-passion defense.[40] The court reasoned Gwen being transgender was an adequate provocation; therefore, the lower court had correctly applied the heat-of-passion defense. Gwen, as a transgender woman, was a sufficient provocation to cause "an ordinary person of average disposition to act rashly or without due deliberation and reflection."[41] The Defense based their argument off of this principle: Merel did not "have the requisite mental state of aider and abettor" when he assisted in the attack of Gwen Araujo.[42] The panic defense—in all of its incarnations—perpetuates violence against LGBTQ+ community members by labeling their mere existence as a threat or danger to society unworthy of protections under the law.[43]

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[35] *Id.*
[36] *Id.* at *1.
[37] *Id*. at *2.
[38] *Id.*
[39] *See id.* at *1–5 (describing in detail how Gwen was murdered, including details from her autopsy report).
[40] *See generally id.* at *9–13.
[41] *Id.* at *11 (quoting People v. Lee, 20 Cal.4th 47, 59 (Cal. 1999)).
[42] *Merel*, 2009 WL 1314822 at *15; *see generally* Malaika Fraley, *Gwen Araujo Murder 14 Years Later: Transgender Teen's Killers Face Parole*, E. BAY TIMES (Oct. 15, 2016), https://www.eastbaytimes.com/2016/10/14/the-murder-of-gwen-araujo/ (explaining that after 14 years Merel was granted parole while Magidson was not).
[43] *See* Omar T. Russo, *How to Get Away with Murder: The "Gay Panic" Defense*, 35 TOURO L. REV. 811, 827 (2019).

Banning the use of the panic defense becomes more important every year. FBI Hate Crime statistics show an average increase of roughly 100 victims of hate crimes per year from 2016–2018.[44] Additionally, 2021 was the deadliest year on record[45] in the United States for transgender people—53 transgender people were killed in targeted violence. [46] This rise is up from 2019, where a total of 26 transgender people were murdered—23 of them transgender women. [47]Since 2013, 77% of victims of fatal violence have been transgender women of color. [48] A 2015 survey by the National Center for Transgender Equality reported 47% of the individuals who took the survey "have been sexually assaulted at some point in their lifetime" and 10% "were sexually assaulted in the past year."[49] Additionally, 9%

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[44] FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., HATE CRIME STATISTICS, 2016 4 (2017), (showing total victims of hate crimes based on sexual orientation were 1,218 in 2016); FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., HATE CRIME STATISTICS, 2017 4 (2018) (showing total victims of hate crimes based on sexual orientation were 1,303 in 2017); BIAS MOTIVATION, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *Incidents, Offenses, Victims, and Known Offenders* (2018) (showing total victims of hate crimes based on sexual orientation were 1,445 in 2018).

[45] This statistic was last updated January 2022. If trends continue, 2022 likely will rank higher. *See generally* Nico Lang, *2021 Was the Deadliest Year on Record for Anti-Trans Murders*, XTRA MAG. (Jan. 4, 2022), https://xtramagazine.com/power/deadliest-year-anti-trans-murders-215625.

[46] *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN FOUND., https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021 (last visited May 22, 2022).

[47] Serena Sonoma, *44 Trans People Killed in 2020, Marking Worst Year on Record for Transphobic Violence*, THEM (Jan. 7, 2021), https://www.them.us/story/44-trans-people-killed-2020-worst-year-for-transphobic-violence; *Murders of Transgender People in 2020 Surpasses Total for Last Year in Just Seven Months*, NAT'L CTR. FOR TRANSGENDER EQUAL.: BLOG (Aug. 7, 2020), https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months.

[48] *An Epidemic of Violence 2021*, HUM. RTS. CAMPAIGN FOUND., https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2021#epidemic-numbers (last visited May 22, 2022).

[49] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 198 (2016).

of the respondents also reported being physically attacked in the past year because of their gender identity.[50] Of the 9%, a disproportionate number were Black, Indigenous, or People of Color (BIPOC).[51]

In 2006, as a direct response to violence against transgender women, California Governor Arnold Schwarzenegger signed the Gwen Araujo Justice for Victims Act into law.[52] The law was the first in the country to address gay and trans panic defenses. The changes to the law included allowing a party to request additional jury instructions which would define bias in any criminal trial[53] and banning the "use of panic strategies based upon discovery or knowledge of an actual or perceived characteristic of their victim."[54] Additional modifications were made in 2014 when California added similar protections to the heat-of-passion defense.[55] The modifications barred the use of the defense if any provocation "resulted from the discovery of . . . the victim's actual or perceived gender."[56] This Bill and subsequent modifications were the first of their kind to start action for change necessary to protect LGBTQ+ people.

After the Gwen Araujo Justice for Victims Act was signed into law, in 2013 the American Bar Association (ABA) issued a resolution calling for "legislative action to curtail the availability and effectiveness of the [panic] defenses."[57] Citing many of the reasons

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[50] *Id.* at 202–03 (defining a physical attack as "grabbing them, throwing something at them, punching them, or using a weapon against them for any reason").
[51] *Id.* at 203 (finding that of the 9%, 19% were American Indian; 11% were Asian; 9% were Black; 9% were Latinx; 14% were Middle Eastern; 12% were Multiracial; and 8% were White).
[52] A.B. 1160, 2005 Gen. Assemb., Reg. Sess. (Cal. 2006).
[53] *Id.* ("[A] party may request that the jury receive an instruction that defines bias as inclusive of bias against the victim or victims based upon disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation, in any criminal trial.").
[54] *Id.*
[55] A.B. 2501, 2013 Gen. Assemb., Reg. Sess. (Cal. 2014); THE LGBTQ+ BAR, *supra* note 1.
[56] *See* Cal. A.B. 2501 ("[T]he provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant.").
[57] ABA H.D., Resolution 113A, 1 (2013).

previously discussed, the ABA addressed the purpose and implications of panic defenses generally, while also asserting that a panic defense "suggests that violence against LGBT individuals is excusable."[58] Having an organization like the ABA condemn use of the panic defense may bolster any argument calling for legislation to ban the defense because of the knowledge and understanding of the legal system within the organization.

After California passed its bill and the ABA issued its resolution, other states slowly began banning or limiting the panic defense. Including California, 17 states have banned or limited the use of gay or trans panic defenses.[59] Each state has adopted unique language, but the purpose remains the same: LGBTQ+ individuals are especially vulnerable and susceptible to violence and should be protected. More states must ban the defense completely—ending the use of this defense will ensure justice for victims.[60]

Legislators have introduced bills at the federal level without success,[61] while 12 other states have introduced legislation banning the defense, which have also been unsuccessful.[62] In Washington D.C., bills failed in both 2017 and 2019.[63] During public hearings on the 2019 bill, support appeared to be overwhelmingly positive from community members, but there was pushback from some organizations like the District of Columbia Association of Criminal Defense Lawyers (DCACDL).[64] The most direct argument the DCACDL made against the panic defense bill was arguing the heat-of-passion defense is a legitimate defense for a heterosexual male if

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[58] *Id.* at 20.
[59] THE LGBTQ+ BAR, *supra* note 1.
[60] *See id.* ("[L]ocal governments need to educate courts, prosecutors, defense counsel, and the public about the devastating individual and legal consequences of the LGBTQ+ 'panic' defense.").
[61] *See, e.g.*, Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358, 115th Cong. (2018).
[62] THE LGBTQ+ BAR, *supra* note 1.
[63] *Id.*
[64] *See generally Public Hearing on Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney, B23-0409, and B23-0435 Before the Council of the D.C. Comm. on the Judiciary & Pub. Safety*, 23–32 (D.C. 2019) (written statement of Richard Gilbert, Chair, Legis. Comm., D.C. Ass'n of Crim. Def. Laws.).

exposed to a person they believed to be *biologically female* because of "human psychology."[65] This argument will be discussed later; however, it is important now to understand the type of barriers are facing legislation banning the panic defense.

II. STATUTORY INTERPRETATION

A. Foundation of Legislation in Rhode Island, Maine, and Connecticut

Rhode Island, Maine, and Connecticut each take a similar approach in drafting legislation banning the panic defense. Independently, each state gives the illusion of addressing the three ways the defense is used by enacting legislation that does not actually ban the panic defense at all.[66] Each state maintains the defense is barred *only* when it is the sole defense being claimed.[67] The state statutes offer no guidance on how "solely" is defined, nor do they elaborate or place limits on how a panic defense may be used when it is claimed alongside another defense. Without a definition or guidance, "solely" in state statutes effectively negates the entire piece of legislation as a whole.

Rhode Island places limits on the panic defense by specifically targeting its use in all three main categories of the defense: provocation,[68] diminished capacity,[69] and self-defense.[70] However, the defense is only blocked in these three instances when the discovery of the victim's gender or sexual orientation was the *sole* reason for the attack.[71] Further, the legislature in Rhode Island explains "[t]his act would *restrict* the use of a victim's gender or sexual orientation as a

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[65] *Id.* at 26 ("We think, however, the Council ignores basic human psychology when it ignores the role that sexual interactions can play in human emotions.").
[66] THE LGBTQ+ BAR, *supra* note 1 (discussing the three main uses of the panic defenses); ME. STAT. tit. 17-A, § 108(3) (2021); 12 R.I. GEN. LAWS ANN. §§ 12-17-17–12-17-19 (West 2018); CONN. GEN. STAT. § 53a-13 (2020).
[67] ME. STAT. tit. 17-A, § 108(3) (2021); 12 R.I. GEN. LAWS ANN. §§ 12-17-17–12-17-19 (West 2018); CONN. GEN. STAT. § 53a-13 (2020).
[68] 12 R.I. GEN. LAWS ANN. § 12-17-17 (West 2018).
[69] *Id.* § 12-17-18.
[70] *Id.* § 12-17-19.
[71] *Id.* §§ 12-17-17–12-17-19.

defense."[72] The Rhode Island Legislature here categorically affirms that the defense is not altogether banned.

The legislature in Maine takes a similar approach to Rhode Island and limits the panic defense in the three previously mentioned incarnations where they are used "based *solely* on the discovery of . . . the victim's actual or perceived gender."[73] The statute additionally limits the use of the panic defense "including . . . [if] the victim made an unwanted nonforcible romantic or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship."[74]

Connecticut added limits in its penal code on using the panic defense. The defense is limited in Connecticut to when the defendant claims lack of capacity due to mental disease or defect as an affirmative defense.[75] Like in Rhode Island and Maine, the defense is only barred in Connecticut when it is used "based *solely* on the discovery of . . . the victim's actual or perceived sex [or] sexual orientation."[76] During the state's hearings on the Act, legislators generally expressed apprehension at even needing to bother with creating legislation to ban the panic defense.[77]

Each state had limited pushback during the enactment period of the new laws. In Maine, one commenter discussed how unnecessary the new law would be because the state courts have already refused to allow the defense.[78] The stakeholder referenced a 2004 case, *State v.*

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[72] H. 7066, 2018 Gen. Assemb., at 3 (R.I. 2018) (emphasis added). The legislative history for the bill shows zero nay votes and twenty-one absent; additionally, no public comments were submitted. *Rhode Island House Bill 7066 (Prior Session Legislation)*, LEGISCAN, https://legiscan.com/RI/rollcall/H7066/id/767569 (last visited May 22, 2022).

[73] ME. STAT. tit. 17-A, § 108(3) (2021) (emphasis added).

[74] *Id.*

[75] CONN. GEN. STAT. § 53a-13 (2020).

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

[77] *See generally An Act Concerning Gay and Transgender Panic Defense: Hearing on P.A. 19-27 Before the Conn. Gen. Assemb.*, 2019 Gen. Assemb. (Conn. 2019), *reprinted in* CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27 (2019). The legislature shows misguided apprehension at enacting the law because the committee had heard of very few instances of the defense being successfully used; this is incorrect as discussed above. *Id.* at 7905.

[78] *See* Memorandum from the Crim. L. Advisory Comm'n to the Comm. on Crim.

Graham.[79] The case was an appeal from the trial court where a jury found Edwin Graham guilty of manslaughter for killing Zachary Savoy in December 2001.[80] Both parties were intoxicated, and at one point Savoy put his hand on Graham's shoulder and moved closer to him. Graham interpreted this action as a "pass" and in reaction "took Savoy's arm and gently placed him back into his seat. . . . [then] told Savoy to respect his space."[81] Later on, Savoy brought out marijuana and Graham asked him to put it away. When Savoy refused, Graham took the marijuana and threw it away.[82] This act escalated into a fistfight, with Graham then hitting Savoy with a baseball bat until it broke and stabbing him five times.[83]

At the trial, Graham attempted to use a panic defense by claiming "sexual self-defense;"[84] however, the court rejected this as an allowable jury instruction and only allowed for a "traditional self-defense" jury instruction.[85] The jury found Graham guilty of manslaughter, and Graham appealed.[86] On appeal, Graham argued he should have been entitled to the sexual self-defense jury instruction.[87] The Maine Supreme Court disagreed, holding that without an objectively reasonable situation, if "Savoy made *any* attempt to forcefully sexually assault Graham," he would not be entitled to the sexual self-defense jury instruction.[88]

In *Graham* the court did not place any type of restriction on using the panic defense. The court determined for Graham's situation

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Just. & Pub. Safety 1 (May 12, 2019) (on file with author) (opposing the limits to the panic defense because criminal codes must be written in ways to address a "myriad [of] specific situations that might arise").

[79] *Id.*

[80] State v. Graham, 845 A.2d 558, 560–61 (Me. 2004).

[81] *Id.* at 560.

[82] *Id.*

[83] *Id.* at 560–61.

[84] "Sexual self-defense" would be justifying the use of deadly force because of Savoy's advance on Graham. *See* THE LGBTQ+ BAR *supra* note 1 (describing the self-defense incarnation of the panic defense).

[85] *See Graham*, 845 A.2d at 561.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 563.

he was only entitled to a *regular* self-defense instruction.[89] Because of the facts of this case, citing it as an instance where the court categorically rejected the defense was incorrect. Instead, this case was an example where Maine courts determined they would not allow the defense to be used where facts were insufficient to support the claim.[90]

Requiring adequate support for a claim or defense is the judicial standard all courts maintain.[91] A person may not make unfounded claims or add questionable favorable facts to make something allowable. The court in *Graham* was not interpreting law to add protection to LGBTQ+ individuals. This interpretation does not contribute to how states will apply or use the legislation banning the panic defense.

B. "Solely" and the Issue with Consistent Application

The laws from each state do in fact actively attempt to curb the ability to use panic defenses. Where they are ineffective is in the uninterpreted gap of the word *solely*. Each state uses foundationally the same language but differs slightly in legislative history and summary guidance. Rhode Island, Maine, and Connecticut offer little guidance on how to apply the law. A court's ability to remain impartial is intrinsic to the justice system; however, where interpretation of the law is required, even Supreme Court Justices have conservative or liberal leanings that may dictate which way they could rule.[92] Conservative leanings of a judge could factor into interpreting panic

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[89] *See id.* ("Even when viewed in the light most favorable to Graham, the evidence is not sufficient to generate a jury instruction on sexual self-defense. The court properly declined to so instruct the jury.").

[90] *Id.*

[91] One example of this principle is the Rule 56 Motion for Summary Judgment. According to this rule, if a party does not present "substantive evidentiary" proof where a reasonable jury could rule in their favor, the case will be dismissed. *See* Anderson v. Liberty Lobby Inc., 477 U.S. 242, 252 (1986).

[92] *See generally* Mona Chalabi, *Here's How Conservative the Supreme Court Could Tip with Amy Coney Barret*, GUARDIAN (Oct. 26, 2020), https://www.theguardian.com/news/datablog/2020/oct/26/us-supreme-court-amy-coney-barrett-conservative-majority (outlining the leanings of the U.S. Supreme Court bench prior to Justice Ruth Bader Ginsberg's death and the confirmation of Justice Ketanji Brown Jackson).

defense statutes because of the different interpretation techniques they might apply.[93] Having a word like *solely* in the statutes permits varying interpretations and inconsistent application, allowing for the panic defense to make its way back into the courtroom. Currently, conservativism is on the rise; the Overton Window is shifting to the right, leading to more conservative leanings in all three branches of government.[94]

The Overton Window is a concept that condenses public policy and societal norms into a single idea to illustrate what is considered "widely accepted . . . as legitimate policy options."[95] Some scholars suggest the Overton Window is moving more to the right.[96] The Trump Administration, conservative policy implementation, and a conservative U.S. Supreme Court have arguably influenced the right-shift in the window.[97] If this is the case, laws and judicial interpretation going forward are likely to move away from protecting marginalized groups, because enacted policy and fringe ideologies are tugging at the Window.[98]

Without defining the word *solely*, courts will be open to interpret and apply the language as they see fit. The U.S. Supreme Court will act as the benchmark for statutory interpretation. If presented with an ambiguity in legislation, the Court would likely

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[93] *See*, *e.g.*, VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 13–15 (2018) (explaining the steps a textualist would take in interpreting a statute).

[94] *See* Sarah Manivas, *How the Alt-Right Shifted the Overton Window*, NEW STATESMAN (Sept. 21, 2021), https://www.newstatesman.com/culture/books/2020/06/alt-right-politics-2016-andrew-marantz-antisocial-review (noting that "alt-right figures were able to shift the Overton window quickly in their favour," as reflected by the effects of figures like Steve Bannon working in the Executive branch, Marjorie Taylor Green working in the legislature, and the repercussions of their views on judicial appointments).

[95] *A Brief Explanation of the Overton Window*, MACKINAC CTR. FOR PUB. POL'Y, https://www.mackinac.org/OvertonWindow (last visited May 22, 2022).

[96] Manivas, *supra* note 94.

[97] *See* Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020) (outlining the new executive order to "combat *offensive* and anti-American race and sex stereotyping and scapegoating" (emphasis added)); Chalabi, *supra* note 92 (explaining the Martin-Quinn Ideology Scale, which shows a significant shift when Amy Coney Barret is confirmed to the Supreme Court).

[98] Manivas, *supra* note 94.

interpret *solely* using a textualist approach, while state courts could vary in their approach.[99] For present purposes, this analysis will use a textualist approach.

Solely in the context of each law is ambiguous. The word is ambiguous because, depending on how it is brought up, the defense could seek different interpretations of the law. [100] In one instance, they could argue *solely* means the panic defense may only be claimed once and must be paired with a defense outside the three main panic claims. In another instance, a defendant could argue that the panic defense may be claimed under multiple defenses. If a party argues, for example, diminished capacity paired with panic and self-defense paired with panic, the question becomes: is this technically outside the parameters of a sole claim of the panic defense?

In *People v. Soto*, Juaquin Garcia Soto claimed self-defense and intoxication (diminished capacity) after he stabbed and killed Israel Ramirez.[101] The issue before the court was whether voluntary intoxication is admissible to prove self-defense.[102] In this case, Soto claimed a methamphetamine-induced psychosis negated the malice element of a murder charge.[103] He also claimed he acted in self-defense.[104] The court held voluntary intoxication was "irrelevant to pro[ve] certain mental states" and the evidence disproved his self-defense claim.[105]

Here, *Soto* analogizes to an application of the panic defense. A party could use a defense strategy similar to Soto and claim panic instead of voluntary intoxication. A panic/diminished capacity defense is defense one, while the self-defense claim is defense two. *Solely* can be read as allowing the panic defense as long as a second defense is claimed. In Rhode Island, Maine, or Connecticut, this defense approach would open the courts to hearing a panic claim any time two

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[99] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag . . . .").
[100] *See Ambiguity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an *ambiguity* as when "the same word is capable of meaning two different things.").
[101] People v. Soto, 415 P.3d 789, 791 (Cal. 2018).
[102] *Id.* at 790.
[103] *Id.* at 792.
[104] *Id.* at 793.
[105] *Id.* at 798.

or more defenses are claimed. The legislation does narrow the claim of the defense as requiring the panic claim to be directly connected to the force used, diminished capacity, or provocation.[106] In Maine, for example, "a person is not justified in using force against another based solely on the discovery of . . . the victim's actual or perceived gender, gender identity, gender expression or sexual orientation."[107]The language here of "not justified . . . based solely on" implies that to claim the force was justified, defendants must link the force to something else beyond only the panic defense. Each section of the Maine act regarding the panic defense begins with similar language, thus extending the same limitations to all three sections.[108] While the act itself provides context to slightly narrow interpretations of *solely*, an ambiguity remains. This ambiguity contributes to defeating any underlying purpose of a law designed to extend justice to a vulnerable population.

Commonwealth of Pennsylvania v. Sheppard is another illustrative case for a discussion on the ambiguity of *solely*.[109] Sheppard was convicted of first-degree murder after he attacked and killed Karl Kerr with an axe.[110] He appealed the decision claiming ineffective counsel because his counsel failed to bring up psychiatric testimony that may have supported a heat-of-passion, diminished capacity, or imperfect self-defense.[111] The Pennsylvania Court held there was no error; the psychiatric testimony also would not support either defense anyway.[112] The court affirmed the conviction of first-degree murder.[113]

Sheppard presents an example where a party may attempt to claim all three panic defenses.[114] Here, the defendant may interpret

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[106] *See supra* text accompanying notes 8–18.
[107] ME. STAT. tit. 17-A, § 108(3) (2021).
[108] *See id.* § 201(4) ("[P]rovocation was not adequate if it resulted solely from the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender . . . .").
[109] *See generally* Commonwealth v. Sheppard, 648 A.2d 563 (Pa. Super. Ct. 1994).
[110] *Id.* at 564–65.
[111] *Id.* at 565–66.
[112] *Id.* at 568, 570.
[113] *Id.* at 571.
[114] *See supra* text accompanying notes 8–29.

solely to mean only one kind of panic defense. The language of the statutes would now read as: the panic defense will be banned if only one defense is being claimed. This method could allow a party to claim self-defense through a non-violent sexual advance coupled with diminished capacity and justification (heat-of-passion).

C. A Textual Interpretation of the Panic Defense

Courts are required to find a balance between interpretation and maintaining the integrity and purpose of the law. A textualist will attempt to read the law staying firmly within the confines of the statute's language at almost all costs.[115] In a case that wrestles with the application of Rhode Island, Maine, or Connecticut's statutes, a party could argue ambiguity. The statute is ambiguous if there are two or more reasonable interpretations of the law.[116] A judge could reasonably interpret *solely* as ambiguous not necessarily because of the definition of the word itself, but rather because of the ways the statute could be applied with the word included, as seen above. For a textualist, the first point of interpretation would be the statute's language.[117] The statutes, however, offer no real clarification in the form of definitions or guidance on how they should be applied. Additionally, the legislation in Rhode Island, Maine, and Connecticut is so new that there is no interpretation or judicial precedent to rely on.

If a textualist has exhausted the intrinsic options for interpretation, the next step may be seeking out a dictionary definition to find the ordinary meaning of the ambiguous language.[118] Merriam-Webster defines *solely* as either "to the exclusion of all else" or "without another: singly."[119] These definitions present few options for a textualist. Here, statutes would have to be interpreted as allowing for the panic defense provided it is claimed along with another defense or

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[115] *See* BRANNON, *supra* note 93 at 13.
[116] BLACK'S LAW DICTIONARY, *Ambiguity*, *supra* note 100.
[117] BRANNON, *supra* note 93, at 13.
[118] *See generally* Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries Consistent with Textualist Principles*, 60 DUKE L.J. 167, 184–98 (2010) (describing ways dictionaries are used in textualist analysis).
[119] *Solely*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2014).

supported by a second claim.[120] A textualist would likely interpret this statute as effectively not banning the panic defense.

Another form of statutory interpretation is purposivism. The purposivist grounds their analysis in following the purpose of the legislation.[121] This is most effective when judges "pay[] attention to the legislative process."[122] If a judge were to review a state's legislative history to interpret the statute, they would see overwhelming support from committees pushing for protection of LGBTQ+ individuals and for banning the defense. For example, in Connecticut, there were members of both the House and Senate expressing overwhelming support for the law.[123] During the Senate hearing, Senator Martin Looney addressed the state's tough stance on hate crimes; he evaluated this new law with the other hate crime statutes: "[i]t is a hate crime. And if we don't recognize or limit or debar the use of this defense, we are in effect eviscerating our own hate crime statutes . . . ."[124] The law passed this same session.[125]

A purposivist would interpret the Connecticut legislative history as openly supporting a ban on the panic defense. While the legislative history does not show pushback on how the defense is banned, it also does not show any back-and-forth about the language at all.[126] The transcripts of both the General Assemblies show *solely* is

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[120] *Supra* text accompanying notes 91–94, 99–105.
[121] BRANNON, *supra* note 93, at 11.
[122] *Id.* at 12.
[123] *See An Act Concerning Gay and Transgender Panic Defense Hearing on PA 19-27 Before the Conn. Gen. Assembly H.*, 2019 Leg. (Conn. 2019) (statement of Rep. Craig C. Fishbein) ("I am in support of nobody being able to use gender against someone else no matter what it is as defense for violence."), *reprinted in* CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27, at 7907 (2019); *An Act Concerning Gay and Transgender Panic Defense Hearing on S-719 Before the Conn. Gen. Assembly S.*, 2019 Leg. (Conn. 2019) (statement of Senator Martin M. Looney) (addressing that the panic defense is rarely used on its own), *reprinted in* CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27, at 1108 [hereinafter Statement of Senator Martin M. Looney, LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27].
[124] Statement of Senator Martin M. Looney, LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27, *supra* note 123, at 1109.
[125] *Id.* at 1143.
[126] *Id.*

not brought into the discussion at all.[127] This lack of discussion may show indifference or oversight, but the statements by senators in support of a ban would support a purposivist's desire to ban the panic defense.

The courts have a duty to merely interpret the law.[128] If a textualist could find continued ambiguity and a purposivist could find a law at odds with the ultimate purpose, neither has the ability to remedy the discrepancy. The only way for Rhode Island, Maine, and Connecticut to close the gap and absolutely ban the panic defense is to amend their respective laws. This decision may not be left for interpretation by the courts.

III. POLICY, PUSHBACK, AND FEASIBILITY

A. Juries and Implicit Bias

The violence against transgender people has been deemed an "epidemic" by the Human Rights Campaign (HRC).[129] Fifty-five transgender and gender non-conforming people were killed in 2021 alone.[130] HRC attributes the increase in violence to the anti-transgender stigma that permeates into the public sector and leads to decreased access to resources like housing.[131] The panic defense is

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[127] *See generally An Act Concerning Gay and Transgender Panic Defense Hearing on PA 19-27 Before the Conn. Gen. Assembly H.*, 2019 Leg. (Conn. 2019), *reprinted in* CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27 (2019); *An Act Concerning Gay and Transgender Panic Defense Hearing on S-719 Before the Conn. Gen. Assembly Senate*, 2019 Leg. (Conn. 2019).

[128] *The Judicial Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ (last visited May 22, 2022).

[129] *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021 (last visited May 22, 2022).

[130] *Id.*

[131] Madeleine Roberts, *Marking the Deadliest Year on Record, HRC Releases Report on Violence Against Transgender and Gender Non-Conforming People*, HUM. RTS. CAMPAIGN (Nov. 19, 2020), https://www.hrc.org/press-releases/marking-the-deadliest-year-on-record-hrc-releases-report-on-violence-against-transgender-and-gender-non-conforming-people; *see* IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW

relevant here because if bias and discrimination are able to permeate into other protected public spheres, it is likely this same bias is present in the courts despite any previous efforts to curb it.

One very important and nearly uncontrollable factor is juries. If a person is on trial for murder, the trial will take place in front of a jury unless they waive a jury trial.[132] These juries are subject to *voir dire*, but during *voir dire* both the prosecution and defense are working to have a jury that works in their favor.[133] Emerging studies look into implicit bias with juries and the LGBTQ+ community.[134] A conservative jury may be swayed by negative stereotypes of LGBTQ+ individuals. Use of the panic defense acts as an overt technique to let juries lean into their own implicit biases. If the panic defense is banned outright, defense attorneys would lose this tactic for lessening their clients' convictions.

In a 2020 psychological study done at the University of Wyoming, Dr. Narina Nuez explored the idea of implicit bias and the panic defense.[135] This study tested to see if the personal characteristics of jurors presented with the panic defense in a trial involving violent crime would influence the success of the defense.[136] This study

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YORK STATE MEN'S PRISONS, SYLVIA RIVERA L. PROJ. 13 (2007), https://srlp.org/files/warinhere.pdf ("Needs assessment surveys of the transgender communities in San Francisco and Washington D.C. illustrate the ubiquitous discrimination and bias that many transgender and gender non-conforming people encounter when trying to access basic healthcare, employment, and housing.").

[132] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

[133] *See Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1 . . . Loosely, the term refers to the jury-selection phase of a trial. 2. A preliminary examination to test the competence of a witness."); *11 Must-Dos from a Voir Dire Master*, AM. BAR ASS'N (Mar. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/ (describing the art of *voir dire* with 11 "tips").

[134] *See generally* Nicholas D. Michalski & Narina Nunez, *When Is "Gay Panic" Accepted? Exploring Juror Characteristics and Case Type as Predictors of a Successful Gay Panic Defense*, 37 J. INTERPERSONAL VIOLENCE 782 (2022) (discussing the implications of anti-LGBTQ+ rhetoric in the courtroom and how it can lead to sympathy from conservative jurors).

[135] *Id.* at 786–87.

[136] *Id.*

initially surveyed participants using different survey scales and testing levels of homophobia, religious fundamentalism, and political orientation.[137] Afterwards, participants were presented with different variations of a similar hypothetical.[138] The hypothetical involved an argument and a "physical altercation between two men."[139] Each version was manipulated to change either party's sexual orientation, type of crime, and "provocation type."[140] Depending on the combination of various traits and if the outcome of the hypothetical was homicide or assault, it was likely that an affirmative claim of a panic defense would lead the juror to choose the more lenient conviction (e.g, manslaughter instead of murder).[141]

The study had many findings; one finding stood out as distinguishing belief systems as a driving force behind some of the verdicts:

> This research suggests that homophobia is the driving force behind perceptions of the case as a hate crime, negative perceptions of the victim, and ultimately verdict decisions compared with other juror characteristics. When the gay panic defense is presented, more homophobic jurors provide more lenient verdicts for the defendant.[142]

This study was essentially conducted in a vacuum, because all the participants were not actual jury members and instead were volunteers;[143] however, it does provide an insight into the untested thoughts of the public and their own implicit biases. Translating this to everyday courts, because of the implicit bias of individuals on juries, this study illustrates ways a defense may not actually speak to the guilt of the person and instead only the sympathy of a juror. It follows that

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[137] *Id.* at 787.
[138] *Id.* at 791.
[139] *Id.* at 789.
[140] *See id.* (describing *provocation type* to mean gay panic or neutral defense).
[141] *See id.* at 792 ("In the homicide case, 70.1% of participants chose the more lenient manslaughter verdict.").
[142] *Id.* at 800.
[143] *Id.* at 791.

even an unsuccessful claim of the panic defense may find a way to create a sympathetic jury and thus still end up with the ultimate result of a drop in conviction from murder to manslaughter.

Cynthia Lee makes the argument in *The Gay Panic Defense* that if this type of defense is categorically banned, defense attorneys "will find more subtle ways to get the same idea across to the jury."[144]—meaning, more elaboration on and reinforcement of negative stereotypes of LGBTQ+ individuals. This would make prejudices harder for the jury to refute since they speak deeply to implicit bias.[145] Lee addresses this argument again in *The Trans Panic Defense Revisited*:

> Even in a jurisdiction where the trans panic defense strategy has been legislatively banned, a defendant claiming trans panic can take the stand and tell the jury that he was so upset when he found out that the victim was a transgender individual that he lost his self-control.[146]

Lee's point reinforces the idea that even discussions of an unsuccessful claim of a panic defense may still bolster the defendant's claim.

While the defendant's claims may be met by a sympathetic jury, making assertions relating to the victim's sexual orientation or gender expression can only lead to abstract sympathy.[147] A jury must return a verdict on the law presented to them by the judge.[148] If a jury is sitting in on a trial for first-degree murder and they are told facts that may make them sympathetic, they cannot unilaterally decide to convict on voluntary manslaughter. "The only way a jury could return a

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[144] Lee, *The Gay Panic Defense*, *supra* note 6, at 522.
[145] *Id.*
[146] Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1456 (2020).
[147] *See id.* at 1456–57 ("If a legislative ban were in place stating that an alleged provocation is not reasonable if it resulted from the discovery of the victim's gender identity, the jury would not be able to lawfully return a voluntary manslaughter verdict.").
[148] ADMIN. OFF. OF THE U.S. CTS., HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 1 (Aug. 2012) [hereinafter HANDBOOK].

voluntary manslaughter verdict for a defendant in such a jurisdiction would be by engaging in jury nullification."[149] Nullification is not a reliable strategy for defendants for two reasons. First, jury nullification is highly disfavored by the courts and thus is unlikely to be allowed for discussion in open court.[150] Second, according to Lee, juries are more likely to follow the law and not simply nullify.[151] Because of this, inflammatory statements about the victim's sexual orientation or gender identity are unlikely to aid in a defense.

B. The New Proposal for Rhode Island, Maine, and Connecticut

Maine, Rhode Island, and Connecticut need to close the gaps in their legislation. Nevada is an example of a state that categorically bans all use of the defense by simply stating "[a] person is not justified in using force against another person based on the discovery of . . . perceived sexual orientation or gender identity."[152] Nevada's statutory language ensures that a victim may not be blamed for their own death based on their sexual orientation or gender identity. Legislation like this ensures fair and equal punishment for a crime and that a person may not be given lighter punishment because they were "justified" in the murder.[153]

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[149] Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1457; *cf.* HANDBOOK, *supra* note 148 (providing that jurors are required to follow the instructions of the law as provided to them by the judge in their individual case, which makes nullification—though technically still an option, as Lee notes—not entirely in line with jury standards).

[150] *See* Naomi Gilens, *It's Perfectly Constitutional To Talk About Jury Nullification*, ACLU (Jan. 22, 2020), https://www.aclu.org/blog/free-speech/its-perfectly-constitutional-talk-about-jury-nullification (describing an instance where two activists were arrested and each charged with seven counts of criminal jury tampering after distributing pamphlets with information about jury nullification outside of a Colorado courthouse).

[151] Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1457.

[152] NEV. REV. STAT. ANN. § 193.225 (LexisNexis 2019).

[153] *See* Julie Compton, *Alleged 'Gay Panic Defense' in Texas Murder Trial Stuns Advocates*, NBC NEWS (May 2, 2018), https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571 (convicting Miller of criminally negligent homicide rather than murder or manslaughter because the court accepted his use of the panic defense to justify his self-defense and disproportionate use of force).

During the enactment process, Nevada's Clark County Public Defender's Office proposed an amendment to the pending legislation.[154] This amendment would have mirrored Rhode Island's legislation by including *solely* in the body of the text regarding the "heat-of-passion."[155] The proposed amendment would have also totally removed banning the defense under diminished capacity and self-defense.[156] Lastly, the office also submitted Lee's 2008 article *The Gay Panic Defense* to the legislature.[157] The Assembly Committee meeting shows a discussion about the proposed amendment in which multiple members of the committee expressed general assent with the proposed amendment. Other members discussed flaws in the language *solely*.[158] Because the proposed amendment changes are not in the final law, it can be reasonably assumed that the majority of the Committee disagreed with including *solely*. Here, the Committee sought to right a very specific wrong and was successful in its modifications to the law.

The Nevada legislation also provides insight into the reasoning for enactment of the law and does not muddle words in furtherance of the purpose of the act:

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[154] S.B. 97, 2019 Leg., 80th Sess. 1 (Nev. 2019) (JOHN J. PIRO, Proposed Amendment 2019).

[155] *Id.*

[156] *Id.* at 2.

[157] Exhibits for *SB97*, Nev. Legislature (Apr. 26, 2022), https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6080/Exhibits (detailing the exhibits submitted to the Nevada legislature during the comment period, including Lee's article, submitted by John J. Piro alongside his proposed amendment on behalf of the Clark County Public Defender's Office). This is relevant because in 2019, Lee's 2008 article was very outdated. About one year after this hearing, Lee published *The Trans Panic Defense Revisited*. The article essentially walked back much of her original analysis against outright bans on the panic defense, while also reintegrating many of the original points that were once used to support a ban. *See* Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1412.

[158] *An Act Relating to Crimes; Prohibiting the Use in a Criminal Case of Certain Defenses Based on the Sexual Orientation or Gender Identity or Expression of the Victim: Meeting on S.B. 97 Before the Judiciary Assemb.*, 2019 Leg., 80th Sess. 21 (Nev. 2019) (statement by Assemb. Jill Tolles) ("[Y]ou add the word 'solely' . . . My concern would be that all somebody would have to do is add something else. . . . [T]hat would not solve the problem we are trying to solve with this legislation.").

> WHEREAS, Continued use of these anachronistic defenses reinforces and institutionalizes prejudice at the expense of norms of self-control, tolerance and compassion, which the law should encourage, and marks an egregious lapse in the march toward a more just criminal justice system; and WHEREAS, To end the antiquated notion that the lives of lesbian, gay, bisexual and transgender persons are worth less than the lives of other persons and to reflect a modern understanding of lesbian, gay, bisexual and transgender persons as equal to other persons under the law, the use of "gay panic" and "trans panic" defenses must end.[159]

The purpose of the act was clear: LGBTQ+ people matter in the eyes of the law—hate and discrimination may not justify their killing.

If Maine, Rhode Island, and Connecticut were to amend their statutes to more closely match the legislation in a state like Nevada, there may be a way to still protect against some of the issues Lee discusses. According to the LGBTQ+ Bar, part of the solution to an absolute end to the panic defense includes educating courts, prosecutors, defense counsel, and the public about the consequences of this legal defense.[160] However, with the Overton Window shifting more and more to the right,[161] it is now more important than ever to close gaps that allow for bias to permeate the judicial system. In her article, Lee says that "[w]hen a message that relies on negative stereotypes is conveyed covertly, it will often have a more powerful impact than if the message had been aired overtly."[162] Lee also frankly explains that "education is necessary but not sufficient to change attitudes and behavior."[163] It would be optimistic to claim just because the law says you may not argue using bias, those arguments would stop.

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[159] S.B. 97, 2019 Leg., 80th Sess. 2 (Nev. 2019).
[160] THE LGBTQ+ BAR, *supra* note 1.
[161] Manivas, *supra* note 94.
[162] Lee, *The Gay Panic Defense*, *supra* note 6, at 522.
[163] Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1446.

Without statutory modification, education may be a long-term superficial catharsis to the system and provide a sliver of protection to LGBTQ+ people. Further, even without modification a purposivist judge may still consider legislative history, which could keep the panic defense barred from the court.[164] However, for more fundamental and effective changes, Maine, Rhode Island, and Connecticut need to modify their statutes. A shift to the Nevada statutory model would remove the ambiguous language that requires judicial interpretation. A textualist (and likely more conservative) judge would no longer have the ability to read the statute as a partial ban[165] and would thus be blocked from admitting the panic defense back into the courtroom. Instead, if the new language mirrors the Nevada statute, a judge should read the language as an unequivocal ban on the defense.

If the ambiguous word *solely* is eliminated, the statute becomes clearer and now matches the legislative intent. If more direction is given in legislation and if protections of LGBTQ+ individuals are made clearer, defense attorneys may be held accountable if they make biased arguments in open court.

CONCLUSION

States across the country have enacted or are in the process of enacting legislation to ban the panic defense.[166] Policy reasons for banning the defense range, but the heart of the argument is to move beyond biases once allowable by law. States that keep the language *solely* in their legislation banning the panic defense make an illusory promise to the public that protection is the purpose of the bill; however, the argument is short-lived when challenged by a defendant claiming two defenses. *Solely* creates a gap that effectively does not ban the panic defense at all.

In the midst of a conservative shift in the judiciary and executive branches, public policy is likely to reflect that shift. At the same time, violence against LGBTQ+ people is reaching an all-time

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[164] *See supra* Part II.C (describing a purposivist's interpretation of an ambiguous statute).
[165] *See id.* (describing a textualist's interpretation of an ambiguous statute).
[166] THE LGBTQ+ BAR, *supra* note 1.

high. Finding ways to reconcile differences means working together. The legislature creates the laws and must ensure clear language with a clear purpose to guide judges in their interpretations. Additionally, with a judicial system that wants to interpret statutes using a textualist approach, state legislatures need to keep clear and concise language in the text of their bills because if challenged, legislative history will not be considered.

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During the publication process for this article, even more trans women were murdered. In Vermont, Fern Feather—a trans woman—was murdered. Her killer, Zane Davison, alleges that Feather "made a sexual advance and attacked him."[167] Vermont recently banned the Panic Defense and Davison will be likely barred from asserting it or any similar defense.

The work banning the use of the panic defense is not over. The work to make LGBTQ+ people feel safe and protected in the United States is not over. LGBTQ+ people deserve more than the ability to just exist. They should have the freedom to thrive and the legislation to be protected.

[167] Peter D'Auria, *Killing of Transgender Woman in Vermont Draws Condemnation, Grief*, VT DIGGER (Apr. 13, 2022), https://vtdigger.org/2022/04/13/killing-of-transgender-woman-in-vermont-draws-condemnation-grief/.